## 1AC

### 1ac – plan

#### The United States federal government should decide for the petitioners in Kiyemba et al. v. Obama, ruling that the Suspension Clause guarantees release from detention as its remedy.

### 1ac – plenary power

Contention one is plenary powers

#### Jamal Kiyemba and the other Uighurs in Guantanamo were successful in their habeas petitions, but are still being held in the prison because no other country will grant them asylum

Jamal Kiyemba et al. 9, petition for cert to SCOTUS, “brief of petitioners”, No. 08-1234, <http://ccrjustice.org/files/2009-12-04%20kiyemba_FINAL%20merits%20brief_0.pdf>

Two terms ago, in a habeas corpus petition brought by aliens held in the Guantánamo prison, this Court held that “when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to . . . issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.” Boumediene v. Bush, 553 U.S. \_\_, 128 S. Ct. 2229, 2271 (2008). Four months later, a judicial officer tried to apply this ruling in the Uighur cases. The government conceded that there was no legal basis to detain the Uighurs, and that years of diligent effort to resettle them elsewhere had failed. Seven years into their imprisonment at Guantánamo, there was no available path abroad to the release Boumediene described. At that point the judicial officer directed that the Petitioners be brought to his court room to impose conditions of release. The court of appeals reversed in the decision below, Kiyemba v. Obama. Pet.App.1a.

Seven of these men are still stranded in the Guantánamo prison more than a year later. Hobbled by the decision below, habeas judges in other cases have issued encouragements to diplomacy. Largely these have failed, and in some cases the government has antagonized the home country with the freight of release conditions. The result is stasis, and the failure of habeas corpus as an “indispensable mechanism for monitoring the separation of powers.” Boumediene, 128 S. Ct. at 2259.

At Guantánamo, where winners and losers remain, habeas corpus is an academic abstraction. Imprisonments drag deep into the eighth year, doubling the detentions of real enemies in past conflicts. The calendar rebukes the ancient boast of the Judicial Branch that habeas is a “swift and imperative” remedy. See, e.g., Price v. Johnston, 334 U.S. 266, 283 (1948), abrogated on other grounds, McCleskey v. Zant, 499 U.S. 467, 483 (1991). Life in that iconic prison is unperturbed by this Court’s decrees. Each night, while armed military police patrol the fences, alleged enemy combatants bunk down not far from men who, the Executive concedes, never were our enemies at all.

#### Rather than release the prisoners into the US, the government has asserted plenary power, but that just means the Uighurs stay in prison without charge

Jamal Kiyemba et al. 9, petition for cert to SCOTUS, “brief of petitioners”, No. 08-1234, <http://ccrjustice.org/files/2009-12-04%20kiyemba_FINAL%20merits%20brief_0.pdf>

Over more than three years, the government never made a return for any Petitioner grounding power to detain in an immigration law. This is not a technical quibble—Congress requires that the government “make a return certifying the true cause of the detention.” 28 U.S.C. § 2243 (cl. 3). The government can hardly claim surprise by the immigration issue. It abandoned an “enemy combatant” theory months before the habeas hearing, when it conceded that it would not re-CSRT Parhat.36 Two weeks later it made the same concession for four prisoners, including Sabir Osman and Khalid Ali.37 On September 30, the government advised that all remaining Uighur prisoners would “be treated as if they are no longer enemy combatants.” JA 427a.38

Immigration issues had been on the table since 2005 in any event. Two identically situated Uighurs litigated them in Qassim. 407 F. Supp. 2d at 201. And the government engaged with these Petitioners— months before the habeas hearing—on immigration issues. On July 22, 2008, Parhat explained why immigration law was not a bar to release. JA 185a-193a. On August 5, the government asserted immigration-law grounds to resist release, citing in particular 8 U.S.C. § 1182(a)(3)(B), and a plenary immigration power. JA 243a-244a. When Petitioners demanded an evidentiary hearing, the government objected to the request. JA 436a437a. In short, for years the government had specific notice of the immigration issues. It did not simply fail to address them—it resisted all efforts of the Petitioners to address them. Remand—which neither party sought—was unwarranted.

ii. Plenary power

The core theory of the Kiyemba panel majority was that detention power could be located in plenary Executive control of the border—that is, in an immanent power separate from the Constitution or statute. Pet.App.4a-7a. The panel majority traced this power to Chae Chan Ping v. United States (“The Chinese Exclusion Case”), 130 U.S. 581 (1889).39 Pet.App.6a. The precarious foundations of that decision eroded more than a century ago, see Wong Wing v. United States, 163 U.S. 228, 237 (1896) (invalidating law authorizing imprisonment of any Chinese citizen in the U.S. illegally), and today have collapsed where detention power is claimed. As the Court explained in Martinez, “the security of our borders” is for Congress to attend to, consistent with the requirements of habeas and the Due Process Clause. 543 U.S. at 386 (emphasis added); see also Zadvydas, 533 U.S. at 696 (no detention power incident to border prerogative without express congressional grant, which is subject to constitutional limits); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (“[T]he executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”); Pet.App.29a (collecting cases). The “whole volume” of history, to which the government refers, Cert. Opp’n at 14, actually describes “the power of Congress” over regulating admission and deportation, see Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added). The border gives the Executive no plenary power to detain.

If an extra-constitutional Executive border power existed, one might have expected some treatment of it in United States v. Libellants of Amistad, 40 U.S. 518 (1841), the last of many cases argued before this Court by John Quincy Adams. Aboard a schooner that arrived off Montauk, Long Island in August, 1839 were Africans. Kidnapped by Spanish slavers, they had killed the crew and seized control of the ship. At Spain’s request, President Van Buren prosecuted treaty-based salvage claims for the vessel and, on the theory that the latter were slaves of Spaniards, the Africans themselves. The Executive asserted significant Article II interests grounded in foreign relations with Spain. Yet neither diplomatic concerns (no less urgent to the Executive of the day than the control-of-theborder interest asserted here) nor a vague notion of security (the Africans had committed homicides) dissuaded Justice Story from ordering the Africans released into Connecticut, thence to travel where they liked. 40 U.S. at 592-97. 40 Nor did any notion of plenary power over immigration, which received no mention at all.

iii. Statutory Power

The government’s failure to file a return asserting a statutory detention power was not inadvertent—no statute afforded detention power here either. For example, 8 U.S.C. § 1182(a)(3)(B) bars admission of aliens who, among other things, “prepare or plan a terrorist activity” or receive “military-type training” from a “terrorist organization.” No evidence was offered to Judge Urbina that any Petitioner fit this description, and following the Parhat decision in June, the government expressly abandoned the opportunity to pursue such a theory in a second CRST. JA 426a-427a. 8 U.S.C. § 1226a(a)(6) authorizes indefinite detentions of aliens who pose a threat to national security. The Government offered no evidence of such a threat (and, indeed, resisted Petitioners’ request for an evidentiary hearing to confront any allegations of this character, see JA 437a) and evidently discerns no such threat to civilians in Bermuda or Palau.

If it existed, any immigration detention power would be limited and in this case was exhausted years ago.

Detention power incident to a proper grant of removal or other immigration power, if it existed at all, would be limited in any event. The right to release— even of concededly undocumented aliens—has trumped the assertion by the political branches even of indefinite detention powers related to a legitimate interest in removal and authorized by statute. Zadvydas, 533 U.S. at 689. In Martinez, the Court extended this proposition to aliens who, like Petitioners, had never made an entry under the immigration laws (and who, unlike Petitioners, were criminals). See 543 U.S. at 386-87. Martinez permitted only a presumptive six-month detention beyond the 90 days for aliens inadmissible under section 1182. Id.; see 8 U.S.C. § 1226a(a)(6) (“[l]imitation on indefinite detention”). Once removal is no longer “reasonably foreseeable,” as happened years ago in the Uighur cases, the Executive must release the alien. Martinez, 543 U.S. at 377-78; Zadvydas, 533 U.S. at 701.

The government would limit Martinez to the construction of 8 U.S.C. § 1231(a)(6), but whenever a “‘serious constitutional threat’” is raised by reading a statute to permit indefinite detention, the doctrine of constitutional avoidance applies. Martinez, 543 U.S. at 377, 380-81. Detention here initially was premised on one statute, the 2001 Authorization for the Use of Military Force, 115 Stat. 224 (Sept. 18, 2001) (“AUMF”), see Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004), and now appears to be based on others, see Pet.App.17a (citing 8 U.S.C. § 1101(a)(16) (requiring visas)); see also Cert. Opp’n at 18 n.3 (citing 8 U.S.C. §§ 1182(f), 1185(a)(1)). Given the absence of an express detention power in the AUMF, the constitutional requirements imposed by the Suspension Clause suggest a maximum six-month limit after the government determines that the laws of war do not authorize detention. Constitutional avoidance also counsels strongly against construing a statute to impose a visa requirement on those whom the government forces here without one. Cf. United States ex rel. Bradley v. Watkins, 163 F.2d at 330-31.

Martinez did precisely what the Kiyemba panel majority contends no court had ever done. See Pet.App.15a. It directed the Executive to release into the population illegal aliens who had not entered and whom the Executive, on congressional authority, had imprisoned. The decision contradicts the argument that separation-of-powers concerns prohibit the Judiciary from intervening to force the release of inadmissible aliens against the will of the political branches. 543 U.S. at 386-87; see also Boumediene, 128 S. Ct. at 2271.

#### This application of plenary power to justify detention is fueled by a fear of the immigrant Other

Ernesto Hernández-López 12, law prof at Chapman, “Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World”, uc irvine law review, Vol. 2:193

Since the Supreme Court in Boumediene found that detainees’ alien status and their physical location outside U.S. borders did not bar access to constitutional habeas,46 judicial review of base detentions has continued on an anomalous path. Suspending legal norms in a geographic area for reasons of political necessity, this anomaly is historic since the United States first occupied Cuba in 1898 and leased the base after 1903.47 Much of this anomaly has to do with practical hurdles or substantive determinations of overseas adjudication. But independent of these anomalies, immigration law provides stable doctrinal justifications to continue detention, even in the prolonged and extreme cases of the Kiyemba detainees. For the alien detained overseas, plenary power reasoning creates a doctrinal wall between constitutional habeas and historic rights exclusions.

To explain how exclusionary assumptions in immigration law came to frame Guantánamo habeas litigation six years after detentions began, and persisted for years after that, this Section describes how judicial opinions refer to immigration law. Mentioned in varying levels of detail in Boumediene, Kiyemba I, Kiyemba II, and Kiyemba III, these issues include: political deference for noncitizen issues; territorial and/or border reasoning to justify rights exclusions (i.e. aliens do not enjoy constitutional rights, aliens do not have a right to enter the United States, or the base is outside sovereign jurisdiction); immigration law statutes do not apply to the base; and detainees need a nonimmigrant or immigrant basis to enter the United States. An examination of these judicial opinions suggests that prodetention opinions consistently refer to noncitizen exclusions with plenary reasoning, but the relevance of this doctrine increased after the Supreme Court and district court affirmed constitutional rights protections for aliens detained overseas. In short, plenary power assumptions operate as a “fallback” set of norms to exclude noncitizens, even when they enjoy constitutional habeas, are not combatants, and have been in detention for nearly nine years. In situations like the Kiyemba cases, when there are potentially dueling doctrinal approaches of extending habeas release or relying on deference to the political branches, the utility of the plenary power doctrine stands out. Here, the doctrine appears more applicable due to the location of the detainees at an overseas base and the diplomatic difficulty of their resettlement. The plenary power doctrine’s utility is triggered explicitly by political resistance concerning the War on Terror and national security, and implicitly by notions of the foreign national “Other,” feeding off fears of Muslims, Asians, Chinese, or something other than Western, Christian, and democratic.48

#### Interrogating the legal doctrines, like plenary power, that are used to justify racist exclusion is a critical first step in reconfiguring oppressive political structures

Change and Aoki 97 (Centering the Immigrant in the Inter/National Imagination 85 Calif. L. Rev. 1395)

Examining the immigrant's entry into and presence in the racialized space of the United States provides an opportunity to explore the racial structures that undergird and constitute this nation-state. We might question official state apparatuses such as the census, which might be described as an official identity producer, and its role in (re)producing racialized subjects.'° **We might question legal doctrines**, such as equal protection, and their role in producing racialized identities while simultaneously mandating color-blindness on the part of public actors." The point of the critique is not to abandon race, but rather to examine the political economy of race, the processes through which race is used to distribute power and maintain racial privilege. These processes produce and maintain both immigrant and native identities. Examination of the immigrant allows us to observe the dynamics of racial formation 2 as immigrants enter the political/cultural/legal space of the United States and "become" differentially racialized as Asian American, Black, Latina/o, and White. 3 It is important to note, though, that this is not a one-way process-as immigrants "become" Asian American, Black, Latina/o, and White, these racial formations are themselves subject to reconfiguration and may become focal points around which one organizes a politics of identity.

The differential racialization of immigrants is evident in the different treatment accorded White immigrants when compared with those from Africa, Asia, the Caribbean, and Latin America." Fear of immigration, often discussed in generalized terms, is colored so that only certain immigrant bodies excite fear. In the midst of cries to limit legal immigration, the Immigration Act of 1990 included legislation to encourage immigration from northwestern European countries such as Ireland." In the midst of cries to limit illegal immigration, the figure of the Mexican border-crosser or of the Chinese boat person makes the evening news, whereas the fact that Italians constitute the largest group of undocumented immigrants in New York is obscured. 6 (After the Italians, the most numerous groups of undocumented immigrants in New York come from Ecuador, Poland, Ireland, and Russia.17) These examples show how the "problem" of legal and illegal immigration is colored in the national imagination: fear over immigration is not articulated solely around foreignness per se; it includes a strong racial dimension."

Etienne Balibar, writing in the European context, describes the new racism, centered around the category of immigration, as:

a racism of the era of "decolonization," of the reversal of population movements between the old colonies and the old metropolises, and the division of humanity within a single political space.... It is a racism whose dominant theme is not biological heredity but the insurmountability of cultural differences, a racism which, at first sight, does not postulate the superiority of certain groups or peoples in relation to others but "only" the harmfulness of abolishing frontiers, the incompatibility of lifestyles and traditions; in short, it is what P.A. Taguieff has rightly called a differentialist racism.9

In the United States, this differentialist racism might be termed nativistic racism. Nativistic racism is not just an intersectional term, but signifies that both nativism and racism are mutually constitutive of the other and operate in tandem to preserve a specific conception of the nation. 0

The nativist movements directed against immigrants from Southern and Eastern Europe, immigrants who were ostensibly White, reflect the constitutive relationship between nativism and racism. As John Higham demonstrates, nativism against those groups did not gain real currency until scientific racism provided a language that allowed them to become targets of nativistic racism. Southern and Eastern European immigrants were represented as racially other to "White" Americans and could therefore be discriminated against.2 To combat this discrimination, these immigrants engaged in an identity politics in which they claimed a White identity.' This eventually proved to be a successful strategy-by claiming a White identity, they could become "American" and escape the animus of nativistic racism.'

Blacks, already present in the geographic space of the United States, posed a different problem. Ironically, the granting of freedom and formal national membership to Blacks provided the predicate for a new form of racial nationalism, the ideology underwriting "[t]he identification of American with White (and the colonization or, failing that, segregation of blacks)."' The demise of the master/slave relationship and the formal ban against racial discrimination necessitated new technologies of racism to preserve White privilege. The Supreme Court provided a new technology in Plessy v. Ferguson, setting forth the "separate but equal" doctrine that marked

a new development in racial thinking ... [that] affirmed racial distinction as such; it affirmed, that is, racial distinction independent of any other legal consideration so that the relation between black and white was radically distinguished from the relation between master and slave. Slaves, in principle, could become free; blacks could never become white. 5

Racial nationalism, or "the identification of American with white," required that Blacks never become American. The doctrine of "separate but equal" enabled the economic disempowerment, political disfranchisement, and physical terrorization of Blacks, preserving the national community as White.

These formations, though, are not static. It is important to note that nativistic racism, which constructs "immigrants" as Asian American, Black, Latina/o, and White, is not a one-way process. These racial and national formations are themselves subject to reconfiguration. Stated more strongly, immigrants, in addition to introducing and representing diversity, remind us of the diversity already present-that Asian American, Black, Latina/o, and White communities are and have always been "heterogenous, hybrid, and multiple." 8 While many scholars have commented on the tremendous diversity within the Asian American and Latina/o formulations,29 relatively little attention has been paid to the new immigration that is bringing an increased diversity to Black communities."0 Further, despite the growing literature on Whiteness as a racial phenomenon,31 insufficient attention has been paid to the diversity encompassed within Whiteness.

Examination of the immigrant requires us to take pluralism seriously and creates the discursive space for an enriched discussion of what it means to be a nation. 2 It forces us to remember that multiculturalism is not just about recognizing and respecting the presence of minority cultures against the backdrop of a dominant, White Euro-American culture; multiculturalism requires us to recognize and respect the heterogeneity within minority and majority communities.3

Although nativistic racism tends to disguise the diversity within broad racial categories, it also creates the enabling condition for ethnic and racial identity politics. Despite the outlawing of formal discrimination,' **the United States remains a hierarchical society that has failed to live up to its democratic principles. Responding to nativistic racism may help us develop an emancipatory politics** that will move us toward what Ernesto Laclau and Chantal Mouffe describe as "a radical and plural democracy": In the face of the project for the reconstruction of a hierarchic society, the alternative of the Left should consist of locating itself fully in the field of the democratic revolution and expanding the chain of equivalents between the different struggles against oppression. **The task of the Left** therefore **cannot be to renounce liberal-democratic ideology, but on the contrary, to deepen and expand it in the direction of a radical and plural democracy**.' Instead of advocating sameness, the "concept of solidarity" may be invoked to establish a "chain of equivalents" between the different groups and their struggles against oppression. 6

### 1ac – human rights

Contention two is human rights

#### Kiyemba reduces habeas to a rubber-stamp – restoring the remedy of release is key to Suspension Clause effectiveness

Brennan Center et al 9, Brief For The Association Of The Bar Of The City Of New York, The Brennan Center For Justice At The New York University School Of Law, The Constitution Project, The Rutherford Institute, And The National Association Of Criminal Defense Lawyers As Amici Curiae In Support Of Petitioners, May 7, <http://www.brennancenter.org/sites/default/files/legacy/Justice/090507.kiyemba.cert.pdf>

2. The Holding of the Court of Appeals That Not Every Violation of a Right Yields a Remedy Raises Grave Constitutional Concerns.

Instead of looking to the history and function of the Suspension Clause as Boumediene directed, the court of appeals relied on an abstract principle that has no application to the scope of constitutional habeas jurisdiction: that “[n]ot every violation of a right yields a remedy, even when the right is constitutional.” Kiyemba, 555 F.3d at 1027. In so doing, it not only eviscerated the Suspension Clause’s express guarantee of a remedy and this Court’s holding in Boumediene, but also triggered grave constitutional questions that should be resolved in the first instance by this Court.

While it is true that an individual whose constitutional rights have been violated may not be entitled to a particular remedy (e.g., damages), this Court has cautioned repeatedly that **a constitutional violation entitles the individual to some remedy**. Any effort to eliminate all effectual remedies for a constitutional violation raises grave constitutional concerns. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”); Webster v. Doe, 486 U.S. 592, 603 (1988) (stating that a “serious constitutional question” would arise if the Court were to construe a federal statute as denying “any judicial forum for a colorable constitutional claim”) (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)); Johnson v. Robison, 415 U.S. 361, 366-67 (1974) (same); Weinberger v. Salfi, 422 U.S. 749 (1975) (same); accord Demore v. Kim, 538 U.S. 510, 517 (2003); see also Bell v. Hood, 327 U.S. 678, 684 (1946) (“[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”).3

The cases on which the court of appeals relied do not support that court’s conclusion that not every constitutional violation has a remedy. Indeed, they do not even concern habeas jurisdiction. Towns of Concord, Norwood & Wellesley v. FERC, 955 F.2d 67 (D.C. Cir. 1992), for example, involved the scope of remedies available under a complex federal regulatory regime, and did not hold that a remedy did not exist for a constitutional violation. Similarly, the Court in Wilkie v. Robbins, 127 S. Ct. 2588 (2007), denied Bivens damages, but recognized that other judicial remedies were available. Id. at 2600-01. See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (stating that the “availability of federal equitable relief against threatened invasions of constitutional interests” is presumed). Moreover, contrary to the court of appeals’ belief, Alden v. Maine, 527 U.S. 706 (1999), explicitly reaffirmed the availability of relief against state officers as a means to ensure some effectual remedy for states’ constitutional violations. Id. at 757.

Whatever significance a hoary adage like “no remedy for every rights violation” might have in the common law, it has no place in habeas jurisprudence under **the Suspension Clause** — a constitutional provision that **enshrines beyond doubt the availability of a judicial remedy**.

#### The remedy of release against wrongful imprisonment is a fundamental human right

Tony Ginsburg et al\* 9, law prof at Chicago, “brief of international law experts as amici curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuIntlLawExperts.authcheckdam.pdf>

\*Ryan Goodman is Anne and Joel Ehrenkranz Professor of Law Professor of Politics and Sociology and Co-Chair of the Center for Human Rights and Global Justice at NYU School of Law. Oona Hathaway is Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School. Jennifer Martinez is Professor of Law and Justin M. Roach, Jr. Faculty Scholar at Stanford Law School. Steven R. Ratner is Bruno Simma Collegiate Professor of Law at the University of Michigan Law School. Kal Raustiala is Professor at UCLA School of Law and UCLA International Institute and Director of the UCLA Ronald W. Burkle Center for International Relations. Beth Van Schaack is Associate Professor of Law at Santa Clara University School of Law and a Visiting Scholar with the Center on Democracy, Development & The Rule of Law at Stanford University. David Scheffer is Mayer Brown/Robert A. Helman Professor of Law at Northwestern University School of Law and Director of the Center for International Human Rights. James Silk is Clinical Professor of Law at Yale Law School, where he directs the Allard K. Lowenstein International Human Rights Clinic. He is also executive director of the Law School’s Orville H. Schell, Jr. Center for International Human Rights. David Sloss is Professor of Law and Director of the Center for Global Law and Policy at Santa Clara University School of Law.

International human rights norms condemn prolonged arbitrary detention and support prompt release in cases of unlawful detention. The prohibition against prolonged arbitrary detention found in the International Covenant on Civil and Political Rights – a binding treaty on the United States, see supra Part I.A. – originates in the Universal Declaration of Human Rights. Articles 8 and 9 of the Universal Declaration flatly prohibit prolonged arbitrary detention and further set forth a “right to an effective remedy” for violations of “fundamental rights.” Universal Declaration of Human Rights, G.A. Res. 217A, arts. 8-9, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].17 **For individuals like Petitioners whose “fundamental rights” are being violated through prolonged arbitrary detention, Article 8’s right to an “effective remedy” necessarily means the right to be released**.

The United States was a central force behind the promulgation of the Universal Declaration in 1948, see Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights 87, 89 (2001), and the United States has consistently urged the Declaration’s adoption as “a common standard of achievement for all nations and all peoples.” Proclamation No. 2999, 3 C.F.R. 46 (1953). **Today, the Universal Declaration is embraced across the globe. Its provisions are regarded as foundational international norms**.18

A core concept of international human rights law is the right to an effective remedy where a violation of rights is found. This right to an effective remedy is the linchpin supporting the protection of all other rights. Thus, the Universal Declaration refers generally to the right to an “effective remedy,” supra art. 8 (emphasis added), and the American Convention on Human Rights provides that “[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights. . . . The State Parties . . . ensure that the competent authorities shall enforce such remedies when granted.” Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 131 [hereinafter American Convention] (emphasis added); see also Council of Europe, European Convention on Human Rights art. 13, Nov. 4, 1950, 213 U.N.Y.S. 232 (1955) [hereinafter European Convention] (providing that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effec- tive remedy before a national authority” (emphasis added)); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms art. 29, May 26, 1995, Council of Europe Doc. H (95) 7 rev. (stating that “[e]veryone whose rights and freedoms are violated shall be entitled to be effectively restored to his rights and freedoms” (emphasis added)); Case of Chaparro Álvarez and o Íñiguez v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 133 (Nov. 21, 2007) (interpreting Article 7 of Inter-American Convention to require that “**it is not enough that . . . a remedy exists formally, it must be effective**; that is, it must provide results or responses to the violations of rights established in the Convention”).

**In the case of prolonged arbitrary detention, the right to an “effective remedy” necessarily requires that the competent court be able to order release**. Indeed, the right to release as an “effective remedy” for unjustified detention is made explicit in numerous international agreements. As already mentioned, supra Part I.A., the Covenant provides that for “[a]nyone who is deprived of his liberty by arrest or detention,” there is a right to judicial review “without delay” and a court shall “order . . . release if the detention is not lawful.” Covenant, supra, art. 9(4). The Covenant has been ratified by 165 countries. The American Declaration of the Rights and Duties of Man contains similar language.19 It provides that “[e]very individual . . . has the right to have the legality of his detention ascertained without delay . . . and the right to be tried without undue delay or, otherwise, to be released.” American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. 25, Int’l Conf. of Am. States, 9th Conf., OAS Doc. OEA/Ser. L./V/II.23, doc. 21 rev. 6 (1948) (emphasis added). The American Convention, which the United States signed in 1977 but has ratified, also requires release as the remedy for unlawful detention: “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.” American Convention, supra, art. 7(6); see Convention on the Rights of the Child art. 37(d), adopted Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (protecting the right of every child “to challenge the legality of the deprivation of his or her liberty before a court” and to “a prompt decision on any such action”); European Convention, supra, art. 5(4) (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”).

#### Human rights are protections, pure and simple – they require universality to be effective

Michael **Ignatief 1**, Director of the Carr Center for Human Rights at the Kennedy School of Government at Harvard University, “The Attack on Human Rights”, Foreign Affairs, November/December

But at the same time. Western defenders or human rights have traded too much away. In the desire to find common ground with Islamic and Asian positions and to purge their own discourse of the imperial legacies uncovered by the postmodernist critique, Western defenders of human rights norms risk compromising the very universality they ought to be defending. They also risk rewriting their own history. Many traditions, not just Western ones, were represented au inc drafting of the Universal Declaration of Human Rights—for example, the Chinese, Middle Eastern Christian, Marxist, Hindu, Latin American, and Islamic. The members of the drafting committee saw their task not as a simple ratification of Western convictions but as an attempt to delimit a range of moral universals from within their very different religious, political, ethnic, and philosophical backgrounds. This fact helps to explain why the document makes no reference to God in its preamble. The communist delegations would have vetoed any such reference, and the competing religious traditions could not have agreed on words that would make human rights derive from human beings' common existence as Gods creatures. Hence the secular ground of the document is not a sign of European cultural domination so much as a pragmatic common denominator designed to make agreement possible across a range of divergent cultural and political viewpoints. It remains true, of course, that Western inspirations—and Western drafters—played the predominant role in the drafting of the document. Even so, the drafters' mood in 1947 was anything but triumphalist. They were aware, first of all, that the age of colonial emancipation was at hand: Indian independence was proclaimed while the language of the declaration was being finalized. Although the declaration does not specifically endorse self-determination, its drafters clearly foresaw the coming tide of struggles for national independence. Because it does proclaim the right of people to selfgovernment and freedom of speech and religion, it also concedes the right of colonial peoples to construe moral universals in a language rooted in their own traditions. Whatever failings the drafters of the declaration may be accused of, unexamined Western triumphalism is not one of them. Key drafters such as Rene Cassin of France and John Humphrey of Canada knew the knell had sounded on two centuries of Western colonialism. They also knew that the declaration was not so much a proclamation of the superiority of European civilization as an attempt to salvage the remains of its Enlightenment heritage from the barbarism of a world war just concluded. The declaration was written in full awareness of Auschwitz and dawning awareness of Kolyma. A consciousness of European savagery is built into the very language of the declarations preamble; "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ..." The declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis. In this sense, human rights norms are not so much a declaration of the superiority of European civilization as a warning by Europeans that the rest of the world should not reproduce their mistakes. The chief of these was the idolatry of the nation-state, causing individuals to forget the higher law commanding them to disobey unjust orders. The abandonment of this moral heritage of natural law and the surrender of individualism to collectivism, the drafters believed, led to the catastrophes of Nazi and Stalinist oppression. Unless the disastrous heritage of European collectivism is kept in mind as the framing experience in the drafting of the declaration, its individualism will appear to be nothing more than the ratification of Western bourgeois capitalist prejudice. In 'act, it was much more: a studied attempt to reinvent the European natural law tradition in order to safeguard individual agency against the totalitarian state. IT REMAINS TRUE, therefore, that the core of the declaration is the moral individualism for which it is so reproached by non-Western societies. It is this individualism for which Western activists have become most apologetic, believing that it should be tempered by greater emphasis on social duties and responsibilities to the community. Human rights, it is argued, can recover universal appeal only if they soften their individualistic bias and put greater emphasis on the communitarian parts of the declaration, especially Article 29, which says that "everyone has duties to the community in which alone the free and full development of his personality is possible." This desire to water down the individualism of rights discourse is driven by a desire both to make human rights more palatable to less individualistic cultures in the non-Western world and also to respond to disquiet among Western communitarians at the supposedly corrosive impact of individualistic values on Western social cohesion. But this tack mistakes what rights actually are and misunderstands why they have proven attractive to millions of people raised in non-Western traditions. Rights are meaningful only if they confer entitlements and immunities on individuals; they are worth having only if they can be enforced against institutions such as the family, the state, and the church. This remains true even when the rights in question are collective or group rights. Some of these group rights such as the right to speak your own language or practice your own religion-are essential preconditions for the exercise of individual rights. The right to speak a language of your choice will not mean very much if the language has died out. For this reason, group rights are needed to protect individual rights. But the ultimate purpose and justification of group rights is not the protection of the group as such but the protection of the individuals who compose it. Group rights to language, for example, must not be used to prevent an individual from learning a second language. Group rights to practice religion should not cancel the right of individuals to leave a religious community if they choose. Rights are inescapably political because they tacitly imply a conflict between a rights holder and a rights "withholder," some authority against which the rights holder can make justified claims. To confuse rights with aspirations, and rights conventions with syncretic syntheses of world values, is to wish away the conflicts that define the very content of rights. Individuals and groups will always be in conflict, and rights exist to protect individuals. Rights language cannot be parsed or translated into a non-individualistic, communitarian framework; it presumes moral individualism and is nonsensical outside that assumption. Moreover, it is precisely this individualism that renders human rights attractive to non-Western peoples and explains why the fight for those rights has become a global movement. The language of human rights is the only universally available moral vernacular that validates the claims of Rights doctrines women and children against the oppression they experience in patriarchal and tribal challenge powerful. societies; it is the only vernacular that enables religions tribes, and dependent persons to perceive themselves a and as moral agents and to act against practices- authoritaran states. arranged marriages, purdah, civic disenfranchisement, genital mutilation, domestic slavery, and so on-that are ratified by the weight and authority of their cultures. These agents seek out human rights protection precisely because it legitimizes their protests against oppression. If this is so, then it is necessary to rethink what it means when one says that rights are universal. Rights doctrines arouse powerfiul opposition because they challenge powerful religions, family structures, authoritarian states, and tribes. It would be a hopeless task to attempt to persuade these holders of power of the universal validity of rights doctrines, since if these doctrines prevailed, their exercise of authority would necessarily be abridged and constrained. Thus universality cannot imply universal assent, since in a world of unequal power, the only propositions that the powerful and powerless would agree on would be entirely toothless and anodyne. Rights are universal because they define the universal interests of the powerless-namely, that power be exercised over them in ways that respect their autonomy as agents. In this sense, human rights represent a revolutionary creed, since they make a radical demand of all human groups that they serve the interests of the individuals who compose them. This, then, implies that human groups should be, insofar as possible, consensual, or at least that they should respect an individual's right to exit when the constraints of the group become unbearable. The idea that groups should respect an individual's right of exit is not easy to reconcile with what groups actually are. Most human groups-the family, for example-are blood groups, based on inherited kinship or ethnic ties, People do not choose to be born into them and do not leave them easily, since these collectivities provide the frame of meaning within which individual life makes sense. This is as true in modern secular societies as it is in religious or traditional ones. Group rights doctrines exist to safeguard the collective rights-for example, to language-that make individual agency meaningful and valuable. But individual and group interests inevitably conflict. Human rights exist to adjudicate these conflicts, to define the irreducible minimum beyond which group and collective claims must not go in constraining the lives of individuals. CULTURE SHOCK ADOPTING THE VALUES of individual agency does not necessarily entail adopting Western ways of life. Believing in your right not to be tortured or abused need not mean adopting Western dress, speaking Western languages, or approving of the Western lifestyle. To seek human rights protection is not to change your civilization; it is merely to avail vourself of the protections of what the philosopher Isaiah Berlin called "negative liberty": to be free from oppression, bondage, and gross physical harm. Human rights do not, and should not, delegitimize traditional culture as a whole. The women in Kabul who come to human rights agencies seeking protection from the Taliban do not want to cease being Muslim wives and mothers; they want to combine their traditions with education and professional health care provided by a woman. And they hope the agencies will defend them against being beaten and persecuted for claiming such rights. The legitimacy of such claims is reinforced by the fact that the people who make them are not foreign human rights activists or employees of international organizations but the victims themselves. In Pakistan, for example, it is poor rural women who are criticizing the grotesque distortion of Islamic teaching that claims to justify "honor killings"-in which women are burned alive when they disobey their husbands. Human rights have gone global by going local, empowering the powerless, giving voice to the voiceless. It is simply not the case, as Islamic and Asian critics contend, that human rights force the Western way of life on their societies. For all its individualism, human rights rhetoric does not require adherents to jettison their other cultural attachments. As the philosopher Jack Donnelly argues, Human rights should human rights assume "that people probably are best suited, and in any case are entitled, not delegitimize to choose the good life for themselves."

#### The moral obligation to uphold universal human rights imbues the concept of ‘personhood’ with meaning

Bernard den **Ouden 97**, philo prof at the University of Hartford, “Sustainable Development, Human Rights, and Postmodernism”, PHIL & TECH 3:2 Winter

There are, however, limits to the postmodernist and social constructionist perspectives. To say that cultures are different and that they are undergoing continuing fragmentation is not necessarily to conclude that the members of humankind cannot have anything in common. We share a dependence on earth, air, fire, and water. We have relatively similar bodies. The deforestation and reforestation in which we engage have dramatic effects beyond all of our borders. The burning of high sulfur fuels affects everyone. The decreasing supply of fresh, potable water is now affecting and will increasingly affect all humankind. Furthermore, universal human rights are not only possible to articulate, but they are necessary to the human condition. We should have the right to personhood regardless of gender or culture. All humankind have the right to the fruits of their labors. We also have the right to due process in legal matters. In addition, individuals should have the right to marry or not to marry. They should be able to leave their country of origin or return to it. (I grant that in many countries or contexts this is only something that world citizens hope for in the future.) My argument is a simple one. Unless we understand and work with cultural differences and the best of indigenous values, economic and social development is not sustainable. However, we must infuse this process with the values and ideals of universal human rights for which all of us are responsible. Without creating or protecting fundamental human rights for our fellow world citizens, sustainable development will not occur. The fruits and benefits of improvement or the development of economic strengths will go to the wealthy and the powerful. Unless the rights and lives of the poorest of the poor in India and Nepal are attended to and protected, systematic deforestation will continue to occur at a traumatic rate in that region. Unless the water subsidies and privileges of agribusiness in California are carefully scrutinized, challenged, and changed in order to take into account all the citizens of the Western part of North America, access to potable water and to an environment even relatively safe from harmful chemicals will continue to be compromised. The economies of Russia and the many former Communist states may continue to grow, but a strong shared base of economic development will not occur unless and until Russia and its surrounding neighbors become societies based on just laws. Marxism has much to say about self-formation and a sense of common humanity. However, one reason why Marxist regimes failed is that they tried— even while retaining class and economic privilege for many party members—to change and improve material conditions in their societies while neither believing in nor genuinely implementing constitutions that respected personhood, cultural diversity, due process, or the right to leave the country of origin. One can create economic growth through cowboy capitalism and by means of economies of extortion. But without laws and respect for persons, economic development that is broad-based and sustainable will not occur. Human rights are tied to global responsibilities. We can, for example, discuss the rights of children, but it is imperative to have moral courage. When children are being enslaved or when they are "parts-out" or used for organ sales which are in turn sold on the black market, to take refuge in differing views of humanity and cultural values is to retreat from our responsibilities. Cultural difference needs to be understood; however, if tolerance is to be real it must have limits. No government or people, for example, should do or be allowed to do what European Americans have done to the people and cultures of the American Indians. Conquest is not a right, and no rights follow from conquest. Quite simply, much (though perhaps not all) of postmodernism ends in hopeless relativism and moral impotence. If we conclude and/or accept that all relations are purely power relations and that all values are historical, relative, and accidental, then today we could just as well be planning or implementing conquest and slavery rather than trying to extend human understanding or to contribute to the unending struggle against cruelty and barbarism. As Kwame Anthony Appiah says in an excellent essay entitled, "The Post-Colonial and the Postmodern" (1995), postmodernism suffers from the same exclusivity of vision it rejects and pretends to abhor. Although allegedly nothing can be said about all cultures, because all cultures are only fragments of difference and meanings, the claim is made for all cultures. Absolute cultural relativism legitimates genocide, sexism, and abusive power relations. Ethical universalism need not be tied to European world views or imperial domination. Appiah is looking for a humanism fully cognizant of human suffering; one which is historically contingent, anti-essentialist, and yet powerfully demanding. He bases his ethics in a concern for human suffering and asserts that obligations or responsibilities transcend cultural differences and national identity. To maintain that we live only in our cultural fragments is to inhabit what Kumkum Sangari (1995) calls "present locales of undecidability" and to live lives void of moral action. Sangari, in "The Politics of the Possible," offers an argument parallel to that of Appiah. She contends (1995, p. 143) that postmodern epistemology "universalizes the self-conscious dissolution of the bourgeois subject." Again, the same contradictory claims. There are allegedly no universal values or modes of knowledge, yet the truth of this assertion is made for all cultures. Sangari regards one of the most important weaknesses of postmodernism to be that it "valorizes indeterminacy as a cognitive mode, [and] also deflates social contradiction into forms of ambiguity or deferral, instates arbitrary juxtaposition or collage as historical 'method,' preempts change by fragmenting the ground of praxis" (Sangari, 1995, p. 147). Postmodernism universalizes cultures into insularity. It generalizes its own skepticism which is its dogmatic epistemological preoccupation. It instantiates the imperialism of relativism. It gives no philosophical or social place to political responsibility or ethical values. In this mode of discourse and inaction, we can only engage in involuted descriptions or in the articulating of ephemeral world pictures which are lost in themselves or at best captured in paralyzed discourses. Action in this mode is as valuable or as hopelessly tragic as inaction. Without the possibility and actuality of moral action, I would argue that we are at best what Dostoevsky referred to as "neurotic bipeds."

#### Disregarding rights means atrocity and dictatorship go unstopped

Richard D. **Mohr 95**, Professor of Philosophy at the University of Illinois at Urbana-Champaign, “The Perils of Postmodernism”, The Harvard Gay & Lesbian Review, Fall 1995, pp. 9-13

But this sense of equality as non-degradation presupposes a culturally-neutral claim that each and every person presumptively is worthy of equal regard and that we have some means of determining this moral fact outside of the moral twists and turns of any given society. Due to its relativistic commitments, postmodernism can never provide this presumption. If a society thinks, in the manner of the Supreme Court's 1857 Dred Scott decision, that slavery is acceptable because blacks are lesser beings, and if values are socially and historically specific - all culture-bound and culturally determined as postmoderns claim - then there is no fulcrum and lever with which one could dislodge this belief about blacks by showing it to be false. But then, if blacks are inferior, they are not treated worse than they should be when they are treated as slaves rather than as full persons. We can tell from within a culture (say, from its jokes and slang) that some group is humiliated, held in contempt; but without culturally-neutral values, one cannot tell whether that group does or does not indeed deserve that contempt. Without such values, we cannot know that certain groups aren't simply being put in their proper place. Postmodern theorists like Judith Butler, author of Gender Trouble, brand as fascist any appeal to culturally-neutral values and the metaphysics such values inevitably entail. But without such values we are unable to tell when ill treatment and ill-will are warranted and when they constitute oppression. The moral relativism of postmoderns leaves them unable even to refute Nazi views on homosexuals: "Himmler recounted to his SS generals the ancient Germanic mode of execution for homosexuals - drowning in bogs - and added: 'That was no punishment, merely the extinction of an abnormal life. It had to be removed just as we now pull up stinging nettles, toss them on a heap and burn them.'" (from James Steakley's 1975 The Homosexual Emancipation Movement in Germany) The moral relativism of the postmoderns destroys the very foundations of the sort of equality which they want to espouse. Talk, Discourse, Free Speech When, as in postmodernism, there are no culturally neutral criteria with which one could properly show to be false a socially held belief that some group is worthy of derision, all one can do is to change the belief itself from within the culture, thus transforming the culture into a different one with its own, new values, which again, thanks to moral relativism, are unassailable. Inevitably, then, under postmodern pressures, equality rights have no separate standing from concerns about how to persuade people to change their values. At best, equality rights against oppression and degradation must be abandoned in favor of rights to free speech, by means of which one side or faction in society tries to upgrade the status of certain groups within the culture. But most postmoderns have not embraced free speech rights. Ruthann Robson, for example, guts the First Amendment in one sentence: "The First Amendment is a rule of law with its roots in European liberal individualism and property-based notions. Its value to lesbians must be decided by us, not assumed by us." Free speech rights are good only if they "assist us" - i.e., us lesbians. This stance, holding that asserted rights really are rights only when the asserting group says they are, does away with free-speech rights altogether once some other competing and winning group makes the same claim for itself: "we believe in free-speech rights only when they work for us, and we've won, so no speech rights for you." In short, majorities, on this account, get to determine what rights there are - which is to say the "rights" are not rights at all, but majority privileges. Perhaps the best-known postmodern attack on the First Amendment is Stanley Fish's 1992 article entitled "There's No Such Thing as Free Speech and It's a Good Thing, Too." Fish holds that speech "impinges on the world in ways indistinguishable from the effect of physical action." This position is silly when taken literally, as it would imply that I can move mountains with my mind and tongue as easily as with dynamite and a steam shovel. What Fish is really doing is taking the postmodern pledge that people's ideas determine what they do because they determine who they "are." To make people good, we, like Plato's Philosopher-Kings, must control what people hear and must hold them legally responsible for their utterances as though these were thrown knives - only worse. Speech for postmoderns is nothing but politics by other means. It cannot be subject to rules other than those of political power, which include the acceptability of its suppression through the machinery of majority rule. Fish's hope is that majority rule, free of the burdens of the First Amendment, will choose to suppress such speech as the shouting of "faggot" and so sweep in a millenium of gay liberation. After all, how else could one do that but with words? Liberation on this account will be cheap, quick, and easy, because talk is cheap, quick, and easy. Fish gives no acknowledgments to the sorts of arguments made by traditional liberals in favor of free-speech rights - arguments like those from John Stuart Mill's On Liberty (1859). Fish fails to see that the free exchange of ideas is the chief means by which we critically assess our beliefs to see if they are warranted and is what allows us, to a significant degree, to evaluate courses of action without having previously performed them ourselves. It is this critical capacity of speech, language, and thought that distinguishes words conceptually from actions and that positions them as things that centrally need to be protected if individuals are to be autonomous, and so warrants speech's protection even if these produce incidental harms in the world of action. Lessons of recent history should teach us that Fish's hope of liberation through the control of speech is a misguided fantasy. When governments suppress speech, it is lesbian and gay speech that they suppress first. In February 1992, the Canadian Supreme Court accepted Catherine MacKinnon and Andrea Dworkin's analysis that pornography may be legally banned because it is degrading to women. After this ruling, the very first publication in Canada to lead to a bookseller's arrest was the lesbian magazine Bad Attitude. The Glad Day Bookstore, Toronto's only gay bookstore, continues now to be harassed by customs officials and police just as it was before the MacKinnon-rationalized decision, because the police view gay sex itself, in whatever form, as degrading to the humanity of its participants. It is not just lesbian feminists who should fear unleashed censorship. The New York Times (June 29, 1994) reports that "earlier this month, the America Online network shut down several feminist discussion forums, saying it was concerned that the subject matter might be inappropriate for young girls who would see the word 'girl' in the forum's headline and 'go in there looking for information about their Barbies'." The cost of postmodernism is high. It eliminates privacy rights, equality rights, and free-speech rights. Ironically, it turns out that postmoderns themselves, when they deign to descend from their ivory towers, also believe that the cost of postmodernism is too high. When confronted with the real world and the need to act politically, they resort to what they call "strategic essentialism" - essentialism here is a code word for the assumptions about human nature that are embedded in liberal individualism. Postmoderns recognize that their own sort of relativistic talk will not get them anywhere in the real world, and that they will have to resort at least to the strategies, styles, and cant used by liberal humanists - that is, if gay progress is to be made. But bereft of the substance and principles of liberalism that are its real tools and that postmodernism supposes it has destroyed, liberal strategies will hardly be effective. Moreover, despite postmoderinism's thick jargon and tangled prose, there is no reason to suppose that the courts won't eventually see through the postmodern bluff and, like Toto, pull back the curtain of its liberal guise to reveal machinery which conservative justices can effectively use to further restrict rights. It is not too difficult to imagine a scenario in which Justice Scalia signs off an opinion upholding the mass arrest of gay Marchers on Washington by block-quoting Stanley Fish: "In short, the name of the name has always been politics, even when (indeed, especially when) it is played by stigmatizing politics as the area to be avoided by legal restraints." Indeed the Supreme Court's most recent gay case gives evidence that it is already able to co-opt postmodern discourses as means of oppressing gays. In its June 1995 St. Patrick's Day Parade ruling, the Court voided the gay civil rights protections of Massachusetts' public accommodations law as applied to parades. In order to reach this conclusion, the Court had to find that Boston's St. Patrick's Day Parade constituted political speech despite the fact that the Court could find no discernible message conveyed by the parade; as far as any message went, the Court analogized the parade to the verse of Lewis Carroll and the music of Arnold Schönberg. What to do? Well, the Court sought out a source that would claim for it and against common opinion that all parades are inherently political. And where better to find such a source than in postmodern beliefs that hold that everything is politics? The Court quoted the requisite claim about the inherently political nature of parades from an obscure 1986 academic book Parades and Power: Street Theatre in Nineteenth-Century Philadelphia, which, on the very next page after the one quoted by the Court, signals its intellectual allegiances: "The concepts framing this study flow from ... E.P. Thompson ... and Raymond Williams." These two men are the Marxist scholars who founded cultural studies in England. The Right-wing Supreme Court here used postmodern Marxist scripture to clobber gays. Global Postmodernism It used to be that tyrants - be they shah or ayatollah - would simply deny that human rights violations were occurring in their countries. But in the last few years, tyrants have become more "theoretical" and devious. Their underlings have been reading Foucault. Now, when someone claims that a ruler is violating some human right, say, religious freedom, the ruler simply asserts that while the purported right may well be a right in Northern European thinking, this fact have no moral weight in his own way of thinking. Indeed, if, as postmoderns claim, values are always historically and culturally specific in their content, then the ruler can claim not only that North European thinking about rights need have no weight in his own thinking, but moreover that it cannot have any weight in his own thinking, determined as it is by local conditions and cultural forces. Recently Muslim fundamentalists have defended their religious cleansing of Coptic Christians out of Egypt by asserting that there is no international human right to religious freedom. In a similar spirit, Saudi Arabia's ambassador to the United States took out a full-page ad in the Sunday New York Times titled "Modernizing in Our Own Way" (July 10, 1994). The ad couched moral relativism in pseudo-liberal verbiage - appealing to "rights to our own basic values" and "respect for other people's cultures" - in order to justify Saudi Arabia's barbaric departures from "Western human rights." For a gay example of such judgment-arresting relativity, consider the case of the 19-year-old Jamaican reggae singer, Buju Banton. In 1992 he had a hit song, "Boom Bye Bye," with lyrics that translate approximately to "Faggots have to run or get a bullet in the head." A spokesman in the singer's defense claimed, "Jamaica is for the most part a Third World country with a different ethical and moral code. For better or worse, homosexuality is a deep stigma there, and the recording should be judged in a Jamaican context." If postmodernism is right, such fundamentalists, ambassadors, and spokesmen are irrefutable. Surprisingly, such moral relativism has even infected Amnesty International - a group that is a conceptual joke if the very idea of international human rights comes a cropper. Through the 1980s, British, Dutch, and American sectors of Amnesty International argued that people arrested for homosexual behavior should be classified as prisoners of conscience - Amnesty International's blanket designation for those whose human rights have been violated. But for a long time, these arguments were drowned out by Third World voices, which claimed that while sexual privacy may be a right in some First World places, it certainly is not where they speak. If postmodernism is right, these Third World voices are irrefutable. Finally, in 1991, "hegemonic" Western voices got the Third World to go along with the reclassification of gay sex acts, but no without a proviso holding that ny work that Amnesty International directs at enforcement of rights to sexual privacy should be as deferential as possible to local conditions. No other right recognized by Amnesty International comes with such a morally deflationary fillip. Human rights won this battle, but in a way that holds out the prospect that they will lose the peace.

#### But embracing human rights does not obviate the need for difference – pluralism and contingency are only possible with basic protections

Zühtü **Arslan 99**, an assistant professor of the Faculty of Security Sciences at the Police Academy in Ankara, Turkey, “Taking Rights Less Seriously: Postmodernism and Human Rights”, Res Publica 5: 195–215, http://www.philosophy.ru/library/pdf/234617.pdf

Incredulous of foundational truth claims, the postmodernists reject the idea that human beings have certain rights simply by virtue of being human. Foucault for instance claims that, like the individual, civil liberties are nothing but expressions of governance and disciplinary power.98 Gaete writes: [A] Post-Modern perspective would assume that human rights are neither the expression of a universal truth nor a denial of it and regard their truth claims as only local moves in a game the subject enters when formulating his/her relationship to power in the language of fundamental rights.99 The postmodern hymn of relativity rules out the possibility of any universal claim to human rights. In the postmodern condition, it would be impossible to argue that individuals have some basic rights irrespective of their nationality or geography. The inevitable consequence of the relativisation of “truth-claims” is to undercut any universal, “principled, normative basis” for claiming that human rights simply exist.100 But without such a basis, we are left in a situation in which we lack any criteria to distinguish between right and wrong. This ethical vacuum may easily lead to the apparent legitimation and justification of almost any belief and practice in the realm of rights. This conservative support of the prevailing status quo is an obvious rejection of the “revolutionary” nature of universal human rights. At the end of the day, the notion of rights is forced to surrender its power as a legitimating factor of political regimes. With the demise of the subject and his/her rights, the postmodernists in fact undermine any possible resistance against oppressive orders. As Touraine asserts, “[T]he idea of the subject is a dissident idea which has always upheld the right to rebel against an unjust power.”101 Touraine also reminds the murderers of the subject what a subject-less world would look like: [T]he day when the Subject is debased to meaning introspection, and the Self to meaning compulsory social roles, our social and personal life will lose all its creative power and will be no more than a post-modern museum in which multiple memories replace our inability to produce anything of lasting importance.102 The postmodern defence of “uncertainty” and “contingency” is equally problematic. The very idea of “uncertainty” itself implies the existence of a certainty, after all: “[I]f you tried to doubt everything, you would not get as far as doubting anything. The game of doubting itself presupposes certainty.”103 Human beings live with their values, and need to rank them. Their highest values, or what Charles Taylor calls “hypergoods”,104 play a central role in our lives. Individuals define and are defined by these hypergoods, be they a divine being, Brahma, Nirvana, Justice, Reason, Science, Progress, Cogito or Superman. To kill our hypergoods therefore means an attempt to kill the sources of the self, sources which confer meaning on the lives of human beings. The need for hypergoods points to the necessity of “an absolute truth”, to use Sartre’s phrase.105 This necessity is also the precondition of any critique. Thus Habermas claims that “Nietzsche’s critique consumes the critical impulse itself”; for “if thought can no longer operate in the realms of truth and validity claims, then analysis and critique lose their meaning”. 106 Oddly, perhaps, Derrida seems to agree with Habermas when he says that he “cannot conceive of a radical critique which would not be ultimately motivated by some sort of affirmation, acknowledged or not”.107 Postmodernity, despite its dream of a “godless” epoch,108 cannot escape the necessity we have explored. Such a dream itself anyway reflects, however implicitly and unintentionally, the belief in linear progress, one of the hypergoods of modernity.109 Postmodernism turns out to be a new grand narrative: “a grand narrative of postmodernity”.110 Even Lyotard comes close to acknowledging the existence of this new metanarrative. He states that “the great narratives are now barely credible. And it is therefore tempting to lend credence to the great narrative of the decline of great narratives.”111 As a new “totalising” project, postmodernism reproduces the very predicaments of modernity,112 and its rejection of metaphysics becomes a merely “rhetorical” claim.113 The real question now is how to establish a socio-political framework in which people’s hypergoods might peacefully live side by side without people trying to kill each other. This is the project of political liberalism: but it is also to certain extent the project of postmodernism itself, as we have earlier seen.114 In other words, pluralism is the common value which in fact pervades the writings of liberals and postmodernists alike,115 even though it is expressed in different terms, and on different epistemological grounds, amounting, ironically, to both the “ethical relativism” of John Keane116 and the “moral universalism” of Habermas.117 Keane writes: [T]o defend relativism requires a social and political stance which is throughly modern. It implies the need for establishing or strengthening a democratic state and a civil society consisting of a plurality of public spheres, within which individuals and groups can openly express their solidarity with (or opposition to) others’ ideas.118 In an interview, Habermas explains what his “moral universalism” stands for: [W]hat does universalism mean, after all? That one relativizes one’s own way of life with regard to the legitimate claims of other forms of life, that one grants the strangers and the others, with all their idiosyncrasies and incomprehensibilities, the same rights as oneself, that one does not insist on universalizing one’s own identity, that one does not simply exclude that which deviates from it, that the areas of tolerance must become infinitely broader than they are today – moral universalism means all these things.119 At the core of this pluralism required by “ethical relativism” and “moral universalism” alike lies the conception of autonomy.120 Indeed, as Raz puts it, pluralism is a necessary requirement of the value of autonomy.121 Autonomy, however, is inextricably connected with rights. An autonomous individual who is “the author of his own life” has certain rights.122 In Raz’s words “autonomy is constituted by rights and nothing else: the autonomous life is a life within unviolated rights”.123 Since it is an essential part and parcel of human being (or being human), autonomy constitutes a “sufficient ontological justification” for rights and thus gives an invaluable support to those who seek for a justificatory ground for them.124 Autonomy requires the existence of the Other(s).125 The Other is not simply external to me, but he or she at the same time constitutes my identity: I am in a way parasitic on the Other. My autonomy makes sense only insofar as there exist others. As Sartre puts it, “[T]he other is indispensable to my existence, and equally so to any knowledge I can have of myself.”126 And unless I in turn recognise others as autonomous beings I shall end up in the fundamental predicament of “absolute loneliness and terror”.127 This points to the absolute necessity of living with others,128 as a “zoon politikon” in Marx’s words.129 Thus autonomy is a key value not only for “I”, but also for others. The postmodernists must take into account autonomy, if they are to present an ethical/political project part of which involves rights, however “locally”. They can do so, furthermore, without having to abandon their conceptual tools. Difference and otherness, the magical terms of postmodern discourse, are in fact quite compatible with such conceptions as autonomy and universality. As Lyotard himself argues, a human being has rights only if she is also an other human being. Likewise, as Terry Eagleton emphasises, universalism and difference are not mutually exclusive. Difference may need universalism. The idea of difference is indeed likely to be undermined by “certain militant particularisms of our day”.130 V. CONCLUSION Whatever the merits of the entirety of their arguments, the postmodernists emphasise the paramount importance of human rights: they are, after all, its starting-point. As Bauman points out, “[T]he great issues of ethics – like human rights . . . – have lost nothing of their topicality”,131 and he is well aware of the fact that “[m]oral issues tend to be increasingly compressed into the idea of ‘human rights’ ”.132 Lyotard himself likewise states that “[A] human being has rights only if he is other than a human being. And if he is to be other than a human being, he must in addition become an other human being.”133 More importantly, influenced by the communitarian and postmodern critique of metaphysical grounds for ethical and political claims, some liberal rights theorists such as Ronald Dworkin and John Rawls adopt a kind of “apologetic” attitude towards the theoretical foundation of rights, refusing to play the traditional role of moral magician by plucking ethical claims out of a metaphysical hat. In a recent essay, Rawls makes it clear that [T]hese [human] rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, such as, for example that human beings are moral persons and have equal worth or that they have certain particular moral and intellectual powers that entitle them to these rights. To show this would require a quite deep philosophical theory that many if not most hierarchical societies might reject as liberal or democratic or else as in some way distinctive of Western political tradition and prejudicial to other countries.134 This passage implies that in fact the idea of human rights is a product of the western liberal tradition, but in order to make it universally applicable we must refrain from any theoretical attempt to reveal this fact. Let’s pretend that human rights are simply there. They do not need any moral or philosophical ground for justification. But there need be no contradiction between the postmodernists and the liberals; nor need the latter apologize for “rights”. For, as we have seen, the postmodernists have never underestimated the importance of human rights. They argue that ethical issues such as human rights “only need to be seen, and dealt with, in a novel way”.135 Yet the postmodernists have not presented us with any postmodern “novel way” in which human rights might be seen. It seems to be difficult, if not impossible, for them to show this novel way without taking into account the conceptions of autonomous self and universality. Perhaps they need to begin taking rights more seriously.

### 1ac – solvency

Contention three is solvency

#### Reversing Kiyemba is key – the squo guarantees the president and courts keep passing the buck

Ernesto Hernández-López 12, law prof at Chapman, “Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World”, uc irvine law review, Vol. 2:193

Kiyemba I, II, and III show how immigration law doctrines, in particular but not limited to plenary powers, justify detention even after they have been found to be unlawful by a district court and long after the executive has ceased classifying detainees as enemy combatants. While certiorari petitions and appellate review of Kiyemba cases focus on habeas doctrine, immigration law operates as a fallback to keep detention legal, even if it is indefinite. This doctrinal quagmire is the product of factual complexities presented by the detention of these Uighurs. The executive and judiciary argue that the detainees are choosing not to accept the limited resettlement options provided and that this keeps them on the base. But it is the U.S. government that placed these men in this situation after so many years. Executive choices to detain Uighurs on Guantánamo, rather than choices made by the Uighurs, created these problems. In this regard, Kiyemba detainees differ greatly from many aliens in most immigration law cases, who chose to enter the United States. Given this factual and legal impasse, the executive, consistent with historical practice, employs immigration law as an instrument to detain aliens and deny rights protections in times of national security. Foreign policy objectives, in this case the War on Terror, set the stage for this treatment of aliens. Here the foreign nationals are Uighurs resisting China, caught in the Afghanistan conflict, and brought by the United States government to Cuba.

In theory, court-ordered habeas release from the extraterritorial jurisdiction of Guantánamo could result in their release, but the doctrinal challenges to this are substantial. Put simply, the judiciary does not find that developing this doctrine is as important as the challenges it creates, even if it effectively turns an eye away from the likelihood of indefinite detention. At the Court of Appeals and Supreme Court levels, the judiciary appears hesitant to make new extraterritorial rights determinations, which would be the outcome of a court order to release them from a U.S. base in Cuba. Similarly, such an order would potentially meddle with diplomatic efforts, upsetting separation of powers. Kiyemba II clearly shows that the judiciary will not question or try to check this executive power. To resettle these men, the executive negotiates with the consular officers from diplomatic corps from countries other than China. Moreover, the Kiyemba III petition asks that a habeas remedy, in the form of release from Guantánamo, requires domestic entry into the United States. As described below, this can be achieved with the executive’s authority to parole aliens into the United States. However, this requires the political will of the President and the Department of Homeland Security. Given popular resistance of Americans and lawmakers to relocating Guantánamo detainees domestically, this seems unlikely for now. More generally, the Obama administration has eliminated plans to create a new detention center in Illinois for base inmates or to try them in domestic courts because of the political fallout.204 This resistance is fueled by popular and public anxieties about the War on Terror and the judiciary’s role in this conflict.205 The problem here remains that the law defers solutions to the political branches. National and global politics inhibit the development of these solutions. The detainees, the United States, and China all resist the options provided so far.

In October 2009, the Supreme Court did grant certiorari for detainee petitions in Kiyemba I and II when it appeared that they would remain indefinitely on the base with no option to be resettled. A few months later, the detainees received new resettlement offers from Palau and Switzerland. The Supreme Court then declined to review these cases.206 Justice Breyer, joined by three justices, argued that the detainees had options to relocate, but that the Uighurs were choosing not to accept them. He added that there had been no meaningful challenge to the appropriateness of these offers and that the Government presented “uncontested commitment” to resettle them.207 As such, there was “no Government-imposed obstacle” to the Uighurs’ timely release and “appropriate resettlement.”208

The remaining five detainees have rejected these offers for various reasons. Given that they have been detained in Guantánamo since 2002, captured in Pakistan a decade ago, and interrogated by Chinese officials while on the base, they are suspicious of what American authorities tell them. They have no connections to Palau or Switzerland. They understandably seek some security and cultural familiarity, which they argue a Uighur community in the United States would provide. It is also reported that relocation experiences of former detainees in Bermuda, Albania, and Palau provide far less than what was promised. The legal and factual developments leave the courts asking why the detainees refuse to accept the resettlement options provided. The court is unwilling to be more reflective of how the United States has treated these noncombatants. Instead the court simply asks whether their continued detention is illegal and whether their release is required by law. In spite of the doctrinal limbos created by immigration, foreign relations, and habeas law, the judiciary presents the detainees as “hold[ing] the keys” to their release.209

#### The intersection of xenophobia and racist anti-terror policy represented by the Uighurs at Gitmo provides a useful avenue to explore the exclusionary nature of detention policy write large

Ernesto Hernández-López 12, law prof at Chapman, “Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World”, uc irvine law review, Vol. 2:193

Next, with an examination of detainee nationalities and their exclusion from legal protections, the detention program at Guantánamo reflects de facto racist discrimination. Base detentions and “unlawful enemy combatants” classifications created proxies in American law to specifically exclude persons from rights protections.254 Initial White House justifications claimed that unlawful enemy combatants did not enjoy protections in international law and that this resembled historic denials of similar rights for savages or barbarians in colonial wars.255 Interestingly, a Washington Post report states that the Chinese detainee population was twenty-two, placing China in the second tier of nationalities represented along with Algeria.256 Of these twenty-two, five remain detained and brought the claims in the Kiyemba cases. Compiling the numbers of all base detainees since 2002, the Washington Post reports Afghanistan, Saudi Arabia, Yemen, and Pakistan each had more than seventy, making them the most represented. But Chinese detainees (i.e., the Uighurs) include a sizably larger population than those from forty-four other countries.257 Most of these detainees may be from countries, especially the top four mentioned, from which the United States had particular strategic reasons to detain based on the Afghanistan campaign. China’s sizable population at the base, relative to all 779 inmates, does suggest Chinese nationality was relevant to the choice to detain them. Based on reviews of WikiLeaks documents released in April of 2011, the New York Times reports a detainee’s country of origin appears as the most important factor for determining if they can be released.258

Drawing inferences concerning the law’s racial exclusions from detainee demographics is difficult.259 Detainee nationalities indicate that most are from the Persian Gulf or Central Asia, regions vital to American security in terms of the War on Terror and regional geopolitics. The Uighur homeland and the place the Uighurs were captured are both in Central Asia. Because American law reserves detention primarily for these populations, detention practices suggest a discriminatory impact in the detention program’s application. With regard to the twenty-two Uighurs, detainees from China appear not as an accident, isolated or limited. One or two men represent the majority of the forty-eight nationalities at the base detention center.260 This suggests it is not an accident or aberration that China is one of the most represented countries at the base detention center, with twenty-two out of 779 detainees being from this particular nationality.

Referring to American law’s racialization of foreigners and the War on Terror, critical race legal scholarship inspires inquiries on base detentions and race. It elucidates how immigration and alienage law stems from, and never fully breaks with, social mechanisms to exclude certain races from American rights protections. Kevin Johnson describes how alienage serves as a proxy for race in U.S. law.261 He ties in history, social, legal, foreign, and domestic analyses. Immigration law, with explicit intent or ignored effect, discriminates against citizens and noncitizens of color. Johnson explains not only how social biases feed lawmaking, but how racism provided the initial reasoning for sovereignty-based immigration doctrine.262 The plenary power doctrine justifies why political branches have plenary powers in foreign relations, overseas territories, and immigration matters. This frames how American law approaches base detention, by focusing jurisprudence on national security, base location, and detainee alienage.

Simualted national security law debates inculcate agency and decision-making skills—that enables activism and avoids cooption

Laura K. Donohue, Associate Professor of Law, Georgetown Law, 4/11/13, National Security Law Pedagogy and the Role of Simulations, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations. The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material. The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos. The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166 A. Course Design The central idea in structuring the NSL Sim 2.0 course was to bridge the gap between theory and practice by conveying doctrinal material and creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking). Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168 Additionally, while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting. NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux. A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise. In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0. The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law. Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media). A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers. The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed. The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session. To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain. Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced. Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals. Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient. The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future. B. Substantive Areas: Interstices and Threats As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. This is the most important determination, because the substance of the doctrinal portion of the course and the simulation follows from this decision. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. This, then, becomes a guide for the doctrinal part of the course, as well as the grounds on which the specific scenarios developed for the simulation are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course. The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life. For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like. The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression. C. How It Works As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play. Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site. For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis. The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication. As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities. At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively. Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172 Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests. CONCLUSION The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same. The one-size fits all approach currently dominating the conversation in legal education, however, appears ill-suited to address the concerns raised in the current conversation. Instead of looking at law across the board, greater insight can be gleaned by looking at the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach. With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field. The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion simulations, which have not yet been addressed in the secondary literature for civilian education in national security law, may provide an important way forward. Such simulations also cure shortcomings in other areas of experiential education, such as clinics and moot court. It is in an effort to address these concerns that I developed the simulation model above. NSL Sim 2.0 certainly is not the only solution, but it does provide a starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. It makes use of technology and physical space to engage students in a multi-day exercise, in which they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

**Simulating the plan creates unique pedagogical benefits by forcing us to build expertise on the details of national security policy—the simulation iself activates agency and enables change—it also builds problem-solving and decision-making skills**

Laura K. **Donohue**, Associate Professor of Law, Georgetown Law, 4/11/**13**, National Security Law Pedagogy and the Role of Simulations, http://jnslp.com/wp-content/uploads/2013/04/National-Security-Law-Pedagogy-and-the-Role-of-Simulations.pdf

2. Factual Chaos and Uncertainty

One of the most important skills for students going into national security law is the ability to deal with factual chaos. The presentation of factual chaos significantly differs from the traditional model of legal education, in which students are provided a set of facts which they must analyze. Lawyers working in national security law must figure out what information they need, integrate enormous amounts of data from numerous sources, determine which information is reliable and relevant, and proceed with analysis and recommendations. Their recommendations, moreover, must be based on contingent conditions: facts may be classified and unavailable to the legal analyst, or facts may change as new information emerges. This is as true for government lawyers as it is for those outside of governmental structures. They must be aware of what is known, what is unsure, what is unknown, and the possibility of changing circumstances, and they must advise their clients, from the beginning, how the legal analysis might shift if the factual basis alters.

a. Chaos. Concern about information overload in the national security environment is not new: in the 1970s scholars discussed and debated how to handle the sequential phases of intelligence gathering and analysis in a manner that yielded an optimal result.132 But the digital revolution has exponentially transformed the quantitative terms of reference, the technical means of collection and analysis, and the volume of information available. The number of sources of information – not least in the online world – is staggering.

Added to this is the rapid expansion in national security law itself: myriad new Executive Orders, Presidential Directives, institutions, programs, statutes, regulations, lawsuits, and judicial decisions mean that national security law itself is rapidly changing. Lawyers inside and outside of government must keep abreast of constantly evolving authorities.

The international arena too is in flux, as global entities, such as the United Nations, the European Court of Human Rights, the G-7/G-8, and other countries, introduce new instruments whose reach includes U.S. interests. Rapid geopolitical changes relating to critical national security concerns, such as worldwide financial flows, the Middle East, the Arab Spring, South American drug cartels, North Korea, the former Soviet Union, China, and other issues require lawyers to keep up on what is happening globally as a way of understanding domestic concerns. Further expanding the information overload is the changing nature of what constitutes national security itself.133

In sum, the sheer amount of information the national security lawyer needs to assimilate is significant. The basic skills required in the 1970s thus may be similar – such as the ability (a) to know where to look for relevant and reliable information; (b) to obtain the necessary information in the most efficient manner possible; (c) to quickly discern reliable from unreliable information; (d) to know what data is critical; and (e) to ascertain what is as yet unknown or contingent on other conditions. But the volume of information, the diversity of information sources, and the heavy reliance on technology requires lawyers to develop new skills. They must be able to obtain the right information and to ignore chaos to focus on the critical issues. These features point in opposite directions – i.e., a broadening of knowledge and a narrowing of focus.

A law school system built on the gradual and incremental advance of law, bolstered or defeated by judicial decisions and solidified through the adhesive nature of stare decisis appears particularly inapposite for this rapidly-changing environment. An important question that will thus confront students upon leaving the legal academy is how to keep abreast of rapidly changing national security and geopolitical concerns in an information-rich world in a manner that allows for capture of relevant information, while retaining the ability to focus on the immediate task at hand.

Staying ahead of the curve requires developing a sense of timing – when to respond to important legal and factual shifts – and identifying the best means of doing so. Again, this applies to government and non-government employees. How should students prioritize certain information and then act upon it? This, too, is an aspect of information overload.

b. Uncertainty. National security law proves an information-rich, factuallydriven environment. The ability to deal with such chaos may be hampered by gaps in the information available and the difficulty of engaging in complex fact-finding – a skill often under-taught in law school. Investigation of relevant information may need to reach far afield in order to generate careful legal analysis. Uncertainty here plays a key role.

In determining, for instance, the contours of quarantine authority, lawyers may need to understand how the pandemic in question works, where there have been outbreaks, how it will spread, what treatments are available, which social distancing measures may prove most effective, what steps are being taken locally, at a state-level, and internationally, and the like. Lawyers in non-profit organizations, legal academics, in-house attorneys, and others, in turn, working in the field, must learn how to find out the relevant information before commenting on new programs and initiatives, agreeing to contractual terms, or advising clients on the best course of action. For both government and non-government lawyers, the secrecy inherent in the field is of great consequence. The key here is learning to ask intelligent questions to generate the best legal analysis possible.

It may be the case that national security lawyers are not aware of the facts they are missing – facts that would be central to legal analysis. This phenomenon front-loads the type of advice and discussions in which national security lawyers must engage. It means that analysis must be given in a transparent manner, contingent on a set of facts currently known, with indication given up front as to how that analysis might change, should the factual basis shift. This is particularly true of government attorneys, who may be advising policymakers who may or may not have a background in the law and who may have access to more information than the attorney. Signaling the key facts on which the legal decision rests with the caveat that the legal analysis of the situation might change if the facts change, provides for more robust consideration of critically important issues.

c. Creative Problem Solving. Part of dealing with factual uncertainty in a rapidly changing environment is learning how to construct new ways to address emerging issues. Admittedly, much has been made in the academy about the importance of problem-based learning as a method in developing students’ critical thinking skills.134 Problem-solving, however, is not merely a method of teaching. It is itself a goal for the type of activities in which lawyers will be engaged. The means-ends distinction is an important one to make here. Problemsolving in a classroom environment may be merely a conduit for learning a specific area of the law or a limited set of skills. But problem-solving as an end suggests the accumulation of a broader set of tools, such as familiarity with multidisciplinary approaches, creativity and originality, sequencing, collaboration, identification of contributors’ expertise, and how to leverage each skill set.

This goal presents itself in the context of fact-finding, but it draws equally on strong understanding of legal authorities and practices, the Washington context, and policy considerations. Similarly, like the factors highlighted in the first pedagogical goal, adding to the tensions inherent in factual analysis is the abbreviated timeline in which national security attorneys must operate. Time may not be a commodity in surplus. This means that national security legal education must not only develop students’ complex fact-finding skills and their ability to provide contingent analysis, but it must teach them how to swiftly and efficiently engage in these activities.

3. Critical Distance

As was recognized more than a century ago, analytical skills by themselves are insufficient training for individuals moving into the legal profession.135 Critical thinking provides the necessary distance from the law that is required in order to move the legal system forward. Critical thought, influenced by the Ancient Greek tradition, finds itself bound up in the Socratic method of dialogue that continues to define the legal academy. But it goes beyond such constructs as well.

Scholars and educators disagree, of course, on what exactly critical thinking entails.136 For purposes of our present discussion, I understand it as the metaconversation in the law. Whereas legal analysis and substantive knowledge focus on the law as it is and how to work within the existing structures, critical thought provides distance and allows students to engage in purposeful discussion of theoretical constructs that deepen our understanding of both the actual and potential constructs of law. It is inherently reflective.

For the purpose of practicing national security law, critical thought is paramount. This is true partly because of the unique conditions that tend to accompany the introduction of national security provisions: these are often introduced in the midst of an emergency. Their creation of new powers frequently has significant implications for distribution of authority at a federal level, a diminished role for state and local government in the federalism realm, and a direct impact on individual rights.137 Constitutional implications demand careful scrutiny.

Yet at the time of an attack, enormous pressure is on officials and legislators to act and to be seen to act to respond.138 With the impact on rights, in particular, foremost in legislators’ minds, the first recourse often is to make any new powers temporary. However, they rarely turn out to be so, instead becoming embedded in the legislative framework and providing a baseline on which further measures are built.139 In order to withdraw them, legislators must demonstrate either that the provisions are not effective or that no violence will ensue upon their withdrawal (either way, a demanding proof). Alternatively, legislators would have to acknowledge that some level of violence may be tolerated – a step no politician is willing to take.

Any new powers, introduced in the heat of the moment, may become a permanent part of the statutory and regulatory regime. They may not operate the way in which they were intended. They may impact certain groups in a disparate manner. They may have unintended and detrimental consequences. Therefore, it is necessary for national security lawyers to be able to view such provisions, and related policy decisions, from a distance and to be able to think through them outside of the contemporary context.

There are many other reasons such critical analysis matters that reflect in other areas of the law. The ability to recognize problems, articulate underlying assumptions and values, understand how language is being used, assess whether argument is logical, test conclusions, and determine and analyze pertinent information depends on critical thinking skills. Indeed, one could draw argue that **it is the goal of higher education to build the capacity to engage in critical thought**. Deeply humanistic theories underlie this approach. The ability to develop discerning judgment – the very meaning of the Greek term, 􏰀􏰁􏰂􏰃􏰄􏰅􏰆 – provides the basis for advancing the human condition through reason and intellectual engagement.

Critical thought as used in practicing national security law may seem somewhat antithetical to the general legal enterprise in certain particulars. For government lawyers and consultants, there may be times in which not providing legal advice, when asked for it, may be as important as providing it. That is, it may be important not to put certain options on the table, with legal justifications behind them. Questions whether to advise or not to advise are bound up in considerations of policy, professional responsibility, and ethics. They may also relate to questions as to who one’s client is in the world of national security law.140 It may be unclear whether and at what point one’s client is a supervisor, the legal (or political) head of an agency, a cross-agency organization, the White House, the Constitution, or the American public. Depending upon this determination, the national security lawyer may or may not want to provide legal advice to one of the potential clients. Alternatively, such a lawyer may want to call attention to certain analyses to other clients. Determining when and how to act in these circumstances requires critical distance.

4. Nontraditional Written and Oral Communication Skills

Law schools have long focused on written and oral communication skills that are central to the practice of law. Brief writing, scholarly analysis, criminal complaints, contractual agreements, trial advocacy, and appellate arguments constitute standard fare. What is perhaps unique about the way communication skills are used in the national security world is the importance of non-traditional modes of legal communication such as concise (and precise) oral briefings, email exchanges, private and passing conversations, agenda setting, meeting changed circumstances, and communications built on swiftly evolving and uncertain information.

For many of these types of communications speed may be of the essence – and unlike the significant amounts of time that accompany preparation of lengthy legal documents (and the painstaking preparation for oral argument that marks moot court preparations.) Much of the activity that goes on within the Executive Branch occurs within a hierarchical system, wherein those closest to the issues have exceedingly short amounts of time to deliver the key points to those with the authority to exercise government power. Unexpected events, shifting conditions on the ground, and deadlines require immediate input, without the opportunity for lengthy consideration of the different facets of the issue presented. This is a different type of activity from the preparation of an appellate brief, for instance, involving a fuller exposition of the issues involved. It is closer to a blend of Supreme Court oral argument and witness crossexamination – although national security lawyers often may not have the luxury of the months, indeed, years, that cases take to evolve to address the myriad legal questions involved.

Facts on which the legal analysis rests, moreover, as discussed above, may not be known. This has substantive implications for written and oral communications. Tension between the level of legal analysis possible and the national security process itself may lead to a different norm than in other areas of the law. Chief Judge Baker explains,

If lawyers insist on knowing all the facts all the time, before they are willing to render advice, or, if they insist on preparing a written legal opinion in response to every question, then national security process would become dysfunctional. The delay alone would cause the policymaker to avoid, and perhaps evade, legal review.141

Simultaneously, lawyers cannot function without some opportunity to look carefully at the questions presented and to consult authoritative sources. “The art of lawyering in such context,” Baker explains, “lies in spotting the issue, accurately identifying the timeline for decision, and applying a meaningful degree of formal or informal review in response.”142 The lawyer providing advice must resist the pressure of the moment and yet still be responsive to the demand for swift action. The resulting written and oral communications thus may be shaped in different ways. Unwilling to bind clients’ hands, particularly in light of rapidly-changing facts and conditions, the potential for nuance to be lost is considerable.

The political and historical overlay of national security law here matters. In some circumstances, even where written advice is not formally required, it may be in the national security lawyer’s best interests to commit informal advice to paper in the form of an email, notation, or short memo. The process may serve to provide an external check on the pressures that have been internalized, by allowing the lawyer to separate from the material and read it. It may give the lawyer the opportunity to have someone subject it to scrutiny. Baker suggests that “on issues of importance, even where the law is clear, as well as situations where novel positions are taken, lawyers should record their informal advice in a formal manner so that they may be held accountable for what they say, and what they don’t say.”143

Written and oral communication may occur at highly irregular moments – yet it is at these moments (in the elevator, during an email exchange, at a meeting, in the course of a telephone call), that critical legal and constitutional decisions are made. This model departs from the formalized nature of legal writing and research. Yet it is important that students are prepared for these types of written and oral communication as an ends in and of themselves.

5. Leadership, Integrity and Good Judgment

National security law often takes place in a high stakes environment. There is tremendous pressure on attorneys operating in the field – not least because of the coercive nature of the authorities in question. The classified environment also plays a key role: many of the decisions made will never be known publicly, nor will they be examined outside of a small group of individuals – much less in a court of law. In this context, leadership, integrity, and good judgment stand paramount.

The types of powers at issue in national security law are among the most coercive authorities available to the government. Decisions may result in the death of one or many human beings, the abridgment of rights, and the bypassing of protections otherwise incorporated into the law. The amount of pressure under which this situation places attorneys is of a higher magnitude than many other areas of the law. Added to this pressure is the highly political nature of national security law and the necessity of understanding the broader Washington context, within which individual decision-making, power relations, and institutional authorities compete. Policy concerns similarly dominate the landscape. It is not enough for national security attorneys to claim that they simply deal in legal advice. Their analyses carry consequences for those exercising power, for those who are the targets of such power, and for the public at large. The function of leadership in this context may be more about process than substantive authority. It may be a willingness to act on critical thought and to accept the impact of legal analysis. It is closely bound to integrity and professional responsibility and the ability to retain good judgment in extraordinary circumstances.

Equally critical in the national security realm is the classified nature of so much of what is done in national security law. All data, for instance, relating to the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of nuclear material in the production of energy is classified from birth.144 NSI, the bread and butter of the practice of national security law, is similarly classified. U.S. law defines NSI as “information which pertains to the national defense and foreign relations (National Security) of the United States and is classified in accordance with an Executive Order.” Nine primary Executive Orders and two subsidiary orders have been issued in this realm.145

The sheer amount of information incorporated within the classification scheme is here relevant. While original classification authorities have steadily decreased since 1980, and the number of original classification decisions is beginning to fall, the numbers are still high: in fiscal year 2010, for instance, there were nearly 2,300 original classification authorities and almost 225,000 original classification decisions.146

The classification realm, moreover, in which national security lawyers are most active, is expanding. Derivative classification decisions – classification resulting from the incorporation, paraphrasing, restating, or generation of classified information in some new form – is increasing. In FY 2010, there were more than seventy-six million such decisions made.147 This number is triple what it was in FY 2008. Legal decisions and advice tend to be based on information already classified relating to programs, initiatives, facts, intelligence, and previously classified legal opinions.

The key issue here is that with so much of the essential information, decisionmaking, and executive branch jurisprudence necessarily secret, lawyers are limited in their opportunity for outside appraisal and review.

Even within the executive branch, stove-piping occurs. The use of secure compartmentalized information (SCI) further compounds this problem as only a limited number of individuals – much less lawyers – may be read into a program. This diminishes the opportunity to identify and correct errors or to engage in debate and discussion over the law. Once a legal opinion is drafted, the opportunity to expose it to other lawyers may be restricted. The effect may be felt for decades, as successive Administrations reference prior legal decisions within certain agencies. The Office of Legal Counsel, for instance, has an entire body of jurisprudence that has never been made public, which continues to inform the legal analysis provided to the President. Only a handful of people at OLC may be aware of the previous decisions. They are prevented by classification authorities from revealing these decisions. This results in a sort of generational secret jurisprudence. Questions related to professional responsibility thus place the national security lawyer in a difficult position: not only may opportunities to check factual data or to consult with other attorneys be limited, but the impact of legal advice rendered may be felt for years to come.

The problem extends beyond the executive branch. There are limited opportunities, for instance, for external judicial review. Two elements are at work here: first, very few cases involving national security concerns make it into court. Much of what is happening is simply not known. Even when it is known, it may be impossible to demonstrate standing – a persistent problem with regard to challenging, for instance, surveillance programs. Second, courts have historically proved particularly reluctant to intervene in national security matters. Judicially-created devices such as political question doctrine and state secrets underscore the reluctance of the judiciary to second-guess the executive in this realm. The exercise of these doctrines is increasing in the post-9/11 environment. Consider state secrets. While much was made of some five to seven state secrets cases that came to court during the Bush administration, in more than 100 cases the executive branch formally invoked state secrets, which the courts accepted.148 Many times judges did not even bother to look at the evidence in question before blocking it and/or dismissing the suit. In numerous additional cases, the courts treated the claims as though state secrets had been asserted – even where the doctrine had not been formally invoked.149

In light of these pressures – the profound consequences of many national security decisions, the existence of stovepiping even within the executive branch, and limited opportunity for external review – the practice of national security law requires a particularly rigorous and committed adherence to ethical standards and professional responsibility. This is a unique world in which there are enormous pressures, with potentially few external consequences for not acting in accordance with high standards. It thus becomes particularly important, from a pedagogical perspective, to think through the types of situations that national security attorneys may face, and to address the types of questions related to professional responsibility that will confront them in the course of their careers.

Good judgment and leadership similarly stand paramount. These skills, like many of those discussed, may also be relevant to other areas of the law; however, the way in which they become manifest in national security law may be different in important ways. Good judgment, for instance, may mean any number of things, depending upon the attorney’s position within the political hierarchy. Policymaking positions will be considerably different from the provision of legal advice to policymakers. Leadership, too, may mean something different in this field intimately tied to political circumstance. It may mean breaking ranks with the political hierarchy, visibly adopting unpopular public or private positions, or resigning when faced by unethical situations. It may mean creating new bureaucratic structures to more effectively respond to threats. It may mean holding off clients until the attorneys within one’s group have the opportunity to look at issues while still being sensitive to the political needs of the institution. Recourse in such situations may be political, either through public statements and use of the media, or by going to different branches of government for a solution.

6. Creating Opportunities for Learning

In addition to the above skills, national security lawyers must be able to engage in continuous self-learning in order to improve their performance. They must be able to identify new and emerging legal and political authorities and processes, systems for handling factual chaos and uncertainty, mechanisms to ensure critical distance, evaluating written and oral performance, and analyzing leadership skills. Law schools do not traditionally focus on how to teach students to continue their learning beyond the walls of academia. Yet it is vital for their future success to give students the ability to create conditions of learning.

**Debating the law teaches us how to make it better – rejection is worse**

Todd **Hedrick**, Assistant Professor of Philosophy at Michigan State University, Sept 20**12**, Democratic Constitutionalism as Mediation: The Decline and Recovery of an Idea in Critical Social Theory, Constellations Volume 19, Issue 3, pages 382–400

Habermas’ alleged abandonment of immanent critique, however, is belied by the role that the democratic legal system comes to play in his theory. While in some sense just one system among others, it has a special capacity to shape the environments of other systems by regulating their interaction. Of course, the legal system is not the only one capable of affecting the environments of other systems, but law is uniquely open to inputs from ordinary language and thus potentially more pliant and responsive to democratic will formation: “Normatively substantive messages can circulate throughout society only in the language of law … . Law thus functions as the ‘transformer’ that guarantees that the socially integrating network of communication stretched across society as a whole holds together.”55 This allows for the possibility of consensual social regulation of domains ranging from the economy to the family, where actors are presumed to be motivated by their private interests instead of respect for the law, while allowing persons directed toward such interests to be cognizant that their privately oriented behavior is compatible with respect for generally valid laws. While we should be cautious about automatically viewing the constitution as the fulcrum of the legal order, its status as basic law is significant in this respect. For, recalling Hegel's broader conception of constitutionalism, political constitutions not only define the structure of government and “the relationship between citizens and the state” (as in Hegel's narrower “political” constitution); they also “implicitly prefigure a comprehensive legal order,” that is, “the totality comprised of an administrative state, capitalist economy, and civil society.”56 So, while these social spheres can be conceived of as autonomous functional subsystems, their boundaries are legally defined in a way that affects the manner and degree of their interaction: “The political constitution is geared to shaping each of these systems by means of the medium of law and to harmonizing them so that they can fulfill their functions as measured by a presumed ‘common good’.”57 Thus, constitutional discourses should be seen less as interpretations of a positive legal text, and more as attempts to articulate legal norms that could shift the balance between these spheres in a manner more reflective of generalizable interests, occurring amidst class stratification and cultural pluralism.

A constitution's status as positive law is also of importance for fundamentally Hegelian reasons relating to his narrower sense of political constitutionalism: its norms must be public and concrete, such that differently positioned citizens have at least an initial sense of what the shared hermeneutic starting points for constitutional discourse might be. But these concrete formulations must also be understood to embody principles in the interest of all citizens, so that constitutional discourse can be the site of effective democratic will formation concerning the basic norms that mediate between particular individuals and the general interests of free and equal citizens. This recalls Hegel's point that constitutions fulfill their mediational function by being sufficiently positive so as to be publicly recognizable, yet are not exhausted by this positivity – the content of the constitution is instead filled in over time through ongoing legislation. In order to avoid Hegel's foreshortened conception of public participation in this process and his consequent authoritarian tendencies, Habermas and, later, Benhabib highlight the importance of being able to conceive of basic constitutional norms as themselves being the products of public contestation and discourse. In order to articulate this idea, they draw on legal theorists like Robert Cover and Frank Michelman who characterize this process of legal rearticulation as “jurisgenesis”58: a community's production of legal meaning by way of continuous rearticulation, through reflection and contestation, of its constitutional project.

Habermas explicitly conceives of the democratic legal order in this way when, in the context of considering the question of how a constitution that confers legitimacy on ordinary legislation could itself be thought to be democratically legitimate, he writes:

I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution: in my view, a constitution that is democratic – not just in its content but also according to its source of legitimation – is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights.59

A constitutional order and its interpretive history represent a community's attempt to render the terms under which they can give themselves the law that shapes their society's basic structure and secure the law's integrity through assigning basic liberties. Although philosophical reflection can give us some grasp of the presuppositions of a practice of legitimate lawmaking, this framework of presuppositions (“the system of rights”) is “unsaturated.”60 In Hegelian fashion, it must, to be meaningful, be concretized through discourse, and not in an one-off way during a founding moment that fixes the terms of political association once and for all, but continuously, as new persons enter the community and as new circumstances, problems, and perspectives emerge.

The stakes involved in sustaining a broad and inclusive constitutional discourse turn out to be significant. Habermas has recently invoked the concept of dignity in this regard, linking it to the process through which society politically constitutes itself as a reciprocal order of free and equal citizens. As a status rather than an inherent property, “dignity that accrues to all persons equally preserves the connotation of a self-respect that depends on social recognition.”61 Rather than being understood as a quality possessed by some persons by virtue of their proximity to something like the divine, the modern universalistic conception of dignity is a social status dependent upon ongoing practices of mutual recognition. Such practices, Habermas posits, are most fully instantiated in the role of citizens as legislators of the order to which they are subject.

[Dignity] can be established only within the framework of a constitutional state, something that never emerges of its own accord. Rather, this framework must be created by the citizens themselves using the means of positive law and must be protected and developed under historically changing conditions. As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order.62

Although the implications of invoking dignity (as opposed to, say, autonomy) as the normative core of democratic constitutionalism are unclear,63 plainly Habermas remains committed to strongly intersubjective conceptions of democratic constitutionalism, to an intersubjectivity that continues to be legally and politically mediated (a dimension largely absent from Honneth's successor theory of intersubectivity).

What all of this suggests is a constitutional politics in which citizens are empowered to take part and meaningfully impact the terms of their cultural, economic, and political relations to each other. Such politics would need to be considerably less legalistic and precedent bound, less focused on the democracy-constraining aspects of constitutionalism emphasized in most liberal rule of law models. The sense of incompleteness and revisability that marks this critical theory approach to constitutionalism represents a point where critical theories of democracy may claim to be more radical and revisionary than most liberal and deliberative counterparts. It implies a sharp critique of more familiar models of bourgeois constitutionalism: whether they conceive of constitutional order as having a foundation in moral rights or natural law, or in an originary founding moment, such models a) tend to be backward-looking in their justifications, seeing the legal order as founded on some exogenously determined vision of moral order; b) tend to represent the law as an already-determined container within which legitimate ordinary politics takes place; and c) find the content of law to be ascertainable through the specialized reasoning of legal professionals. § Marked 11:03 § On the critical theory conception of constitutionalism, this presumption of completeness and technicity amounts to the reification of a constitutional project, where a dynamic social relation is misperceived as something fixed and objective.64 We can see why this would be immensely problematic for someone like Habermas, for whom constitutional norms are supposed to concern the generalizable interests of free and equal citizens. If it is overall the case for him that generalizable interests are at least partially constituted through discourse and are therefore not given in any pre-political, pre-discursive sense,65 this is especially so in a society like ours with an unreconciled class structure sustained by pseudo-compromises. Therefore, discursive rearticulation of basic norms is necessary for the very emergence of generalizable interests.

Despite offering an admirably systematic synthesis of radical democracy and the constitutional rule of law, Habermas’ theory is hobbled by the hesitant way he embraces these ideas. Given his strong commitment to proceduralism, the view that actual discourses among those affected must take place during the production of legitimate law if constitutionalism is to perform its mediational function, as well as his opposition to foundational or backward-looking models of political justification, we might expect Habermas to advocate the continuous circulation in civil society of constitutional discourses that consistently have appreciable impact on the way constitutional projects develop through ongoing legislation such that citizens can see the links between their political constitution (narrowly construed), the effects that democratic discourse has on the shape that it takes, and the role of the political constitution in regulating and transforming the broader institutional backbone of society in accordance with the common good. And indeed, at least in the abstract, this is what the “two track” conception of democracy in Between Facts and Norms, with its model of discourses circulating between the informal public sphere and more formal legislative institutions, seeks to capture.66 As such, Habermas’ version of constitutionalism seems a natural ally of theories of “popular constitutionalism”67 emerging from the American legal academy or of those who, like Jeremy Waldron,68 are skeptical of the merits of legalistic constitutionalism and press for democratic participation in the ongoing rearticulation of constitutional norms. Indeed, I would submit that the preceding pages demonstrate that the Left Hegelian social theoretic backdrop of Habermas’ theory supplies a deeper normative justification for more democratic conceptions of constitutionalism than have heretofore been supplied by their proponents (who are, to be fair, primarily legal theorists seeking to uncover the basic commitments of American constitutionalism, a project more interpretive than normative.69) Given that such theories have very revisionary views on the appropriate method and scope of judicial review and the role of the constitution in public life, it is surprising that Habermas evinces at most a mild critique of the constitutional practices and institutions of actually existing democracies, never really confronting the possibility that institutions of constitutional review administered by legal elites could be paternalistic or extinguish the public impetus for discourse he so prizes.70 In fact, institutional questions concerning where constitutional discourse ought to take place and how the power to make authoritative determinations of constitutional meaning should be shared among civil society, legislative, and judiciary are mostly abstracted away in Habermas’ post-Between Facts and Norms writings, while that work is mostly content with the professional of administration of constitutional issues as it exists in the United States and Germany.

This is evident in Habermas’ embrace of figures from liberal constitutional theory. He does not present an independent theory of judicial decision-making, but warmly receives Dworkin's well-known model of “law as integrity.” To a certain extent, this allegiance makes sense, given Dworkin's sensitivity to the hermeneutic dimension of interpretation and the fact that his concept of integrity mirrors discourse theory in holding that legal decisions must be justifiable to those affected in terms of publicly recognizable principles. Habermas does, however, follow Michelman in criticizing the “monological” form of reasoning that Dworkin's exemplary Judge Hercules employs,71 replacing it with the interpretive activities of a specialized legal public sphere, presumably more responsive to the public than Hercules. But this substitution does nothing to alleviate other aspects of Dworkin's theory that make a match between him and Habermas quite awkward: Dworkin's standard of integrity compels judges to regard the law as a complete, coherent whole that rests on a foundation of moral rights.72 Because Dworkin regards deontic rights in a strongly realistic manner and as an unwritten part of the law, there is a finished, retrospective, “already there” quality to his picture of it. Thinking of moral rights as existing independently of their social articulation is what moves Dworkin to conceive of them as, at least in principle, accessible to the right reason of individual moral subjects.73 Legal correctness can be achieved when lawyers and judges combine their specialized knowledge of precedent with their potentially objective insights into deontic rights. Fashioning the law in accordance with the demands of integrity thereby becomes the province of legal elites, rendering public discourse and the construction of generalizable interests in principle unnecessary. This helps explain Dworkin's highly un-participatory conception of democracy and his comfort with placing vast decision-making powers in the hands of the judiciary.7

There is more than a little here that should make Habermas uncomfortable. Firstly, on his account, legitimate law is the product of actual discourses, which include the full spate of discourse types (pragmatic, ethical-political, and moral). If the task of judicial decision-making is to reconstruct the types of discourse that went into the production of law, Dworkin's vision of filling in the gaps between legal rules exclusively with considerations of individual moral rights (other considerations are collected under the heading of “policy”75) makes little sense.76 While Habermas distances himself from Dworkin's moral realism, calling it “hard to defend,”77 he appears not to appreciate the extent to which Dworkin links his account of legal correctness to this very possibility of individual insight into the objective moral order. If Habermas wishes to maintain his long held position that constitutional projects involve the ongoing construction of generalizable interests through the democratic process – which in my view is really the heart of his program – he needs an account of legal correctness that puts some distance between this vision and Dworkin's picture of legal elites discovering the content of law through technical interpretation and rational intuition into a fixed moral order.

Also puzzling is the degree of influence exercised by civil society in the development of constitutional projects that Habermas appears willing to countenance. While we might expect professional adjudicative institutions to play a sort of yeoman's role vis-à-vis the public, Habermas actually puts forth something akin to Bruce Ackerman's picture of infrequent constitutional revolutions, where the basic meaning of a constitutional project is transformed during swelling periods of national ferment, only to resettle for decades at a time, during which it is administered by legal professionals.78 According to this position, American civil society has not generated new understandings of constitutional order that overcome group divisions since the New Deal, or possibly the Civil Rights era. Now, this may actually be the case, and perhaps Habermas’ apparent acquiescence to this view of once-every-few-generations national conversations is a nod to realism, i.e., a realistic conception of how much broad based, ongoing constitutional discourse it is reasonable to expect the public to conduct. But while a theory with a Left Hegelian pedigree should avoid “the impotence of the ought” and utopian speculation, and therefore ought not develop critical conceptions of legal practice utterly divorced from present ones, such concessions to realism are unnecessary. After all, critical theory conceptions of constitutionalism will aim to be appreciably different from the more authoritarian ones currently in circulation, which more often than not fail to stimulate and sustain public discourse on the basic constitution of society. Instead, their point would be to suggest how a more dynamic, expansive, and mediational conception of constitutionalism could unlock greater democratic freedom and rationally integrated social identities.

Given these problems in Habermas’ theory, the innovations that Benhabib makes to his conception of constitutionalism are most welcome. While operating within a discourse theoretic framework, her recent work more unabashedly recalls Hegel's broader conception of the constitution as the basic norms through which a community understands and relates to itself (of which a founding legal document is but a part): a constitution is a way of life through which individuals seek to connect themselves to each other, and in which the very identity and membership of a community is constantly at stake.79 Benhabib's concept of “democratic iterations,” which draws on meaning-as-use theories, emphasizes how meaning is inevitably transformed through repetition:

 In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, very repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. In fact, there is really no ‘originary’ source of meaning, or an ‘original’ to which all subsequent forms must conform … . Every iteration involves making sense of an authoritative original in a new and different context … . Iteration is the reappropriation of the ‘origin’; it is at the same time its dissolution as the original and its preservation through its continuous deployment.80

Recalling the reciprocal relationship that Hegel hints at between the narrow “political” constitution and the broader constitution of society's backbone of interrelated institutions, Benhabib here seems to envision a circular process whereby groups take up the conceptions of social relations instantiated in the legal order and transform them in their more everyday attempts to live with others in accordance with these norms. Like Cover and Michelman, she stresses that the transformation of legal meaning takes place primarily in informal settings, where different groups try (and sometimes fail) to live together and to understand themselves in their relation to others according to the terms they inherit from the constitutional tradition they find themselves subject to.81 Her main example of such democratic iteration is the challenge Muslim girls in France raised against the head scarf prohibition in public schools (“L’Affaire du Foulard”), which, while undoubtedly antagonistic, she contends has the potential to felicitously transform the meaning of secularity and inclusion in the French state and to create new forms of togetherness and understanding. But although Benhabib illustrates the concept of democratic iterations through an exemplary episode, this iterative process is a constant and pervasive one, which is punctuated by events and has the tendency to have a destabilizing effect on authority.82

It is telling, however, that Benhabib's examples of democratic iterations are exclusively centered on what Habermas would call ethical-political discourses.83 While otherwise not guilty of the charge,84 Benhabib, in her constitutional theory, runs afoul of Nancy Fraser's critical diagnosis of the trend in current political philosophy to subordinate class and distributional conflicts to struggles for cultural inclusion and recognition.85 Perhaps this is due to the fact that “hot” constitutional issues are so often ones with cultural dimensions in the foreground, rarely touching visibly on distributional conflicts between groups. This nonetheless is problematic since much court business clearly affects – often subtly and invisibly – the outcomes of these conflicts, frequently with bad results.86 For another reason why centering constitutional discourse on inclusion and cultural issues is problematic, it is useful to remind ourselves of Habermas’ critique of civic republicanism, according to which the main deficit in republican models of democracy is its “ethical overburdening” of the political process.87 To some extent, republicanism's emphasis on ethical discourse is understandable: given the level of cooperativeness and public spirit that republicans view as the font of legitimate law, political discourses need to engage the motivations and identities of citizens. Arguably, issues of ethical self-understanding do this better than more abstract or arid forms of politics. But it is not clear that this is intrinsically so, and it can have distorting effects on politics. In the American media, for example, this amplification of the cultural facets of issues is very common; conflicts over everything from guns to taxes are often reduced to conflicts over who is a good, real American and who is not. It is hard to say that this proves edifying; substantive issues of rights and social justice are elided, politics becomes more fraudulent and conflictual. None of this is to deny a legitimate place for ethical-political discourse. However, we do see something of a two-steps-forward-one-step-back movement in Benhabib's advancement of Habermas’ discourse theory of law: although her concept of democratic iterations takes center stage, she develops the notion solely along an ethical-political track. Going forward, critical theorists developing conceptions of constitutional discourse should work to see it as a way of integrating questions of distributional justice with questions of moral rights and collective identities without subordinating or conflating them.

4. Conclusion

Some readers may find the general notion of reinvigorating a politics of constitutionalism quixotic. Certainly, it has not been not my intention to overstate the importance or positive contributions of constitutions in actually existing democracies, where they can serve to entrench political systems experiencing paralysis in the face of long term fiscal and environmental problems, and where public appeals to them more often than not invoke visions of society that are more nostalgic, ethno-nationalistic, authoritarian, and reactionary than what Habermas and Benhabib presumably have in mind. Instead, I take the basic Hegelian point I started this paper with to be this: modern persons ought to be able to comprehend their social order as the work of reason; the spine of institutions through which their relations to differently abled and positioned others are mediated ought to be responsive to their interests as fully-rounded persons; and comprehending this system of mediation ought to be able to reconcile them to the partiality of their roles within the universal state. Though modern life is differentiated, it can be understood, when seen through the lens of the constitutional order, as a result of citizens’ jointly exercised rationality as long as certain conditions are met. These conditions are, however, more stringent than Hegel realized. In light of this point, that so many issues deeply impacting citizens’ social and economic relations to one another are rendered marginal – and even invisible – in terms of the airing they receive in the public sphere, that they are treated as mostly settled or non-questions in the legal system consitutues a strikingly deficient aspect of modern politics. Examples include the intrusion of market logic and technology into everyday life, the commodification of public goods, the legal standing of consumers and residents, the role of shareholders and public interests in corporate governance, and the status of collective bargaining arrangements. Surely a contributing factor here is the absence of a shared sense of possibility that the basic terms of our social union could be responsive to the force that discursive reason can exert. Such a sense is what I am contending jurisgenerative theories ought to aim at recapturing while critiquing more legalistic and authoritarian models of law.

This is not to deny the possibility that democratic iterations themselves may be regressive or authoritarian, populist in the pejorative sense. But the denial of their legitimacy or possibility moves us in the direction of authoritarian conceptions of law and political power and the isolation of individuals and social groups wrought by a political order of machine-like administration that Horkheimer and Adorno describe as a main feature of modern political domination. Recapturing some sense of how human activity makes reason actual in the ongoing organization of society need not amount to the claim that reason culminates in some centralized form, as in the Hegelian state, or in some end state, as in Marx. It can, however, move us to envision the possibility of an ongoing practice of communication, lawmaking, and revision that seeks to reconcile and overcome positivity and division, without the triumphalist pretension of ever being able to fully do so.

## 2AC

### perm

Our political strategy is consistent with a struggle for reform in the face of slavery’s ongoing insidious influence on the legal system

Paul Finkelman at al\* 9, law prof at Albany, “brief of scholars of nineteenthcentury american legal history as amicus curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuScholarsof19thcenturyAmeLegHistory.authcheckdam.pdf>

\*Howard Jones University Research Professor Department of History University of Alabama Tuscaloosa, Alabama Douglas O. Linder Elmer Powell Peer Professor of Law University of Missouri–Kansas City School of Law Kansas City, Missouri

Several parallels emerge between the Africans in Schooner Amistad and the Petitioners in this case.

• Both groups were sold into captivity against their will—the Africans by slave traders, and the Uighurs by Pakistani villagers.54

• Both groups were transported hundreds of miles from their homes and detained in American prisons.

• Both groups were considered dangers to the established order—the Africans as purported murderers and pirates, and the Uighurs as purported enemy combatants.

• Both groups had to seek release through the courts of the United States, while controversy swirled around them.

• The efforts of both groups to gain their freedom were opposed by foreign governments—Spain in the Schooner Amistad litigation, and China in this case.55

**The most important parallel**, though, **is in the relief ordered in** Schooner **Amistad**. Though this Court’s decision did not involve a habeas petition, it nonetheless illustrates the courts’ power in this case. Schooner Amistad found that because the Africans were not slaves, they could not be returned to their supposed Spanish owners under the 1795 Treaty, nor could they be returned to Africa under the 1819 statute.56 The Treaty and the slave trade laws did not apply to them. Consequently, the Africans were declared free and released in Connecticut.57

In this case, the government insists that they cannot release the Uighurs in this country because the immigration laws give the executive branch the power to exclude them.58 **Yet the Uighurs are no more immigrants than the Amistad Africans were slaves**. The Uighurs never applied to enter the United States as immigrants. They were brought into American jurisdiction by force, just like the Amistad Africans. The immigration statutes are as irrelevant to the Uighurs as the 1795 Treaty and the 1819 statute were to the Amistad Africans.

The existence of habeas petitions promoting human rights proves that an institution can be caught up in systems of whiteness while still combatting violence

Robert A **Williams** Jr **90**, “Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World”, Duke Law Journal, Vol. 1990, No. 4, Frontiers of Legal Thought III, (Sep., 1990), pp. 660-704

Not too long ago, it was fashionable for some legal academics in this country to assert that rights discourse—that is, talk and thought about rights—was actually harmful to the social movements of peoples of color and other oppressed groups.1 And as recent times have shown, legal academics of color can attract a great deal of attention and the sympathies of anonymous white colleagues by telling us that the sufferings and stories of peoples of color in this country possess no unique capacity to transform the law.2 These legal academic denials of the efficacy of rights discourse and storytelling for the social movements of peoples of color now seem disharmonious with the larger transformations occurring in the world. Why any legal academics would discount the usefulness of such proven, liberating forms of discourse in the particular society they serve from their positions of privilege is a curious and contentious question. The disaggregated narratives of human rights struggles on the nightly news apparently have not been sufficient for some legal academics. They want documented accounts demonstrating the efficacy of rights discourse and storytelling in the social movements of outsider groups. Empirical evidence of the traditions, histories, and lives of oppressed peoples actually transforming legal thought and doctrine about rights could then be used to cure skeptics of the critical race scholarly enterprise.3 "See here," the still unconverted in the faculty lounge can be told, "this stuff works, if applied and systematized correctly." Despite the attacks from society's dominant groups in the legal academic spectrum—both the left and right—the voices of legal scholars of color have sought to keep faith with the struggles and aspirations of oppressed peoples around the world. These emerging voices recognize that now is the time to intensify the struggle for human rights on all fronts— to heighten demands, engage in intense political rhetoric, and sharpen critical thinking about all aspects of legal thought and doctrine. The rapid emergence of indigenous peoples\* human rights as a subject of major concern and action in contemporary international law provides a unique opportunity to witness the application of rights discourse and storytelling in institutionalized, law-bound settings around the world.4 By telling their own stories in recognized and authoritative intcrnational human rights standard-setting bodies during the past decade, indigenous peoples have sought to redefine the terms of their right to survival under international law.5 Under present, Western-dominated conceptions of international law, indigenous peoples are regarded as subjects of the exclusive domestic jurisdiction of the settler state regimes that invaded their territories and established hegemony during prior colonial eras.6 At present, international law does not contest unilateral assertions of state sovereignty that limit, or completely deny the collective cultural rights of indigenous peoples.7 Contemporary international law also does not concern itself with protecting indigenous peoples' traditionally-occupied territories from uncompensated state appropriation, even when indigenous territories are secured through treaties with a state. According to contemporary international discourse, such treaties should be treated as legal nullities.8 Finally, modern international law refuses to recognize indigenous peoples as "peoples," entitled to rights of self-determination as specified in United Nations and other major international human rights legal instruments.9 Since the 1970s, in international human rights forums around the world, indigenous peoples have contested the international legal system's continued acquiescence to the assertions of exclusive state sovereignty and jurisdiction over the terms of their survival. Pushed to the brink of extinction by state-sanctioned policies of genocide and ethnocide, indigenous peoples have demanded heightened international concern and legal protection for their continued survival.10 The emergence of indigenous rights in contemporary international legal discourse is a direct response to the consciousness-raising efforts of indigenous peoples in international human rights forums. Specialized international and regional bodies, non-governmental organizations (NGOs), and advocacy groups are now devoting greater attention to indigenous human rights concerns." By far the most important of these specialized initiatives to emerge out of the indigenous human rights movement is the United Nations Working Group on Indigenous Populations (Working Group). The Working Group is composed of five international legal experts drawn from the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Working Group was created by the Sub-Commission's parent body, the United Nations Economic and Social Council (ECOSOC) in 1982 and given a specific mandate to develop international legal standards for the protection of indigenous peoples' human rights.12

Supporting institutional rights a key necessary for struggles against oppression – we may not change the heart, but we can restrain the heartless

Cook 90

Anthony E. Cook, Florida University Associate law Professor, Beyond Critical legal Studies: The Reconstrutive Theology of Dr. Martin luther King, Jr., 1990, 103.5, JSTOR

Unlike some CLS scholars, King understood the importance of a system of individual rights. CLS proponents have urged that rights are incoherent and indeterminate reifications of concrete experiences; they obfuscate, through the manipulation of abstract categories, disempowering social relations. [FN158] King, on the other hand, understood that the oppressed could make rights determinate in practice; although "law tends to declare rights--it does not deliver them. A catalyst is needed to breathe life experience into a judicial decision."' [FN159] For King, the catalyst was persistent social struggle to transform the oppressiveness of one's existential condition into ever closer approximations of the ideal. The hierarchies of race, gender, and class define those conditions, and the struggle for substantive rights closes the gap between the latter and the ideal of the Beloved Community. Under the pressures of social struggle, the oppressed can alter rights to better reflect the exigencies of social reality--a reality itself more fully understood by those engaged in transformative struggle.

King's Beloved Community accepted and expanded the liberal tradition of rights. King realized that notwithstanding its limits, the liberal vision contained important insights into the human condition. For those deprived of basic freedoms and subjected to arbitrary acts of state authority, the enforcement of formal rights was revolutionary. African-Americans understood the importance of formal liberal rights and demanded the full enforcement of such rights in order to challenge and rectify historical practices that had objectified and subsumed their existence.

Although conservatives contended that the emphasis on rights disrupted the gradual moral evolution that would ultimately change white sentiment, King contended that "[j]udicial decrees may not change the heart, but they can restrain the heartless."' [FN160] On the other \*1036 hand, although radicals contended that such rights were mere tokens and created a false sense of security masking continued violence, King understood that the strict enforcement of the rule of law was essential to any struggle for social justice, whether that struggle was moderate or radical in its sentiment and goals. Freedom of dissent and protest; freedom from arbitrary searches, seizures, and detention; and freedom to organize and associate with those of common purpose were necessary rights that no movement for social reconstruction could take for granted.

Furthermore, King saw the initial emphasis on civil rights, [FN161] I believe, as a **necessary struggle** for the collective self-respect and dignity of a people whose subordination was, in part, maintained by laws reproducing and reinforcing feelings of inadequacy and inferiority. The civil rights struggle attempted to lift the veil of shame and degradation from the eyes of a people who could then glimpse the possibilities of their personhood and achieve that potential through varied forms of social struggle. King's richer conception of rights provided limitations on collective action while broadening the scope of personal duty to permit movement toward a more socially conscious community.

### tibbs

The Tibbs evidence is also a reason the permutation is viable – he says white supremacy persists in the courts because rights are denied to black and brown bodies – the Uighers are brown bodies and voting for the symbolic speech act of the 1ac is key to render them visible – that solves Tibbs who says

white supremacy renders the humanity of the colonized subject invisible. When he served as the head clinician at a psychiatric hospital in French-occupied Algeria during the mid-1950s, Fanon came to the realization that the Western discourse on man and civilization--whether in philosophy or medicine--literally expunged the black from existence.

### at: state bad

**No link – one state action doesn’t legitimize it**

Mervyn **Frost**, U of Kent, **1996**, Ethics in Int’l Relations, p. 90-1

A first objection which seems inherent in Donelan’s approach is that utilizing the modern state domain of discourse in effect sanctifies the state: it assumes that people will always live in states and that it is not possible within such a language to consider alternatives to the system. This objection is not well founded, by having recourse to the ordinary language of international relations I am not thereby committed to argue that the state system as it exists is the best mode of human political organization or that people ought always to live in states as we know them. As I have said, my argument is that whatever proposals for piecemeal or large-scale reform of the state system are made, they must of necessity be made in the language of the modern state. Whatever proposals are made, whether in justification or in criticism of the state system, will have to make use of concepts which are at present part and parcel of the theory of states. Thus,for example. any proposal for a new global institutional arrangement superseding the state system will itself have to be justified, and that justification will have to include within it reference to a new and good form of individual citizenship, reference to a new legislative machinery equipped with satisfactory checks and balances, reference to satisfactory law enforcement procedures, reference to a satisfactory arrangement for distributing the goods produced in the world, and so on. All of these notions are notions which have been developed and finely honed within the theory of the modern state. It is not possible to imagine a justification of a new world order succeeding which used, for example, feudal, or traditional/tribal, discourse. More generally there is no worldwide language of political morality which is not completely shot through with state-related notions such as citizenship, rights under law, representative government and so on.

### at: sovereignty k

**Legal restraints work – the theory of the exception is self-serving and wrong**

William E. **Scheuerman 6**, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: **Schmitt** occasionally **wants to define “political” conflicts as those irresolvable by legal** or juridical **devices in order** then **to argue against** **legal** or juridical **solutions** to them. **The claim** also **suffers from** a certain **vagueness** and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, **legal devices have undoubtedly played a positive role** **in taming** or at least minimizing the potential dangers of harsh **political antagonisms**. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22

Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors.

This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, **it is by no means self-evident that trying to give coherent legal form to a transitional** political and social **moment is always doomed to fail**. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, **the general trend** towards extending basic protections to non-state actors **is** plausibly interpreted in a more **positive** – **and by no means incoherent** – light.24

Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17).

As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet **one** possible **resolution** of the dilemma he describes **would be** to figure how **to reform the process** whereby rules of war are adapted to novel changes in military affairs in order **to minimize the danger of** anachronistic or **out-of-date law. Instead, Schmitt** simply **employs the dilemma of legal obsolescence as a battering ram** against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

### 2ac reformism

Progressivism is possible vis a vis prisons, and it depends on effective decision-making

Clark, professor of law – Catholic University, ‘95

(Leroy D., 73 Denv. U.L. Rev. 23)

I must now address the thesis that there has been no evolutionary progress for blacks in America. Professor Bell concludes that blacks improperly read history if we believe, as Americans in general believe, that progress--racial, in the case of blacks--is "linear and evolutionary." n49 According to Professor Bell, the "American dogma of automatic progress" has never applied to blacks. n50 Blacks will never gain full equality, and "even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance." n51

Progress toward reducing racial discrimination and subordination has never been "automatic," if that refers to some natural and inexorable process without struggle. Nor has progress ever been strictly "linear" in terms of unvarying year by year improvement, because the combatants on either side of the equality struggle have varied over time in their energies, resources, capacities, and the quality of their plans. Moreover, neither side could predict or control all of the variables which accompany progress or non-progress; some factors, like World War II, occurred in the international arena, and were not exclusively under American control.

With these qualifications, and a long view of history, blacks and their white allies achieved two profound and qualitatively different leaps forward toward the goal of equality: the end of slavery, and the Civil Rights Act of 1964. Moreover, despite open and, lately, covert resistance, black progress has never been shoved back, in a qualitative sense, to the powerlessness and abuse of periods preceding these leaps forward. n52

Structural antagonism destroys progressivism and re-entrenches racism—we can acknowledge every problem with the status quo, but adopt a pragmatic orientation towards solutions

Clark, professor of law – Catholic University, ‘95

(Leroy D., 73 Denv. U.L. Rev. 23)

A Final Word

Despite Professor Bell's prophecy of doom, I believe he would like to have his analysis proven wrong. However, he desperately leans on a tactic from the past--laying out the disabilities of the black condition and accusing whites of not having the moral strength to act fairly. That is the ultimate theme in both of his books and in much of his law review writing. That tactic not only lacks full force against today's complex society, it also becomes, for many whites, an exaggerated claim that racism is the sole cause of black misfortunes. n146 Many whites may feel about the black condition what many of us may have felt about the homeless: dismayed, but having no clear answer as to how the problem is to be solved, and feeling individually powerless if the resolution calls for massive resources that we, personally, lack. Professor Bell's two books may confirm this sense of powerlessness in whites with a limited background in this subject, because Professor Bell does not offer a single programmatic approach toward changing the circumstance of blacks. He presents only startling, unanalyzed prophecies of doom, which will easily garner attention from a controversy-hungry media. n147

It is much harder to exercise imagination to create viable strategies for change. n148 Professor Bell sensed the despair that the average--especially average black--reader would experience, so he put forth rhetoric urging an "unremitting struggle that leaves no room for giving up." n149 His contention is ultimately hollow, given the total sweep of his work.

At some point it becomes dysfunctional to refuse giving any credit to the very positive abatements of racism that occurred with white support, and on occasion, white leadership. Racism thrives in an atmosphere of insecurity, apprehension about the future, and inter-group resentments. Unrelenting, unqualified accusations only add to that negative atmosphere. Empathetic and more generous responses are possible in an atmosphere of support, security, and a sense that advancement is possible; the greatest progress of blacks occurred during the 1960s and early 1970s when the economy was expanding. Professor Bell's "analysis" is really only accusation and "harassing white folks," and is undermining and destructive. There is no love--except for his own group--and there is a constricted reach for an understanding of whites. There is only rage and perplexity. No bridges are built--only righteousness is being sold.

A people, black or white, are capable only to the extent they believe they are. Neither I, nor Professor Bell, have a crystal ball, but I do know that creativity and a drive for change are very much linked to a belief that they are needed, and to a belief that they can make a difference. The future will be shaped by past conditions and the actions of those over whom we have no control. Yet it is not fixed; it will also be shaped by the attitudes and energy with which we face the future. Writing about race is to engage in a power struggle. It is a non-neutral political act, and one must take responsibility for its consequences. Telling whites that they are irremediably racist is not mere "information"; it is a force that helps create the future it predicts. If whites believe the message, feelings of futility could overwhelm any further efforts to seek change. I am encouraged, however, that the motto of the most articulate black spokesperson alive today, Jesse Jackson, is, "Keep hope alive!" and that much of the strength of Martin Luther King, Jr. was his capacity to "dream" us toward a better place.

### 2ac impact d

Whiteness overtheorizes and underexplains political action – best historical analysis goes aff

**Kolchin 2**, Professor of History at Delaware University, (Peter, “ Whiteness Studies: The New History of Race in America,” The Journal of American History, Vol. 89, No. 1 (Jun., 2002), pp. 154-173, JSTOR)

 The central question one must confront in evaluating whiteness studies is the salience of whiteness as an explanation for exploitation, injustice, and, more gener- ally, the American past. In addressing that question, the matter of context becomes crucial. Simply put, in making whiteness omnipresent, whiteness studies authors risk losing sight of contextual variations and thereby undermining the very understand- ing of race and whiteness as socially constructed.

 Nonhistorians are particularly prone to deprive whiteness of historical context. As Roediger notes in pointing to "tensions" within the field of whiteness studies, "much cultural studies work in the area lacks historical grounding and ignores or miscon- ceives the emphasis on class relations common among historians of whiteness." In Scenes of Subjection, for example, the literary scholar Saidiya V. Hartman portrays white racism as a constant unaffected by any change in the social order, including "the nonevent of emancipation," and sees virtually everything done to or for African Americans as an expression of that racism. A similar inattention to context underlies Brodkin's attribution of American prejudice against Jews (their "temporary darken- ing") to the desire to exploit them as industrial laborers, without bothering to place that prejudice in the framework of the long European history of anti-Semitism-an anti-Semitism that was not always rooted in economic interest and did not always require that Jews be seen as nonwhite. Writing as if racism were a uniquely American illness, the American studies scholar George Lipsitz muses that "it must be the con- tent of our character.'19 But inattention to context bedevils many of the historians as well. In White Women's Rights, for example, one of the few historical works to examine the way whiteness shaped the experiences and behavior of women, Louise Michele Newman too often strays from her intriguing exploration of the impact on feminism of a par- ticular form of evolutionary racism and generalizes about the views of "white women," who resisted patriarchy for themselves but sought to impose it on "inferior" races. Pushing far beyond the sensible observation that most white feminists shared the racial prejudices common among whites in the late nineteenth and early twenti- eth centuries, she understates the range and complexity of feminist thought and argues that racism was "an integral, constitutive element" of feminism itself, or as she puts it, "feminism developed . .. as a racialized theory of gender oppression."20 Such overgeneralization is especially prevalent among historians who rely heavily on image, representation, and literary depiction. Grace Elizabeth Hale's densely writ- ten but fascinating book, Making Whiteness, has the rare advantage among whiteness studies works of dealing with that part of the country where race has most pervasively shaped social relations: the South. But Hale loses much of that advantage by paying virtually no attention to social relations and confusing what is southern with what is more generally American until the reader is unsure whether she is describing south- ern whiteness or American whiteness, or whether she thinks that it does not make any difference. The South, she concludes, "lies not south of anywhere but inside us." Never really explaining what she means by "whiteness" (which at times she equates with segregation) or whose interests it served, she is on equally slippery ground in confronting chronological context. "Whites [all? most? some?] created the culture of segregation," she proclaims, "in large part to counter black success." This thesis is perfectly plausible, if undemonstrated. But in arguing that the myths of the happy slave and of criminal Reconstruction were products of the late-nineteenth-century imagination, Hale largely ignores earlier versions of those myths propounded by pro- tagonists in the struggles over slavery and Reconstruction; the arguments that she treats as new were appropriations and modifications of arguments previously forged in real social relations. Indiscriminately mixing fiction and nonfiction as documenta- tion, she confuses description (at which she is very good) with explanation and almost totally ignores interest and politics in her delineation of the "making" of whiteness .21 Although Jacobson pays more attention to contextual variation, he too can paint with a very broad brush, in the process placing a heavy explanatory burden-I believe too heavy-on whiteness. His focus on image and representation makes it difficult to judge the prevalence of particular ideas, because in quoting extensively from racist stereotypes, he makes no effort to give equal time to the opponents of such views. Brilliantly exploring racial depictions of diverse immigrant groups that Americans would later consider ethnic rather than racial and thereby showing the subjective character of race, he too often blurs a crucial distinction between "race" on the one hand and "nation," "nationality," and "ethnicity" on the other. For if both race and nation are constructed (imagined) communities, they are differently con- structed: whereas race implies inherent, immutable characteristics, national and eth- nic identity can be conceived of as inherent but need not be. Throughout much of American history, Americans have promiscuously combined racial and nonracial thinking in differentiating among groups; sometimes they assumed that differences were inherent, sometimes not, and often they failed to articulate clear positions on the question (no doubt because they had not formulated such positions). Jacobson himself notes in passing that discrimination was not always based on color or race- "The loudest voices in the organized nativism of the 1 840s and 1 850s harped upon matters of Catholicism and economics, not race"-but he tends to assume the bio- logical nature of arguments that could as easily be interpreted as cultural. (See, for example, his citation of the assertion in the 191 1 publication A Dictionary of Races or Peoples that "'the savage manners of the last century are still met with amongst some Serbo-Croatians of to-day"' as evidence for emphasis on the "physical properties" of race.)22

 The role of whiteness in this process of distinguishing among groups remains murky. On one hand, Jacobson portrays the 1840s-1920s as a period of "variegated whiteness" in which white Americans saw some whites as whiter than others, warns us not to "reify a monolithic whiteness," and speaks of a "system of 'difference' by which one might be both white and racially distinct from other whites." On the other, he speaks of the "process by which Celts or Slavs became Caucasians." The unresolved issue here is the extent to which Americans conceived of whiteness (rather than other criteria such as religion, culture, ethnicity, and class) as the main ingredi- ent separating the civilized from the uncivilized.23 There can be no doubt, for example, that many antebellum Americans viewed the Irish as a degraded and savage people, but whether they saw lack of whiteness as the key source of this inferior status is dubious; to most Americans, for whom Protestant- ism went hand in hand with both republicanism and Americanism, the Irish immi- grants' Catholicism was far more alarming than their color. Indeed, some abolitionists managed to combine a passionate belief in the goodness and intellectual potential of black people with an equally passionate conviction of the unworthiness of the Irish, and in the 1850s many nativists saw little difficulty in moving from the anti-Irish Know-Nothing party into the antislavery Republican party, a trajectory that would have been truly remarkable had their dominant perception of the Irish been that they were nonwhite. And as Jacobson points out, the 1790 law that limited naturalization to "free white persons" "allowed Irish immigrants entrance as 'white persons"'; in what sense, then, should one speak of their subsequently "becoming" white? This can make sense if whiteness is to be understood metaphorically, meaning "acceptable," but Jacobson and other whiteness studies authors clearly intend the term to serve as more than a metaphor; indeed, if it is understood only metaphori- cally, much of their analysis collapses.24

The overworking of whiteness is especially noteworthy in the work of David Roe- diger, for he professes greater interest in specific social relations than many whiteness studies authors. Nevertheless, his argument too often depends on blurring important distinctions among whites, thereby belying the commonality of the "wages of white- ness" he outlines. His starting point is promising: living in a slaveholding republic, white workers in the (northern) United States increasingly defined themselves by what they were not blacks, slaves. But defining oneself as not-black and as not-slave are not at all the same, and Roediger's fudging on that crucial point is especially strik- ing coming from someone who usually pays such careful attention to language. The "not-slave" formulation led to the elaboration of a "free-labor" ideology that com- bined an emphasis on the dignity of labor with a condemnation of chattel slavery as the antithesis of free, republican (that is, American) values; the "not-black" variation led to a racist denigration of nonwhites and the insistence that the United States was a "white man's country." The two views could go together, but often they did not, and Roediger's argument that whiteness was an essential element of free-labor ideol- ogy is unpersuasive. If some labor radicals took what amounted to the proslavery position that slaves in the South were better off than "free" white workers in the North, others did not, and the argument in any case rested less on the degree of whiteness than on the degree of exploitation. Similarly, Roediger's thesis that in rejecting the term "servant" in favor of "hired hand" and "help," workingmen were "becoming" white conflates two very different forms of resistance to dependence that could be, but were not always, combined. The uppity domestics who tormented Frances Trollope in Cincinnati expressed little or no concern for whiteness as they asserted their American equality, and they contrasted their rights, not with black dependence, but with that stemming from English hierarchy. Responding disdain- fully to Trollope's expectation that she would eat in the kitchen, one servant typically "turned up her pretty lip, and said, 'I guess that's 'cause you don't think I'm good enough to eat with you. You'll find that won't do here."'25

The question is not whether white racism was pervasive in antebellum America- it was-but whether it explains as much as Roediger and others maintain. In an argu- ment further developed by Ignatiev, Roediger asserts that "it was by no means clear that the Irish were white." They present little evidence, however, that most Ameri- cans viewed the Irish as nonwhite. (To establish this point one would have to analyze the "racial" thought of Americans about the Irish, a task that neither Roediger nor Ignatiev undertakes.) Indeed, the whiteness studies authors often display a notable lack of precision in asserting the nonwhite status of despised groups. Roediger sug- gests that Irish whiteness was "by no means clear"; Ignatiev speaks of "strong tenden- cies . . . to consign the Irish, if not to the black race, then to an intermediate race located between white and black"; Neil Foley, in discussing prejudice against poor whites in central Texas, proclaims that "not all whites . . . were equally white" and suggests that landlords felt that their tenants "lacked certain qualities of whiteness"; Brodkin states that "for almost half a century, [Jews] were treated as racially not- quite-white." What is at issue is not the widespread hostility to and discrimination against the Irish, Jews, poor whites, and multiple other groups, but the salience of whiteness in either explaining or describing such hostility and discrimination. The status of southern poor whites is especially telling, for despite persistent "racial" stereotypes of them as shiftless, slovenly, and degraded, such stereotypes did not usu- ally include denials of their whiteness. Americans have had many ways of looking down on people without questioning their whiteness.26

A brief consideration of the ideology of four prominent nineteenth-century Amer- icans-the Confederate vice president Alexander H. Stephens, Illinois's Democratic senator Stephen A. Douglas, Abraham Lincoln, and Ohio's Republican senator Ben- jamin F. Wade-illustrates the risk of overemphasizing whiteness. Like most white Americans, all four were in some sense committed to whiteness. In his famous speech hailing the secession of the southern states, Stephens boldly identified as the "corner- stone" of the new government "the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and moral condition." In the Lincoln-Douglas debates of 1858, Douglas mercilessly denounced his Republican challenger as a supporter of black equality and boasted that "this gov- ernment was made on the white basis.... It was made by white men, for the benefit of white men and their posterity for ever, and I am in favor of confining citizenship to white men." Lincoln responded that he did not favor "political and social equality between the white and black races"; noting the "physical difference" between the races, he proclaimed that "inasmuch as it becomes a necessity that there must be a difference, I, as well as Judge Douglas, am in favor of the race to which I belong, hav- ing the superior position." Upon his arrival in Washington, D.C., in 1851, Wade complained that "the Nigger smell I cannot bear," adding that the food was "all cooked by Niggers until I can smell and taste the Nigger."27

Yet any treatment of those four men that stopped at their common commitment to whiteness would be so incomplete as to be totally misleading. Stephens was an ardent Confederate whereas the other three were committed Unionists. Their differ- ences on slavery and black rights were even more notable. Stephens was a defender of slavery and black racial subordination. Douglas saw slavery as a minor issue whose fate should be left to local (white) control. Lincoln believed that slavery was morally wrong as well as socially degrading, eschewed the race-baiting that Douglas and many other white Americans took for granted, and in his debate with Douglas imme- diately qualified his support for white supremacy with the ringing assertion that whether or not "the negro" was equal in all respects, "in the right to eat the bread, without leave of anybody else, which his own hand earns, he is my equal and the equal ofJudge Douglas, and the equal of every living man." Wade was an ardent opponent of slavery, who became one of the most enthusiastic proponents of a radical Reconstruc- tion policy designed to remake the South and provide equal rights for the former slaves, as well as a sturdy champion of the rights of women and of labor. In short, what is most significant about the careers of the four men lies, not in their shared expressions of whiteness, but in the sharply divergent positions they took on the major issues of their era. Whiteness turns out to be a blunt instrument for dissecting the nuances-or even the major outlines-of their political ideology and behavior.28

### 2ac social death

No social death – history proves

Vincent **Brown**, Prof. of History and African and African-American Studies @ Harvard Univ., December 20**09**, "Social Death and Political Life in the Study of Slavery," American Historical Review, p. 1231-1249

THE PREMISE OF ORLANDO PATTERSON’S MAJOR WORK, that enslaved Africans were natally alienated and culturally isolated, was challenged even before he published his influential thesis, primarily by scholars concerned with “survivals” or “retentions” of African culture and by historians of slave resistance. In the early to mid-twentieth century, when Robert Park’s view of “the Negro” predominated among scholars, it was generally assumed that the slave trade and slavery had denuded black people of any ancestral heritage from Africa. The historians Carter G. Woodson and W. E. B. Du Bois and the anthropologist Melville J. Herskovits argued the opposite. Their research supported the conclusion that while enslaved Africans could not have brought intact social, political, and religious institutions with them to the Americas, they did maintain significant aspects of their cultural backgrounds.32 Herskovits ex- amined “Africanisms”—any practices that seemed to be identifiably African—as useful symbols of cultural survival that would help him to analyze change and continuity in African American culture.33 He engaged in one of his most heated scholarly disputes with the sociologist E. Franklin Frazier, a student of Park’s, who empha- sized the damage wrought by slavery on black families and folkways.34 More recently, a number of scholars have built on Herskovits’s line of thought, enhancing our understanding of African history during the era of the slave trade. Their studies have evolved productively from assertions about general cultural heritage into more precise demonstrations of the continuity of worldviews, categories of belonging, and social practices from Africa to America. For these scholars, the preservation of distinctive cultural forms has served as an index both of a resilient social personhood, or identity, and of resistance to slavery itself. 35

Scholars of slave resistance have never had much use for the concept of social death. The early efforts of writers such as Herbert Aptheker aimed to derail the popular notion that American slavery had been a civilizing institution threatened by “slave crime.”36 Soon after, studies of slave revolts and conspiracies advocated the idea that resistance demonstrated the basic humanity and intractable will of the enslaved—indeed, they often equated acts of will with humanity itself. As these writ- ers turned toward more detailed analyses of the causes, strategies, and tactics of slave revolts in the context of the social relations of slavery, they had trouble squaring abstract characterizations of “the slave” with what they were learning about the en- slaved.37 Michael Craton, who authored Testing the Chains: Resistance to Slavery in the British West Indies, was an early critic of Slavery and Social Death, protesting that what was known about chattel bondage in the Americas did not confirm Patterson’s definition of slavery. “If slaves were in fact ‘generally dishonored,’ ” Craton asked, “how does he explain the degrees of rank found among all groups of slaves—that is, the scale of ‘reputation’ and authority accorded, or at least acknowledged, by slave and master alike?” How could they have formed the fragile families documented by social historians if they had been “natally alienated” by definition? Finally, and per- haps most tellingly, if slaves had been uniformly subjected to “permanent violent domination,” they could not have revolted as often as they did or shown the “varied manifestations of their resistance” that so frustrated masters and compromised their power, sometimes “fatally.”38 The dynamics of social control and slave resistance falsified Patterson’s description of slavery even as the tenacity of African culture showed that enslaved men, women, and children had arrived in the Americas bearing much more than their “tropical temperament.”

The cultural continuity and resistance schools of thought come together pow- erfully in an important book by Walter C. Rucker, The River Flows On: Black Re- sistance, Culture, and Identity Formation in Early America. In Rucker’s analysis of slave revolts, conspiracies, and daily recalcitrance, African concepts, values, and cul- tural metaphors play the central role. Unlike Smallwood and Hartman, for whom “the rupture was the story” of slavery, Rucker aims to reveal the “perseverance of African culture even among second, third, and fourth generation creoles.”39 He looks again at some familiar events in North America—New York City’s 1712 Coromantee revolt and 1741 conspiracy, the 1739 Stono rebellion in South Carolina, as well as the plots, schemes, and insurgencies of Gabriel Prosser, Denmark Vesey, and Nat Turner—deftly teasing out the African origins of many of the attitudes and actions of the black rebels. Rucker outlines how the transformation of a “shared cultural heritage” that shaped collective action against slavery corresponded to the “various steps Africans made in the process of becoming ‘African American’ in culture, orientation, and identity.”40

The invocation of social death as ontologically inevitable inscribes a pessimism towards politics which makes agency impossible and oversimplifies the history of resistance

Vincent **Brown**, Prof. of History and African and African-American Studies @ Harvard Univ., December 20**09**, "Social Death and Political Life in the Study of Slavery," American Historical Review, p. 1231-1249

Specters of the Atlantic is a compellingly sophisticated study of the relation be- tween the epistemologies underwriting both modern slavery and modern capitalism, but the book’s discussion of the politics of anti-slavery is fundamentally incomplete. While Baucom brilliantly traces the development of “melancholy realism” as an op- positional discourse that ran counter to the logic of slavery and finance capital, he has very little to say about the enslaved themselves. Social death, so well suited to the tragic perspective, stands in for the experience of enslavement. While this heightens the reader’s sense of the way Atlantic slavery haunts the present, Baucom largely fails to acknowledge that the enslaved performed melancholy acts of accounting not unlike those that he shows to be a fundamental component of abolitionist and human rights discourses, or that those acts could be a basic element of slaves’ oppositional activities. In many ways, the effectiveness of his text depends upon the silence of slaves—it is easier to describe the continuity of structures of power when one down- plays countervailing forces such as the political activity of the weak. So Baucom’s deep insights into the structural features of Atlantic slave trading and its afterlife come with a cost. Without engagement with the politics of the enslaved, slavery’s history serves as an effective charge leveled against modernity and capitalism, but not as an uneven and evolving process of human interaction, and certainly not as a locus of conflict in which the enslaved sometimes won small but important victories.11

Specters of the Atlantic is self-consciously a work of theory (despite Baucom’s prodigious archival research), and social death may be largely unproblematic as a matter of theory, or even law. In these arenas, as David Brion Davis has argued, “the slave has no legitimate, independent being, no place in the cosmos except as an instrument of her or his master’s will.”12 But the concept often becomes a general description of actual social life in slavery. Vincent Carretta, for example, in his au- thoritative biography of the abolitionist writer and former slave Olaudah Equiano, agrees with Patterson that because enslaved Africans and their descendants were “stripped of their personal identities and history, [they] were forced to suffer what has been aptly called ‘social death.’ ” The self-fashioning enabled by writing and print “allowed Equiano to resurrect himself publicly” from the condition that had been imposed by his enslavement.13 The living conditions of slavery in eighteenth-century Jamaica, one slave society with which Equiano had experience, are described in rich detail in Trevor Burnard’s unflinching examination of the career of Thomas Thistle- wood, an English migrant who became an overseer and landholder in Jamaica, and who kept a diary there from 1750 to 1786. Through Thistlewood’s descriptions of his life among slaves, Burnard glimpses a “world of uncertainty,” where the enslaved were always vulnerable to repeated depredations that actually led to “significant slave dehumanization as masters sought, with considerable success, to obliterate slaves’ personal histories.” Burnard consequently concurs with Patterson: “slavery completely stripped slaves of their cultural heritage, brutalized them, and rendered ordinary life and normal relationships extremely difficult.”14 This was slavery, after all, and much more than a transfer of migrants from Africa to America.15 Yet one wonders, after reading Burnard’s indispensable account, how slaves in Jamaica or- ganized some of British America’s greatest political events during Thistlewood’s time and after, including the Coromantee Wars of the 1760s, the 1776 Hanover conspiracy, and the Baptist War of 1831–1832. Surely they must have found some way to turn the “disorganization, instability, and chaos” of slavery into collective forms of belonging and striving, making connections when confronted with alien- ation and finding dignity in the face of dishonor. Rather than pathologizing slaves by allowing the condition of social death to stand for the experience of life in slavery, then, it might be more helpful to focus on what the enslaved actually made of their

situation.

Among the most insightful texts to explore the experiential meaning of Afro- Atlantic slavery (for both the slaves and their descendants) are two recent books by Saidiya Hartman and Stephanie Smallwood. Rather than eschewing the concept of social death, as might be expected from writing that begins by considering the per- spective of the enslaved, these two authors use the idea in penetrating ways. Hart- man’s Lose Your Mother: A Journey along the Atlantic Slave Route and Smallwood’s Saltwater Slavery: A Middle Passage from Africa to American Diaspora extend social death beyond a general description of slavery as a condition and imagine it as an experience of self. Here both the promise and the problem with the concept are most fully apparent.16

Both authors seek a deeper understanding of the experience of enslavement and its consequences for the past, present, and future of black life than we generally find in histories of slavery. In Hartman’s account especially, slavery is not only an object of study, but also the focus of a personal memoir. She travels along a slave route in Ghana, from its coastal forts to the backcountry hinterlands, symbolically reversing the first stage of the trek now commonly called the Middle Passage. In searching prose, she meditates on the history of slavery in Africa to explore the precarious nature of belonging to the social category “African American.” Rendering her re- markable facility with social theory in elegant and affective terms, Hartman asks the question that nags all identities, but especially those forged by the descendants of slaves: What identifications, imagined affinities, mythical narratives, and acts of re- membering and forgetting hold the category together? Confronting her own alienation from any story that would yield a knowable genealogy or a comfortable identity, Hartman wrestles with what it means to be a stranger in one’s putative motherland, to be denied country, kin, and identity, and to forget one’s past—to be an orphan.17 Ultimately, as the title suggests, Lose Your Mother is an injunction to accept dis- possession as the basis of black self-definition.

Such a judgment is warranted, in Hartman’s account, by the implications of social death both for the experience of enslavement and for slavery’s afterlife in the present. As Patterson delineated in sociological terms the death of social personhood and the reincorporation of individuals into slavery, Hartman sets out on a personal quest to “retrace the process by which lives were destroyed and slaves born.”18 When she contends with what it meant to be a slave, she frequently invokes Patterson’s idiom: “Seized from home, sold in the market, and severed from kin, the slave was for all intents and purposes dead, no less so than had he been killed in combat. No less so than had she never belonged to the world.” By making men, women, and children into commodities, enslavement destroyed lineages, tethering people to own- ers rather than families, and in this way it “annulled lives, transforming men and women into dead matter, and then resuscitated them for servitude.” Admittedly, the enslaved “lived and breathed, but they were dead in the social world of men.”19 As it turns out, this kind of alienation is also part of what it presently means to be African American. “The transience of the slave’s existence,” for example, still leaves its traces in how black people imagine and speak of home:

We never tire of dreaming of a place that we can call home, a place better than here, wherever here might be . . . We stay there, but we don’t live there . . . Staying is living in a country without exercising any claims on its resources. It is the perilous condition of existing in a world in which you have no investments. It is having never resided in a place that you can say is yours. It is being “of the house” but not having a stake in it. Staying implies transient quarters, a makeshift domicile, a temporary shelter, but no attachment or affiliation. This sense of not belonging and of being an extraneous element is at the heart of slavery.20

“We may have forgotten our country,” Hartman writes, “but we haven’t forgotten our dispossession.”21

Like Baucom, Hartman sees the history of slavery as a constituent part of a tragic present. Atlantic slavery continues to be manifested in black people’s skewed life chances, poor education and health, and high rates of incarceration, poverty, and premature death. Disregarding the commonplace temporalities of professional historians, whose literary conventions are generally predicated on a formal distinction between past, present, and future, Hartman addresses slavery as a problem that spans all three. The afterlife of slavery inhabits the nature of belonging, which in turn guides the “freedom dreams” that shape prospects for change. “If slavery persists as an issue in the political life of black America,” she writes, “it is not because of an antiquated obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago.”22

A professor of English and comparative literature, Hartman is in many respects in a better position than most historians to understand events such as the funeral aboard the Hudibras. This is because for all of her evident erudition, her scholarship is harnessed not so much to a performance of mastery over the facts of what hap- pened, which might substitute precision for understanding, as to an act of mourning, even yearning. She writes with a depth of introspection and personal anguish that is transgressive of professional boundaries but absolutely appropriate to the task. Reading Hartman, one wonders how a historian could ever write dispassionately about slavery without feeling complicit and ashamed. For dispassionate accounting—exemplified by the ledgers of slave traders—has been a great weapon of the powerful, an episteme that made the grossest violations of personhood acceptable, even necessary. This is the kind of bookkeeping that bore fruit upon the Zong. “It made it easier for a trader to countenance yet another dead black body or for a captain to dump a shipload of captives into the sea in order to collect the insurance, since it wasn’t possible to kill cargo or to murder a thing already denied life. Death was simply part of the workings of the trade.” The archive of slavery, then, is “a mortuary.” Not content to total up the body count, Hartman offers elegy, echoing in her own way the lamentations of the women aboard the Hudibras. Like them, she is concerned with the dead and what they mean to the living. “I was desperate to reclaim the dead,” she writes, “to reckon with the lives undone and obliterated in the making of human commodities.”23

It is this mournful quality of Lose Your Mother that elevates it above so many histories of slavery, but the same sense of lament seems to require that Hartman overlook small but significant political victories like the one described by Butter- worth. Even as Hartman seems to agree with Paul Gilroy on the “value of seeing the consciousness of the slave as involving an extended act of mourning,” she remains so focused on her own commemorations that her text makes little space for a consideration of how the enslaved struggled with alienation and the fragility of belonging, or of the mourning rites they used to confront their condition.24 All of the ques- tions she raises about the meaning of slavery in the present—both highly personal and insistently political—might as well be asked about the meaning of slavery to slaves themselves, that is, if one begins by closely examining their social and political lives rather than assuming their lack of social being. Here Hartman is undone by her reliance on Orlando Patterson’s totalizing definition of slavery. She asserts that “no solace can be found in the death of the slave, no higher ground can be located, no perspective can be found from which death serves a greater good or becomes any- thing other than what it is.”25 If she is correct, the events on the Hudibras were of negligible importance. And indeed, Hartman’s understandable emphasis on the personal damage wrought by slavery encourages her to disavow two generations of social history that have demonstrated slaves’ remarkable capacity to forge fragile com- munities, preserve cultural inheritance, and resist the predations of slaveholders. This in turn precludes her from describing the ways that violence, dislocation, and death actually generate culture, politics, and consequential action by the enslaved.26

This limitation is particularly evident in a stunning chapter that Hartman calls “The Dead Book.” Here she creatively reimagines the events that occurred on the voyage of the slave ship Recovery, bound, like the Hudibras, from the Bight of Biafra to Grenada, when Captain John Kimber hung an enslaved girl naked from the mizzen stay and beat her, ultimately to her death, for being “sulky”: she was sick and could not dance when so ordered. As Hartman notes, the event would have been unre- markable had not Captain Kimber been tried for murder on the testimony of the ship’s surgeon, a brief transcript of the trial been published, and the woman’s death been offered up as allegory by the abolitionist William Wilberforce and the graphic satirist Isaac Cruikshank. Hartman re-creates the murder and the surge of words it inspired, representing the perspectives of the captain, the surgeon, and the aboli tionist, for each of whom the girl was a cipher “outfitted in a different guise,” and then she puts herself in the position of the victim, substituting her own voice for the unknowable thoughts of the girl. Imagining the experience as her own and wistfully representing her demise as a suicide—a final act of agency—Hartman hopes, by this bold device, to save the girl from oblivion. Or perhaps her hope is to prove the impossibility of ever doing so, because by failing, she concedes that the girl cannot be put to rest. It is a compelling move, but there is something missing. Hartman discerns a convincing subject position for all of the participants in the events sur- rounding the death of the girl, except for the other slaves who watched the woman die and carried the memory with them to the Americas, presumably to tell others, plausibly even survivors of the Hudibras, who must have drawn from such stories a basic perspective on the history of the Atlantic world. For the enslaved spectators, Hartman imagines only a fatalistic detachment: “The women were assembled a few feet away, but it might well have been a thousand. They held back from the girl, steering clear of her bad luck, pestilence, and recklessness. Some said she had lost her mind. What could they do, anyway? The women danced and sang as she lay dying.”

Hartman ends her odyssey among the Gwolu, descendants of peoples who fled the slave raids and who, as communities of refugees, shared her sense of dispos- session. “Newcomers were welcome. It didn’t matter that they weren’t kin because genealogy didn’t matter”; rather, “building community did.” Lose Your Mother con- cludes with a moving description of a particular one of their songs, a lament for those who were lost, which resonated deeply with her sense of slavery’s meaning in the present. And yet Hartman has more difficulty hearing similar cries intoned in the past by slaves who managed to find themselves.27

Saltwater Slavery has much in common with Lose Your Mother. Smallwood’s study of the slave trade from the Gold Coast to the British Americas in the late seventeenth and early eighteenth centuries likewise redeems the experience of the people traded like so many bolts of cloth, “who were represented merely as ciphers in the political arithmetic,” and therefore “feature in the documentary record not as subjects of a social history but as objects or quantities.”28 Each text offers a penetrating analysis of the market logic that turned people into goods. Both books work with the concept of social death. However, Smallwood examines the problem of social death for the enslaved even more closely than Hartman does.29

Like Hartman, Smallwood sees social death as a by-product of commodification. “If in the regime of the market Africans’ most socially relevant feature was their exchangeability,” she argues, “for Africans as immigrants the most socially relevant feature was their isolation, their desperate need to restore some measure of social life to counterbalance the alienation engendered by their social death.” But Small- wood’s approach is different in a subtle way. Whereas for Hartman, as for others, social death is an accomplished state of being, Smallwood veers between a notion of social death as an actual condition produced by violent dislocation and social death as a compelling threat. On the one hand, she argues, captivity on the Atlantic littoral was a social death. Exchangeable persons “inhabited a new category of mar- ginalization, one not of extreme alienation within the community, but rather of ab- solute exclusion from any community.” She seems to accept the idea of enslaved commodities as finished products for whom there could be no socially relevant relationships: “the slave cargo constituted the antithesis of community.” Yet elsewhere she contends that captives were only “menaced” with social death. “At every point along the passage from African to New World markets,” she writes, “we find a stark contest between slave traders and slaves, between the traders’ will to commodify people and the captives’ will to remain fully recognizable as human subjects.”30 Here, I think, Smallwood captures the truth of the idea: social death was a receding ho- rizon—the farther slaveholders moved toward the goal of complete mastery, the more they found that struggles with their human property would continue, even into the most elemental realms: birth, hunger, health, fellowship, sex, death, and time.

If social death did not define the slaves’ condition, it did frame their vision of apocalypse. In a harrowing chapter on the meaning of death (that is, physical death) during the Atlantic passage, Smallwood is clear that the captives could have no frame of reference for the experience aboard the slave ships, but she also shows how des- perate they were to make one. If they could not reassemble some meaningful way to map their social worlds, “slaves could foresee only further descent into an endless purgatory.” The women aboard the Hudibras were not in fact the living dead; they were the mothers of gasping new societies. Their view of the danger that confronted them made their mourning rites vitally important, putting these at the center of the women’s emerging lives as slaves—and as a result at the heart of the struggles that would define them. As Smallwood argues, this was first and foremost a battle over their presence in time, to define their place among ancestors, kin, friends, and future progeny. “The connection Africans needed was a narrative continuity between past and present—an epistemological means of connecting the dots between there and here, then and now, to craft a coherent story out of incoherent experience.” That is precisely what the women on the Hudibras fought to accomplish.31

## 1AR

### epistemology

**Method focus causes scholarly failure**

**Jackson**, associate professor of IR – School of International Service @ American University, **‘11**

(Patrick Thadeus, The Conduct of Inquiry in International Relations, p. 57-59)

Perhaps the greatest irony of this instrumental, decontextualized importation of “falsification” and its critics into IR is the way that an entire line of thought that privileged disconfirmation and refutation—no matter how complicated that disconfirmation and refutation was in practice—has been transformed into a license to **worry endlessly about foundational assumptions.** At the very beginning of the effort to bring terms such as “paradigm” to bear on the study of politics, Albert O. **Hirschman** (1970b, 338) **noted this very danger**, suggesting that without “a little more ‘reverence for life’ and a little less straightjacketing of the future,” the **focus on** producing internally **consistent** packages of **assumptions instead of** actually examining **complex empirical situations would result in scholarly paralysis.** Here as elsewhere, Hirschman appears to have been quite prescient, inasmuch as the major effect of paradigm and research programme language in IR seems to have been a series of debates and discussions about whether the fundamentals of a given school of thought were sufficiently “scientific” in their construction. Thus **we have debates about how to evaluate scientific progress**, and attempts to propose one or another set of research design principles **as uniquely scientific**, and inventive, “reconstructions” of IR schools, such as Patrick James’ “elaborated structural realism,” supposedly for the purpose of placing them on a **firmer scientific footing** by making sure that they have all of the required elements of a basically Lakatosian19 model of science (James 2002, 67, 98–103).

The bet with all of this scholarly activity seems to be that if we can just get the fundamentals right, then scientific progress will inevitably ensue . . . even though this is the precise opposite of what Popper and Kuhn and Lakatos argued! In fact, all of this obsessive interest in foundations and starting-points is, in form if not in content, a lot closer to logical positivism than it is to the concerns of the falsificationist philosophers, despite the prominence of language about “hypothesis testing” and the concern to formulate testable hypotheses among IR scholars engaged in these endeavors. That, above all, is why I have labeled this methodology of scholarship neopositivist. While it takes much of its self justification as a science from criticisms of logical positivism, in overall sensibility it still operates in a visibly positivist way, attempting to construct knowledge from the ground up by getting its foundations in logical order before concentrating on how claims encounter the world in terms of their theoretical implications. This is by no means to say that neopositivism is not interested in hypothesis testing; on the contrary, neopositivists are extremely concerned with testing hypotheses, but **only after the fundamentals have been** soundly **established.** Certainty, not conjectural provisionality, seems to be the goal—a goal that, ironically, Popper and Kuhn and Lakatos would all reject.

### at: onto

**Ontology isn’t a good way to analyze the world**

**Shirky 5**

Clay Shirky, teacher of NYU's graduate Interactive Telecommunications Program, 03/15/05

<http://www.itconversations.com/shows/detail470.html>

 I hold a joint appointment at NYU, as an Associate Arts Professor at the Interactive Telecommunications Program (ITP) and as a Distinguished Writer in Residence in the Journalism Department. I am also a Fellow at the Berkman Center for Internet and Society, and was the Edward R. Murrow Visiting Lecturer at Harvard's Joan Shorenstein Center on the Press, Politics, and Public Policy in 2010.

There are many ways to organize data: labels, lists, categories, taxonomies, **ontologies.** Of these, ontology -- assertions about essence and relations among a group of items -- seems to be the highest-order method of organization. Indeed, the predicted value of the Semantic Web assumes that ontological successes such as the Library of Congress's classification scheme are easily replicable. Those successes are not easily replicable. Ontology, far from being an ideal high-order tool, is a **300-year-old hack**, now nearing the end of its useful life. **The problem ontology solves is not how to organize ideas but how to organize things** -- the Library of Congress's classification scheme exists not because concepts require consistent hierarchical placement, **but because books do**. The LC scheme, when examined closely, is riddled with inconsistencies, bias, and gaps. Top level geographic categories, for example, include "The Balkan Penninsula" and "Asia." The primary medical categories don't include oncology, defaulting to the older and now discredited notion that cancers were more related to specific organs than to common processes. And the list of such oddities goes on. The reason the LC scheme is accumulating these errors faster than they can correct them is the physical fact of the book, which makes a card catalog scheme necessary, and constant re-shelving impossible. Likewise, it enforces **cookie-cutter categorization** that doesn't reflect the polyphony of its contents--there is a literature of creativity, for example, made up of books about art, science, engineering, and so on, and yet those books are not categorized (which is to say shelved) together, because the LC scheme doesn't recognize creativity as an organizing principle. For a reader interested in creativity, the LC **ontology destroys value rather than creating it.**

As we have learned from the Web, when data is decoupled from physical presence, it is fluid enough to be grouped differently by different readers, and on different days. The Web's main virtue, in handling data, is to transmute organization from an a priori, content-based judgment to one that can be ad hoc, context-based, socially embedded, and constantly altered. The Web frees us from needing to argue about whether The Book of 5 Rings "is" a business book or a primer on war -- it is plainly both, and not only are we freed from making that judgment firmly or in advance, we are freed from needing to make it explicit at all.

This talk begins by exploring the rise of ontological classification. In the period after the invention of the printing press but before the invention of the search engine, intellectual production was vested in books, objects that were numerous but opaque. When you have more than a few hundred books, categorization becomes a forced move, even if the categories are somewhat arbitrary, because without categories, you can no longer locate individual books.

### Impacts

Eric A. **Posner and** Adrian **Vermeule 3**, law profs at Chicago and Harvard, Accommodating Emergencies, September, <http://www.law.uchicago.edu/files/files/48.eap-av.emergency.pdf>

Against the view that panicked government officials overreact to an emergency, and unnecessarily curtail civil liberties, we suggest a more constructive theory of the role of fear. Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive. **It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm**. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse. For that reason, the existence of fear during emergencies does not support the antiaccommodation theory that the Constitution should be enforced as strictly during emergencies as during non-emergencies.

C. The Influence of Fear during Emergencies

Suppose now that the simple view of fear is correct, and that it is an unambiguously negative influence on government decisionmaking. Critics of accommodation argue that this negative influence of fear justifies skepticism about emergency policies and strict enforcement of the Constitution. However, this argument is implausible. It is doubtful that fear, so understood, has more influence on decisionmaking during emergencies than decisionmaking during non-emergencies.

The panic thesis, implicit in much scholarship though rarely discussed in detail, holds that citizens and officials respond to terrorism and war in the same way that an individual in the jungle responds to a tiger or snake. The national response to emergency, because it is a standard fear response, is characterized by the same circumvention of ordinary deliberative processes: thus, (i) the response is instinctive rather than reasoned, and thus subject to error; and (ii) the error will be biased in the direction of overreaction. While the flight reaction was a good evolutionary strategy on the savannah, in a complex modern society the flight response is not suitable and can only interfere with judgment. Its advantage—speed—has minimal value for social decisionmaking. No national emergency requires an immediate reaction—except by trained professionals who execute policies established earlier—but instead over days, months, or years people make complex judgments about the appropriate institutional response. And the asymmetrical nature of fear guarantees that people will, during a national emergency, overweight the threat and underweight other things that people value, such as civil liberties.

But if decisionmakers rarely act immediately, then the tiger story cannot bear the metaphoric weight that is placed on it. Indeed, the flight response has nothing to do with the political response to the bombing of Pearl Harbor or the attack on September 11. The people who were there—the citizens and soldiers beneath the bombs, the office workers in the World Trade Center—no doubt felt fear, and most of them probably responded in the classic way. They experienced the standard physiological effects, and (with the exception of trained soldiers and security officials) fled without stopping to think. It is also true that in the days and weeks after the attacks, many people felt fear, although not the sort that produces a irresistible urge to flee. **But this kind of fear is not the kind in which cognition shuts down**. (Some people did have more severe mental reactions and, for example, shut themselves in their houses, but these reactions were rare.) The fear is probably better described as a general anxiety or jumpiness, an anxiety that was probably shared by government officials as well as ordinary citizens.53

While, as we have noted, there is psychological research suggesting that normal cognition partly shuts down in response to an immediate threat, we are aware of no research suggesting that people who feel anxious about a non-immediate threat are incapable of thinking, or thinking properly, or systematically overweight the threat relative to other values.

 Indeed, it would be surprising to find research that clearly distinguished “anxious thinking” and “calm thinking,” given that anxiety is a pervasive aspect of life. People are anxious about their children; about their health; about their job prospects; about their vacation arrangements; about walking home at night. No one argues that people’s anxiety about their health causes them to take too many precautions—to get too much exercise, to diet too aggressively, to go to the doctor too frequently—and to undervalue other things like leisure. So it is hard to see why anxiety about more remote threats, from terrorists or unfriendly countries with nuclear weapons, should cause the public, or elected officials, to place more emphasis on security than is justified, and to sacrifice civil liberties.

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.54 Post-9/11 curtailments of civil liberties, aside from immediate detentions, came after a significant delay and much deliberation. The civil libertarians’ argument that fear produces bad policy trades on the ambiguity of the word “panic,” which refers both to real fear that undermines rationality, and to collectively harmful outcomes that are driven by rational decisions, such as a bank run, where it is rational for all depositors to withdraw funds if they believe that enough other depositors are withdrawing funds. Once we eliminate the false concern about fear, it becomes clear that the panic thesis is indistinguishable from the argument that during an emergency people are likely to make mistakes. But if the only concern is that during emergencies people make mistakes, there would be no reason for demanding that the constitution be enforced normally during emergencies. Political errors occur during emergencies and nonemergencies, but the stakes are higher during emergencies, and that is the conventional reason why constitutional constraints should be relaxed.

Their critique of whiteness overgeneralizes

Purcell, 8

(Teaching Fellow-Philosophy at Boston College – Review of “What White Looks Like: African-American Philosophers on The Whiteness Question” –Essays in Philosophy – Volume 9, Issue 1 Philosophy of Disability Article 16)

The second concern is more specifically philosophical in nature. Yancy rightly leaves open the question of what “whiteness” means in his introduction, but unless this question can be answered in some way it seems that many of the central concerns of whiteness studies will be **left unresolved in a hazy cloud.** I believe that a failure to engage with this question substantively would **mark a failure** to engage the questions of whiteness **at a philosophical level**. Numerous essays certainly are clear about their definitions of whiteness, and if we are to agree with Paul Taylor, then there is really no disagreement at this level. However, it appears from the foregoing review that more than a few loose ends still remain at a methodological level in whiteness studies. While no one does seem to disagree that whiteness ought to be reconstructed, they hardly agree over the following points: (i) whether whiteness and white supremacy are identical or separate, and if separate what that relation is, or (ii) whether privilege exhausts white supremacy or whether something else must also be added, or (iii) whether victimization and domination are the only forms of power operative or whether Foucault’s productive biopower has a role to play, or finally (iv) whether whiteness is symmetrically related to other racializations (e.g. that it is an instantiation of racialized groups generally) or asymmetrically related (e.g. as grounding norm). It is a credit to Yancy’s work, however, that he has been able to assemble such a full cast of competent philosophers who, through their separate contributions, illustrate these difficulties. Not only are these essays provocative, but they are illuminating and useful both to scholars and to neophytes. The anthology as a whole, then, deserves an unqualified recommendation for all interested in this matter.

### Reformism

Their view of irresolvable antagonism is easily coopted by the right—furthers oppression

Patterson 98

The Ordeal Of Integration:

Progress And Resentment In America's "Racial" Crisis

Orlando Patterson is a Jamaican-born American historical and cultural sociologist known for his work regarding issues of race in the United States, as well as the sociology of development

In the attempt to understand and come to terms with the problems of Afro-Americans and of their interethnic relations, the country has been ill served by its intellectuals, policy advocates, and leaders in recent years. At present, dogmatic ethnic advocates and extremists appear to dominate discourse on the subject, drowning out both moderate and other dissenting voices. A strange convergence has emerged between these extremists. On the left, the nation is misled by an endless stream of tracts and studies that deny any meaningful change in America's "Two Nations," decry "The Myth of Black Progress," mourn "The Dream Deferred," dismiss AfroAmerican middle-class status as "Volunteer Slavery," pronounce AfroAmerican men an "Endangered Species," and apocalyptically announce "The Coming Race War." On the right is complete agreement with this dismal portrait in which we are fast "Losing Ground," except that the road to "racial" hell, according to conservatives, has been paved by the very pQlicies intended to help solve the problem, abetted by "The Dream and the Nightmare" of cultural changes in the sixties and by the overbreeding and educational integration of inferior Afro-Americans and very policies intended to help solve the problem, abetted by "The Dream and the Nightmare" of cultural changes in the sixties and by the overbreeding and educational integration of inferior Afro-Americans and lower-class Euro-Americans genetically situated on the wrong tail of the IQ "Bell Curve." If it is true that a "racial crisis" persists in America, this crisis is as much one of perception and interpretation as of actual socioeconomic and interethnic realities. By any measure, the record of the past half century has been one of great achievement, thanks in good part to the suecess of the government policies now being maligned by the left for not having gone far enough and by the right for having both failed and gone too far. At the same time, there is still no room for complacency: because our starting point half a century ago was so deplorably backward, we still have some way to go before approaching anything like a resolution.

Engagement the law solves their impacts, even if bottom-up approaches are ultimately better

Andrews, associate professor of law – University of San Francisco, ‘3

(Rhonda V. Magee, 54 Ala. L. Rev. 483)

The following argument relies on a few important assumptions. The first is the assumption that legal rules have consequences that reach far beyond their intended application from the standpoint of legal analysis. Legal rules play an important part in shaping concrete and metaphysical aspects of the world that we know. Thus, the impact of equal protection doctrine on the meta-narrative of race in America is more than merely symbolic. The Supreme Court's pronouncements on race are presumptively to be followed by lower courts, and together these opinions and their consequences influence the representations of race in federal and state social policies, in the media, in literature, and in the arts. n18 As Justice Brennan noted from the bench, every decision of the court has "ripples" which impact society and social processes. n19 Perhaps in no other area is this basic sociological insight more demonstrably true than in the area of race law. In a very real sense, the history of American civil rights law is the history of America's socio-legal construction, deconstruction, and reconstruction of what it means to be a constitutionally protected human being. In the aftermath of the war required to preserve the Union itself, the architects of the First Reconstruction n20 took on [\*491] the task of reforming the Constitution to provide federal protection for newly "freed" Americans. The law they made not only created a new world in which the centuries-old institution of slavery was virtually **impossible**, § Marked 12:19 § n21 but perhaps more importantly, marked the beginning of the reshaping of American **thinking** about the very nature of humanity through the powerful symbolism and mechanisms of the law. n22 Thus, the continuing evolution of what it means to be a human being, and refinement of the state's obligations to human beings subject to its laws, are among the most significant of the unstated objectives of the reconstruction of post-slavery America, and the law itself will play a central role.