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The United States Supreme Courts should restrict the President’s war powers authority to indefinitely detain, on the grounds that the Geneva Conventions are self-executing.

The plan is key to effective human rights treaties

Gruber, 7

(Law Prof-Florida International, “Who’s Afraid of Geneva Law,” 39 Ariz. St. L.J. 1017, Winter, Lexis)

Internationalists and civil libertarians have widely praised Hamdi and Hamdan for creating a new era of rights, and at least one commentator has stated that the MCA, following Hamdan, "put the final nail in the coffin" of unbridled executive discretion. n447 Yet reports of the demise of executive overreaching and American isolationism are greatly exaggerated. To this day, the **Guantanamo detentions continue, and the U**nited **S**tates **remains a consistent subject of criticism from international actors, the press, and the public**. A finding that the Geneva Conventions are self-executing, in addition to possibly affording real and effective relief to detainees who continue to be treated in inhumane ways, would **truly set the U**nited **S**tates **on a path toward reversing the sad history of the last six years.** It would permit the United States to **step out of the** dark **era of** Bricker, racism, and **isolation into a new light of taking international law seriously**. **Holding the Geneva Conventions self-executing could demonstrate** that the United States is a country of laws that can proudly **occupy the position of a global defender of human rights**. Unfortunately, although the Supreme Court was well poised to take up the issue of treaty self-execution, it did not do so, evidencing an unfortunate [\*1085] internalization of treaty law fear created by lower court activism and conservative scholarship. This fear is neither justified by the Supreme Courts' own history nor compelled by the structure of the Constitution. Because the modern self-execution doctrine, particularly the intent analysis, is essentially isolationist, **the Court can only be truly internationalist when it finally puts an end to** recent **treaty law hostility**. Consequently, now is not the time for civil libertarians and internationalists to be complacent. They must be vigilant in their advocacy of the rule of law and judicial review. If the Supreme Court is willing to once again exercise jurisdiction over cases like Hamdan, it may well have the opportunity to assess whether the procedures set forth in the MCA violate the Geneva Conventions. This time, the Court will not be able to avoid the issue of self-execution by relying on congressional intent. Thus, internationalists and civil libertarians yet have a role to play in urging the **Supreme Court to be an international team player rather than a "lone ranger**."

Otherwise, non-self-execution renders all treaty commitments null and void

Friedman, 5

(JD-University of Florida Law, “The Uneasy US Relationship with Human Rights Treaties: The Constitutional Treaty System and Non-Self-Execution Declarations,” 17 Fla. J. Int'l L. 187, March, Lexis)

E. Policy Arguments Against Nonself-Execution Declarations: The International Implications

Regardless of whether the constitutional arguments against nonself-execution declarations pass muster, the practice of attaching them to human rights treaties **is an integral part of the blatantly protectionist U.S. foreign policy on human rights**. n418 Routinely using non self-execution declarations communicates to other nations that the United States does not take its international human rights obligations seriously enough to allow them to take effect as domestic law. n419 It also undermines the foreign policy justifications for ratifying human rights treaties in the first place - most fundamentally, the motivation to serve as an example to other nations. n420 Nonself-execution declarations render the human rights treaties to which they are attached **empty promises,** because the terms of those treaties do not effect any change in U.S. domestic law. n421 The United States thus [\*251] is seen by other nations as seeking the benefits of human rights treaties - most importantly, membership in the organizations that oversee them - without assuming any of the burdens. n422 The practice of using nonself-execution declarations reflects an attitude that human rights treaties are only for other nations, not for the United States. n423 The U.S. foreign policy on human rights **promotes a double standard**, whereby the United States seeks to enforce international human rights law against other nations but is unwilling to have its own practices subjected to international regulation and scrutiny. n424 On one hand, the United States [\*252] played a leading role in establishing the United Nations and drafting the UDHR and other human rights treaties. n425 It also frequently expresses concern about human rights violations around the world and sometimes uses economic or military pressure to induce nations to improve their human rights practices. n426 Moreover, U.S. domestic law reflects a fundamental commitment to domestic human rights protection. n427 On the other hand, the United States has an uneasy relationship with human rights treaties and institutions. n428 The United States only occasionally ratifies human rights treaties, n429 and when it does, it attaches nonself-execution declarations without fail. n430 Furthermore, after declaring the treaties nonself-executing, it enacts the necessary implementing legislation erratically, if at all. n431 The root of this double standard lies in U.S. unilateralism, exceptionalism, and isolationism. n432 At the heart of those beliefs are two [\*253] related ideas: first, that human rights in the United States are "alive and well" and do not need scrutiny from other nations whose human rights protections are much less so; n433 and second, that the U.S. government, especially U.S. courts, would take human rights obligations much more seriously than would other governments. There are four basic foundations of this "pervasive sense of cultural relativism, ethnocentrism, and nationalism" n434 in the United States: the U.S. superpower status in world affairs, n435 the exceptional stability of democratic governance inside its borders, n436 the "general conservatism" of its politics, n437 and the decentralized and divided nature of its political institutions. n438 Nonself-execution declarations reflect this **nationalistic sense of superiority** and communicate a "refusal to consider the possibility that change may potentially bring improvement rather than deterioration" to domestic human rights protections. n439 To a somewhat lesser extent, the foundation of the human rights double standard also lies in the differences between U.S. constitutional rights and international human rights. n440 First, American constitutional rights focus [\*254] on the democratic form of government more specifically than do international rights. n441 Second, American constitutional rights are natural rights, and refer back to ideas that are European - rather than universal - in nature. n442 Other nations are becoming increasingly frustrated with U.S. foreign policy on human rights and with U.S. domestic human rights practices. n443 This widespread criticism **damages the U.S. credibility in foreign human rights policy**. n444 It also undercuts the U.S. foreign policy motivations for ratifying human rights treaties in the first place, especially the desire to serve as an example to other nations. n445

Enforcement of the ICCPR crucial to marshal support for a rights-based approach to water issues

Varma, 13

(Director of Robert F. Kennedy Center for Justice and Human Rights, 9/9, “Wòch nan soley: The denial of the right to water in Haiti,” http://www.hhrjournal.org/2013/09/09/woch-nan-soley-the-denial-of-the-right-to-water-in-haiti/)

In addition to protections in domestic law, **the right to water is** also **recognized in international** **law**. International and regional human rights bodies and national and international courts have interpreted the right to water as being an implicit part of other human rights, such as the right to life, the right to health, the right to an adequate standard of living, the right to food, the right to housing, and the right to education.117 These rights have **been enshrined in** both UN and regional **human rights instruments**, several of which have been **ratified by** Haiti and the United States. Both Haiti and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR), which protects, inter alia, the right to life. Both have signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes, inter alia, the right to housing, food, health, and an adequate standard of living.118 The right to water is also protected under other international instruments. These instruments are useful indicators of norms accepted by the international community and reflect evidence of political will to make access to water a priority. The provisions in some international instruments have obtained the status of customary international law and thus create legal obligations for states. Customary international law is derived from a clear consensus among states as to a legal rule, which is evidenced by widespread conduct by states accompanied by a sense of legal obligation to adhere to such rule, known as opinio juris.119 The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has found that the minimum core of the main economic, social, and cultural rights has become customary international law and is thus binding on all states, regardless of whether they have signed or ratified treaties protecting those rights. Many scholars support this position.120 The right to life is further protected by customary international law, and as a necessary component of the right to life, the right to water is thus implicitly protected by customary international law.121 International instruments that may reflect customary international law and that protect the right to water, either explicitly or implicitly, include the Universal Declaration of Human Rights, the Declaration on the Right to Development, and the Millennium Development Goals.122 States’ treaty-based obligations to secure Haitians’ right to water As the situation in Haiti makes clear, **legal rights provide no real protection for individuals without corresponding responsibilities, and the responsibility for fulfilling rights is an integral part of all legal rights**. Generally, the government of each state bears the primary responsibility to ensure the protection and achievement of human rights for those on its territory or otherwise under its jurisdiction. A state’s human rights obligations also apply when it acts as part of a multilateral or international organization, such as the UN or the World Bank.123 Thus, members of the international community bear a measure of legal responsibility. The case of water in Haiti is **directly relevant to the issue of international human rights law as codified in treaties** and under customary international law. When a state signs a treaty, the state is required to refrain from any action that would contradict the object and purpose of the treaty, and when a state ratifies a treaty, the state thereby accepts the duties contained within the treaty and is required to immediately take positive steps to realize the rights contained in the treaty.124 Even if a state has neither signed nor ratified a human rights treaty, it has certain obligations under customary international law, which protects fundamental human rights and in general applies to all states. Types of duties Human rights treaties generally specify three different kinds of duties relating to the rights set out in the treaty. The first is the obligation to respect, meaning that governments must refrain from interfering directly or indirectly with an individual’s enjoyment of rights. The second is the obligation to protect, meaning that governments must prevent the violation of human rights by other actors. States’ actions to protect include actions that prevent individuals, companies, or other entities from violating individuals’ human rights, and also actions to investigate and punish such violations if they occur. And the third duty is the obligation to fulfill, meaning that governments must adopt whatever measures are necessary to achieve the full realization of human rights for all. Thus, governments are required to provide subsidies, services, or other direct assistance to the most vulnerable and needy members of a society when they cannot otherwise access their rights. Obligations of the government of Haiti In accordance with these treaty-based obligations and customary international law, the Haitian government is responsible for guaranteeing and fulfilling the human rights of everyone in Haiti.125 Haiti is a party to the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, the Organization of American States (OAS) Charter, and the American Convention on Human Rights; it is thus responsible for all the obligations found within each of these treaties. The Haitian government has signed, but not yet ratified, the ICESCR and the Protocol of San Salvador, both of which enumerate many of the rights at issue in this article; thus, these treaties do not strictly bind the government of Haiti. However, as a signatory, Haiti has an obligation to refrain from actions that will frustrate the object and purpose of these treaties.126 Furthermore, given that the Haitian Constitution protects the rights to health and food, the Haitian government has an obligation to ensure the satisfaction of — at the very least — minimum essential levels of each of these rights, of which access to water is an integral component. All Haitians, as rights-holders, have a particular set of entitlements, and the Haitian state, as the primary duty-bearer, has a particular set of obligations. Haitians who cannot access even the most basic forms of these entitlements are being deprived of their constitutional economic and social rights and their rights under treaties guaranteeing basic civil and political rights, such as the right to life, personal liberty, and security.127 The Haitian Constitution requires the Haitian government to recognize and protect Haitians’ rights to health, decent housing, education, and food.128 Because the right to water is an important component of these rights, the Haitian government has a responsibility to ensure the full realization of the right to water through national legislation and policies. A national water strategy should elaborate how the right to water is to be realized and should include concrete goals, policies, and a time frame for implementation.129 Obligations of the international community While the government of Haiti is the primary guarantor of Haitians’ rights, the international community also has obligations.130 Human rights treaty obligations apply not only within the territory of the ratifying state, but also apply to states’ behavior outside of their borders, through the concept of jurisdiction, and to states’ actions as members of the international community.131 This means that states must protect the human rights of all individuals within their territory or under their jurisdiction and **ensure that their actions at the international level are in compliance with their human rights obligations**.132 With respect to the right to water, this means that states must “refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.”133 The following brief summary of international obligations relevant to Haiti illustrates the importance of this factor in discussing Haitians’ right to water. Two types of state action are most pertinent to the denial of the right to water in Haiti: 1) when states act individually on the international level, and 2) when they act as members of international organizations, particularly international financial institutions (IFIs). The Maastricht Guidelines, developed to clarify which state actions constitute violations of economic, social, and cultural rights, assert that states’ duties to protect human rights extend to their “participation in international organizations, where they act collectively.”134 When authorized by member states, IFIs can take actions that may help fulfill human rights, such as financing the construction of the infrastructure needed to deliver and treat water. Alternatively, actions by IFIs may hinder the enjoyment of human rights, through, for example, requiring governments to minimize social programs or privatize core services as a precondition to receipt of grants or loans. IFI actions in such cases may interfere with the target state’s ability to fulfill human rights obligations.135 To effectively ensure the realization of the right to water, member states must be held accountable for the actions that they take, through IFIs, that have a direct impact on the human rights of individuals located outside their territory.136 At a minimum, member states must abide by their duty to respect human rights in their actions as members of IFIs.137 The ESCR Committee — responsible for interpreting and monitoring compliance with the ICESCR — has determined that states are bound by human rights obligations when acting as members of IFIs.138 With regard to the right to water, the Committee notes that “States parties that are members of international financial institutions, notably the International Monetary Fund (IMF), the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.”139 This statement further stipulates that “water should never be used as an instrument of political and economic pressure.”140 The majority of members of the World Bank Group and IMF (including the United States) are party to the ICCPR, which can be **seen as providing protections of the right to water as an element of the right to life, a right central to the ICCPR**.141 Also, since the ICESCR has been ratified by the majority of major IFI state members and all European Union countries, these states are obligated to comply with its provisions. The United States has not ratified the ICESCR, but it has signed the treaty, and thus must refrain from acting in a manner that would frustrate the object and purpose of the treaty.142 Many IDB member states are also members of the OAS, through which states may ratify regional treaties, including the American Convention and the Protocol of San Salvador, that protect economic and social rights. Moreover, the minimum core content of the key economic and social rights is regarded as customary international law, binding even non-ratifying states such as the United States. Thus, the action taken by the United States in blocking IDB development loans earmarked for water projects in Haiti is a **direct violation of** the **U**nited **S**tates’ **human rights obligations**.143 In this case, the United States actively impeded the Haitian state’s ability to fulfill Haitians’ human right to water through its actions, breaching its duty to respect. Such blatant frustration of the object and purpose of the human rights treaties to which the United States is a signatory or a state party is a clear violation of international law. Recommendation: Adopt a rights-based approach This article has documented the disastrous consequences of the IDB’s extended failure to disburse loans earmarked for water projects in Haiti. It has demonstrated how these actions directly impeded the Haitian government’s ability to respect, protect, and fulfill its citizens’ right to water. While the government of Haiti is primarily responsible for ensuring this right, other key actors, such as IFIs, foreign states, nongovernmental organizations, and private companies also have a role in solving Haiti’s water crisis. To ensure a sustainable solution, we recommend that all of these actors, in addition to the Haitian government, adopt a rights-based approach to the development and implementation of water projects. Such an approach would enhance the Haitian government’s ability to deliver these services and the Haitian population’s right to access safe and sufficient water. This section provides a brief explanation of a rights-based approach to development and its implications for water security in Haiti. A rights-based approach A rights-based approach to development is a conceptual framework that is based on international human rights law and methodology.144 It integrates the norms, standards, and principles of international human rights law into the plans, policies, and processes of development. A rights-based approach to development is based on five principles. First, a human rights-based approach shifts the language of development from charity to empowerment, viewing the beneficiary of development assistance as the owner of a right. The duty-bearer has a responsibility to develop access to the relevant rights to the rights-holder. Second, a rights-based approach considers the indivisibility and interdependence of interrelated rights (civil, cultural, economic, political, and social), recognizing that a policy affecting one right will necessarily have an impact on the others.145 Third, a rights-based approach requires non-discrimination and attention to vulnerable groups; that is, groups historically excluded from the political process and prohibited access to basic services must receive particular attention. Fourth, a rights-based approach to development ceases to be about charity and instead is about duty-bearers’ accountability to human rights obligations. In this case, accountability falls primarily on the government of Haiti, but also on the actions of donor states and private actors (for example, those providing public services) as they have obligations in particular situations. Transparency is crucial to increasing accountability.146 Finally, a rights-based approach requires duty-bearers to ensure a high degree of participation from communities, civil society, minorities, indigenous peoples, women, and other marginalized groups. Such participation must be active, free, and meaningful and must occur at each level of the development process.147 Measures to address and reduce structural participation inequalities or disadvantages may require appropriate preferential treatment to vulnerable and disadvantaged groups. Transparency is, again, essential. A rights-based approach to water projects in Haiti A rights-based approach to developing the water sector in Haiti requires all actors to incorporate each of these principles into their work. For example, effective participation requires that community members be involved in all efforts to improve the water situation. They should be consulted during the development of water projects, especially on issues such as water source, availability, sanitation precautions, time frames for implementation, water cost, and water quality. There must be regular consultations with the community during project development. Community members must have easy access to ongoing project information during implementation — for example, via posters, meetings, and radio programs. Such participation would help to ensure that water projects are empowering the Haitian people as rights-holders and that the projects are adequately and accurately meeting their needs. A rights-based approach also requires transparency of all efforts and actors involved in developing and implementing water projects in Haiti. There are several means to achieving this transparency. For example, since the government does not yet have the capacity to effectively regulate the private sector, groups responsible for water distribution or sale should also be responsible for regularly checking the safety of sources used for drinking water and publicizing test results. In addition, all water providers should report regularly on the status of projects, providing, at a minimum, information about available project funds, monies spent, specific timelines for implementation and completion, and any changes to original implementation plans. International entities might include mechanisms for transparency in their work in Haiti by providing readily-available public documentation of project status, including expenditures. Finally, a rights-based approach requires that each implementing entity has a clear and accessible accountability mechanism (or mechanisms) through which communities can report project problems. In Haiti’s case, this should include mechanisms for redress from all actors, including international organizations, states, IFIs, NGOs, and private entities. These mechanisms need to be locally focused and easily accessible, and they should have built-in transparency so that community members can follow the status of grievances or complaints and keep the public aware of their outcomes. Accountability also lies with the government, which should build internal accountability mechanisms into its national water strategy, with identifying benchmarks to measure the extent to which the right to water is being realized. The right to water has been compromised in Haiti for too long. **A rights-based approach is an essential strategy in the successful implementation and monitoring of** sustainable development projects, including **water projects**. While the government of Haiti is obligated to implement a rights-based approach, all entities involved in the development and implementation of water projects can contribute to fulfilling Haitians’ human rights by adopting this framework.

Right to water is protected under the ICCPR but the self-execution doctrine precludes recognition

WCU, 6

(World Conservation Union, 4/24, “Does international law recognise a human right to water?,” http://data.iucn.org/dbtw-wpd/html/EPLP-051-water-human-right/II.%20Does%20international%20law%20recognise%20a%20human%20right%20to%20water.html)

**The legally binding human rights covenants of** 1966, the International Covenant on Civil and Political Rights (**ICCPR)**14 and the International Covenant on Economic, Social and Cultural Rights (ICESCR)15 implicitly **recognise a right to water**, although perhaps more strongly so in the ICESCR. **The ICCPR affirms the “right to life**”,16 which has conventionally been interpreted to mean that no person shall be deprived of his or her life in a civil and political sense. According to the Human Rights Committee (HRC) in adopting a General Comment on this issue, this should now be interpreted expansively to include measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. “[HRC] has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”17 Disregarding this new development in the understanding of Art. 6 and assuming a narrow interpretation of such a right would nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water, because this is one of the most fundamental resources necessary to sustain life. In the ICESCR, it may be argued that the right to water is already apparent in Arts. 11–12. The newly adopted General Comment18 by the UN Committee on Economic, Social and Cultural Rights left little doubt as to its view of the correct legal position: “The human right to water is indispensable for leading a life in human dignity. It is prerequisite for the realization of other human rights.” There is no obligation on State parties to implement the Covenant's provisions immediately. Hence, even though there is an implied right to water, such a right does not necessarily have to be given immediate effect. Member States do have certain immediate obligations, which include the obligation to take steps – Art. 2(1) – towards the full realization of Arts. 11(1) and 12. Therefore, because the above-mentioned General Comment (which amounts to an interpretative instrument for Arts. 11 and 12) specifically recognises the human right to water, Member States “have a constant and continuing duty”19 to progressively take active steps (including the development of policy, strategy and action plans) in order to ensure that everyone has access to safe and secure drinking water and sanitation facilities. This should be undertaken equitably and without discrimination of any kind, as Art. 2(2) requires. 5. Declaration on the Right to Development Several international documents, among them the Vienna Declaration, state that the right to development is a “universal and inalienable right and an integral part of fundamental human rights”.20 Art. 8(1) of the Declaration on the Right to Development says that “[s]tates should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources ...” In interpreting this article, the General Assembly clarified and reaffirmed in its Resolution 54/175 that “[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”21 6. CEDAW and the Convention on the Rights of the Child To date, only two human rights treaties have referred directly to a right to water, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),22 and the Convention on the Rights of the Child.23 CEDAW obliges States Parties to eliminate discrimination against women, particularly in rural areas to ensure that women “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”24 The express recognition of water may be viewed as a testament to the uneven burden traditionally placed on women in developing countries to collect water over long distances and represents an attempt to redress this burden.25 A different emphasis is made in the Convention on the Rights of the Child. It recognises a child's right to enjoy the highest attainable standard of health in order to “combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution…”26 In contrast to CEDAW, the pressing water issue for children is related more to health, and hence water quality rather than any other issue is emphasised. Global environmental instruments The right to water is more often expressed within non-legally binding resolutions and declarations. These instruments, both international and regional in scope, accept that fundamental human rights, such as life, health, and well being are dependent upon the premise that people are guaranteed access to sufficient quality and quantity of water. The following takes note of some of these instruments, which recognise a right to water to varying degrees.27 1. Stockholm Declaration The Declaration is one of the earliest environmental instruments that recognises the fundamental right to “an environment of a quality that permits a life of dignity and well being”28 and also that “[t]he natural resources of the earth including…water…must be safeguarded for the benefit of present and future generations…”29 2. Mar del Plata Action Plan Specific water instruments, such as the Action Plan from the United Nations Water Conference held in Mar del Plata in 1977, recognised water as a “right”, declaring that all people have the right to drinking water in quantities and of a quality equal to their basic needs.30 The primary outcome of this conference was the launching of the International Drinking Water Supply and Sanitation Decade (1980–1990) with the slogan ‘Water and Sanitation for All’. 3. Dublin Statement Principle 4 of the Dublin Conference on Water and Sustainable Development explicitly reaffirmed the human right to water: “… it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.” 4. Agenda 21 Agenda 21, the blueprint for sustainable development, is possibly the primary non-binding international environmental legal instrument. Chapter 18 on freshwater notes that a right to water entails three elements: access, quality and quantity, including not only a “general objective …to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet”31, but also to provide that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic human needs.”32 Overall, an integrated approach is promoted throughout the chapter, which emphasises the three elements of sustainable development as equally important; water is to be viewed as “a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization.”33 5. Millennium Declaration and Political Declaration of Johannesburg Both the Millennium Declaration and the discourse adopted at the recent World Summit on Sustainable Development (WSSD) enhance the possibility of linking environmental health with human development goals in the global effort to eliminate poverty. However, WSSD –together with the World Water Forums (Hague, Bonn, and Kyoto) – failed to expressly recognise a fundamental human right to water. The indivisibility of human dignity and a right to water has been included in the Political Declaration of the World Summit on Sustainable Development through the commitment “to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity…”34 Regional arrangements Regionally too, there are numerous legal instruments which explicitly or implicitly recognise a right to water and again, the reader is referred to Appendix I for a more comprehensive list. 1. ECEL Resolution The European Council of Environmental Law (ECEL) Resolution on the right to water,35 forms yet another definitive link between human rights and water and “consider[s] that access to water is part of a sustainable development policy and cannot be regulated by market forces alone”, and “consider[s] that the right to water cannot be dissociated from the right to food and the right to housing which are recognized as human rights and that the right to water is also closely linked to the right to health.”36 Art. 1 of the Resolution states “[e]ach person has the right to water in sufficient quantity and quality for his life and health.” 2. ECE Protocol The European Commission of the United Nations for Europe (ECE) Protocol on Water and Health to the 1992 Convention on the Use of Transboundary Watercourses and International Lakes specifically states that “[p]arties shall, in particular, take all appropriate measures for the purpose of ensuring: (a) adequate supplies of wholesome drinking water …; (b) adequate sanitation …”.37 It mentions the three central aspects of a human right to water, stating that “…equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”38 Access to water and sanitation services are reinforced in Art. 6(1), which provides that “the Parties shall pursue the aims of: (a) access to drinking water for everyone; (b) provision of sanitation for everyone”. 3. African Charters There are a few instruments specific to the African region, such as the African Charter on Human and People's Rights, which notes broadly that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development”,39 and the African Charter on the Rights and Welfare of the Child, which states that “every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health”40 and States Parties are required to take measures “to ensure the provision of adequate nutrition and safe drinking water...”41 4. Protocol of San Salvador Art. 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights provides that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.” It is undoubtable that basic public services include water supply and sanitation: a report made by the Inter-American Commission on the human rights situation of Brazil clearly proves this by claiming that “there was inequality in the access to basic public services: 20.3% of the population have no access to potable water and 26.6% lack access to sanitary services…”42 B. Customary international law The development of environmental law as a recognised body of law has created an additional source of law for analysis of the existence of a right to water. This is because uniform State practice may provide evidence of opinio juris. It is appropriate to consider national constitutions as a source of an emerging right to water and court interpretations of fundamental rights contained in those constitutions. Whilst over 60 constitutions refer to environmental obligations, less than one-half expressly refer to the right of its citizens to a healthy environment. 43 Only the South African Bill of Rights enshrines an explicit right of access to sufficient water.44 In view of the aforegoing, a position that a uniform constitutional practice has emerged is rather doubtful, especially considering the fact that despite the increasing prevalence of constitutional environmental norms, most countries have yet to interpret or apply such norms.45 In many countries, particularly those with a civil law tradition, traditionally constitutional **rights were not regarded as being self-executing; legislation was required to implement a constitutional provision and to empower a person to invoke protections.** However, with the rise of constitutionalism globally, courts increasingly view the constitution as an independent source of rights, enforceable even in the absence of implementing legislation.46 Thus, courts could and do rely on the environmental provisions of their constitutions when protecting water from pollution or ensuring access to water to meet basic human needs. Where constitutions lack environmental provisions, reliance has been placed on the right to life, a provision contained in most constitutions worldwide. Constitutions many times incorporate ‘penumbral rights’, rights that are not explicitly mentioned in the constitution, but are consistent with its principles and existing rights.47 These rights could easily adopt emerging fundamental human rights. Both civil and common-law countries have incorporated the ‘Public Trust Doctrine’ in their constitutions.48 The doctrine dates back to the Institutes of Justinian (530 A.D.) and requires governments to protect certain resources, like water, that the government holds in trust for the public.49 Many of the US state constitutions have incorporated this doctrine, and courts in at least five states have used them to review state action.50 Similarly, Indian and Sri Lankan courts have relied on the doctrine to protect the environment. In the M.C. Mehta v. Kamal Nath Case 51 (1977), which concerned the diversion of a river's flow, the Supreme Court held that the government violated the public trust by leasing the environmentally sensitive riparian forest land to a company. In a landmark decision concerning the Eppawela Phosphate Mining Project, the Sri Lankan Supreme Court said that the ‘Public Trust Doctrine’ on which the petitioners depended was “comparatively restrictive in scope”. The court instead put forward a broader doctrine revolving around “Public Guardianship” to protect the site of an ancient kingdom and agricultural lands, and prevent the forced relocation of residents in Sri Lanka's North Central Province. The Court said that “[t]he organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people.”52 In many cases, courts have applied the provisions of the right to life, environment, etc. where an environmentally destructive activity directly threatened people's health and life. The cases set out in Appendix II show that while there might not be a constitutional right to water, courts have been prepared to liberally interpret existing constitutional provisions. C. Judicial decisions Recent decisions show that recognition of a human right to water, though not recognised within the law of nations per se, is an emerging trend. In the Gabcikovo-Nagymaros Case53 (1997), Judge Weeramantry wrote that “[t]he protection of the environment is…a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself…damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”54 While there is no express recognition, human rights courts have been prepared to be creative and liberally interpret existing provisions in their decisions. The following shows how water has been recognised as an integral part of several fundamental human rights.

ICCPR critical to recognition and enforcement of a global right to water

Huang, 8

(JD-University of Florida, “Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water,” 20 Fla. J. Int'l L. 353, December, Lexis)

Currently amidst the United Nations proclaimed Decade of Water for Life, n1 a vast sector of the world's population still lacks daily access to sources of clean water for personal and domestic use. n2 Despite the universal necessity of water for basic survival and minimal living conditions, a codified right to water does not presently exist in the international legal sphere. Although the right may be derived from many human rights treaties or non-binding declarations, States have seldom recognized an explicit right to water. Yet as the dialogue on climate [\*354] change and other meteorological variations has increased, the movement toward codifying a right to water has simultaneously gained momentum. However, the question remains: why is it necessary to codify a human right to water? Left to the accretion of State practice n3 over time, development of customary international law may compensate for the silence on water rights-an unsatisfactory answer for the billions of people who face water deprivation and poverty as dual obstacles. Projected global populations will increasingly strain water resources, potentially leading to greater conflicts over this precious natural resource. Conflicts have already arisen in parts of the Middle East and sub-Saharan Africa and even include conflicts between humans and native fauna. n4 In addition to increased water consumption in the agricultural and industrial sectors, consumption will only rise further with the rapid industrialization of developing countries. n5 Other development issues include mismanagement of water and ecological resources, such as a lack of adequate water institutions, fragmented institutional structures, and short-sighted water policies. n6 The ecological consequences of water mismanagement are equally detrimental. Draining wetlands decreases water retention and recycling capacity; n7 and contaminated runoff and pollution of natural waterbodies foreclose human use. n8 The destruction of ecological habitats contributes [\*355] to the increase of greenhouse gases and further exacerbates projected temperature increases. n9 Projections indicate a disproportionate increase of volatile weather patterns across the globe. n10 Increased severity of floods, such as those in India, will cause greater contamination of water sources and speed the spread of disease, n11 while other areas will experience corresponding drought and desertification. n12 The legal motivations to codify a right to water are equally compelling. State obligations and duties would be clearly identifiable, as would subsequent violations. Under a right to water, a State could not condone policies that discriminate against individuals based on their economic level or housing status. Yet the current failure to recognize a human right to water also does not provide any legal recourse or access for individuals whose rights are being violated. As a codified right, domestic and international legal institutions provide relief for violations by a State. n13 Currently, violations of a right to water are linked to other rights in order to provide a remedy. Codifying a right to water would spare this rhetorical gymnastics and hold states accountable for specific violations. II. Defining a Human Right to Water That water is an undisputed necessity for life attests to the need to protect a right to water for all. However, the importance of water in the current global order extends beyond its biological and ecological importance. Access to safe drinking water has transformed into a political, economic, and social issue at all levels. Underlying many of the political tensions in the Middle East are conflicts over water and water use among neighboring countries, such as Jordan, Israel, Syria, and Lebanon that dispute the use of the Jordon River. n14 The health implications are also significant; investments in water quality and sanitation can yield net [\*356] economic benefits as a result of improved health conditions and reduced health-care costs. n15 Although the primary international human rights texts do not explicitly recognize a human right to water, n16 **this right is clearly implied in and derived from the provisions of the** International Covenant on Civil and Political Rights (**ICCPR)** and the International Covenant of Economic, Social, and Cultural Rights (ICESCR). n17 For example, Articles 6 and 7 of the ICCPR guarantee the "inherent right to life" and freedom from "torture or to cruel, inhuman, or degrading treatment," respectively. n18 Water is essential to the full realization of these Articles, for deprivation of water may amount to deprivation of life or inhumane treatment. Moreover, Articles 21 and 25 of the ICCPR guarantee the right of peaceful assembly and the right to participate in public life, both of which relate to the monitoring, surveillance, and advocacy aspects of water management and a human right to water. n19

Legal recognition of the right to water key to solve water shortages and de-escalate conflicts

Gleick, 7

(President- Pacific Institute for Studies in Development, Environment, and Security, “The Human Right to Water,” May, http://www.pacinst.org/reports/human\_right\_may\_07.pdf)

What is the point or advantage of explicitly acknowledging such a right? Even if the human right to water is formally accepted, what is the advantage of such an acknowledgment? After all, despite the declaration of a formal right to food, nearly a billion people remain undernourished. Let me offer five reasons for acknowledging a human right to water: 1. Acknowledging a right to water would **encourage the international community and individual governments to renew their efforts to meet basic water needs of their populations**. 2. By acknowledging a right to water, pressures to **translate that right into specific national and international legal obligations** and responsibilities are much more likely to occur. As Richard Jolly of the United Nations Development Programme noted: To emphasize the human right of access to drinking water does more than emphasize its importance. It grounds the priority on the bedrock of social and economic rights, it emphasizes the obligations of states parties to ensure access, and it identifies the obligations of states parties to provide support internationally as well as nationally. 3. Acknowledging a right to water maintains a spotlight of attention on the deplorable state of water management in many parts of the world. 4. Acknowledging a right to water helps **focus attention on the need to more widely address international watershed disputes and to resolve conflicts over the use of shared water** by identifying minimum water requirements and allocations for all basin parties. 5. Explicitly acknowledging a human right to water can help set specific priorities for water policy. In particular, meeting a basic water requirement for all humans to satisfy this right should take precedence over other water management and investment decisions. What are the implications of a human right to water? A right to water cannot imply a right to an unlimited amount of water, nor does it require that water be provided for free. Water availability is limited by resource constraints, the need to maintain natural ecosystems, and economic and political factors. Given such constraints on water availability, how much water is necessary to satisfy this right? Enough solely to sustain a life? Enough to grow all food sufficient to sustain a life? Enough to maintain a certain economic standard of living? Answers to these questions come from international discussions over development, analysis of the human rights literature, and an understanding of human needs and uses of water. These lead to the conclusion that a human right to water most logically applies only to basic needs for drinking, cooking, and fundamental domestic uses. Both the 1977 Mar del Plata statement and the 1986 UN Right to Development set a goal of meeting basic needs. The concept of meeting basic water needs was strongly reaffirmed during the 1992 Earth Summit in Rio de Janeiro. In developing and using water resources, priority has to be given to the satisfaction of basic needs … The Comprehensive Assessment of the Freshwater Resources of the World prepared for the Commission on Sustainable Development of the UN stated: All people require access to adequate amounts of clean water, for such basic needs as drinking, sanitation and hygiene. The UN Convention on the Law of the Non-Navigational Uses of International Watercourses, approved by the General Assembly on May 21, 1997, also explicitly addresses this question of water for basic human needs. Article 10 states that in the event of a conflict between uses of water in an international watercourse, special regard shall be given “to the requirements of vital human needs.” The states negotiating the Convention included in the Statement of Understanding accompanying it an explicit definition that: In determining ‘vital human needs’, special attention is to be paid to providing sufficient water to sustain human life… At what cost should this water be provided? Free? Full economic cost? Here the human rights literature is of little help, but the international water community is increasingly clear about the economics of water. I believe that water should be paid for, even basic water requirements, but that when a basic water requirement cannot be paid for by individuals – for reasons of poverty, emergency, or circumstance – it is still the responsibility of local communities, local governments, or national governments to provide that basic water requirement though subsidies or outright entitlement. Conclusion The failure to meet the most basic water requirements of billions of people has resulted in enormous human suffering and tragedy. It may be remembered as the 20th Century’s greatest failure. Reviewing evidence of international law, declarations of governments and international organizations, and state practices, **access to a basic water requirement must be considered a fundamental human right**. Let me offer a possible formulation appropriate to the existing human rights declarations: All human beings have an inherent right to have access to water in quantities and of a quality necessary to meet their basic needs. This right shall be protected by law. Will the recognition of the human right to water actually improve conditions worldwide? Perhaps not. The challenge of meeting human rights obligations in all areas is a difficult one that has been inadequately and incompletely addressed. But the imperatives to meet basic human water needs are more than just moral, they are rooted in justice and law and the responsibilities of individuals and governments. A first step toward meeting a human right to water would be for governments, water agencies, and international and local organizations to guarantee all humans the most fundamental of basic water needs and to work out the necessary institutional, economic, and management strategies necessary for meeting those basic needs, quickly and completely.

Water scarcity is increasing – it short-circuits cooperation in every region

Dinar et al 10/18/12

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In short, predictions of a Water World War are overwrought. However, tensions over water usage can still exacerbate other existing regional conflicts. Climate change is expected to intensify droughts, floods, and other extreme weather conditions that jeopardize freshwater quantity and quality and therefore act as a threat-multiplier, making shaky regions shakier. So what river basins constitute the biggest risks today? In a World Bank report we published in 2010 (as well as a subsequent article in a special issue of the Journal of Peace Research) we analyzed the physical effects of climate change on international rivers. We modeled the variability in river annual runoff in the past and for future climate scenarios. We also considered the existence and nature of the institutional capacity around river basins, in the form of international water treaties, to potentially deal with the effects of climate change. According to our research, 24 of the world's 276 international river basins are already experiencing increased water variability. These 24 basins, which collectively serve about 332 million people, are at high risk of water related political tensions. The majority of the basins are located in northern and sub-Saharan Africa. A few others are located in the Middle East, south-central Asia, and South America. They include the Tafna (Algeria and Morocco), the Dasht (Iran and Pakistan), the Congo (Central Africa), Lake Chad (Central Africa), the Niger (Western Africa), the Nile (Northeastern Africa), and the Chira (Ecuador and Peru). There are no strong treaties governing the use of these water reserves in tense territories. Should conflicts break out, there are no good mechanisms in place for dealing with them. By 2050, an additional 37 river basins, serving 83 million people, will be at high risk for feeding into political tensions. As is the case currently, a large portion of these are in Africa. But, unlike today, river basins within Central Asia, Eastern Europe, Central Europe, and Central America will also be at high risk within 40 years. Some of these include the Kura-Araks (Iran, Turkey, and the Caucasus), the Neman (Eastern Europe) Asi-Orontes (Lebanon, Syria, Turkey), and the Catatumbo Basins (Colombia and Venezuela). CROSSING THE NILE Among the larger African basins, the Nile has the greatest implications for regional and global security. Tensions over access to the river already pit Ethiopia and Egypt, two important Western allies, against one another. Egypt has been a major player in the Middle East Peace Process and Ethiopia is an important regional force in the Horn of Africa, currently aiding other African forces to battle Al-Shabbab in Somalia. Over the years, a number of international water treaties have made rules for the basin, but they are largely limited to small stretches of it. In particular, only Egypt and Sudan are party to the 1959 Nile River Agreement, the principal treaty regarding the river. Egypt, which is the furthest downstream yet is one of the most powerful countries in the region, has been able to heavily influence the water-sharing regime. Upstream countries, such as Ethiopia and Burundi, have been left out, hard-pressed to harness the Nile for their own needs. In 1999, with increasingly vitriolic rhetoric between Egypt and Ethiopia sidetracking regional development, the World Bank stepped up its involvement in the basin. It helped create a network of professional water managers as well as a set of investments in a number of sub-basins. Still, the drafting of a new agreement stalled: upstream countries would not compromise on their right to develop water infrastructure while downstream countries would not compromise on protecting their shares. In 2010, Ethiopia signed an agreement with a number of the other upstream countries hoping to balance against Egypt and Sudan. More recently, the country has also announced plans to construct a number of large upstream dams, which could affect the stability of the region. By 2050, the environmental state of the Nile Basin will be even worse. That is why it is important to create a robust and equitable water treaty now. Such a treaty would focus on ways to harness the river's hydropower potential to satiate the energy needs of all the riparian states while maintaining ecosystem health. The construction of dams and reservoirs further upstream could likewise help even out water flows and facilitate agricultural growth. Projects such as these, mitigating damage to ecosystem health and local populations, would benefit all parties concerned and thus facilitate further basin-wide cooperation. UP IN THE ARAL Another water basin of concern is the Aral Sea, which is shared by Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. The basin consists of two major rivers, the Syr Darya and Amu Darya. During the Soviet era, these two rivers were managed relatively effectively. The break-up of the Soviet Union, however, ended that. The major dispute now is between upstream Kyrgyzstan and downstream Uzbekistan over the Syr Darya. During the winter, Kyrgyzstan needs flowing water to produce hydroelectricity whereas Uzbekistan needs to store water to later irrigate cotton fields. The countries have made several attempts to resolve the dispute. In particular, downstream Uzbekistan, which is rich in fuel and gas, has provided energy to Kyrgyzstan to compensate for keeping water in its large reservoirs until the cotton-growing season. Such barter agreements, however, have had limited success because they are easily manipulated. Downstream states might deliver less fuel during a rainy year, claiming they need less water from upstream reservoirs, and upstream states might deliver less water in retaliation. Kyrgyzstan, frustrated and desperate for energy in winter months, plans to build mega hydro-electric plants in its territory. And another upstream state, Tajikistan, is likewise considering hydro-electricity to satiate its own energy needs. Meanwhile, Uzbekistan is building large reservoirs. Although these plans might make sense in the very near term, they are inefficient in the medium and long term because they don't solve the real needs of downstream states for large storage capacity to protect against water variability across time. In fact, both Kyrgyzstan and Uzbekistan, along with Kazakhstan, will see substantial increases in water variability between now and 2050. And so, the need to share the benefits of existing large-capacity upstream reservoirs and coordinate water uses through strong and more efficient inter-state agreements is unavoidable. A stabilized Aral Sea basin would also benefit the United States. With its withdrawal from Afghanistan, Washington has been courting Uzbekistan as a potential alternative ally and provider of stability in the region. The Uzbek government seems willing to host U.S. military bases and work as a counter-weight to Russia. Kyrgyzstan is also an important regional player. The Manas Air Base, the U.S. military installation near Bishkek, is an important transit point. The country is also working with the United States to battle drug trafficking and infiltration of criminal and insurgent groups. Regional instability could disrupt any of these strategic relationships. If the past is any indication, the world probably does not need to worry about impending water wars. But they must recognize how tensions over water can easily fuel larger conflicts and distract states from other important geopolitical and domestic priorities. Since formal inter-state institutions are key to alleviating tensions over shared resources, it would be wise, then, for the involved governments as well as the international community to negotiate sufficiently robust agreements to deal with impending environmental change. Otherwise, freshwater will only further frustrate stability efforts in the world's volatile regions.

That causes wars

Reilly ‘2

(Kristie, Editor for In These Times, a nonprofit, independent, national magazine published in Chicago. We’ve been around since 1976, fighting for corporate accountability and progressive government. In other words, a better world, “NOT A DROP TO DRINK,” <http://www.inthesetimes.com/issue/26/25/culture1.shtml>)

\*Cites environmental thinker and activist Vandana Shiva Maude Barlow and Tony Clarke—probably North America’s foremost water experts

The two books provide a chilling, in-depth examination of a rapidly emerging global crisis. “Quite simply,” Barlow and Clarke write, “unless we dramatically change our ways, between one-half and two-thirds of humanity will be living with severe fresh water shortages within the next quarter-century. … The hard news is this: Humanity is depleting, diverting and polluting the planet’s fresh water resources so quickly and relentlessly that every species on earth—including our own—is in mortal danger.” The crisis is so great, the three authors agree, that the world’s next great wars will be over water. The Middle East, parts of Africa, China, Russia, parts of the United States and several other areas are already struggling to equitably share water resources. Many conflicts over water are not even recognized as such: Shiva blames the Israeli-Palestinian conflict in part on the severe scarcity of water in settlement areas. As available fresh water on the planet decreases, today’s low-level conflicts can only increase in intensity.

The plan also results in adherence to the convention against torture, that’s an inviolable human right

CVT 13, Center for Victims Against Torture, the center for victims of torture policy report: u.s. bi-partisan leadership against torture, April, <http://www.cvt.org/sites/cvt.org/files/downloads/Report_Bipartisan%20Leadership%20Against%20Torture_April%202013.pdf>

The United States, as a democratic society that respects the rule of law, has an interest in abiding by its legal obligation under both international and domestic law to uphold the absolute prohibition against torture. Additionally, the United States has both a foreign policy and national security interest in being a global leader on human rights generally, and a leader in combatting torture specifically. Generally, U.S. global leadership on human rights promotes good will and cooperation from allies and world citizens in furtherance of U.S. interests. More specifically, U.S. leadership on combatting torture helps to build democratic societies and institutions abroad – where often, torture is used to repress and destroy democratic freedoms. Additionally, because of the U.S. economic, military and political power on the world stage, U.S. global leadership against torture has serious ramifications for the torture movement and survivors’ healing worldwide. INTERNATIONAL AND U.S. DOMESTIC LEGAL OBLIGATIONS The absolute prohibition against torture is a universally recognized legal obligation under international law from which no exception is ever permitted. In addition to the Convention Against Torture, torture is unequivocally banned under the Universal Declaration of Human Rights,26 International Covenant on Civil and Political Rights,27 Geneva Conventions,28 and in every regional human rights treaty.29 Indeed, the prohibition against torture is well established under customary international law as a legal norm in which no country can derogate.30 Torture is also banned under U.S. law under the federal Anti-Torture Act,31 the War Crimes Act,32 and the Detainee Treatment Act.33 Torture also violates rights established under the U.S. Constitution, including the Eighth Amendment’s right to be free of cruel or unusual punishment.34 As the U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor, Harold Koh, testified to a United Nations committee: "Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government—federal, state, or local, civilian or military—is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture."35 The United States has long embraced the principles and values underpinning democratic societies such as justice, fairness and individual rights. Enforcing and upholding the rule of law is an essential pillar of democracy. The U.S., therefore, should embrace its international and domestic obligations to prohibit torture. As Koh wrote in 2008, “Official cruelty has long been considered both illegal and abhorrent to our values and constitutional traditions. The commitment to due process and the ban against cruel and unusual punishment are legal principles of the highest significance in American life.” 36 Furthermore, international treaties are a practical step toward creating international cooperation and consensus toward a more stable world. Reducing risk and creating a more manageable global community are in the United States’ interest. William H. Taft, IV, Legal Adviser for the U.S. State Department, under President George W. Bush, warned “A decision that the [Geneva] Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.”37 U.S. FOREIGN POLICY The U.S. State Department has repeatedly acknowledged that U.S. funding to the UN Voluntary Fund for Victims of Torture “supports the U.S. foreign policy goal of promoting democracy and human rights.”38 In 2002, the U.S. State Department affirmed, “The use of torture presents a formidable obstacle to establishing and developing accountable democratic governmental institutions. Assisting torture victims helps establish and reinforce a climate of respect for the rule of law, good governance and respect for human rights.”39 Moreover, the United States needs to engage the international community on many complex issues requiring multilateral cooperation. U.S. leadership to promote and protect human rights encourages political, military, and intelligence cooperation from our allies. By contrast, U.S. engagement in torture and abuse discourages cooperation from allies and international partners critical to furthering interests abroad. Prior to the Bush Administration deciding that the Geneva Conventions did not apply to the conflict in Afghanistan, Secretary of State Colin L. Powell argued that the advantages of applying the Geneva Conventions to the conflict in Afghanistan far outweighed their rejection because declaring the conventions inapplicable "has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.”40 He also said it would "undermine public support among critical allies"41 and that “Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.”42 Indeed, in testimony before the Senate Armed Services, U.S. Navy General Counsel Alberto Mora (who served in this capacity during the first George W. Bush Administration) recounted that the U.S.’s decision “to adopt cruelty has had devastating foreign policy consequences” that would “inevitably damage [U.S.] national security strategy and [U.S.] operational effectiveness in the War on Terror.”43 He added, “International cooperation, including in the military, intelligence, and law enforcements arenas, diminished as foreign officials became concerned that assisting the U.S. in detainee matters could constitute aiding and abetting criminal conduct in their own countries.”44 U.S. NATIONAL SECURITY U.S. national security interests are also furthered when the United States leads on human rights and combatting torture by promoting good will and winning hearts and minds of local populations – efforts that are critical to counter-insurgency and counterterrorism efforts. Likewise, these efforts are essential to building and sustaining international support and cooperation with allied nations. The Senate Armed Services Committee found that: “The collection of timely and accurate intelligence is critical to the safety of U.S. personnel deployed abroad and to the security of the American people here at home. The methods by which we elicit intelligence information from detainees in our custody affect not only the reliability of that information, but our broader efforts to win hearts and minds and attract allies to our side.”45 In fact, in testifying before Congress that U.S. mistreatment caused damaged to U.S. national security interest at an operational level, U.S. Navy General Counsel Alberto Mora cited specific examples in which allies “hesitated on occasion to participate in combat operations” and “refused on occasion to train with [the U.S.] in joint detainee capture and handling operations” because of concerns with U.S. treatment of detainees and detention policies.46 He also stated that senior NATO officers in Afghanistan reportedly “left the room when issues of detainee treatment [were] raised by U.S. officials out of fear that they may become complicit in detainee abuse.”47 As stated by then Senator John Kerry in 2008, “Most of us can agree that sometimes, in the name of national security, it is necessary to make difficult ethical decisions to protect the American people. However, the administration's dangerous and counterproductive choice to employ torture has severely weakened our ability to win the struggle against extremism. It has also wasted our greatest asset: our moral authority.”48 Moreover, engaging in practices of torture and cruelty serves as a recruitment tool for U.S. enemies and discourages enemies from surrendering. The Senate Armed Services Committee found that“[t]reating detainees harshly only reinforces that distorted view, increases resistance to cooperation, and creates new enemies.”49 In testifying before Congress, U.S. Navy General Counsel Alberto Mora stated, “There are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq -- as judged by their effectiveness in recruiting insurgent fighters into combat -- are, respectively the symbols of Abu Ghraib and Guantanamo.”50 Similarly, General Raymond Odierno, commander of U.S. troops in Iraq, stated, “The graphic revelations of detainee abuse motivated some terrorists including foreign fighters from Syria, Yemen and Saudi Arabia to join the jihad.”51 SPILL-OVER “JUSTIFICATIONS” AND DANGEROUS PRECEDENT When the United States engages in torture and abuse in the name of national security, it provides justifications for other governments and oppressive regimes to do the same against innocent civilians, journalists, democracy activists, people seeking to practice their own religion, and even puts U.S. troops in danger. CVT has seen strikingly similar patterns worldwide among different leaders – left and right- who rationalize the use of torture by dehumanizing the victim, citing national emergencies and security as justification, and assuming an ability to produce a desired outcome through fear and violence. When crises arise that prove beyond the scope of leaders’ imaginations and/or resources, desperate measures are often supposed necessary. Moreover, when the U.S. government openly violated its international legal obligations, it set a dangerous precedent not only on the issue of torture, but for the broader notion that those duties are optional. U.S. government policies and practices weakened international human rights instruments designed to end torture (the CAT and the Geneva Conventions). Flagrant disregard for treaties and conventions that the U.S. has ratified has profound implications for the global community’s efforts to secure support for international norms. By flouting these obligations, the United States also delivered an implicit message that torture, once seen as the tool of despotic regimes, could be shaped to look like legitimate component of a democratic government’s national defense. Furthermore, the United States’ practice of torture places U.S. troops in danger should they be captured. In remarks on the floor of the U.S. Senate, Senator John McCain cautioned, “… if America uses torture, it could someday result in the torture of American combatants.”52 He went on to warn that the United States should “…be careful that we do not set a standard that another country could use to justify their mistreatment of our prisoners.” 53 HEALING FOR TORTURE SURVIVORS AROUND THE WORLD Whenever laws banning torture are upheld, a message is transmitted to repressive governments and victims seeking an end to impunity wherever it exists. Leaders and ordinary citizens learn that, in some places, those who violate human rights are held responsible. By contrast, the cost of impunity for survivors is enormous. For CVT clients, accountability for perpetrators is intertwined with the healing process and their struggle to make sense of their suffering. The recovery process is made more challenging when the person who committed the violence against them still walks free. In response to reports that the United States was using torture and cruelty on detainees, an unprecedented number of retired military leaders spoke out publicly against these policies, and Congress held hearings and attempted to repair the damage by passing the McCain Amendment, requiring all Department of Defense personnel and facilities to use the guidelines set forth in the U.S. Army Field Manual as the minimum standards for the treatment of detainees. Other important steps include the public release of the Senate Armed Services Committee’s Inquiry into the Treatment of Detainees in U.S. Custody, the Office of Legal Counsel Memos authorizing torture, and the CIA Inspector General Report. But perhaps the most significant step taken by the United States was on January 22, 2009, when President Obama signed an Executive Order banning torture and cruelty and closing CIA black sites. Nevertheless, important work remains to be done. The U.S. national consensus against torture has been eroded. In a climate of extreme fear and deep anxiety about our national security, the need for, efficacy of and moral justifications for torture and cruelty were distorted. Many Americans have been led to believe that we must abide by torture and cruelty to keep our families safe. Furthermore, the U.S. government has not, to date, conducted a thorough investigation into sound evidence of torture and cruelty as required by the CAT. Article 12 of the CAT states: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Accountability has been inaccurately framed as a divisive partisan battle. Recall, however, that it was President Reagan who noted in his transmission of the Convention to the Senate that its strength was in its provisions to criminally prosecute perpetrators under the principle of universal jurisdiction. Moreover, from the perspective of those who provide care to torture survivors, this is not a political question. We see both the compelling public policy reasons – ending impunity is a powerful deterrent—as well as the profound, far-reaching effects on the lives of our clients. Whenever atrocities are committed, there is often a desire to avoid unearthing the uncomfortable and to instead move forward. Yet, in doing so, we allow the culture of impunity to persist and miss an opportunity to prevent future abuses. In order for the United States to regain its historical commitment to supporting the international ban on torture and cruelty, it must fully examine and account for its recent past unlawful policies and practices of torture and official cruelty. To this end, the United States must ensure it does not return to illegal policies of torture and cruelty; it must fully investigate credible allegations of abuse; it must prosecute those who authorize, order, or engage in acts of torture; it must provide torture survivors an effective right to a remedy; and it should continue to rehabilitate torture survivors worldwide. Until the United States comes to terms with its own use of torture post 9/11, it cannot be and will not be seen to be a credible force for human rights.

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

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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

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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.

**Simulation of national security law debates is the best pedagogical approach—inculcates agency 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

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.

Specifically true in the context of contemporary detention law

Marguiles 11, Professor of Law

[February 9, 2011, Peter Margulies is Professor of Law, Roger Williams University., “The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education’s Responses to Terrorism”Journal of Legal Education, Vol. 60, p. 373, 2011, Roger Williams Univ. Legal Studies Paper No. 100]

If timidity in the face of government overreaching is the academy’s overarching historical narrative,1 responses to September 11 broke the mold. In what I will call the first generation of Guantánamo issues, members of the legal academy mounted a vigorous campaign against the unilateralism of Bush Administration policies.2 However, the landscape has changed in Guantánamo’s second generation, which started with the Supreme Court’s landmark decision in Boumediene v. Bush,3 affirming detainees’ access to habeas corpus, and continued with the election of Barack Obama. Second generation Guantánamo issues are murkier, without the clarion calls that marked first generation fights. This Article identifies points of substantive and methodological convergence4 in the wake of Boumediene and President Obama’s election. It then addresses the risks in the latter form of convergence. Substantive points of convergence that have emerged include a consensus on the lawfulness of detention of suspected terrorists subject to judicial review5 and a more fragile meeting of the minds on the salutary role of constraints generally and international law in particular. However, the promise of substantive consensus is marred by the peril of a methodological convergence that I call dominant doctrinalism. Too often, law school pedagogy and scholarship squint through the lens of doctrine, inattentive to the way that law works in practice.6 Novel doctrinal developments, such as the president’s power to detain United States citizens or persons apprehended in the United States, get disproportionate attention in casebooks and scholarship. In contrast, developments such as an expansion in criminal and immigration law enforcement that build on settled doctrine get short shrift, even though they have equal or greater real-world consequences. Consumers of pedagogy and scholarship are ill-equipped to make informed assessments or push for necessary changes. If legal academia is to respond adequately to second generation Guantánamo issues, as well as issues raised by any future attacks, it must transcend the fascination with doctrine displayed by both left and right, and bolster its commitment to understanding and changing how law works “on the ground.” To combat dominant doctrinalism and promote positive change, this Article asks for greater attention in three areas. First, law schools should do even more to promote clinical and other courses that give students first-hand experience in advocacy for vulnerable and sometimes unpopular clients, including the need for affirming their clients’ humanity and expanding the venue of advocacy into the court of public opinion.7 Clinical students also often discover with their clients that legal rights matter, although chastened veterans of rights battles like Joe Margulies and Hope Metcalf are correct that victories are provisional and sometimes pyrrhic.8 Second, legal scholarship and education should encourage the study of social phenomena like path dependence—the notion that past choices frame current advocacy strategies, so that lawyers recommending an option must consider the consequences of push-back from that choice. Aggressive Bush Administration lawyers unduly discounted risks flagged by more reflective colleagues on the consequences of push-back from the courts. Similarly, both the new Obama Administration and advocates trying to cope with Guantánamo’s post-Boumediene second generation failed to gauge the probability of push-back from the administration’s early announcement of plans to close the facility within a year. In each case, unexpected but reasonably foreseeable reactions skewed the implementation of legal and policy choices. Students should learn more about these dynamics before they enter the legal arena. Third, teachers need to focus more on ways in which bureaucratic structures affect policy choices. For example, terrorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution who have been unable to press meritorious claims for refugee status and other forms of relief. Similarly, creation of the Department of Homeland Security turned a vital governmental function like disaster relief into a bureaucratic orphan, thereby paving the way for the inadequate response to Hurricane Katrina. Students need more guidance on what to look for when structure shapes substance.

**The plan creates unique pedagogical benefits by forcing us to build expertise on the details of national security policy, enabling change**

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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, § Marked 14:13 § 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.

## 2ac

### 2ac fiat da

No link to institutions

Michael Eber 5, former Director of Debate at Michigan State University, “Everyone Uses Fiat”, April 8th, [http://www.opensubscriber.com/message/edebate@ndtceda.com/1077700.html](http://www.opensubscriber.com/message/edebate%40ndtceda.com/1077700.html)

**It is shocking to me how**, after literally a DECADE of debates, **no one seems to understand *what the hell fiat is***. **Policy teams foolishly defend "role playing" even though *they do not role play*.** And critique teams reject fiat even though almost every single K alternative relies on a utopian imaginary that necessitates a greater degree of fiat than the reformist Aff. **Debate is about *opinion formation, not role-playing. Affirmative policy teams do not pretend to BE the federal government. They merely IMAGINE the consequences of the government enacting the plan as a means of determining whether it SHOULD be done***. **All fiat represents is the step of imagining hypothetical enactment of the plan as an intellectual tool for deciding whether WE should endorse it.**"**How should we determine whether or not to ENDORSE lifting sanctions on Cuba?**" "**Well, what would happen if the government did that**?" "**Let's** ***IMAGINE*** **a world where sanctions are lifted**. **What would that world look like? Would it be better than the status quo**?" "Is that world better than competitive alternatives?"***This conversation does NOT posit the discussants AS the federal government. They do not switch identities and act like Condaleeza*** and Rummy. ***They do not give up the agency to decide something for themselves - the whole point is simply to use the imagination of fiat to determine OUR OPINION.***"**I think sanctions should be removed [by the government] because IT IS A GOOD IDEA. It would save lives**." "I think sanctions should not be removed because that policy would help Castro and make things worse" ***It is nonsensical to***simultaneously ***say "Aff = fiat = bad"*** a**nd then defend alternatives that are only coherent/debatable/endorsable BY USING THE IMAGINITIVE TOOL** OF FIAT. "Our alternative is revolution against capitalism" "Why do that? How should we determine whether or not to ENDORSE revolution against capitalism?" "Well, what would happen if we did that?" "Let's IMAGINE a world of revolution against capitalism [or us demanding revolution, or whatever]. Would that be a good thing?" ***It is NEARLY IMPOSSIBLE, and certainly irresponsible, to have a debate about whether to reject capitalism without imagining what would happen if we did***. It is also incoherent to say something like "we will defend the consequences of our plan, but not fiat." ***The imagination of "what would happen if" IS FIAT.***If you want to make framework debates better, then never again utter the stupid phrases "pre-fiat" and "post-fiat."

The performances of the 1ac and 1nc are not exclusive – their arg that we should only seek to effectuate political change here and now is an excuse for dismissing the suffering of people outside the parochial circle of our immediate experience – the impact is ongoing violence and dictatorship

Nick Cohen 14, columnist for the Spectator, Noam Chomsky in the Crimea, March 3, <http://blogs.spectator.co.uk/nick-cohen/2014/03/chomsky-in-the-crimea/>

In short, the activist left will not tell its followers that we are witnessing imperialism: not ‘cultural imperialism’ or ‘neo-colonialism’ or any of those other catchall, thought-forbidding phrases, but the real thing.

Ukraine has not committed crimes against humanity, so there is no duty on foreign states to intervene to protect its citizens. It does not menace its neighbours or threaten the international order by seeking to obtain weapons of mass destruction. Moreover anyone with a sense of history knows that Putin is invading a region where the Russian empire in its Stalinist stage persecuted and deported native and Muslim Tartars.

Yet **the same people who are the first to shout ‘Islamophobia’ and pledge their allegiance to endangered minorities stay silent**. **Just as they stay silent about the Syrian atrocities, although they would have been the first to march if the West had intervened** after the Assad regime used chemical weapons.

Justifications for these hypocrisies are hard to find. Modern people admit to sexual behaviour their ancestors would have died rather than admit. But do not like to say that they are hypocrites, let alone explain their deceits. A few readers, however, have justified themselves by pointing to an argument by Noam Chomsky, in which he explained the double standards of his own career to his own satisfaction and the satisfaction of his easily pleased followers.

**The** Chomsky **apologia** is worth considering because it defends the rejection of universal values by millions of people in the rich world, many of whom will never have heard of Noam Chomsky, but feel as he does.

Chomsky divided his defence of concentrating his criticism on the West and ignoring crimes against humanity by others in two.

First, he **said that the U**nited **S**tates **was** the main cause of terror in the world – ‘the larger component of international violence’. I guess he lost many readers as soon as the words were out of his mouth. Before you dismiss them and say that Chomsky and his kind are hysterics, however, you must be careful not to make the same mistake as they do.

Human rights are not a competition. Western crimes are not diminished just because it is easy to prove that the United States or the West does not provide ‘the larger component of international violence’. To say in the Cold War that the West’s support of dictatorships in Latin America or Africa was not as bad as the crimes of Stalin, Mao or the Ethiopian colonels was back-covering relativism then. It put Western crimes into context but was meant to excuse them. **America today still supports dictatorships. Today, the fact that Western-backed Saudi Arabia is a better place to live than**, say, **communist, North Korea is** an irrelevance **both to Saudis and North Koreans**. In one area of coercive policy, meanwhile, America is as oppressive as any dictatorship. Per hundred thousand of population, its prison population is greater than Russia’s and far greater than China’s. That there is so little commentary on (let alone condemnation of) mass incarceration on a staggering scale shows how easily westerners accept an intolerable status quo, just because it has been like that for as long as anyone can remember.

**The way to avoid double standard is so clear I feel embarrassed pointing it out. You stick by your values** and praise or criticise without fear or favour. **Chomsky, however**, goes on to endorse double-standards. He presents a casuistic defence of hypocrisy, which many find comfort in. Even if, he says, America were responsible for only two per cent of the violence in the world rather than “the majority of it”, he **would still concentrate all his criticism on American crimes because as a US citizen he can do something about American policy, but nothing about the crimes of others**:

‘The ethical value of one’s actions depends on their anticipated and predictable consequences. It is very easy to denounce the atrocities of someone else. That has about as much ethical value as denouncing atrocities that took place in the 18th century.’

I will pass over the self-serving notion that Chomsky, brave man that he is, has taken the hard road while his opponents have chosen the easy life. It is not courageous to protest in a Western country against the actions of a Western government when Western societies protect your rights to protest, and to speak and to write freely. Instead you should consider the isolationist view conveyed by that glib little phrase “the atrocities of someone else”, which slips from his lips like a sneer.

**Although there is something to be said for the notion that protest, like charity, should begin at home**, **Chomsky’s argument turns into the left-wing equivalent of the right-wing belief that we should not give aid to the poor world**. **When you rule out concern for** the victims of ‘**the atrocities someone else’ you prohibit lobbying** **for Western states to take in** the **refugees** of ‘the atrocities of someone else’. **You rule out organising diplomatic pressure, and investigating** ‘the **atrocities** of someone else,’ **and prosecutions in the** international criminal court, **and sanctions**. In short, Chomsky rules out the idea of solidarity.

When solidarity goes, all kinds of contortions become possible. The worst elements of the Western left opposed Saddam Hussein, and wept hot tears for his victims. But when Saddam stopped being America’s de facto ally his crimes became “the atrocities of someone else,’ which they dismissed with a shrug. If Western governments were supporting Assad as a bulwark against radical Islam, the left would be marching against Baathist crimes. Equally, if NATO had intervened after Assad had used chemical weapons the left would also be marching – but this time against a ‘western war’.

As events have turned out, **the West has done nothing** worth mentioning in the Levant, **so the mass murder in Syria can be dumped in the file marked ‘the atrocities of someone else,’ and** forgotten.

**The lack of principle on display shows the breakdown of any coherent far left project**. We have seen alliances between western leftists and radical Islamists, even though radical Islam is a vicious movement of the religious right. **Now we are seeing left-wing defences of Putin**, even though Putin wants to make Russia a bulwark of reactionary politics.

I use the word ‘alliances’ because the **indifference** to ‘the atrocities of someone else’ Chomsky recommends always slips from neutrality to endorsement. Chomsky himself covered up for the intellectuals who justified the Serb atrocities against Bosnia’s Muslims. This morning we see the British anti-war movement declaring in favour of war when Russian troops march. The Economist has just denounced Britain’s part-time pacifists from the moral high ground – and when the Economist can look down on you from that exalted height anyone from the left should know that they are in trouble . How, it asks, is it

[The] job of an ‘anti-war’ movement is to attack its own passive government while parroting the arguments of a thuggish, illiberal power threatening its neighbour with invasion.

The only answer is the answer Chomsky provides: **the relativist Western left is interested only in the West, and cannot even think about ‘the atrocities of someone else’**.

**The people of the Ukraine** may not have much to be grateful for, but they **should be glad that they do not have the support of the relativist left**. Its principles are pliable. Its morality is parochial. For believers trapped in its ever-shifting ideology, **it is not enough that a stranger is a victim of oppression; they must be the victim of** the right sort **of oppression**. If they are the victims of the West, they have played their part well and are the Western left’s object of compassion. **If their country should have the misfortune to be invaded by Russia rather than the U**nited **S**tates, **their** sufferingsbecome as remote **and distant** as – what else? – the 18th century.

### at: rights = white

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

### at: settlers

The use of ‘tradition’ to prevent human rights is violent and wrong – we should oppose both settlers and indigenous people who advocate torture or privatize water resources or deny access to better schools

Graeme Reid 13, director of the LGBT Rights division at Human Rights Watch, “World Report 2013”, <https://www.hrw.org/sites/default/files/wr2013_web.pdf>

But a close look at the context from which this resolution arose reveals that traditional values are often deployed as an excuse to undermine human rights. And in declaring that “all cultures and civilizations in their traditions, customs, religions and beliefs share a common set of values,” the resolution invokes a single, supposedly agreed-upon value system that steamrolls over diversity, ignores the dynamic nature of traditional practice and customary laws, and undermines decades of rights-respecting progress for women and members of the lesbian, gay, bisexual, and transgender (LGBT) communities, among others. In countries around the world, Human Rights Watch has documented how discriminatory elements of traditions and customs have impeded, rather than enhanced, people’s social, political, civil, cultural, and economic rights. In Saudi Arabia, authorities cite cultural norms and religious teachings in denying women and girls the right to participate in sporting activities—“steps of the devil” on the path to immorality, as one religious leader called them (Steps of the Devil, 2012). In the United States in the early 1990s, “traditional values” was the rallying cry for evangelist Pat Robertson’s “Culture War”—code for opposition to LGBT and women’s rights that he claimed undermined so-called family values. Today, it is familiar rhetoric of the US religious right, which has used the same language to oppose gay marriage and to accuse political opponents of undermining tradition and “Western civilization.” And in Kenya, the customary laws of some ethnic communities discriminate against women when it comes to property ownership and inheritance; while some traditional leaders have supported transforming these laws, many others defend them as embodying “tradition” (Double Standards, 2003). As one woman told us, “They talk about African traditions, but there is no tradition you can speak of—just double standards.” International human rights law—including the Convention on the Elimination of All Forms of Discrimination against Women, and the Protocol to the African Charter of Human and Peoples’ Rights on the Rights of Women in Africa—calls for customary and traditional practices that violate human rights to be transformed to remove discriminatory elements. United Nations treaty monitoring committees, such as the Committee on the Rights of the Child (CRC) and the Committee Against Torture (CAT), have also stated that customs and traditions cannot be put forward as a justification for violating rights. UN Secretary-General Ban Ki-moon in June 2012 told the New York Human Rights Watch Film Festival, “In all regions of the world, LGBT people suffer discrimination—at work, at home, at school, in all aspects of daily life…. No custom or tradition, no cultural values or religious beliefs, can justify depriving a human being of his or her rights.” But such authoritative statements have done little to dampen growing support among UN member states for resolutions that support “traditional values.” Not only did September’s HRC resolution pass easily—with 25 votes for, 15 against, and 7 abstentions—it was the latest in a series of efforts that Russia has championed in an effort to formalize an abstract set of universal moral values as a lodestar for human rights. In October 2009, for example, the HRC passed a resolution calling for the UN high commissioner for human rights to convene an expert workshop “on how a better understanding of traditional values of humankind … can contribute to the promotion and protection of human rights.” And in March 2011, the council adopted a second resolution requesting a study of how “better understanding and appreciation of traditional values” can promote and protect these rights. Tradition need not be out of step with international human rights norms and standards. For many people living in rural areas, such as parts of sub-Saharan Africa, traditional values interpreted in customary law may be the only recourse to any form of justice. Nor is the substance of the HRC resolution all bad. It does not, for example, necessarily indicate a global consensus (many countries, including some from the developing world, did not support it), and its text specifically states that “traditions shall not be invoked to justify practices contrary to human dignity and that violate international human rights law.” But unfortunately, such language can seem out of touch with a reality in which “tradition” is indeed often used to justify discrimination and crackdowns on rights—especially those of women and members of the LGBT community, among others—and is easily hijacked by nations determined to flout the rights of particular groups and to quash broader social, political, and legal freedoms. In such environments, “tradition” subordinates human rights. It should be the other way around.

### body

Making the ballot about our so-called performance in its essence – the impact is violent confessions

Andrea Smith, Ph.D., co-founder of Incite! Women of Color Against Violence, UC Riverside Associate Professor, 2013, Geographies of Privilege, Unsettling the Privilege of Self-Reflexivity, Kindle

In my experience working with a multitude of anti-racist organizing projects over the years, I frequently found myself participating in various workshops in which participants were asked to reflect on their gender/race/sexuality/class/etc. privilege. These workshops had a bit of a self-help orientation to them: “I am so and so, and I have x privilege.” It was never quite clear what the point of these confessions were. It was not as if other participants did not know the confessor in question had her/his proclaimed privilege. It did not appear that these individual confessions actually led to any political projects to dismantle the structures of domination that enabled their privilege. Rather, the confessions became the political project themselves. The benefits of these confessions seemed to be ephemeral. For the instant the confession took place, those who do not have that privilege in daily life would have a temporary position of power as the hearer of the confession who could grant absolution and forgiveness. The sayer of the confession could then be granted temporary forgiveness for her/his abuses of power and relief from white/male/heterosexual/etc guilt. Because of the perceived benefits of this ritual, there was generally little critique of the fact that in the end, it primarily served to reinstantiate the structures of domination it was supposed to resist. One of the reasons there was little critique of this practice is that it bestowed cultural capital to those who seemed to be the “most oppressed.” Those who had little privilege did not have to confess and were in the position to be the judge of those who did have privilege. Consequently, people aspired to be oppressed. Inevitably, those with more privilege would develop new heretofore unknown forms of oppression from which they suffered. “I may be white, but my best friend was a person of color, which caused me to be oppressed when we played together.” Consequently, the goal became not to actually end oppression but to be as oppressed as possible. These rituals often substituted confession for political movement-building. And despite the cultural capital that was, at least temporarily, bestowed to those who seemed to be the most oppressed, these rituals ultimately reinstantiated the white majority subject as the subject capable of self-reflexivity and the colonized/racialized subject as the occasion for self-reflexivity. These rituals around self-reflexivity in the academy and in activist circles are not without merit. They are informed by key insights into how the logics of domination that structure the world also constitute who we are as subjects. Political projects of transformation necessarily involve a fundamental reconstitution of ourselves as well. However, for this process to work, individual transformation must occur concurrently with social and political transformation. That is, the undoing of privilege occurs not by individuals confessing their privileges or trying to think themselves into a new subject position, but through the creation of collective structures that dismantle the systems that enable these privileges. The activist genealogies that produced this response to racism and settler colonialism were not initially focused on racism as a problem of individual prejudice. Rather, the purpose was for individuals to recognize how they were shaped by structural forms of oppression. However, the response to structural racism became an individual one – individual confession at the expense of collective action. Thus the question becomes, how would one collectivize individual transformation? Many organizing projects attempt and have attempted to do precisely this, such Sisters in Action for Power, Sista II Sista, Incite! Women of Color Against Violence, and Communities Against Rape and Abuse, among many others. Rather than focus simply on one’s individual privilege, they address privilege on an organizational level. For instance, they might assess – is everyone who is invited to speak a college graduate? Are certain peoples always in the limelight? Based on this assessment, they develop structures to address how privilege is exercised collectively. For instance, anytime a person with a college degree is invited to speak, they bring with them a co-speaker who does not have that education level. They might develop mentoring and skills-sharing programs within the group. To quote one of my activist mentors, Judy Vaughn, “You don’t think your way into a different way of acting; you act your way into a different way of thinking.” Essentially, the current social structure conditions us to exercise what privileges we may have. If we want to undermine those privileges, we must change the structures within which we live so that we become different peoples in the process.

### at: state link

The state is not a Platonic entity – it is a configured social space where we can impose strategies – that’s why the 1ac method is not passive

Brubaker 4

Rogers Brubaker, Department of Sociology, UCLA, 2004, In the Name of the Nation: Reflectionson Nationalism and Patriotism, Citizenship Studies, Vol. 8, No. 2, [www.sailorstraining.eu/admin/download/b28.pdf](http://www.sailorstraining.eu/admin/download/b28.pdf)

This, then, is the basic work done by the category ‘nation’ in the context of nationalist movements—movements to create a polity for a putative nation. In other contexts, the category ‘nation’ is used in a very different way. It is used not to challenge the existing territorial and political order, but to create a sense of national unity for a given polity. This is the sort of work that is often called nation-building, of which we have heard much of late. It is this sort of work that was evoked by the Italian statesman Massimo D’Azeglio, when he famously said, ‘we have made Italy, now we have to make Italians’. It is this sort of work that was (and still is) undertaken—with varying but on the whole not particularly impressive degrees of success—by leaders of post-colonial states, who had won independence, but whose populations were and remain deeply divided along regional, ethnic, linguistic, and religious lines. It is this sort of work that the category ‘nation’ could, in principle, be mobilized to do in contemporary Iraq—to cultivate solidarity and appeal to loyalty in a way that cuts across divisions between Shi’ites and Sunnis, Kurds and Arabs, North and South.2

In contexts like this, the category ‘nation’ can also be used in another way, not to appeal to a ‘national’ identity transcending ethnolinguistic, ethnoreligious, or ethnoregional distinctions, but rather to assert ‘ownership’ of the polity on behalf of a ‘core’ ethnocultural ‘nation’ distinct from the citizenry of the state as a whole, and thereby to define or redefine the state as the state of and for that core ‘nation’ (Brubaker, 1996, p. 83ff). This is the way ‘nation’ is used, for example, by Hindu nationalists in India, who seek to redefine India as a state founded on Hindutva or Hinduness, a state of and for the Hindu ethnoreligious ‘nation’ (Van der Veer, 1994). Needless to say, this use of ‘nation’ excludes Muslims from membership of the nation, just as similar claims to ‘ownership’ of the state in the name of an ethnocultural core nation exclude other ethnoreligious, ethnolinguistic, or ethnoracial groups in other settings.

In the United States and other relatively settled, longstanding nation-states, ‘nation’ can work in this exclusionary way, as in nativist movements in America or in the rhetoric of the contemporary European far right (‘la France oux Franc¸ais’, ‘Deutschland den Deutshchen’). Yet it can also work in a very different and fundamentally inclusive way.3 It can work to mobilize mutual solidarity among members of ‘the nation’, inclusively defined to include all citizens—and perhaps all long-term residents—of the state. To invoke nationhood, in this sense, is to attempt to transcend or at least relativize internal differences and distinctions. It is an attempt to get people to think of themselves— to formulate their identities and their interests—as members of that nation, rather than as members of some other collectivity. To appeal to the nation can be a powerful rhetorical resource, though it is not automatically so. Academics in the social sciences and humanities in the United States are generally skeptical of or even hostile to such invocations of nationhood. They are often seen as de´passe´, parochial, naive, regressive, or even dangerous. For many scholars in the social sciences and humanities, ‘nation’ is a suspect category.

Few American scholars wave flags, and many of us are suspicious of those who do. And often with good reason, since flag-waving has been associated with intolerance, xenophobia, and militarism, with exaggerated national pride and aggressive foreign policy. Unspeakable horrors—and a wide range of lesser evils—have been perpetrated in the name of the nation, and not just in the name of ‘ethnic’ nations, but in the name of putatively ‘civic’ nations as well (Mann, 2004). But this is not sufficient to account for the prevailingly negative stance towards the nation. Unspeakable horrors, and an equally wide range of lesser evils, have been committed in the name of many other sorts of imagined communities as well—in the name of the state, the race, the ethnic group, the class, the party, the faith.

In addition to the sense that nationalism is dangerous, and closely connected to some of the great evils of our time—the sense that, as John Dunn (1979, p. 55) put it, nationalism is ‘the starkest political shame of the 20th-century’— there is a much broader suspicion of invocations of nationhood. This derives from the widespread diagnosis that we live in a post-national age. It comes from the sense that, however well fitted the category ‘nation’ was to economic, political, and cultural realities in the nineteenth century, it is increasingly ill-fitted to those realities today. On this account, nation is fundamentally an anachronistic category, and invocations of nationhood, even if not dangerous, are out of sync with the basic principles that structure social life today.4

The post-nationalist stance combines an empirical claim, a methodological critique, and a normative argument. I will say a few words about each in turn. The empirical claim asserts the declining capacity and diminishing relevance of the nation-state. Buffeted by the unprecedented circulation of people, goods, messages, images, ideas, and cultural products, the nation-state is said to have progressively lost its ability to ‘cage’ (Mann, 1993, p. 61), frame, and govern social, economic, cultural, and political life. It is said to have lost its ability to control its borders, regulate its economy, shape its culture, address a variety of border-spanning problems, and engage the hearts and minds of its citizens. I believe this thesis is greatly overstated, and not just because the September 11 attacks have prompted an aggressively resurgent statism.5 Even the European Union, central to a good deal of writing on post-nationalism, does not represent a linear or unambiguous move ‘beyond the nation-state’. As Milward (1992) has argued, the initially limited moves toward supranational authority in Europe worked—and were intended—to restore and strengthen the authority of the nation-state. And the massive reconfiguration of political space along national lines in Central and Eastern Europe at the end of the Cold War suggests that far from moving beyond the nation-state, large parts of Europe were moving back to the nation-state.6 The ‘short twentieth century’ concluded much as it had begun, with Central and Eastern Europe entering not a post-national but a post-multinational era through the large-scale nationalization of previously multinational political space. Certainly nationhood remains the universal formula for legitimating statehood.

 Can one speak of an ‘unprecedented porosity’ of borders, as one recent book has put it (Sheffer, 2003, p. 22)? In some respects, perhaps; but in other respects—especially with regard to the movement of people—social technologies of border control have continued to develop. One cannot speak of a generalized loss of control by states over their borders; in fact, during the last century, the opposite trend has prevailed, as states have deployed increasingly sophisticated technologies of identification, surveillance, and control, from passports and visas through integrated databases and biometric devices. The world’s poor who seek to better their estate through international migration face a tighter mesh of state regulation than they did a century ago (Hirst and Thompson, 1999, pp. 30–1, 267). Is migration today unprecedented in volume and velocity, as is often asserted? Actually, it is not: on a per capita basis, the overseas flows of a century ago to the United States were considerably larger than those of recent decades, while global migration flows are today ‘on balance slightly less intensive’ than those of the later nineteenth and early twentieth century (Held et al., 1999, p. 326). Do migrants today sustain ties with their countries of origin? Of course they do; but they managed to do so without e-mail and inexpensive telephone connections a century ago, and it is not clear—contrary to what theorists of post-nationalism suggest—that the manner in which they do so today represents a basic transcendence of the nation-state.7 Has a globalizing capitalism reduced the capacity of the state to regulate the economy? Undoubtedly. Yet in other domains—such as the regulation of what had previously been considered private behavior—the regulatory grip of the state has become tighter rather than looser (Mann, 1997, pp. 491–2).

The methodological critique is that the social sciences have long suffered from ‘methodological nationalism’ (Centre for the Study of Global Governance, 2002; Wimmer and Glick-Schiller, 2002)—the tendency to take the ‘nation-state’ as equivalent to ‘society’, and to focus on internal structures and processes at the expense of global or otherwise border-transcending processes and structures. There is obviously a good deal of truth in this critique, even if it tends to be overstated, and neglects the work that some historians and social scientists have long been doing on border-spanning flows and networks.

But what follows from this critique? If it serves to encourage the study of social processes organized on multiple levels in addition to the level of the nation-state, so much the better. But if the methodological critique is coupled— as it often is—with the empirical claim about the diminishing relevance of the nation-state, and if it serves therefore to channel attention away from state-level processes and structures, there is a risk that academic fashion will lead us to neglect what remains, for better or worse, a fundamental level of organization and fundamental locus of power.

The normative critique of the nation-state comes from two directions. From above, the cosmopolitan argument is that humanity as a whole, not the nation- state, should define the primary horizon of our moral imagination and political engagement (Nussbaum, 1996). From below, muticulturalism and identity politics celebrate group identities and privilege them over wider, more encompassing affiliations.

One can distinguish stronger and weaker versions of the cosmopolitan argument. The strong cosmopolitan argument is that there is no good reason to privilege the nation-state as a focus of solidarity, a domain of mutual responsibility, and a locus of citizenship.8 The nation-state is a morally arbitrary community, since membership in it is determined, for the most part, by the lottery of birth, by morally arbitrary facts of birthplace or parentage. The weaker version of the cosmopolitan argument is that the boundaries of the nation-state should not set limits to our moral responsibility and political commitments. It is hard to disagree with this point. No matter how open and ‘joinable’ a nation is—a point to which I will return below—it is always imagined, as Benedict Anderson (1991) observed, as a limited community. It is intrinsically parochial and irredeemably particular. Even the most adamant critics of universalism will surely agree that those beyond the boundaries of the nation-state have some claim, as fellow human beings, on our moral imagination, our political energy, even perhaps our economic resources.9

The second strand of the normative critique of the nation-state—the multiculturalist critique—itself takes various forms. Some criticize the nation-state for a homogenizing logic that inexorably suppresses cultural differences. Others claim that most putative nation-states (including the United States) are not in fact nation-states at all, but multinational states whose citizens may share a common loyalty to the state, but not a common national identity (Kymlicka, 1995, p. 11). But the main challenge to the nation-state from multiculturalism and identity politics comes less from specific arguments than from a general disposition to cultivate and celebrate group identities and loyalties at the expense of state-wide identities and loyalties.

In the face of this twofold cosmopolitan and multiculturalist critique, I would like to sketch a qualified defense of nationalism and patriotism in the contemporary American context.10 Observers have long noted the Janus-faced character of nationalism and patriotism, and I am well aware of their dark side. As someone who has studied nationalism in Eastern Europe, I am perhaps especially aware of that dark side, and I am aware that nationalism and patriotism have a dark side not only there but here. Yet the prevailing anti-national, post-national, and trans-national stances in the social sciences and humanities risk obscuring the good reasons—at least in the American context—for cultivating solidarity, mutual responsibility, and citizenship at the level of the nation-state. Some of those who defend patriotism do so by distinguishing it from nationalism.11 I do not want to take this tack, for I think that attempts to distinguish good patriotism from bad nationalism neglect the intrinsic ambivalence and polymorphism of both. Patriotism and nationalism are not things with fixed natures; they are highly flexible political languages, ways of framing political arguments by appealing to the patria, the fatherland, the country, the nation. These terms have somewhat different connotations and resonances, and the political languages of patriotism and nationalism are therefore not fully overlapping. But they do overlap a great deal, and an enormous variety of work can be done with both languages. I therefore want to consider them together here.

I want to suggest that patriotism and nationalism can be valuable in four respects. They can help develop more robust forms of citizenship, provide support for redistributive social policies, foster the integration of immigrants, and even serve as a check on the development of an aggressively unilateralist foreign policy.

First, nationalism and patriotism can motivate and sustain civic engagement. It is sometimes argued that liberal democratic states need committed and active citizens, and therefore need patriotism to generate and motivate such citizens. This argument shares the general weakness of functionalist arguments about what states or societies allegedly ‘need’; in fact, liberal democratic states seem to be able to muddle through with largely passive and uncommitted citizenries. But the argument need not be cast in functionalist form. A committed and engaged citizenry may not be necessary, but that does not make it any less desirable. And patriotism can help nourish civic engagement. It can help generate feelings of solidarity and mutual responsibility across the boundaries of identity groups. As Benedict Anderson (1991, p. 7) put it, the nation is conceived as a ‘deep horizontal comradeship’. Identification with fellow members of this imagined community can nourish the sense that their problems are on some level my problems, for which I have a special responsibility.12

Patriotic identification with one’s country—the feeling that this is my country, and my government—can help ground a sense of responsibility for, rather than disengagement from, actions taken by the national government. A feeling of responsibility for such actions does not, of course, imply agreement with them; it may even generate powerful emotions such as shame, outrage, and anger that underlie and motivate opposition to government policies. Patriotic commitments are likely to intensify rather than attenuate such emotions. As Richard Rorty (1994) observed, ‘you can feel shame over your country’s behavior only to the extent to which you feel it is your country’.13 Patriotic commitments can furnish the energies and passions that motivate and sustain civic engagement.

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.

### at: victimization

there will always be tension between representing/not representing violence – eschewing it all together fails – affirming the aff and analyzing deployment of suffering solves

Elizabeth Dauphinée, School of Social Sciences, University of Manchester, 2007, “The Politics of the Body in Pain: Reading the Ethics of Imagery,” Security Dialogue Vol. 38(2): 139–155

The point here is that if we are always already fundamentally occupied by the other – by the other’s desire, the other’s pain, the other’s grief – then the process of differentiation between ourselves and others becomes extremely murky (Butler, 2004: 75). Indeed, the risk is that the distinction becomes meaningless. Other people’s violence becomes our own. In the context of Abu Ghraib, the notion of a collective American participation in and responsibility for the torture is apparent. Why, then, should we not understand the pain of others in some way, in some measure, as our own? I am aware of the danger that, in this paradigm, the pain of the tortured body becomes everyone’s, and by extension, no one’s. But, the point is not to reach a place from which we can no longer respond, or to reach a place where we can respond with a perfect ethicality (**this is impossible**). Rather, what is at stake here is the recognition that we must both convey the material reality of bodies in pain and seek to avoid relegation **of that pain to other bodies in ways that cut off the possibilities for ethical response**. To be sure, there is no straightforward way to do this. To choose not to circulate the images of Abu Ghraib in a culture that relies fundamentally on the visual is to perhaps participate in the desires of some to deny that the torture took place at all. Here, we arrive at an ethical impasse of sorts, caught between the imperative to witness and the impossibility of doing so through the visual forms of representation that most often constitute our access (Sontag, 2003, Sliwinski, 2005). To recognize that the body in pain does not self-evidently point to the problem (indeed, for many, the torture at Abu Ghraib was not a problem) is to potentially rethink the violence associated with the strategies we employ to generate resistance. It is to refocus our attention on the question of pain itself; of the ways in which it is inscribed and experienced; of the ways in which we seek to represent it; of the ways in which we think we might best access it; and, by extension, of the ways in which we might consider our uses of imagery and our **range of options for response**.

The alt renders pain and trauma unspeakable – forcing disclosure on the part of the speaker leads to ressentiment and rejecting a dialogue proliferates imageries of suffering – turns the k

Elizabeth Dauphinée, School of Social Sciences, University of Manchester, 2007, “The Politics of the Body in Pain: Reading the Ethics of Imagery,” Security Dialogue Vol. 38(2): 139–155

This atomistic model of individual human beings with their unique interior landscapes **translates into the fundamental unsayability of pain**, and the failure of pain to take an object means that we can only approach the pain of others with **doubt**. For Scarry (1985: 4), ‘pain comes unsharably into our midst as at once that which cannot be denied and that which cannot be confirmed’. Here, the possibilities for accurately or meaningfully expressing pain are always subject to the ever-present threat of their negation. As physical pain is seen to destroy the possibility of its own expression in language, **the options for representing pain are limited** to a range of visual practices that can only ever point to some trace – some visible cause that might point to the presence of pain in another (i.e. the emaciated body in starvation, the torn and bleeding body in war, the contorted face of the prisoner at Abu Ghraib). In this sense, the drive to image the pain of others seeks to impart a certainty to experience that, in the Cartesian model, can ever only be marked by a radical doubt. It is from within the frame of doubt associated with pain **that the drive to visualize correlative expressions of pain – rather than the pain itself – occurs.** For this reason, the visual expression of pain and trauma translates into a politics of representation that **flattens the experience of pain** by being able to capture only the visible causes or expressions of pain. One of the results of this is the development of an aesthetic imagery of pain-causing phenomena – an iconography of symbols that stand in for pain and thus become the representational alibis for actual pain: images of starvation, of emaciated concentration-camp victims, of hooded prisoners, of broken and bleeding skins, of blood-stained floors in prison cells, and so on. In the imaging of pain-causing phenomena and of bodies in pain, the specificity of the interior experience of pain, and of the subject that experiences it, is elided or even entirely evacuated. People become representations of their plights. As Feldman argues, we encounter ‘generalities of bodies – dead, wounded, starving, diseased, and homeless. . . . In their pervasive depersonalization, [they appear as an] anonymous corporeality’ (cited in Malkki, 1996: 388). The fundamental inexpressibility of pain is the unsaid hypothesis on which a range of claims about torture, war, and death as primarily interior experiences (and thus doubtable experiences) are made possible. For Hannah Arendt, for example, the concentration-camp survivor, had he been able to return to narrate his experience, would not have been believed. The suffering in the camp as a space of profound and potentially limitless pain is understood to defy attempts at narration, because the capacity to express the content of that pain is understood to be **severely curtailed**. Arendt uses terms such as ‘unimaginable’ to describe experiences that ‘can never be fully embraced by the imagination’, and that, as a consequence, can ‘never be fully reported’. In short, ‘it is as though [the survivor] had a story to tell of another planet’ (Arendt, 2000: 125). Similarly, she writes that ‘anyone speaking or writing about the concentration camps is . . . **regarded as suspect**; and if the speaker has resolutely returned to the world of the living, he himself is often assailed by doubts with regard to his own truthfulness, as though he had mistaken a nightmare for reality’ (Arendt, 2000: 120). Here, we see that pain and trauma are regarded as so fundamentally inaccessible and unshareable that any attempt at recounting one’s experiences is haunted by the stark fact that **one’s suffering will always and necessarily be received by others with radical doubt**. The poverty of communicating traumatic experience was also expressed by Walter Benjamin, who suggests that ‘witnessing war . . . takes away the ability to speak about it’ (cited in Sliwinski, 2004: 151). Jenny Edkins (2003: 8) expresses a similar understanding with regard to trauma, writing that ‘what we can say no longer makes sense; what we want to say, we can’t. There are no words for it.’ Similarly, the act of witnessing others’ pain (and deaths) is also fraught with an unsayability, because the **witness is limited to only a modicum of access** to the trauma of the other body. To be sure, there is an ethical imperative here to mark the experience of trauma as both unique and exceptional – an imperative that, for all its ethical motivations, also works to further divide the pain-filled from the pain-less. Here, the witnessing of pain, because it is marked by the inability of the witness to experience the pain of the other body, can ever only be a partial witnessing. This is Levi’s (1989) formulation of the differentiation between the drowned and the saved. The drowned cannot come back to bear witness to what happened to them, and the saved are capable of only a partial witnessing. Of course, the possibility of perfect witnessing – of perfect affinity between the one who experiences pain and the one who witnesses it – is not only impossible, but also probably undesirable. The reasons for this undesirability are found not in the impossibility of experiencing the pain of the other, but rather in the **immanent risk that** the pain of others might be evacuated – through a refocusing on the self – from the realm of politics.

### at: linguistics

We can apply infinite perspectives to reach the best solution – don’t throw out expertism without evaluating its usefulness

Kathleen Higgins, University of Texas-Austin, Philosophy Professor, Winter 2013, Post-Truth Pluralism: The Unlikely Political Wisdom of Friedrich Nietzche, Kindle

Progressives are right that we live increasingly in a post-truth era, but rather than rejecting it and pining nostalgically for a return to a more truthful time, we should learn to better navigate it. Where the New York Times and Walter Cronkite were once viewed as arbiters of public truths, today the Times competes with the Wall Street Journal, and CBS News with FOX News and MSNBC, in describing reality. The Internet multiplies the perspectives and truths available for public consumption. The diversity of viewpoints opened up by new media is not going away and is likely to intensify. This diversity of interpretations of reality is part of a longstanding trend. Democracy and modernization have brought a proliferation of worldviews and declining authority of traditional institutions to meanings. Citizens have more freedom to create new interpretations of facts.

This proliferation of viewpoints makes the challenge of democratically addressing contemporary problems more complex. One consequence of all this is that our problems become more wicked and more subject to conflicting meanings and agendas. We can’t agree on the nature of problems or their solutions because of fundamentally unbridgeable values and worldviews. In attempting to reduce political disagreement to black and white categories of fact and fiction, progressives themselves uniquely ill-equipped to address our current difficulties, or to advance liberal values in the culture.

A new progressive politics should have a different understanding of the truth than the one suggested by the critics of conservative dishonesty. We should understand that human beings make meaning and apprehend truth from radically different standpoints and worldviews, and that our great wealth and freedom will likely lead to more, not fewer, disagreements about the world. Nietzsche was no democrat, but the pluralism he offers can be encouragement to today’s political class, as well as the rest of us, to become more self-aware of, and honest about, how our standpoint, values, and power affect our determinations of what is true and what is false.

In the post­truth era, we should be able to articulate not one but many different perspectives. Progressives seeking to govern and change society cannot be free of bias, interests, and passions, but they should strive to be aware of them so that they can adopt different eyes to see the world from the standpoint of their fiercest opponents. Taking multiple perspectives into account might alert us to more sites of possible intervention and prime us for creative formulations of alternative possibilities for concerted responses to our problems.

Our era, in short, need not be an obstacle to taking common action. We might see today’s divided expert class and fractions public not as temporary problems to be solved by more reason, science, and truth, but rather as permanent features of our developed democracy. We might even see this proliferation of belief systems and worldviews as an opportunity for human development. We can agree to disagree and still engage in pragmatic action in the World.

There are no fixed codes, to speak is to code switch, and insistence on a single preferable code is essentialist

Mellom 6 - Assistant Research Scientist for CLASE; Center for Latino Achievement and Success in Education CODE-SWITCHING AT A BILINGUAL SCHOOL IN COSTA RICA: IDENTITY, INTERTEXTUALITY AND NEW ORTRAITS OF COMPETENCE, PAULA JEAN MELLOM

<http://athenaeum.libs.uga.edu/bitstream/handle/10724/9023/mellom_paula_j_200605_phd.pdf?sequence=1>

On the other hand, some sociolinguists have tended to view code-switching as an emergent phenomenon which is a product of social interaction (Gumperz, 1982) and a means to construct identity or (re)affirm group membership (Heller, 1988). However, there is little agreement about when code-switching can happen and who can do it. Some argue that code-switching, can only occur in “stable bilingual communities”, like those in countries like Belgium and Switzerland. However, some researchers (Zentella, 1997) have troubled the essentialist model of traditional diglossia which posits that the two languages used in a community are relegated to certain social situations which are clearly defined and mutually exclusive. In fact, recent studies have begun to focus on other language contact situations, where code-switching can also occur (Gallindo 1996, Rampton 1995). These “linguistic borderlands” like cities with large immigrant populations, borders between countries or territories and schools with large and diverse ethnic populations are rife with individuals, with varying degrees of bilingualism who alternate from one language to another as a matter of course. But these borderlands, with their shifting linguistic landscape, muddy the monolingual-based analysis waters and pose serious theoretical problems to structuralist frameworks designed to analyze code-switching because these depend on the integrity of discreet language systems. Gardner-Chloros (1995), in her work on Alsatian code-switching advocates a (re)viewing of the theoretical assumptions behind the terminology used in code-switching research. She forcefully argues that the commonly accepted concept of “code-switching” implies two inherently separate “standard” languages and asserts that we must remember that all “standard languages” are hybrids.

## 1ar

### Privilege

We should take collectivize action against social ills—a personality litmus test dooms political projects—their claim that social position determines activism and correct epistemology is essentialist and prevents a focus on universal rights

Rob the Idealist, Carleton College, 10/1/13, Tim Wise & The Failure of Privilege Discourse, www.orchestratedpulse.com/2013/10/tim-wise-failure-privilege-discourse/

I don’t find it meaningful to criticize Tim Wise the person and judge whether he’s living up to some anti-racist bona fides. Instead, I choose to focus on the paradigm of “White privilege” upon which his work is based, and its conceptual and practical limitations. **Although the personal is political, not all politics is personal; we have to attack systems**. To paraphrase the urban poet and philosopher Meek Mill: there are levels to this shit.

How I Define Privilege

There are power structures that shape individuals’ lived experiences. Those structures provide and withhold resources to people based on factors like class, disability status, gender, and race. It’s not a “benefit” to receive resources from an unjust order because ultimately, injustice is cannibalistic. Slavery binds the slave, but destroys the master. So, the point then becomes not to assimilate the “underprivileged”, but to instead eradicate the power structures that create the privileges in the first place.

The conventional wisdom on privilege often says that it’s “benefits” are “unearned”. However, this belief ignores the reality and history that privilege is earned and maintained through violence. Systemic advantages are allocated and secured as a class, and simply because an individual hasn’t personally committed the acts, it does not render their class dominance unearned.

The history and modern reality of violence is why Tim Wise’ comparison between whiteness and tallness fails. White supremacy is not some natural evolution, nor did it occur by happenstance. White folks \*murdered\* people for this thing that we often call “White privilege”; it was bought and paid for by blood and terror. White supremacy is not some benign invisible knapsack. The same interplay between violence and advantage is true of any systemic hierarchy (class, gender, disability, etc). Being tall, irrespective of its advantages, does not follow that pattern of violence.

Privilege is Failing Us

**Unfortunately, I think our use of the term “privilege” is no longer a productive way for us to gain a thorough understanding of systemic injustice, nor is it helping us to develop collective strategies to dismantle those systems**. Basically, I never want to hear the word “privilege” again because the term is so thoroughly misused at this point that it does more harm than good.

Andrea Smith, in the essay “The Problem with Privilege”, outlines the pitfalls of misapplied privilege theory.

Those who had little privilege did not have to confess and were in the position to be the judge of those who did have privilege. Consequently, people aspired to be oppressed. Inevitably, those with more privilege would develop new heretofore unknown forms of oppression from which they suffered… Consequently, the goal became not to actually end oppression but to be as oppressed as possible. **These rituals** often **substituted confession for political movement-building**.

Andrea Smith, The Problem with Privilege

Dr. Tommy Curry says it more bluntly, “It’s not genius to say that in an oppressive society there are benefits to being in the superior class instead of the inferior one. That’s true in any hierarchy, that’s not an ‘aha’ moment.”

Conceptually, privilege is best used when narrowly focused on explaining how structures generally shape experiences. However, **when we overly personalize the problem, then privilege becomes a tit-for-tat exercise in blame, shame, and guilt**. In its worst manifestations, this dynamic becomes “oppression Olympics” and people tally perceived life advantages and identities in order to invalidate one another. At best, we treat structural injustice as a personal problem, and moralizing exercises like “privilege confessions” inadequately address the nexus between systemic power and individual behavior.

The undoing of privilege occurs not by individuals confessing their privileges or trying to think themselves into a new subject position, but through the creation of collective structures that dismantle the systems that enable these privileges. The activist genealogies that produced this response to racism and settler colonialism were not initially focused on racism as a problem of individual prejudice. Rather, the purpose was for individuals to recognize how they were shaped by structural forms of oppression.

Andrea Smith, The Problem with Privilege

Bigger than Tim Wise

However, the problem with White privilege isn’t simply that Tim Wise, a white man, can build a career off of Black struggles. As I’ve already said, White people need to talk to White people about the historical and social construction of their racial identities and power, and the foundation for that conversation often comes from past Black theory and political projects. The problem for me is that **privilege work has become a cottage industry of self-help moralizing that in no way attacks the systemic ills that create the personal injustices in the first place**.

A substantive critique of privilege requires us to get beyond identity politics. It’s not about good people and bad people; it’s a bad system.

 It’s not just White people that participate in the White privilege industry, although not everyone equally benefits/profits (see: Tim Wise).

Dr. Tommy Curry takes elite Black academics to task for their role in profiting from the White privilege industry while offering no challenge to White supremacy.

These conversations about White privilege are not conversations about race, and certainly not about racism; it’s a business where Blacks market themselves as racial therapists for White people…

The White privilege discourse became a bourgeois distraction. **It’s a tool that we use to morally condemn whites for not supporting the political goals of** elite black academics that take the vantages of white notions of virtue and reformism and persuade departments, journals, and presses into making concessions for the benefit of a select species of Black intellectuals in the Ivory Tower, without seeing that the white racial vantages that these Black intellectuals claim they’re really interested in need to be dissolved, need to be attacked all the way to the very bottom of American society.

Dr. Tommy Curry, Radio Interview

The truth is that a lot of people, marginalized groups included, simply want more access to existing systems of power. They don’t want to challenge and push beyond these systems; they just want to participate. **So if we continue to play identity politics and persist with a personal privilege view of power, then we will lose the struggle**. Barack Obama is president, yet White supremacy marches on, and often with his help (record deportations, expanded a drone war based on profiling, fought on behalf of US corporations to repeal a Haitian law that raised the minimum wage).

Adolph Reed, writing in 1996, predicted the quagmire of identity politics in the Age of Obama.

In Chicago, for instance, we’ve gotten a foretaste of the new breed of foundation-hatched black communitarian voices; one of them, a smooth Harvard lawyer with impeccable do-good credentials and vacuous-to-repressive neoliberal politics, has won a state senate seat on a base mainly in the liberal foundation and development worlds. His fundamentally bootstrap line was softened by a patina of the rhetoric of authentic community, talk about meeting in kitchens, small-scale solutions to social problems, and the predictable elevation of process over program — the point where identity politics converges with old-fashioned middle-class reform in favoring form over substance. I suspect that his ilk is the wave of the future in U.S. black politics.

Adolph Reed Jr., Class Notes: Posing As Politics and Other Thoughts on the American Scene

Although it has always been the case, Obama’s election and subsequent presidency has made it starkly clear that it’s not just White people that can perpetuate White supremacy. Systems of oppression condition all members of society to accept systemic injustice, and there are (unequal) incentives for both marginalized and dominant groups to perpetuate these structures. Our approaches to injustice must reflect this reality.

**This isn’t a naïve plea for “unity”,** **nor am I saying that talking about identities**/experiences **is** **inherently “divisive**”. Many of these privilege discussions use empathy to build personal and collective character, and there certainly should be space for us to work together to improve/heal ourselves and one another. People will always make mistakes and our spaces have to be flexible enough to allow for reconciliation. Though we don’t have to work with persistently abusive people who refuse to redirect their behavior, **there’s a difference between establishing boundaries and puritanism**.

Fighting systemic marginalization and exploitation requires more than good character, and we cannot fetishize personal morals over collective action.

### at: view from nowhere

Our analysis isn’t disembodied—situated impartiality isn’t neutral or objective, but it does allow contestation

Disch, professor and associate chair of women’s studies – U Michigan, ‘93

(Lisa J., “MORE TRUTH THAN FACT: Storytelling as Critical Understanding in the Writings of Hannah Arendt,” *Political Theory* Vol. 21 No. 4, p. 665-694)

Arendt seems to have viewed Thucydides as she did herself, as a political theorist from whom the question of historical objectivity is an irrelevant methodological debate. The task of the political theorist is not to report objectively but to tell a story that engages the critical faculties of the audience. Euben makes a similar claim, crediting Thucydides with "offering a new standard of accuracy" to his readers. He writes that "however personal or Athenian his work, however much he may have had ties to the aristocratic class at Athens, there is a sense in which he is absent from his discourse. Or to put it more accurately, he is trying to sustain conditions within the text that makes discourse outside it possible."87 This is no conventional model of objective reporting, as it consists neither in a bloodlessly neutral writing style nor in an attempt to avoid selectivity but, rather, in the fact that Thucydides leaves the reader with the task of interpreting the various conflicts he represents. To Euben and Arendt then, who are political theorists, Thucydides' work achieves something more important than objectivity: political impartiality. Political impartiality is not secured by means of detachment from politics but by fostering public deliberation that depends on the ability "to **look upon the same world from one another's standpoint."**88 Arendt credits the practice of political impartiality to the polis, which she idealizes as a realm of "incessant talk" and plurality, in which "the Greeks discovered that the world we have in common is usually regarded from an infinite number of different standpoints, to which correspond the most diverse points of view."89 Thucydides' work fosters political impartiality by an artistic (though not fictional) creation of plurality by his representation of speeches from the multiple, divergent perspectives that constitute the public realm. Euben writes that Thucydides gives us "a form of political knowledge that respects, even recapitulates, the paradoxes and 'perspectivism' of political life."9? This account of political impartiality, characterized not by abstraction but by the interplay among a plurality of perspectives, anticipates the conception of impartiality that Arendt will discern in Kant's description of the "enlarged mentality" in Third Critique. She admires Thucydides because his imagina- tive history makes it possible for the reader to think as if engaged in the debates of his time. This section bears out the claim that there is an "untold story" about storytelling in the discrepancies among the various statements of method, published and unpublished, that Arendt formulated over the course of writing Origins. This story documents her "unusual approach" to political theory and historical writing, in the shift she makes from abstract, neutral reporting to explicitly moral storytelling from the personal experience of the author. She adopts this approach to demonstrate and teach a kind of critical understanding that, in Nussbaum's words, "consists in the keen responsiveness of intellect, imagination, and feeling to the particulars of a situation."9' This early work begins to describe how to make a judgment from experience, arguing that one proceeds not by applying principles from a transcendent framework but by considered attention to one's immediate response to an event. It does not yet explain what makes this contingent judgment critical. The answer to this question lies in her attempt to discern a political philosophy in Kant's Critique of Judgment. SITUATED IMPARTIALITY In her lectures on Third Critique, Arendt explains that she is drawn to Kant's conception of taste as a model for political thinking because she finds in it a formulation of impartiality that accords with plurality. Its subject, she claims, is "men in the plural, as they really are and live in societies."92 Where practical reason is individual and abstract, imagining the principle of one's act as a universal rule, Kant defines the impartiality necessary for aesthetic judgment in terms of intersubjectivity, which he calls "enlarged thought."93 Arendt creatively appropriates Kant's description of taste as "enlarged thought" to explain how one gets from experience to criticism: the critical move entails a shift from thinking from a private perspective to thinking from a public vantage point. Her version of enlarged thought makes a bridge between storytelling and situated impartial critical understanding Arendt foreshadows her turn to Kant's Third Critique as early as the preface to Origins where she uses the term "crystallization." As Seyla Benhabib argues, this term is an attempt to explain the unconventional structure and organization of the book-the structure that Arendt explained to Mary Underwood as writing "against" history-by alluding to Benjamin's "Theses on the Philosophy of History." Benjamin argues that the critical historian who refuses to write from the perspective of the victor must "brush history against the grain."94 According to Benhabib, Arendt uses the peculiar language of "elements" and "crystallization" because she, like Benjamin, wants "to break the chain of narrative continuity, to shatter chronology as the natural structure of narrative, to stress fragmentariness, historical dead ends, failures and ruptures."9 The crystallization metaphor is unquestionably an attempt by Arendt to bring Benjamin to mind, but it is also an allusion to Kant's account of taste. The reference to Kant affirms the claim of Arendt's early writings that political events are contingent and so cannot be named or known in terms of existing conceptual categories. In Third Critique, Kant introduces "crystal- lization" as a metaphor for contingency, which he calls "the form of the purposiveness of an object, so far as this is perceived in it without any representation of a purpose. "' Crystallization describes the formation of objects that come into being not by a gradual, evolutionary process but suddenly and unpredictably "by a shooting together, i.e. by a sudden solidi- fication, not by a gradual transition. . . but all at once by a saltus, which transition is also called crystallization."97 In describing a kind of being that is contingent but susceptible to critical evaluation nonetheless, crystallization justifies the possibility of a kind of judgment that is both spontaneous and principled.98 In calling totalitarianism "the final crystallizing catastrophe" that consti- tutes its various "elements" into a historical crisis, Arendt makes an analogy between contingent beauty and unprecedented evil. This analogy turns on the claim that totalitarianism, a phenomenon to which no abstract categorical framework is adequate, poses a problem of understanding that is similar to that posed by beauty. Political events, like aesthetic objects, can neither be explained in evolutionary terms nor judged with reference to an external purpose or principle. Even so, we are bound to discern their meaning or else to relinquish our freedom by reacting without thinking against forces we do not understand. Arendt is drawn to Third Critique because she wants to argue that political judgment is not a kind of practical reason or moral judgment but a kind of taste. Moral judgment, according to Kant, is "determinant," which means that it functions by subsuming a particular instance under a general rule that is rationally derived prior to that instance.99 Taste, on the other hand, is reflec- tive. It operates in a contingent situation, meaning one for which there can be no predetermined principle, so that a thinker takes her bearings not from the universal but from the particular (p. 15). Leaving technical language behind, the implication of reflective judgment is that it is primarily concerned with questions of meaning. Arendt's turn to Third Critique for a model for political judgment is utterly consistent with her early essays, then, because aesthetic judgment confronts the world from the start as a problem of understanding. Kant's problem in Third Critique is to account for the possibility of aesthetic judgment by distinguishing judgments about beauty from idiosyn- cratic preferences, on one hand, and from categorical values, on the other. He claims that an expression of taste in the beautiful differs from our interest in the pleasant, to which we are drawn by the desire for gratification, and from our regard for the good, which we are compelled to esteem by its objective worth according to the categorical imperative. Taste is unique in that it is spontaneous but principled. He calls it "a disinterested and free satisfaction; for no interest, either of sense or of reason, here forces our assent" (p. 44). To account for the possibility of aesthetic judgment, Kant must explain how an expression of taste can be more than "groundless and vain fancy," without arguing that it is objectively necessary (p. 191). Kant answers this problem by proposing that aesthetic judgment is intersubjective. A statement of preference is subjective, in that when I affirm that something is pleasing I mean that it is pleasing to me; in stating that something is beautiful, however, I am expressing a preference that I attribute to everyone else. Aesthetic judgment differs from pure and practical reason in that this claim to intersubjective validity is not justified with reference to an abstract universal concept of beauty but rests on a purportedly common sense of pleasure in the beautiful. This common sense is, according to Kant, what makes taste "strange and irregular" because "it is not an empirical concept, but a feeling of pleasure (consequently not a concept at all) which, by the judgment of taste, is attributed to everyone" (p. 27). He explains further that taste speaks "with a universal voice . . [but] does not postulate the agree- ment of everyone.... It only imputes this agreement to everyone, as a case of the rule in respect of which it expects, not confirmation by concepts, but assent from others" (pp. 50-51). That is, although a judgment of taste cannot be proved, its validity turns on the presumption that others would assent to it. The paradox that Kant sustains in defining taste as a judgment that takes its bearings not from transcendental concepts but from feeling is analogous to Arendt's attempt to define political judgment as critical understanding that does not withdraw to an abstract vantage point but takes its bearings from experience. Paul Guyer has noted that Kant's account is deeply ambiguous because Kant proposes to defend the possibility of taste both on the grounds of intersubjectivity, that a judgment about beauty is imputed to everyone else, and on the grounds of communicability, that it actually secures the assent of others in public exchange. Although Kant appears to suggest that intersub- jectivity is both necessary and sufficient to communicability, one could impute a judgment to others without communicating it to them or defending it to their satisfaction. Guyer claims that intersubjectivity takes precedence over communicability in Kant's argument, writing that although Kant "is at pains to show that pleasure in the beautiful may be imputed to others, he is not at equal pains to show how such pleasure may be conveyed from one who feels it to one who, in particular circumstances, does not.""" What is interesting about this ambiguity for the purposes of this essay is that Arendt makes a creative appropriation of taste by suggesting a significantly different ground of validity. Arendt politicizes Kant's concept of taste by arguing that its validity turns on "publicity."'0' Publicity means openness to contestation, which she de- scribes as "the testing that arises from contact with other people's think- ing."'02 This claim that critical thinking involves contestation suggests that neither intersubjectivity nor communicability adequately accounts for the possibility of reflective judgment. In contrast to intersubjectivity, publicity requires that a judgment come into "contact" with others' perspectives; it cannot simply be imputed to them. But "contact" and "testing" in no way imply that validity depends on actually securing general assent to one's own beliefs. On the contrary, given Arendt's claim that the public realm is constituted by a plurality of divergent perspectives, general assent would be not just an unlikely outcome of public debate but an undesirable one. Thus Arendt politicizes Kant's "taste" by eschewing its tendency toward consen- sus in favor of contestation. Even though "publicity" makes a significant departure from Kant's de- fense of taste, Arendt attributes it to him nonetheless, claiming that she learned it from his concept "common sense." Kant argues that aesthetic judgment presupposes common sense, which he defines as a capacity to practice "enlarged thought." This practice involves "comparing your judg- ment with the possible rather than the actual judgments of others, and by putting ourselves in the place of any other man, by abstracting from the limitations which contingently attach to our own judgment."'03 Thus Kant argues that one raises one's idiosyncratic preference for an object to a critical judgment by abstracting from one's own contingent situation to arrive at the standpoint of any observer. Hannah Arendt appropriates "enlarged thought" from Kant's Third Cri- tique but with a creative departure from the original that she does not acknowledge. Arendt writes that the general validity of taste is "closely connected with particulars, with the particular conditions of the standpoints one has to go through in order to arrive at one's own 'general standpoint.' "104 Where enlarged thinking, as Kant describes it, involves abstracting from the limitations of a contingent situation to think in the place of any other man,"'05 Arendt speaks explicitly of a general standpoint that is achieved not by abstraction but by considered attention to particularity."> Thus enlarged thought, in her terms, is situated rather than abstract. She calls it training "one's imagination to go visiting,"" which involves evoking or telling yourself the multiple stories of a situation from the plurality of conflicting perspectives that constitute it.'08 Enlarged thought is Arendt's answer to the question of how one **moves from experience to critical understanding**, but it is not the Kantian "enlarged thought" that she has in mind. In her creative appropriation of Third Critique, Arendt redefines enlarged thought from abstract reasoning to what I call "situated impartiality." She credits Kant with breaking from the customary assumption that abstraction is requisite to impartiality, writing that Kantian impartiality "is not the result of some higher standpoint that would then actually settle [a] dispute by being altogether above the melee"; instead, it "is obtained by taking the viewpoints of others into account."'09 Curiously, Arendt conceals her innovation by failing to mark the distinction between situated impartial thinking and Kant's "enlarged mentality." Where enlarged thinking is a consequence of either securing assent to one's judgment or simply imputing it to others, situated impartial thinking involves taking divergent opinions into account in the process of making up one's mind and, ultimately, locating one's judgment in relation to those views. Although she conceals it, Arendt makes a **significant break** with the universalizing assumptions

of Kant's thought. The departure from Kant's "taste" is even more pronounced, as Arendt argues that it is not the philosopher but the storyteller who possesses an extraordinary talent for enlarged thinking.110 Arendt describes storytelling as an art that needs "a certain detachment from the heady, intoxicating business of sheer living that, perhaps, only the born artist can manage in the midst of living.""' Although this description comes from her essay on Isak Dinesen, the conceptualization of storytelling on which it relies brings to mind Walter Benjamin's essay, 'The Storyteller." Not only does Benjamin credit story- tellers with the ability to think critically "in the midst of living," but he also implies that storytellers inspire enlarged thinking in others: "the storyteller takes what he tells from experience-his own or that reported by others. And he in turn makes it the experience of those who are listening to his tale.""2 As Benjamin describes it, the capacity for situated impartial thinking is not the storyteller's exclusive privilege, and the storyteller is not the kind of teacher who imparts a lesson to her listeners. Rather, the storyteller's gift is, in his words, the ability to craft an account that is "free from explanation," thereby teaching the practice of situated impartial vision."3 A skillful story- teller teaches her readers to see as she does, not what she does, affording them the "intoxicating" experience of seeing from multiple perspectives but leaving them with the responsibility to undertake the critical task of interpre- tation for themselves. This capacity of storytelling to invite situated impartial thinking can be understood only if the distinctions among storytelling, testimonial, and illustration are clearly demarcated. A testimonial is **self-expressive**: it asserts "this is the way I see the world." It is fully determined by the experience of the speaker and, as such, can inspire refutation or empathy but not critical engagement as Arendt defines it. In contrast, illustration is not at all expres- sive. Its purpose is to give anecdotal "proof" of a theory; consequently, it is determined not by experience but by the abstract framework it is meant to exemplify. The kind of story that Arendt and Benjamin have in mind invites the reader to "go visiting," asking "how would the world look to you if you saw it from this position?" The critical perspective that one achieves by visiting is neither disinterested, like Kant's taste, nor empathic. Arendt writes that "this process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective; this is not a question of . .. empathy, as though I tried to be or to feel like something else ... but of being and thinking in my own identity where I am not."" 4 Visiting means imagining what the world would look like to me from another position, imagining how I would look to myself from within a different world, and coming to understand that I might define my principles differently if I did not stand where I am accustomed to."5 Where visiting promotes understanding, empathy obstructs it. By empathizing with another, I erase all difference. But when I visit another place, I experience the disorientation that lets me understand just how different the world looks from different perspectives. The relationship between storytelling and situated impartiality is multiple and complex. Storytelling is a means by which one "visits" different perspec- tives. It is also a narrative form that lends itself to giving a multiperspectival account of a situation, that, in turn, invites others to "visit" those perspectives. Relative to abstract argument, testimonial, and illustration, the advantage of a story is that it can be both ambiguous and meaningful at once. An ambiguous argument, testimony, or example is less effective for its indeter- minacy, because the purpose of such modes of discourse is to distill the plural meanings of an incident into definitive conclusions. Ambiguity in a story encourages the permanent contestation and multiple reinterpretation of meanings that make situated impartiality possible. In Arendt's unfinished lectures on judgment, then, there is an implicit answer to the question of how thinking from experience can be critical. This answer turns on a creative appropriation of Kant's enlarged thinking by means of storytelling and situated impartiality. For Arendt, critical under- standing involves telling or hearing multiple stories of an event from the plurality of perspectives that it engages. One purpose of testing one's per- spective against the perspectives of others is to take a stand in full recognition of the complexity and ambiguity of the real situations in which judgments are made. One further purpose is to hold oneself responsible to argue with and speak not only to those with whom one agrees but to those with whom one disagrees. This means not simply acknowledging the inevitable partiality of any individual perspective but insisting that perspectival differences be raised, contested, and situated in reference to each other. The point is not consensus or accuracy but plurality and accountability.