## 1AC

### 1ac – plan

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

### 1ac – plenary power

Contention one is plenary powers

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

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

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

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

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

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

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

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

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

ii. Plenary power

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

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

iii. Statutory Power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1ac – human rights

Contention two is human rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1ac – solvency

Contention three is solvency

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Factual Chaos and Uncertainty

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

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

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

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

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

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

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

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

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

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

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

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

3. Critical Distance

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

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

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

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

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

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

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

4. Nontraditional Written and Oral Communication Skills

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

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

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

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

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

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

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

5. Leadership, Integrity and Good Judgment

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

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

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

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

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

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

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

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

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

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

6. Creating Opportunities for Learning

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

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

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

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

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

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

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

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

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

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

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

What all of this suggests is a constitutional politics in which citizens are empowered to take part and meaningfully impact the terms of their cultural, economic, and political relations to each other. Such politics would need to be considerably less legalistic and precedent bound, less focused on the democracy-constraining aspects of constitutionalism emphasized in most liberal rule of law models. The sense of incompleteness and revisability that marks this critical theory approach § Marked 07:57 § to constitutionalism represents a point where critical theories of democracy may claim to be more radical and revisionary than most liberal and deliberative counterparts. It implies a sharp critique of more familiar models of bourgeois constitutionalism: whether they conceive of constitutional order as having a foundation in moral rights or natural law, or in an originary founding moment, such models a) tend to be backward-looking in their justifications, seeing the legal order as founded on some exogenously determined vision of moral order; b) tend to represent the law as an already-determined container within which legitimate ordinary politics takes place; and c) find the content of law to be ascertainable through the specialized reasoning of legal professionals. On the critical theory conception of constitutionalism, this presumption of completeness and technicity amounts to the reification of a constitutional project, where a dynamic social relation is misperceived as something fixed and objective.64 We can see why this would be immensely problematic for someone like Habermas, for whom constitutional norms are supposed to concern the generalizable interests of free and equal citizens. If it is overall the case for him that generalizable interests are at least partially constituted through discourse and are therefore not given in any pre-political, pre-discursive sense,65 this is especially so in a society like ours with an unreconciled class structure sustained by pseudo-compromises. Therefore, discursive rearticulation of basic norms is necessary for the very emergence of generalizable interests.

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

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

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

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

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

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

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

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

4. Conclusion

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

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

## 2AC

### 2ac body focus

We should not be forced to refute the content of their personal experience because it’s sociopathic and impossible for us to do so – people are victimized, the core question is “what do we do?!”

SUBOTNIK 98

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Having traced a major strand in the development of CRT, we turn now to the strands' effect on the relationships of CRATs with each other and with outsiders. As the foregoing material suggests, **the central** CRT **message is not simply that minorities are being treated unfairly**, or even that individuals out there are in pain - assertions for which there are data to serve as grist for the academic mill - **but that the minority scholar himself or herself hurts and hurts badly**.

An important problem that concerns the very definition of the scholarly enterprise now comes into focus. **What can an academic** trained to [\*694] question and to doubt n72 **possibly say to Patricia Williams when effectively she announces, "I hurt bad"?** n73 **"No, you don't hurt"? "You shouldn't hurt"?** "Other people hurt too"? Or, most dangerously - and perhaps most tellingly - "What do you expect when you keep shooting yourself in the foot?" If the majority were perceived as having the well- being of minority groups in mind, these responses might be acceptable, even welcomed. And they might lead to real conversation. But, **writes Williams, the failure by those "cushioned within the invisible privileges of race and power**... to incorporate a sense of precarious connection as a part of our **lives is... ultimately obliterating**." n74

"Precarious." "Obliterating." **These words will clearly invite responses only from fools and sociopaths; they will, by effectively precluding objection, disconcert and disunite others**. **"I hurt," in academic discourse, has three broad though interrelated effects**. First, **it demands priority from the reader's conscience. It is for this reason that law review editors, waiving usual standards, have privileged a long trail of undisciplined - even silly** n75 **- destructive and, above all, self-destructive arti cles.** n76 **Second, by emphasizing the emotional bond between those who hurt in a similar way, "I hurt" discourages fellow sufferers from abstracting themselves from their pain in order to gain perspective on their condition**. n77

 [\*696] **Last, as we have seen,** it precludes the possibility of open and structured conversation with others. n78 [\*697] **It is because of this conversation-stopping effect** of what they insensitively call "first-person agony stories" **that Farber and Sherry deplore their use.** "The norms of academic civility hamper readers from challenging the accuracy of the researcher's account; it would be rather difficult, for example, to criticize a law review article by questioning the author's emotional stability or veracity." n79 Perhaps, a better practice would be to put the scholar's experience on the table, along with other relevant material, but to subject that experience to the same level of scrutiny.

If **through the foregoing rhetorical strategies CRATs succeeded in limiting academic debate**, why do they not have greater influence on public policy? **Discouraging white legal scholars from entering the national conversation about race**, n80 I suggest, **has generated a kind of cynicism in white audiences** which, in turn, has had precisely the reverse effect of that ostensibly desired by CRATs. **It drives the American public to the right and ensures that anything CRT offers is reflexively rejected.**

In the absence of scholarly work by white males in the area of race, of course, it is difficult to be sure what reasons they would give for not having rallied behind CRT. Two things, however, are certain. First, **the kinds of issues** raised by Williams **are too important** in their implications  [\*698]  for American life **to be confined to communities of color.** If the lives of minorities are heavily constrained, if not fully defined, by the thoughts and actions of the majority elements in society, **it would seem to be of great importance that white thinkers and doers participate in open discourse** to bring about change. Second, given the lack of engagement of CRT by the community of legal scholars as a whole, the discourse that should be taking place at the highest scholarly levels has, by default, been displaced to faculty offices and, more generally, the streets and the airwaves.

Case is a disad to voting negative – their implication that experience validates their argument reentrenches oppression by precluding a goal-oriented strategy of altering the prison structure

David Bridges, Centre for Applied Research in Education, University of East Anglia, 2001, The Ethics of Outsider Research, Journal of Philosophy of Education, Vol. 35, No. 3

First, it is argued that only those who have shared in, and have been part of, a particular experience can understand or can properly understand (and perhaps `properly' is particularly heavily loaded here) what it is like. You need to be a woman to understand what it is like to live as a woman; to be disabled to understand what it is like to live as a disabled person etc. Thus Charlton writes of `the innate inability of able-bodied people, regardless of fancy credentials and awards, to understand the disability experience' (Charlton, 1998, p. 128).

Charlton's choice of language here is indicative of the rhetorical character which these arguments tend to assume. This arises perhaps from the strength of feeling from which they issue, but it warns of a need for caution in their treatment and acceptance. Even if able-bodied people have this `inability' it is difficult to see in what sense it is `innate'. Are all credentials `fancy' or might some (e.g. those reflecting a sustained, humble and patient attempt to grapple with the issues) be pertinent to that ability? And does Charlton really wish to maintain that there is a single experience which is the experience of disability, whatever solidarity disabled people might feel for each other?

The understanding that any of us have of our own conditions or experience is unique and special, though recent work on personal narratives also shows that it is itself multi-layered and inconstant, i.e. that we have and can provide many different understandings even of our own lives (see, for example, Tierney, 1993). Nevertheless, our own understanding has a special status: it provides among other things a data source for others' interpretations of our actions; it stands in a unique relationship to our own experiencing; and no one else can have quite the same understanding. It is also plausible that people who share certain kinds of experience in common stand in a special position in terms of understanding those shared aspects of experience. However, once this argument is applied to such broad categories as `women' or `blacks', it has to deal with some very heterogeneous groups; the different social, personal and situational characteristics that constitute their individuality may well outweigh the shared characteristics; and there may indeed be greater barriers to mutual understanding than there are gateways.

These arguments, however, all risk a descent into solipsism: if our individual understanding is so particular, how can we have communication with or any understanding of anyone else? But, granted Wittgenstein's persuasive argument against a private language (Wittgenstein, 1963, perhaps more straightforwardly presented in Rhees, 1970), **we cannot in these circumstances even describe or have any real understanding of our own condition in such an isolated world**. **Rather it is in talking to each other, in participating in a shared language, that we construct the conceptual apparatus that allows us to understand our own situation in relation to others,** and this is a construction which involves understanding differences as well as similarities.

Besides, we have good reason to treat with some scepticism accounts provided by individuals of their own experience and by extension accounts provided by members of a particular category or community of people. We know that such accounts can be riddled with special pleading, selective memory, careless error, self-centredness, myopia, prejudice and a good deal more. A lesbian scholar illustrates some of the pressures that can bear, for example, on an insider researcher in her own community:

As an insider, the lesbian has an important sensitivity to offer, yet she is also more vulnerable than the non-lesbian researcher, both to the pressure from the heterosexual world--that her studies conform to previous works and describe lesbian reality in terms of its relationship with the outside-and to pressure from the inside, from within the lesbian community itself--that her studies mirror not the reality of that community but its self-protective ideology. (Kreiger, 1982, p. 108)

In other words, while individuals from within a community have access to a particular kind of understanding of their experience, this does not automatically attach special authority (though it might attach special interest) to their own representations of that experience. Moreover, while we might acknowledge the limitations of the understanding which someone from outside a community (or someone other than the individual who is the focus of the research) can develop, this does not entail that they cannot develop and present an understanding or that such understanding is worthless. Individuals can indeed find benefit in the understandings that others offer of their experience in, for example, a counselling relationship, or when a researcher adopts a supportive role with teachers engaged in reflection on or research into their own practice. Many have echoed the plea of the Scottish poet, Robert Burns (in `To a louse'):

O wad some Pow'r the giftie gie us To see oursels as others see us!3

--**even if they might have been horrified with what such power revealed to them**. Russell argued that it was the function of philosophy (and why not research too?) `to suggest many possibilities which enlarge our thoughts and free them from the tyranny of custom . . .It keeps alive our sense of wonder by showing familiar things in an unfamiliar aspect' (Russell, 1912, p. 91). `Making the familiar strange', as Stenhouse called it, often requires the assistance of someone unfamiliar with our own world who can look at our taken-for-granted experience through, precisely, the eye of a stranger. Sparkes (1994) writes very much in these terms in describing his own research, as a white, heterosexual middleaged male, into the life history of a lesbian PE teacher. He describes his own struggle with the question `is it possible for heterosexual people to undertake research into homosexual populations?' but he concludes that being a `phenomenological stranger' who asks `dumb questions' may be a useful and illuminating experience for the research subject in that they may have to return to first principles in reviewing their story. This could, of course be an elaborate piece of self-justification, but it is interesting that someone like Max Biddulph, who writes from a gay/bisexual standpoint, can quote this conclusion with apparent approval (Biddulph, 1996).

People from outside a community clearly can have an understanding of the experience of those who are inside that community. It is almost certainly a different understanding from that of the insiders. Whether it is of any value will depend among other things on the extent to which they have immersed themselves in the world of the other and portrayed it in its richness and complexity; on the empathy and imagination that they have brought to their enquiry and writing; on whether their stories are honest, responsible and critical (Barone, 1992). Nevertheless, this value will also depend on qualities derived from the researchers' externality: their capacity to relate one set of experiences to others (perhaps from their own community); their outsider perspective on the structures which surround and help to define the experience of the community; on the reactions and responses to that community of individuals and groups external to it.4

Finally, it must surely follow that if we hold that a researcher, who (to take the favourable case) seeks honestly, sensitively and with humility to understand and to represent the experience of a community to which he or she does not belong, is incapable of such understanding and representation, then how can he or she understand either that same experience as mediated through the research of someone from that community? The argument which excludes the outsider from understanding a community through the effort of their own research, a fortiori excludes the outsider from that understanding through the secondary source in the form of the effort of an insider researcher or indeed any other means. Again, the point can only be maintained by insisting that a particular (and itself ill-defined) understanding is the only kind of understanding which is worth having.

The epistemological argument (that outsiders cannot understand the experience of a community to which they do not belong) becomes an ethical argument when this is taken to entail the further proposition that they ought not therefore attempt to research that community. I hope to have shown that this argument is based on a false premise. Even if the premise were sound, however, it would not necessarily follow that researchers should be prevented or excluded from attempting to understand this experience, unless it could be shown that in so doing they would cause some harm. This is indeed part of the argument emerging from disempowered communities and it is to this that I shall now turn.

III OUTSIDERS IMPORT DAMAGING FRAMEWORKS OF UNDERSTANDING

Frequent in the literature about research into disability, women's experience, race and homosexuality is the claim that people from outside these particular communities will import into their research, for example, homophobic, sexist or racist frameworks of understanding, which damage the interests of those being researched.

In the case of research into disability it has been argued that outsider researchers carry with them assumptions that the problem of disability lies with the disabled rather than with the society which frames and defines disability. `The essential problem of recent anthropological work on culture and disability is that it perpetuates outmoded beliefs and continues to distance research from lived oppression' (Charlton, 1998, p. 27). By contrast: `a growing number of people with disabilities have developed a consciousness that transforms the notion and concept of disability from a medical condition to a political and social condition' (Charlton, 1998, p.17). Charlton goes on to criticise, for example, a publication by Ingstad and Reynolds Whyte (1995), Disability and Culture. He claims that, although it does add to our understanding of how the conceptualisation and symbolisation of disability takes place, `its language is and perspective are still lodged in the past. In the first forty pages alone we find the words suffering, lameness, interest group, incapacitated, handicapped, deformities. Notions of oppression, dominant culture, justice, human rights, political movement, and selfdetermination are conspicuously absent' (Charlton, 1998 p. 27).

Discussing the neo-colonialism of outsider research into Maori experience, Smith extends this type of claim to embrace the wider methodological and metaphysical framing of outsider research: `From an indigenous perspective Western research is more than just research that is located in a positivist tradition. It is research which brings to bear, on any study of indigenous peoples, a cultural orientation, a set of values, a different conceptualization of such things as time, space and subjectivity, different and competing theories of knowledge, highly specialized forms of language, and structures of power' (Smith, 1999, p. 42).5

This position requires, I think, some qualification. First, researchers are clearly not immune from some of the damaging and prejudicial attitudes on matters of race, sexuality, disability and gender which are found among the rest of the population, though I might hope that their training and experience might give them above-average awareness of these issues and above-average alertness to their expression in their own work. Even where such attitudes remain in researchers' consciousness, this intelligent self-awareness and social sensitivity mean on the whole that they are able to deploy sufficient self-censorship not to expose it in a damaging way. Researchers may thus remain morally culpable for their thoughts, but, at least, communities can be spared the harm of their expression. It is also a matter of some significance that researchers are more exposed than most to public criticism, not least from critics from within these disempowered communities, when such prejudices do enter and are revealed in their work. If they employ the rhetoric of, for example, anti-racist or anti-sexist conviction, they are at least in their public pronouncements exposed to the humiliation of being hoisted by their own petard. It is difficult to see the fairness in excluding all outsider researchers on the a priori supposition of universal prejudice. It is better, surely, to expose it where it is revealed and, if absolutely necessary, to debar individuals who ignore such criticism and persist in using the privilege of their research position to peddle what can then only be regarded as damaging and prejudicial propaganda. Secondly, it is plainly not the case that Western research is located exclusively (as is implied) in a positivist tradition, even if this tradition has been a dominant one. Phenomenology, ethnography, life history, even, more recently, the use of narrative fiction and poetry as forms of research representation, are all established ingredients of the educational research worlds in the UK, USA or Australasia. Contemporary research literature abounds with critiques of positivism as well as examples of its continuing expression.

I have placed much weight in these considerations on the importance of any research being exposed to criticism--most importantly, perhaps, but by no means exclusively by the people whose experience it claims to represent. This principle is not simply an ethical principle associated with the obligations that a researcher might accept towards participants in the research, but it is a fundamental feature of the processes of research and its claims to command our attention. **It is precisely exposure to, modification through and survival of** a process of vigorous public **scrutiny that provides research with whatever authority it can claim**. In contemporary ethnographic research, case-study and life-history research, for example, this expectancy of exposure to correction and criticism is one which runs right through the research process. The methodological requirement is for participants to have several opportunities to challenge any prejudices which researchers may bring with them: at the point where the terms of the research are first negotiated and they agree to participate (or not); during any conversations or interviews that take place in the course of the research; in responding to any record which is produced of the data gathering; in response to any draft or final publication. Indeed, engagement with a researcher provides any group with what is potentially a richly educative opportunity: an opportunity to open their eyes and to see things differently. It is, moreover, an opportunity which any researcher worth his or her salt will welcome.

Not all researchers or research processes will be as open as are described here to that educative opportunity, and not all participants (least of all those who are self-defining as `disempowered') will feel the confidence to take them even if they are there. **This may be seen as a reason to set up barriers to the outsider researcher, but they can and should** more often **be seen as problems** for researchers and participants **to address together in the interests of** their **mutual understanding and benefit.**

Notwithstanding these considerations, one of the chief complaints coming out of disempowered communities is that this kind of mutual interest and benefit is precisely what is lacking in their experience of research. It is to this consideration that I shall now turn. IV OUTSIDERS EXPLOIT INSIDER PARTICIPANTS IN THE COMMUNITIES THEY RESEARCH Ellen describes how fieldwork has become `a rite of passage by which the novice is transformed into the rounded anthropologist and initiated into the ranks of the profession'Ða ritual by which `the student of anthropology dies and a professional anthropologist is born' 􏰈Ellen, 1984, p. 23). This is a reminder that research can carry benefits to the researcher which go beyond those associated with the `pure' pursuit of understanding. As participants in research become more aware of this, their attitudes towards research and researchers can, understandably, change. The following observation was made by a woman from a community that had experienced several waves of enthusiastic researchers: The kind of behaviour researchers have towards locals tells us that they just want to exploit them and take from them their ideas and information. It also tells us that they don't really care at all. They want the information to use in front of a group of people at home, so that they can be seen as clever academics. Then in the end they publish books, reviews, articles etc in order to spread their popularities. So what is this, and what is research really about? Not all researchers are exploiters, but most are, and I think it is time up now for this, and that these researchers should also be exploited by local people. 􏰈Florence Shumba, quoted in Wilson, 1992, p. 199) Researchers who are sensitive to this issue typically look for ways to counter the imbalance of benefit. They will sometimes discuss with participants ways in which the research could be designed to benefit all parties, by, for example, ensuring that it addresses issues on which the participants need information as well as the researchers or by providing data that the research participants can use independently and for their own purposes. In the absence of any other perceived benefit, some schools in the UK have responded to researchers' requests for access and time for interviews by proposing to charge by the hour for teachers' time. Of course sometimes participants will be persuaded to participate on the grounds that some other people whose interests they care aboutÐ pupils in schools, for example, or children currently excluded from educationÐwill secure the benefit of the research, but there has to be the link between something which they perceive to be a benefit 􏰈albeit altruistically) and the commitment which they are asked to make. These illustrations of the terms of engagement between researchers and their participants present a picture of a trade in benefit, the negotiation of a utilitarian equation of mutual happiness and, perhaps, pain, though one in which higher satisfactions 􏰈e.g. new insights and the improvements to the future education of children) have a place alongside lower ones 􏰈a bit of self-publicity or cash in the school fund). Questions of exploitation, in Kantian terms of treating people as means rather than ends 􏰈see Kant, 1964)6 come in if, as is sometimes alleged, researchers use their positions of authority or their sophistication to establish relationships in which the benefits are very one-sided in their favour. This distinction between the utilitarian principle and the Kantian one is crucial here. The utilitarian principle might require us to measure in the scales a much wider community of benefit. If, for example, the researcher could show that, even though the Maori community he or she was researching experienced the inconvenience of the research without the benefit, thousands of other people would benefit from it, then the utilitarian equation might provide justification for the research. But this is precisely one of the weaknesses of the utilitarian principle of the greatest happiness of the greatest numberÐat least when it is applied with this sort of simplicity. It requires either a broader take on the utilitarian principle 􏰈which might observe that a programme of action which allocates all the benefits to one group and all the `pain' to another will not be conducive to the greatest aggregation of happiness) or the invoking of something closer to the Kantian principle, which would demand that we do not exploit one group of people to the exclusive benefit of another. Researchers seeking collaboration with participants in disempowered communities have essentially two forms of appealÐto their self-interest or to their generosity. Either they need to see some benefit to themselves which is at least roughly commensurate to the effort that is required of them 􏰈or in some cases the value of what they have to offer); or they need knowingly to contribute out of their own benevolence towards the researcher or others whom they believe the research will benefit. In this second case, the researcher is placed in something of the position of the receiver of a gift and he or she needs to recognise consequently the quite elaborate ethical apparatus that surrounds such receipt. There is a particular `spirit' in which we might be expected to receive a gift: a spirit of gratitude, of humility, of mutuality in the relationship. There may also be a network of social expectations, which flow from such givingÐof being in thrall to the giver, of being in his or her debtÐbut on the whole anyone contributing to an educational research project would be naõÈve to assume that such `debts' might be repaid. Most of the time, researchers are in fact inviting the generosity of their participants, and perhaps there is something more ethically elevated in responding to such generosity with a true spirit of gratitude and a recognition of the mutuality of relationship which binds giver and receiver, than in seeking to establish a trade in dubious benefits. Smith 􏰈1999) provides a wonderful picture of the combination of spirit and benefits that might be involved in establishing this relationship 􏰈as well as a whole new angle on the notion of `empowerment'!) when she outlines the range of issues on which a researcher approaching a Maori community might need to satisfy them: `Is her spirit clear? Does he have a good heart? What other baggage are they carrying? Are they useful to us? Can they fix up our generator? Can they actually do anything?' 􏰈Smith, 1999, p.10). Perhaps all educational researchers should be required to satisfy participants on these questions. I conclude that the possibility that outsider educational research may be conducted in an exploitative manner is not an argument for obstructing it comprehensively, but it is an argument for requiring that it be conducted under an appropriate set of principles and obligations and in a proper spirit. `Qualitative researchers', argued Stake, `are guests in the private spaces of the world. Their manners should be good and their code of ethics strict' 􏰈Stake, 1998, p.103). Any community may legitimately reject a researcher 􏰈insider or outsider) who fails to establish and conduct relationships under these requirements. In this field, ethics is never far removed from politics. This essay has focused on the relationship between educational researchers and communities that are self-defined as `disempowered' but has not really addressed the issue of power. At the heart of the objections to outsider research is a view that such research, far from challenging and removing such disempowerment, operates to reinforce it. It is this argument which I shall now address. V OUTSIDERS' RESEARCH DISEMPOWERS INSIDERS At least one of the arguments against outsider research into self-defined `disempowered' sections of the population is made independently of the measure of sensitivity and care, which the outsider researchers demonstrate in its conduct. `If we have learned one thing from the civil rights movement in the US', wrote Ed Roberts, a leading figure in the Disability Rights Movement 􏰈DRM), `it's that when others speak for you, you lose' 􏰈quoted in Driedger, 1989, p. 28). Roberts' case is in part that for so long as such groups depend on outsiders to represent them on the wider stage, they will be reinforcing both the fact and the perception of their subordination and dependency as well as exposing themselves to potential misrepresentation. They have to break the vicious circle of dependencyÐand that means taking control for themselves of the ways in which their experience is represented more widely: The DRM's demand for control is the essential theme that runs through all its work, regardless of political-economic or cultural di􏰀erences. Control has universal appeal for DRM activists because their needs are everywhere conditioned by a dependency born of powerlessness, poverty, degradation, and institutionalisation. This dependency, saturated with paternalism, begins with the onset of disability and continues until death. 􏰈Charlton, 1998, p. 3) Outsider researchers sometimes persuade themselves that they are acting in an emancipatory way by `giving voice to' neglected or disenfranchised sections of the community. Their research may indeed push the evident voice of the researcher far into the background as he or she `simply presents', perhaps as large chunks of direct transcription and without commentary, what participants have to say. But, as Reinharz has warned, this is by no means as simple as it might appear: To listen to people is to empower them. But if you want to hear it, you have to go hear it, in their space, or in a safe space. Before you can expect to hear anything worth hearing, you have to examine the power dynamics of the space and the social actors . . . Second, you have to be the person someone else can talk to, and you have to be able to create a context where the person can speak and you can listen. That means we have to study who we are and who we are in relation to those we study . . . Third, you have to be willing to hear what someone is saying, even when it violates your expectations or threatens your interests. In other words, if you want someone to tell it like it is, you have to hear it like it is. 􏰈Reinharz, 1988, pp. 15±16) Even with this level of self knowledge, sensitivity and discipline, there is a significant temptation in such situations to what is sometimes called ventriloquy: the using of the voice of the participant to give expression to the things which the researcher wants to say or to have said. This is a process which is present in the selection of participants, in the framing of the questions which they are encouraged to answer, in the verbal and visual cues which they are given of the researcher's pleasure or excitement with their responses, and, later, in the researcher's selection of material for publication. Such ventriloquy, argues Fine, disguises `the usually unacknowledged stances of researchers who navigate and camouflage theory through the richness of ``native voices''' 􏰈Fine, 1994, p.22).

The argument that insiders within `disempowered' communities (or any other communities for that matter) should be researching and, where appropriate, giving public expression to their own experience is surely uncontroversial. In a context in which insider research has been negligible and hugely subordinated to waves of outsider research, there is a good case for taking practical steps to correct that balance and spare a community what can understandably be experienced as an increasingly oppressive relationship with research.

There are, however, at last three reasons in principle for keeping the possibility of outsider research open: (i) that such enquiry might enhance the understanding of the researcher; (ii) that it might enhance the understanding of the community itself; and (iii) that it might enhance the understanding of a wider public. There is no doubt a place for researching our own experience and that of our own communities, but surely we cannot be condemned lifelong to such social solipsism? Notwithstanding some postmodernist misgivings, `There is still a world out there, much to learn, much to discover; and the exploration of ourselves, however laudable in that at least it risks no new imperialistic gesture, is not, in the end, capable of sustaining lasting interest' (Patai, 1994, p. 67). The issue is not, however, merely one of satisfying curiosity. **There is a real danger that if we become persuaded that we cannot understand the experience of others and that `we have no right to speak for anyone but ourselves', then we will all too easily find ourselves** epistemologically and morally isolated**, furnished with a comfortable legitimation for** ignoring the condition of anyone but ourselves. This is not, any more than the paternalism of the powerful, the route to a more just society.

How, then can we reconcile the importance of (1) wider social understanding of the world of `disempowered' communities and of the structures which contribute to that disempowerment, (2) the openness of those communities and structures to the outsider researcher, and (3) the determination that the researcher should not wittingly or unwittingly reinforce that disempowerment? The literature (from which a few selected examples are quoted below) provides some clues as to the character of relations between researcher and researched which `emancipatory', `participatory' or `educative' research might take.

To begin with, **we need to re-examine the application of the notion of `property' to the ownership of knowledge**. In economic terms, knowledge is not a competitive good. It has the distinctive virtue that (at least in terms of its educative function) it can be infinitely distributed without loss to any of those who are sharing in it. Similarly **the researcher can acquire it from people without denying it to them and can return it enriched**. However, it is easy to neglect the processes of reporting back to people and sharing in knowledge and the importance which can be attached to this process by those concerned. For Smith, a Maori woman working with research students from the indigenous people of New Zealand, `Reporting back to the people is never a one-off exercise or a task that can be signed off on completion of the written report'. She describes how one of her students took her work back to the people she interviewed. `The family was waiting for her; they cooked food and made us welcome. We left knowing that her work will be passed around the family to be read and eventually will have a place in the living room along with other valued family books and family photographs' (Smith, 1999, pp. 15±16).

For some, what is required is a moving away from regarding research as a property and towards seeing it as a dialogic enquiry designed to assist the understanding of all concerned:

Educative research attempts to restructure the traditional relationship between researcher and `subject'. Instead of a one-way process where researchers extract data from `subjects', Educational Research encourages a dialogic process where participants negotiate meanings at the level of question posing, data collection and analysis . . . It . . . encourages participants to work together on an equal basis to reach a mutual understanding. Neither participant should stand apart in an aloof or judgmental manner; neither should be silenced in the process. (Gitlin and Russell, 1994, p. 185)

The result is cooption into biological determinism that results in neo-tribalism and violent politics

Craig Ireland, Assistant Professor, Dept. Of American Culture and Literature Bilkent University, 2004, The Subaltern Appeal to Experience: Self-Identity, Late Modernity, and the Politics of Immediacy, p. 13-22

This Thompsonian notion of experience has found its way into numerous strands of histories of difference and subaltern studies, and rooted as it is in prediscursive materiality, it is hardly surprising that it should have lately migrated to what is considered by many to be the last enclave of resistance against ideological contamination — the perceived material immediacy of the body itself. Certain North American feminists propose "experience, qua women's experience of alienation from their own bodies, as the evidence of difference," while others, by contend disruptive fissure within dominant discursive regimes, have retreated, as Joan W. Scott notes, to "the biological or physical 'experience' of the body" itself.27 Others still have gone so far as to see the body as the last enclave of resistance where the nonmediated specificity of experience is "registered" or "inscribed," in the manner of Kafka's penal colony, as so many body piercings testifying to the irreducibly singular, telling us that "our body is becoming a new locus of struggle, which lays claim to its difference through actions such as body piercing."28

Such a stance is of course beset by numerous epistemological problems that have already been repeatedly pointed out by others and that need not be rehearsed here. Suffice to say, as does Fredric Jameson, that "we must be very suspicious of the reference to the body as an appeal to immediacy (the warning goes back to the very first chapter of Hegel's Phenomenology); even Foucault's medical and penal work can be read as an account of the construction of the body which rebukes premature immediacy."29 The recent obsession with the material body, moreover, is hardly in a position to vindicate the historical materialism with which, as if to appease Bourdieu, it often fancies itself allied.3° But **at stake in the recent obsession with the** materiality of immediate **bodily experience** is not just an attempt to redeem historical, let alone dialectical, materialism — something that an exclusive reliance on immediate experience, bodily or otherwise, is hardly in a position to accomplish anyway; at stake instead **is the condition of possibility of an active subject and of a ground from which can be erected strategies of resistance** (to use the jargon of the ig8os) and a politics of identity (to use the slogan of the 199os) that might evade the hegemony, as current parlance phrases it, of dominant discursive formations. And to this day, it is in the name of agency and cultural specificity that appeals are made to immediate experience by those currents in subaltern studies that presuppose a non-mediated homology or correlation between one's structural position, one's socioeconomic interests, one's propensity for certain types of experiences, and certain forms of consciousness or awareness.

It is of course unlikely that Thompson would endorse some of the uses to which his notion of experience has been put. But that is beside the point. **Regardless of** Thompson's **motivations**, this turn to the material immediacy of bodily experiences is but the logical unfolding of his argument, which, for all its cautious disclaimers, attempts to ground group specificity and agency in the nondiscursive and the immediate. Since for the Thompsonian notion of experience all forms of mediation are considered fair game for ideological penetration, the turn to the immediate is to be expected, and the migration towards material immediacy is but an extrapolation of such a turn. But what are the potential consequences of such a turn?

More is involved here than some epistemological blunder. In their bid to circumvent ideological mediation by turning to the immediacy of experience, Thompsonian experience-oriented theories advance an argument that is not so much specious as it is potentially dangerous: there is nothing within the logic of such an argument that precludes the hypostatization of other nondiscursive bases for group membership and specificity — bases that can as readily be those of a group's immediate experiences as they can be those, say, of a group's presumed materially immediate biological characteristics or physical markers of ethnicity and sexuality. If, indeed, the criterion for the disruptive antihegemonic potential of experience is its immediacy and if, as we have just seen, such a criterion can readily lead to a fetishization of the material body itself, then what starts out as an attempt to account for a nonmediated locus of resistance and agency can end up as a surenchere of immediacy that a mere nudge by a cluster of circumstances can propel towards what Michael Piore has termed "**biologism**"3' — an increasingly common trend whereby "a person's entire identity resides in a single physical characteristic, whether it be of blackness, of deafness or of homosexuality."32 Blut and Boden seems but a step away.

THE INSISTENCE ON EXPERIENCE: THE SPECTRE OF NEO-ETHNIC TRIBALISM

For theories hoping to account for agency and for groups struggling for cultural recognition, such a step from a wager on immediate experience to rabid neo-ethnic fundamentalisms is only a possible step and not a necessary one, and any link between appeals to immediate experience and neo-ethnic tribalism is certainly not one of affinity and still less one of causality. What the parallelism between the two does suggest, however, is that in spite of their divergent motivations and means, they both attempt to ground group specificity by appealing to immediacy — by appealing, in other words, to something that is less a historical product or a mediated construct than it is an immediately given natural entity, whether it be the essence of a Volk, as in current tribalisms, or the essence of material experiences specific to groups, as in strains of Alltagsgeschichte and certain other subaltern endeavours.33 If a potential for **biologism and the** spectre of neo-ethnic tribalism seem close at hand in certain cultural theories and social movements, **it is because the recourse to immediate experience** opens the back door to what was booted out the front door — it inadvertently naturalizes what it initially set out to historicize.

The tendency in appeals to experience towards naturalizing the historical have already been repeatedly pointed out precisely by those most sympathetic to the motivations behind such appeals. Joan W. Scott — hardly an antisubaltern historian — has indeed argued, as have Nancy Fraser, Rita Felski, and others, that it is by predicating identity and agency on shared nonmediated experiences that certain historians of difference and cultural theorists in fact "locate resistance outside its discursive construction and reify agency as an inherent attribute of individuals" — a move that, when pushed to its logical conclusion, "naturalizes categories such as woman, black, white, heterosexual and homosexual by treating them as given characteristics of individuals."34 Although such a tendency within experience-oriented theories is of course rarely thematized, and more rarely still is it intended, it nevertheless logically follows from the argument according to which group identity, specificity, and concerted political action have as their condition of possibility the nonmediated experiences that bind or are shared by their members. On the basis of such a stance, it is hardly surprising that currents of gayidentity politics (to take but one of the more recent examples) should treat homosexuality, as Nancy Fraser has noted, "as a substantive, cultural, identificatory positivity, much like an ethnicity."35

It may seem unfair to impute to certain experience-oriented theories an argument that, when pushed to its logical conclusion, can as readily foster an "emancipatory" politics of identity as it can neo-ethnic tribalism.36 The potential for biologism hardly represents the intentions of experience-oriented theories — after all, such theories focus on the immediacy of experience, rather than on the essence of a group, in order to avoid both strong structural determination and the naturalizing of class or subaltern groups. But if, as these theories tell us, the counterhegemonic potential of experience resides in its prediscursive immediacy and if mediation is thus relegated to a parasitical, supplemental, and retrospective operation and if, finally, a nondiscursive or ideologically uncontaminated common ground constitutes a guarantee of group authenticity, it then inevitably follows that experiences cannot be discursively differentiated from one another and, as a result, the criteria for group specificity end up being those elements that unite groups in non-discursive ways. And such nondiscursive elements, in turn, can as readily be those of a group's shared nonmediated experience, say, of oppression, as they can be those of a group's biological characteristics. At best, "the evidence of experience," Scott notes, "becomes the evidence for the fact of difference, rather than a way of exploring how differences are established;"37 at its worst, the wager on immediate experience fosters tribalistic reflexes **that need but a little prodding before turning into those** rabid neo-ethnic "micro fascisms" against which Felix Guattari warned in his last essay before his death.38

### at: reparations

The perm is net beneficial – legal advocacy makes microreparations efforts more successful

Kaimipono David Wenger 10, Assistant Professor of Law at the Thomas Jefferson School of Law, "too big to remedy?" Rethinking mass restitution for Slavery and jim crow, 44 Loy. L.A. L. Rev. 177

Thus far, law's engagement with reparations has come in the tort framework. However, law can make invaluable contributions to these alternate approaches.

Law can help increase the power of storytelling. This happened in the Japanese American context. The legal strategy of attacking wrongful convictions focused the public's attention on sympathetic cases of clear injustice. The increased public consciousness of the wrong helped contribute to a shift in perception, which ultimately led to restitution.312 Similarly, Holocaust cases led to storytelling that raised public consciousness of previously unknown incidents. " Some similar consciousness-raising may have already happened in the slavery reparations context. The publicity from the failed tort claims may have contributed to consciousness-raising or to shifts in public opinions that contributed to the movement for microreparations.

Law can reinforce microreparations efforts. For instance, changes to the statute of limitations were vital in the microreparations cases that facilitated some recovery for Armenian genocide victims.31 Legal scholars must continue to examine the microreparations phenomenon. "

Microreparations ordinances may provide opportunity for additional storytelling or spotlighting. For instance, recent slavery ordinances may provide a platform for storytelling in the context of the law. These ordinances call for businesses to disclose past ties to slavery. 316 Reparations advocates can use these as a platform by bringing litigation or other enforcement actions. These kinds of measures allow advocates to keep the spotlight on the issues without opening the door to criticisms of individual plaintiffs. They also allow for broader storytelling, as advocates can highlight the many lesser-known links to slavery.

Other legal rights may provide the context for storytelling and public consciousness-raising about slavery. For instance, Brophy has written recently about rights to access graveyards. "This is an evocative image, which may serve as a platform for storytelling and consciousness-raising. Many stories remain to be told. For instance, the East St. Louis riot story is, in some ways, as compelling as Tulsa and may be the next microreparations front. 318

VI. CONCLUSION

The traditional tort model has not succeeded in securing compensation for slavery. This failure illustrates some of the limits of the law in addressing mass harms. However, the emergence of a variety of creative potential remedies suggests that even for harms like slavery, some sorts of legal responses may be beneficial. These illustrate that, for a society intent on achieving social justice, no harm is really too big to remedy.

Reparations don’t solve material inequality and cause backlash

John Torpey 3, sociology prof at CUNY, Reparation Politics in the 21st Century, Third World Legal Studies: Vol. 16, Article 3

Beyond these difficulties, reparations politics also has a curiously apolitical quality about it. The notion of gaining compensation for those who have suffered injustice in the past seems at first glance inherently uncontroversial - of course, why not? The decline of the nation-state as a legitimate force promoting social and political integration and the more or less simultaneous decline of the socialist project have weakened the appeal of a transformative politics that speaks to the vast majority, as socialism once attempted to do. Reparations politics presents itself in this climate as an appealing alternative to the tribulations of coalition-building. Whatever the potential benefits of reparations campaigns, they should not be mistaken for a broadly based politics capable of challenging the fundamental distribution of wealth and power in society.46

The recent flowering of "rights talk" and the pursuit of damages for historical injustices both reflect and promote the "juridification" of politics. In the absence of a progressive political project with broad cross-racial appeal, a politics of legal disputation rather than of mass mobilization comes to the fore. Reparations politics is typically a politics of courtrooms and legal briefs, not street demonstrations. It is consistent with an era of "individualization," in which the expansive solidarities of the Fordist age increasingly seem a thing of the past, and even mildly ameliorative responses to racial inequality encounter strong political headwinds. Thus legal scholar Robert Westley begins his recent analysis of reparations for black Americans by noting that affirmative action is "almost dead," and that therefore "mapping a legal path to enforcement of Black reparations ... remains a challenge for legal theorists and policymakers attempting to pursue alternative routes to social justice." 47 It remains to be seen whether reparations politics will gain much traction beyond the ranks of lawyers and intellectuals, who so far clearly dominate the discussion of reparations for black Americans.

Finally, in many contexts reparations politics seem destined to generate their own backlash, as with any politics that promises benefits for specific groups rather than for "everyone" (though admittedly the latter is a rare bird). The likelihood of a backlash is not necessarily a reason to forgo this avenue. Much politics provokes backlash of one sort or another, and in the reigning absence of a convincing universalist project, the forward-looking aspects of reparations politics may have much to offer in contemporary struggles to enhance equality both within countries and on a global scale. The fact that there are many who have suffered unjustly by no means insures, however, that everyone will regard compensation to specific groups as appropriate, no matter how demonstrable the injustices done to them. Indeed, some fear that the heightened attention to reparations payments for former slave laborers may be adding fuel to a resurgence of anti-Semitism in contemporary Germany, despite the fact that many of them were not Jews at all but Slavic groups slated by the Nazis for a perpetual subaltern status.48 It makes sense to take seriously the possible backlash against those pursuing reparations.

### at: social death

No social death – history proves

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

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

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

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

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

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

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

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

situation.

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

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

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

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

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

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

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

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

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

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

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

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

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

### at: wilderson

Wilderson’s scholarship isn’t intended to preclude goal-oriented political change

Wilderson 10

Frank b. Wilderson III, Prof at UC Irvine, speaking on a panel on literary activism at the National Black Writers Conference, March 26, 2010, "Panel on Literary Activism", transcribed from the video available at http://www.c-spanvideo.org/program/id/222448, begins at roughly 49:10

Typically what I mean when I ask myself whether or not people will like or accept my reading, what I'm really trying to say to myself whether or not people will like or accept me and this is a difficult thing to overcome especially for a black writer because we are not just black writers, we are black people and as black people we live every day of our lives in an anti-black world. A world that defines itself in a very fundamental ways in constant distinction from us, we live everyday of our lives in a context of daily rejection so its understandable that we as black writers might strive for acceptance and appreciation through our writing, as I said this gets us tangled up in the result. The lessons we have to learn as writers resonate with what I want to say about literature and political struggle. I am a political writer which is to say my writing is self consciously about radical change but when I have worked as an activist in political movements, my labor has been intentional and goal oriented. For example, I organized, with a purpose to say free Mumia Abu Jamal, to free all political prisoners, or to abolish the prison industrial complex here in the United States or in South Africa, I have worked to abolish apartheid and unsuccessfully set up a socialist state whereas I want my poetry and my fiction, my creative non fiction and my theoretical writing to resonate with and to impact and impacted by those tangible identifiable results, I think that something really debilitating will happen to the writing, that it the writing will be hobbled if and when I become clear in the ways that which I want my writing to have an impact on political struggle what I am trying to say when I say that I want to be unclear is I don't want to clarify, I do not want to clarify the impact that my work will have or should have on political struggle, is that the relationship of literature to struggle is not one of causality but one of accompaniment, when I write I want to hold my political beliefs and my political agenda loosely. I want to look at my political life the way I might look at a solar eclipse which is to say look indirectly, look arie, in this way I might be able to liberate my imagination and go to places in the writing that I and other black people go to all the time the places that are too dangerous to go to and too dangerous to speak about when one is trying to organize people to take risk or when a political organization is presetting a list of demands, I said at the beginning this is an anti-black world. Its anti black in places I hate like apartheid South Africa and apartheid America and it’s anti-black in the places I don't hate such as Cuba, I've been involved with some really radical political movements but none of them have called for an end of the world but if I can get away from the result of my writing, if I can think of my writing as something that accompanies political struggle as opposed to something that will cause political struggle then maybe just maybe I will be able to explore forbidden territory, the unspoken demands that the world come to an end, the thing that I can’t say when I am trying to organize maybe I can harness the energy of the political movement to make breakthroughs in the imagination that the movement can't always accommodate, if its to maintain its organizational capacity.

### at: williams

We are sorry for the speaker awards fiasco at Kentucky – we weren’t at that tournament, but we thought what happened was awful – the apology is uniquely radical as a reparation for collective groups

Kaimipono David Wenger 11, Associate Professor of Law, Thomas Jefferson Law School, “From radical to practical (and back again?): reparations, rhetoric, and revolution), Journal of Civil Rights and Economic Development, Summer, 25 J. Civ. Rts. & Econ. Dev. 697

Microreparations can build on and interact with intermediate steps, such as apology, affirmative action, and commemorative events. n257 Society already engages in periodic discussion of racial ideas, such as during Black History Month and on Martin Luther King Day. Microreparations efforts can build on existing building blocks.

WGA’s card ends

c. Moral and Restorative Framing

In addition, reparations advocates can draw on moral and restorative frameworks. One important idea here is the concept of restorative justice, which is drawn from human rights law. Restorative justice is "focused on attempting to make the victim and society whole." n258 It "tends to be community-oriented, aimed at restoring society through reconciliation," and "may take the form of truth commissions and symbolic gestures of atonement and forgiveness between victim and perpetrator." n259

 [\*738] Another option is the moral approach of atonement suggested by Roy Brooks. n260 The idea of atonement originates in the religious context, and signifies a reconciliation or setting straight of records. n261 It also implies an expiatory act, which is designed to heal harms done in the past. As in the religious context, reparations for slavery would involve a sacrifice designed to show contrition, and to cleanse and make the community whole. n262 The atonement approach is one of treating all individuals as community members who have been harmed by the racism that is an ongoing legacy of slavery. n263 Atonement requires not simply monetary payments, but also the moral gesture of apology. n264 Brooks writes that "atonement - apology and reparations - plus forgiveness leads to racial reconciliation." n265 The idea of atonement can fit into existing law, but it involves a radical re-envisioning of the moral framework of reparations.

Ideas like storytelling, microreparations, restorative justice, and atonement draw on both the practical and radical sides of reparations discourse. They blend well with the results-oriented focus of practical reparations, but as consciousness-raising tools they can be quite radical in their ultimate effects.

Conclusion

The intellectual history of reparations argument shows the ways that advocates have framed the idea over time. The discourse reflects shifts in the goals of the reparations movement, as well as changing perceptions of political realities. The interplay between radical and practical strands of reparations offers not only a fascinating history, but also a possible map for the future. Moving forward will ultimately require strategies that can build on both practical and radical approaches to reparations.

### at: human rights k

#### 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.

#### 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

## 1AR

### at: technocracy

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.

### hunt

Single issue rights focus spills over and is distinct from the ideologies that determine its use—their author

Hunt ’90 (Alan, Professor of Law and Sociology, Carleton University, Ottawa, Canada, “Rights and Social Movements: Counter-Hegemon Strategies,” Journal of Law and Society Vol. 17 No. 3, 1990)

Beyond questions concerning the criteria of 'success' there is another and perhaps more fundamental problem with the existing studies of the use of litigation by social movements. There is a failure to distinguish between the very different types of social movements that have been studied.26 What is missing is a concern with what I propose to call the 'hegemonic capacity' of social movements. In a first approximation the distinction can be drawn between **'single issue' movements** and those whose **goals would constitute a wider set of social changes** than their immediate objectives. But this approximation requires further refinement because some movements which are apparently single issue have extensive ramifications. The abortion rights movement, whilst superficially focusing on a single issue, has ramifications extending beyond the immediate question of women's right to control their fertility. The abortion rights movement is a prime example of the concept of 'local hegemony'. Such a movement is not directed to the kind of global hegemony that Gramsci had in mind with his focus on the role of the revolutionary party. But movements directed towards local (or regional) hegemony can only be adequately judged in their capacity to **transform a wide range of social practices and discourses**. For present purposes I suggest that, in addition, the environmental movement and the civil rights movement also serve as my example of movements of 'local hegemony' in that **while focused on a set of** specific demands**, their realization would both necessitate and occasion** wider structural changes**.** The most immediate implication is that their 'success' is not a matter of securing some immediate interest. It follows that to evaluate the role of litigation for such movements necessitates that focus be directed to the articulation between the elements that make up the strategic project of the movement. My suggestion is that a key feature of any such assessment revolves around their capacity to **put in place a new or transformed discourse of rights** which **goes to the heart** of the way in which the substantive issues are conceived, expressed, argued about, and struggled over. My more controversial suggestion is that the immediate **'success' or 'failure' of specific litigation has to be approached in a different way** which requires that we take account of the possibility that litigation 'failure' may, paradoxically, provide the conditions of 'success' that compel a movement forward. In current struggles over wife abuse, all those cases in which judges impose derisory sanctions are contexts which drive the movement forward because they provide instances of a dying discourse in which women 'deserve' chastisement by their husbands. Such judicial pronouncements become more self-evidently anachronistic and in this inverted form speak of a new and emergent discourse of rights and autonomy. The implications of this line of thought are that the whole question of the success or failure of litigation and its connection with transformative strategies is far more complex than our existing attempts to measure 'success' and 'failure' admit.

A more far-reaching criticism of litigation is that, rather than helping, 'law', conceived variously as litigation or legal reform politics, is itself part of the problem. This line of argument is at the root of Kristin Bumiller's study of the civil rights movement.27 This strand of the anti-rights critique is, I want to suggest, even if unintended, a form of 'Leftism' whose inescapable error lies in the fact that it imagines a terrain of struggle in which a social movement can, by an act of will, **step outside the terrain on which the struggle is constituted**, Here a hegemonic strategy must insist that it is precisely in the engagement with the actually existing terrain, in particular, with its discursive forms**, that the possibility of their transformation and transcendence becomes possible.** To refuse this terrain is, in general, Leftist because is marks a refusal to engage with the conditions within which social change is grounded.

### at: mills—prag

Mills isn’t advocating revolutionary change – liberal democratic capitalism

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RACIAL CONTRACT THEORY: A CRITICAL INTRODUCTION by Stephen C. Ferguson II Submitted to the Department of Philosophy and the Faculty of the Graduate School of the University of Kansas in partial fulfillment of the requirements for the degree of Doctor of Philosophy

Racial contract theory: A critical introduction

by Ferguson, Stephen C., Ii, Ph.D., UNIVERSITY OF KANSAS, 2004, 210 pages; 3153181

The outcome of The Racial Contract is quite simply what I have termed, Racial Contract Theory (RCT). There are five main components to RCT. First, to subject contractarianism to an ideological critique and expose the racist presuppositions of contract theorists from Thomas Hobbes through John Rawls. Second, to identify the origins of white supremacy as a political system in a Racial Contract between whites against non-whites. The third component, therefore, is an argument to show that being white - under the white supremacist polity - entails being endowed with white privilege, that is, material and psychological benefits. The fourth component of Mills' project is to demonstrate that race is a social construction created for the purpose of political rule over non-whites. And, lastly, Mills argues that the only historically feasible solution to the problem of white supremacy is liberal democratic capitalism.

Pragmatism outweighs – racial contract theory fails placing ontology before results. DIALOGUE is still POSSIBLE

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Race and Epistemologies of Ignorance

Ed. Shannon Sullivan, Nancy Tuana

Associate Professor, Stony Brook Ph.D. Harvard University, 1992 M.A. University of Houston, 1982 B.A. University of Houston, 1982 Harriman Hall 237 Stony Brook University Stony Brook, NY 11794-3750 Tel: (631) 632-7572 Harvey.Cormier@stonybrook.edu Areas of Interest Kantian ethics; Nietzschean arguments against morality; pragmatic ethics; animal rights; justifications for affirmative action; realistic, idealistic, and pragmatic theories of truth; concepts of knowledge and objectivity connected with these; pragmatism versus neo-pragmatism; philosophy and literature, Nelson Goodman's and Arthur Danto's philosophies of art, Marx-influenced theories of art and culture; ancient skepticism and stoicism; "Black philosophy" and arguments for the reality of "race" and against individualism; Cornel West's "prophetic pragmatism"; Peter Singer's comparisons of racism with "speciesism" Harvey Cormier's dissertation was on the work of the psychologist and pragmatist philosopher William James. His work since then has taken on diverse subject matters such as Cornel West's Marx-influenced criticisms of James; Nietzsche on freedom and selfhood; the idea that Henry James the novelist was a pragmatist like his brother William; and the film 2001: A Space Odyssey considered as a work of modernist art. Cormier's book, The Truth Is What Works: William James, Pragmatism, and the Seed of Death (Rowman and Littlefield, 2000), attributes to James the "Forrest Gump theory of truth," or the simple but profound idea that truth, like stupidity, is as it does or tends to do. Cormier thinks that this Darwinian "functionalist" approach to epistemology is the best one, and he is interested in the bearing of this idea on questions concerning psychology, evolution, human identity, and morality

The project of truth-, world-, and self-making that the pragmatists are trying to jump-start is at bottom a matter of the choices and interests of individuals in localities, and this means that it does lack some of the world-historical sweep, drama, and grandeur that the descendents of Marx look for in their philosophical understandings of things. Throughout The American Evasion of Philosophy, West makes it clear that he admires the kind of romantic, world-transforming urge that he finds in both Emerson and Marx (West 1989,10-11). Gramsci complained disdainfully that the Rotary Club was about the best thing that had come out of the pragmatic movement (Gramsci 1971, 373). But though the project of being what we are is one that we must begin alone or in small groups, we can elect to join like-minded individuals to do battle— intellectual, political, or even military battle, if need be—with individuals of different minds, or with others who have not become what they are and wiio are still just social products. We don't have to stay alone, and we wont if we can share our ideas. As part of the groups that we choose to help create—Rotary Clubs, maybe (they actually do a lot of good internationally), but also university faculties, hospital staffs and administrations, disaster-relief organizations, groups of volunteers in public schools, labor unions, political parties, army regiments, nations, nonbiological "races," and, perhaps someday, if we're lucky, even the "human race"—wre individuals can make large changes in the world. Human society can act as an amplifier for individuals' efforts, and with some cooperation a Martin Luther King, a Henry Ford, or a Josef Stalin can leave quite a footprint—for better or worse. But as the pragmatist tries to make her own mark on the world, she will not ever see herself as peeking over inaccurate representations at the dark power relations that are sweeping her along. The wrords and thoughts of particular, unique persons give them power in the world— that is why they bother to generate them—and the wrorld is therefore not a thing independent of those thoughts. We do not live behind a screen, or even in a QuinianNeurathian boat, of true or false appearances. We live right there in the world, and we have better and worse thought-tools to use in shaping that world. And starting to think of ourselves in this way will help us take advantage of that world-shaping power. This is the real political meaning of both Emerson's and James's prophetic exhortations. Emerson and James do not tell us about beings with a given social nature requiring democracy, nor are they only advising us of the evils of conservatism. They are provoking us, stirring us out of our socially induced torpor, so that we will make ourselves into political beings and then do specific moral and political things. They advocate in their philosophy no specific specific practices, and James's worries about truth may therefore seem to be no more than a lot of socially indifferent protoprofessionalism; but James is in fact enjoining us individuals, whoever we may be and whenever we may exist, to try to be more than just a part of the whole, to be real entities in our own right and to act in our own behalf. He is not ignoring social groupings; he is trying to provoke us to create and contribute to those groups and to the wrorld as a whole, to make our specific differences there, thus And Rorty is carrying on James's provocation without quite appreciating it. Where both West and Rorty himself see a tedious struggle for the minds of a few professors, James would see part of the pragmatic battle to keep individual minds open, active, and free in a changing world. Rorty has expressed bewilderment concerning the worldwide popularity of his own work; he cannot figure out why his book Contingency, Irony, and Solidarity, wrhich advocates no specific political or moral positions, and wrhich Rorty sees as an effort to talk to a few professional philosophers about a lot of dusty issues, was translated into Bulgarian (Rorty 1995, 56-71). The answer is that the pragmatists, including Rorty, may not offer eternal truth about truth, but they do offer an eternal challenge. They have become the best-known and most successful philosophical figures in American history by challenging their readers, even readers in very different places and times—even in Bulgaria!—to think for themselves and thus become fit for life in democracy, Neither Plato's problem nor Orwell's will trouble us much on the way to this kind of democracy of individuals. Once we take on the task of building truths as we go rather than grasping them, the appearance-reality distinction, on which both of these problems depend, begins to seem not only dubious but—much more important—trivial. ("False" is important, but "unimportant" is more important.) We begin to feel that there are only less useful claims and more useful ones. We will inevitably hold the less useful ones from time to time, but we will dispose of them wrhen we find ones that work better. Many of today's "objective truths" will become tomorrowr's "mere appearances" when more helpful beliefs turn up, and the same thing will happen the day after tomorrow. Even some of that infinite knowledge of the world beyond our limited experience—Euclid's parallel postulate, for one standard example—will amount to no more than rules that seemed good to follow for a while, ways of talking and acting that seemed as if they would pay off forever but did not. And after this happens enough, we will realize, to adapt an idea from both T. H. Green and Jesus in the Gospel of Mark, that the rules of thought are made for us, not we for the rules of thought. We will cease looking for the innate endowment that makes it possible for us to look into a ready-made infinite. What's more, the flip side of this problem, our ignorance of the world that is present to our experience, will begin to seem less compelling as well, since the very ideas of "experience" and "the world' that figure in this formulation will begin to make less sense. After we realize that no one has access to a world beyond all of those deceptive appearances, the issues of what structures of deception are hiding that world from us will not seem urgent. Neither will the meta-issue of how certain persons, or perhaps certain persons of color, managed to see through those structures. After we have these pragmatic insights, we will not see anything particularly promising about an epistemology of ignorance. We are all ignorant of many things, even "obvious facts," thanks to misperceptions, unquestioned preconceptions, common misconceptions, everyday irrationalities, limited experience, crippling neuroses, white lies and black, half-truths, propaganda, convenient self-deception . .. the usual suspects. No systematic study will reveal the structures of our foolishness. The ignorant people of the world include even people such as Chomsky, Marx, Orwell, and Mills, who have new, different, and potentially helpful ideas about how we should describe our societies and our histories. No one's ideas, not even those of Chomsky or Mills, are warranted by their closeness to the really objective reality. This is not, of course, to say that we should just think whatever we like. Chomsky may well be right to argue that we should be more skeptical of the mainstream media, and Mills may be right to argue that we should be skeptical of blithe appeals to universality in political philosophy. Maybe it is true that there is not so much difference between Republicans and Democrats as we might think, and it may be true that, under present circumstances, political philosophy would benefit if it paid more attention to the ways in which persons of color, women, and the poor have historically been judged to be of substandard rationality. Criticism is possible according to a pragmatic outlook, and neither believers in radical new theories nor believers in moribund old ones are trapped in their own discrete language games. The ideas traded in criticism and debate, especially the true ideas we did not have before, can give us power. They are useful tools, which is why we want them and why we trade them. If a novel reconception of mainstream politics or human rationality actually makes life, thought, and the world better, then that reconception will be true, or it will at least have the only kind of truth we are interested in getting. But it remains to be seen whose newr ideas actually improve things. Maybe it remains eternally to be seen, so that no philosophical closing of these questions by appeal to what is already real and present will ever be possible. Emersonian philosophy of a Jamesian-Rortian type, far from trapping us in our old ways of thinking, is in fact designed to encourage us to take an experimental, let's-try-this-on approach to new ideas. It does this by showing us what we have to gain by getting things right, and it even takes some of the sting away from the very idea of getting things wrong. Getting things wrong, being ignorant, is not a matter of betraying logical, material, or racial reality; getting things wrong on the way to getting things right is just what we do as we try to make things better, we makers and remakers of ourselves and the world.