# 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 powers

Contention 1 is plenary powers

The 12 year indefinite detention of the Uighurs was based on the US government’s assertion of plenary power, despite the lack of evidence for detention.

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 was 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 2 is human rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disregarding rights means atrocity and dictatorship go unstopped

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

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

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

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

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

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Contention 3 is solvency

Reversing the court decision 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

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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.

We know we’re not the USFG—Obviously the aff doesn’t happen but it’s still useful to talk about.

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.

The law is malleable—debating it is the only way to affect change

Todd Hedrick, Assistant Professor of Philosophy at Michigan State University, Sept 2012, Democratic Constitutionalism as Mediation: The Decline and Recovery of an Idea in Critical Social Theory, Constellations Volume 19, Issue 3, pages 382–400

Habermas’ alleged abandonment of immanent critique, however, is belied by the role that the democratic legal system comes to play in his theory. While in some sense just one system among others, it has a special capacity to shape the environments of other systems by regulating their interaction. Of course, the legal system is not the only one capable of affecting the environments of other systems, but law is uniquely open to inputs from ordinary language and thus potentially more **pliant and responsive** to democratic will formation: “Normatively substantive messages can circulate throughout society only in the language of law … . Law thus functions as the ‘transformer’ that guarantees that the socially integrating network of communication stretched across society as a whole holds together.”55 This allows for the possibility of consensual social regulation of domains ranging from the economy to the family, where actors are presumed to be motivated by their private interests instead of respect for the law, while allowing persons directed toward such interests to be cognizant that their privately oriented behavior is compatible with respect for generally valid laws. While we should be cautious about automatically viewing the constitution as the fulcrum of the legal order, its status as basic law is significant in this respect. For, recalling Hegel's broader conception of constitutionalism, political constitutions not only define the structure of government and “the relationship between citizens and the state” (as in Hegel's narrower “political” constitution); they also “implicitly prefigure a comprehensive legal order,” that is, “the totality comprised of an administrative state, capitalist economy, and civil society.”56 So, while these social spheres can be conceived of as autonomous functional subsystems, their boundaries are legally defined in a way that affects the manner and degree of their interaction: “The political constitution is geared to shaping each of these systems by means of the medium of law and to harmonizing them so that they can fulfill their functions as measured by a presumed ‘common good’.”57 Thus, constitutional discourses should be seen less as interpretations of a positive legal text, and more as attempts to articulate legal norms that could shift the balance between these spheres in a manner more reflective of generalizable interests, occurring amidst class stratification and cultural pluralism. A constitution's status as positive law is also of importance for fundamentally Hegelian reasons relating to his narrower sense of political constitutionalism: its norms must be public and concrete, such that differently positioned citizens have at least an initial sense of what the shared hermeneutic starting points for constitutional discourse might be. But these concrete formulations must also be understood to embody principles in the interest of all citizens, so that constitutional discourse can be the site of effective democratic will formation concerning the basic norms that mediate between particular individuals and the general interests of free and equal citizens. This recalls Hegel's point that constitutions fulfill their mediational function by being sufficiently positive so as to be publicly recognizable, yet are not exhausted by this positivity – the content of the constitution is instead filled in over time through ongoing legislation. In order to avoid Hegel's foreshortened conception of public participation in this process and his consequent authoritarian tendencies, Habermas and, later, Benhabib highlight the importance of being able to conceive of basic constitutional norms as themselves being the products of public contestation and discourse. In order to articulate this idea, they draw on legal theorists like Robert Cover and Frank Michelman who characterize this process of legal rearticulation as “jurisgenesis”58: a community's production of legal meaning by way of continuous rearticulation, through reflection and contestation, of its constitutional project. Habermas explicitly conceives of the democratic legal order in this way when, in the context of considering the question of how a constitution that confers legitimacy on ordinary legislation could itself be thought to be democratically legitimate, he writes: I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution: in my view, a constitution that is democratic – not just in its content but also according to its source of legitimation – is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights.59 A constitutional order and its interpretive history represent a community's attempt to render the terms under which they can give themselves the law that shapes their society's basic structure and secure the law's integrity through assigning basic liberties. Although philosophical reflection can give us some grasp of the presuppositions of a practice of legitimate lawmaking, this framework of presuppositions (“the system of rights”) is “unsaturated.”60 In Hegelian fashion, it must, to be meaningful, be concretized through discourse, and not in an one-off way during a founding moment that fixes the terms of political association once and for all, but continuously, as new persons enter the community and as new circumstances, problems, and perspectives emerge. The stakes involved in sustaining a broad and inclusive constitutional discourse turn out to be significant. Habermas has recently invoked the concept of dignity in this regard, linking it to the process through which society politically constitutes itself as a reciprocal order of free and equal citizens. As a status rather than an inherent property, “dignity that accrues to all persons equally preserves the connotation of a self-respect that depends on social recognition.”61 Rather than being understood as a quality possessed by some persons by virtue of their proximity to something like the divine, the modern universalistic conception of dignity is a social status dependent upon ongoing practices of mutual recognition. Such practices, Habermas posits, are most fully instantiated in the role of citizens as legislators of the order to which they are subject. [Dignity] can be established only within the framework of a constitutional state, something that never emerges of its own accord. Rather, this framework must be created by the citizens themselves using the means of positive law and must be protected and developed under historically changing conditions. As a modern legal concept, human dignity is associated with the status that citizens assume in the self-created political order.62 Although the implications of invoking dignity (as opposed to, say, autonomy) as the normative core of democratic constitutionalism are unclear,63 plainly Habermas remains committed to strongly intersubjective conceptions of democratic constitutionalism, to an intersubjectivity that continues to be legally and politically mediated (a dimension largely absent from Honneth's successor theory of intersubectivity). What all of this suggests is a constitutional politics in which citizens are empowered to take part and meaningfully impact the terms of their cultural, economic, and political relations to each other. Such politics would need to be considerably less legalistic and precedent bound, less focused on the democracy-constraining aspects of constitutionalism emphasized in most liberal rule of law models. The sense of incompleteness and revisability that marks this critical theory approach to constitutionalism represents a point where critical theories of democracy may claim to be more radical and revisionary than most liberal and deliberative counterparts. It implies a sharp critique of more familiar models of bourgeois constitutionalism: whether they conceive of constitutional order as having a foundation in moral rights or natural law, or in an originary founding moment, such models a) tend to be backward-looking in their justifications, seeing the legal order as founded on some exogenously determined vision of moral order; b) tend to represent the law as an already-determined container within which legitimate ordinary politics takes place; and c) find the content of law to be ascertainable through the specialized reasoning of legal professionals. 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**.

Rejecting the state creates ineffective activism, undermining progressive forces

Orly Lobel, University of San Diego Assistant Professor of Law, 2007, The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics,” 120 HARV. L. REV. 937, http://www.harvardlawreview.org/media/pdf/lobel.pdf

Both the practical failures and the fallacy of rigid boundaries generated by extralegal activism rhetoric permit us to broaden our inquiry to the underlying assumptions of current proposals regarding transformative politics — that is, attempts to produce meaningful changes in the political and socioeconomic landscapes. The suggested alternatives produce a new image of social and political action. This vision rejects a shared theory of social reform, rejects formal programmatic agendas, and embraces a multiplicity of forms and practices. Thus, it is described in such terms as a plan of no plan,211 “a project of projects,”212 “anti-theory theory,”213 politics rather than goals,214 presence rather than power,215 “practice over theory,”216 and chaos and openness over order and formality. As a result, the contemporary message rarely includes a comprehensive vision of common social claims, but rather engages in the description of fragmented efforts. As Professor Joel Handler argues, the commonality of struggle and social vision that existed during the civil rights movement has disappeared.217 There is no unifying discourse or set of values, but rather an aversion to any metanarrative and a resignation from theory. Professor Handler warns that this move away from grand narratives is self-defeating precisely because only certain parts of the political spectrum have accepted this new stance: “[T]he opposition is not playing that game . . . . [E]veryone else is operating as if there were Grand Narratives . . . .”218 Intertwined with the resignation from law and policy, the new bromide of “neither left nor right” has become axiomatic only for some.219 The contemporary critical legal consciousness informs the scholarship of those who are interested in progressive social activism, but less so that of those who are interested, for example, in a more competitive securities market. Indeed, an interesting recent development has been the rise of “conservative public interest lawyer[ing].”220 Although “public interest law” was originally associated exclusively with liberal projects, in the past three decades conservative advocacy groups have rapidly grown both in number and in their vigorous use of traditional legal strategies to promote their causes.221 This growth in conservative advocacy is particularly salient in juxtaposition to the decline of traditional progressive advocacy. Most recently, some thinkers have even suggested that there may be “something inherent in the left’s conception of social change — focused as it is on participation and empowerment — that produces a unique distrust of legal expertise.”222 Once again, **this conclusion reveals flaws** parallel **to the** original **disenchantment with legal reform**. Although the new extralegal frames present themselves as apt alternatives to legal reform models and as capable of producing significant changes to the social map, in practice they generate very limited improvement in existing social arrangements. Most strikingly, the cooptation effect here can be explained in terms of the most profound risk of the typology — that of legitimation. The common pattern of extralegal scholarship is to describe an inherent instability in dominant structures by pointing, for example, to grassroots strategies,223 and then to **assume** that specific instances of counterhegemonic activities translate into a more complete transformation. This celebration of multiple micro-resistances seems to rely on an aggregate approach — an idea that the multiplication of practices will evolve into something substantial. **In fact, the myth of engagement obscures the** actual lack of change being produced**, while the broader pattern of equating extralegal activism with social reform produces a** false belief in the potential of change. There are few instances of meaningful reordering of social and economic arrangements and macro-redistribution. Scholars write about decoding what is really happening, as though the scholarly narrative has the power to unpack more than the actual conventional experience will admit.224 Unrelated efforts become related and part of a whole through mere reframing. At the same time, the elephant in the room — the rising level of economic inequality — is left unaddressed and comes to be understood as natural and inevitable.225 This is precisely the problematic process that critical theorists decry as losers’ self-mystification, through which marginalized groups come to see systemic losses as the product of their own actions and thereby begin to focus on minor achievements as representing the boundaries of their willed reality. The explorations of micro-instances of activism are often fundamentally performative, obscuring the distance between the descriptive and the prescriptive. The manifestations of **extralegal** **activism** — the law and organizing model; the proliferation of informal, soft norms and norm-generating actors; and the celebrated, separate nongovernmental sphere of action — all **produce a fantasy that change can be brought about through small-scale, decentralized transformation**. The emphasis is local, but the locality **is** described as a microcosm of the whole and the audience is national and global. In the context of the humanities, Professor Carol Greenhouse poses a comparable challenge to ethnographic studies from the 1990s, which utilized the genres of narrative and community studies, the latter including works on American cities and neighborhoods in trouble.226 The aspiration of these genres was that each individual story could translate into a “time of the nation” body of knowledge and motivation.227 In contemporary legal thought, a corresponding gap opens between the local scale and the larger, translocal one. In reality, although there has been a recent proliferation of associations and grassroots groups, few new local-statenational federations have emerged in the United States since the 1960s and 1970s, and many of the existing voluntary federations that flourished in the mid-twentieth century are in decline.228 There is, therefore, an absence of links between the local and the national, an absent intermediate public sphere, which has been termed “the missing middle” by Professor Theda Skocpol.229 New social movements have for the most part failed in sustaining coalitions or producing significant institutional change through grassroots activism. Professor Handler concludes that this failure is due in part to the ideas of contingency, pluralism, and localism that are so embedded in current activism.230 Is the focus on small-scale dynamics simply an evasion of the need to engage in broader substantive debate? **It is important for next-generation progressive legal scholars**, while maintaining a critical legal consciousness, to recognize that not all extralegal associational life is transformative. We must differentiate, for example, between inward-looking groups, which tend to be self-regarding and depoliticized, and social movements that participate in political activities, engage the public debate, and aim to challenge and reform existing realities.231 We must differentiate between professional associations and more inclusive forms of institutions that act as trustees for larger segments of the community.232 As described above, extralegal activism tends to operate on a more divided and hence a smaller scale than earlier social movements, which had national reform agendas. Consequently, **within critical discourse there is a need to recognize the limited capacity of small-scale action**. We should question the narrative that imagines consciousness-raising as directly translating into action and action as directly translating into change. Certainly not every cultural description is political. Indeed, it is questionable whether forms of activism that are opposed to programmatic reconstruction of a social agenda should even be understood as social movements. In fact, when groups are situated in opposition to any form of institutionalized power, they may be simply mirroring what they are fighting against and merely producing moot activism that settles for what seems possible within the narrow space that is left in a rising convergence of ideologies. The original vision is consequently coopted, and contemporary discontent is legitimated through a process of self-mystification.

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Simulating the plan creates unique pedagogical benefits by forcing us to build expertise on the details of national security policy—the simulation itself 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.

We outweigh and link turn the K—focus on the legal questions of the 1ac is the only way to solve our impacts—The Uighurs treatment lies at the intersection of immigration and terror discourse, revealing the exclusionary logic at the heart of Otherization

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

To make sense of the law’s limitations in resolving the Kiyemba debates and the context that lead to indefinite detentions, this section raises two points. First, it describes relevant assumptions in the law of alienage and Guantánamo detentions in the War on Terror. The Uighurs’ detention predicament is consistent with exclusionary effects in the law of alienage and overseas detentions. While Uighur detentions continue, their situation reflects larger exclusionary trends in immigration law and detention policies. Insider/outsider dynamics of citizenship and alienage, de facto discrimination based on the nationalities of Guantánamo detainees, and cultural and geopolitical assumptions about the War on Terror shape what legal options the Kiyemba detainees may receive. The legal doctrine applied to these detentions is framed by significant assumptions on citizenship and alienage, racial exclusion, and overseas military operations. To begin exploring why this happens, and to provide the context that creates legal disputes and then limits their resolution, this section initiates a transnational exploration.241

Legal strategies are key—enables productive change and shifts in praxis—COMBINING law with critique is comparatively best—solves the case and k

Scott Cummings, Professor of Law, UCLA School of Law, 2007, CRITICAL LEGAL CONSCIOUSNESS IN ACTION, www.harvardlawreview.org/media/pdf/cummings.pdf

Classical civil rights activism has been channeled into a diverse range of new movements, including prominent efforts to promote the rights of immigrants and other noncitizens. The movement for undocumented immigrant rights has deployed a traditional social movement strategy, with the 2006 “Spring Marches” demonstrating power in numbers in order to influence the content of a proposed guest worker statute. The movement has also relied on strategic litigation, as mentioned above in the context of restaurant and garment advocacy, as well as organizing-based labor enforcement efforts in the low-wage immigrant work sector, as the example of the Workplace Project illustrates. **In the wake of the Bush administration’s counterterrorism policies after 9/11, we have also been reminded of the continued importance of public interest law in protecting the rights of noncitizens against executive power**, with the Center for Constitutional Rights bringing two successful lawsuits that resulted in courts upholding the right of detainees to challenge their detention through habeas corpus in Rasul v. Bush40 and invalidating military commissions in Hamdan v. Rumsfeld.41 Though these cases have by no means ended the battle over detainee rights, they have succeeded in mobilizing **intense political pressure on administration officials to** change their practices. It is the self-conscious effort to combine the legal and political — **to deploy them in mutually reinforcing ways that recognize the power and limits of both** — **that points beyond the boundaries of extralegalism.**

Professor Lobel ends with a call for restoring “critical optimism” to the field of legal inquiry.42 Her article, which stands as a milestone of legal scholarship, does the heavy lifting of dislodging the freighted ideology of the past. For directions on future paths forward, one need look no further than the contemporary thrust of legal activism on the ground.

## k

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

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.

The perm’s effective---no cooption as “their cause” can become “our cause”

Bhambra 10—U Warwick—AND—Victoria Margree—School of Humanities, U Brighton (Identity Politics and the Need for a ‘Tomorrow’, http://www.academia.edu/471824/Identity\_Politics\_and\_the\_Need\_for\_a\_Tomorrow\_)

We suggest that alternative models of identity and community are required from those put forward by essentialist theories, andthat these are offered by the work of two theorists, SatyaMohanty and Lynn Hankinson Nelson. Mohanty’s ([1993] 2000)post-positivist, realist theorisation of identity suggests a way through the impasses of essentialism, while avoiding the excessesof the postmodernism that Bramen, among others, derides as aproposed alternative to identity politics. For Mohanty ([1993]2000), identities must be understood as theoretical constructions that enable subjects to read the world in particular ways; as such, substantial claims about identity are, in fact, implicit explana-tions of the social world and its constitutive relations of power. Experience – that from which identity is usually thought to derive– is not something that simply occurs, or announces its meaningand signiﬁcance in a self-evident fashion: rather, experience is always a work of interpretation that is collectively produced (Scott 1991). Mohanty’s work resonates with that of Nelson (1993), whosimilarly insists upon the communal nature of meaning ork nowledge-making. Rejecting both foundationalist views of knowledge and the postmodern alternative which announces the“death of the subject” and the impossibility of epistemology,Nelson argues instead that, it is not individuals who are theagents of epistemology, but communities. Since it is not possiblefor an individual to know something that another individualcould not also (possibly) know, it must be that the ability to makesense of the world proceeds from shared conceptual frameworksand practices. Thus, it is the community that is the generator andrepository of knowledge. Bringing Mohanty’s work on identity astheoretical construction together with Nelson’s work on episte-mological communities therefore suggests that, “identity” is one of the knowledges that is produced and enabled for and by individu-als in the context of the communities within which they exist. The post-positivist reformulation of “experience” is necessary here as it privileges understandings that emerge through the processing of experience in the context of negotiated premises about the world, over experience itself producing self-evident knowledge (self-evident, however, only to the one who has “had” the experience). This distinction is crucial for, if it is not the expe-rience of, for example, sexual discrimination that “makes” one afeminist, but rather, the paradigm through which one attempts tounderstand acts of sexual discrimination, then it is not necessary to have actually had the experience oneself in order to make theidentiﬁcation “feminist”. If being a “feminist” is not a given factof a particular social (and/or biological) location – that is, beingdesignated “female” – but is, in Mohanty’s terms, an “achieve-ment” – that is, something worked towards through a process of analysis and interpretation – then two implications follow. First,that not all women are feminists. Second, that feminism is some-thing that is “achievable” by men. 3 While it is accepted that experiences are not merely theoretical or conceptual constructs which can be transferred from one person to another with transparency, we think that there is some-thing politically self-defeating about insisting that one can only understand an experience (or then comment upon it) if one has actually had the experience oneself. As Rege (1998) argues, to privilege knowledge claims on the basis of direct experience, orthen on claims of authenticity, can lead to a narrow identity poli-tics that limits the emancipatory potential of the movements or organisations making such claims. Further, if it is not possible to understand an experience one has not had, then what point is there in listening to each other? Following Said, such a view seems to authorise privileged groups to ignore the discourses of disadvantaged ones, or, we would add, to place exclusive responsibility for addressing injustice with the oppressed themselves. Indeed, as Rege suggests, reluctance to speak about the experi-ence of others has led to an assumption on the part of some whitefeminists that “confronting racism is the sole responsibility of black feminists”, just as today “issues of caste become the soleresponsibility of the dalit women’s organisations” (Rege 1998).Her argument for a dalit feminist standpoint, then, is not made in terms solely of the experiences of dalit women, but rather a call for others to “educate themselves about the histories, the preferred social relations and utopias and the struggles of the marginalised” (Rege 1998). This, she argues, allows “their cause” to become “our cause”, not as a form of appropriation of “their” struggle, but through the transformation of subjectivities that enables a recognition that “their” struggle is also “our” struggle. Following Rege, we suggest that social processes can facilitate the understanding of experiences, thus making those experi-ences the possible object of analysis and action for all, while recognising that they are not equally available or powerful forall subjects. 4 Understandings of identity as given and essential, then, we suggest, need to give way to understandings which accept them as socially constructed and contingent on the work of particular,overlapping, epistemological communities that agree that this orthat is a viable and recognised identity. Such an understanding avoids what Bramen identiﬁes as the postmodern excesses of “post-racial” theory, where in this “world without borders (“rac-ism is real, but race is not”) one can be anything one wants to be: a black kid in Harlem can be Croatian-American, if that is whathe chooses, and a white kid from Iowa can be Korean-American”(2002: 6). Unconstrained choice is not possible to the extent that,as Nelson (1993) argues, the concept of the epistemological com-munity requires any individual knowledge claim to sustain itself in relation to standards of evaluation that already exist and thatare social. Any claim to identity, then, would have to be recog-nised by particular communities as valid in order to be success-ful. This further shifts the discussion beyond the limitations of essentialist accounts of identity by recognising that the commu-nities that confer identity are constituted through their shared epistemological frameworks and not necessarily by shared characteristics of their members conceived of as irreducible. 5 Hence, the epistemological community that enables us to identify our-selves as feminists is one that is built up out of a broadly agreed upon paradigm for interpreting the world and the relations between the sexes: it is not one that is premised upon possessing the physical attribute of being a woman or upon sharing the same experiences. Since at least the 1970s, a key aspect of black and/orpostcolonial feminism has been to identify the problems associated with such assumptions (see, for discussion, Rege 1998, 2000). We believe that it is the identiﬁcation of injustice which calls forth action and thus allows for the construction of healthy solidarities. 6 While it is accepted that there may be important differences between those who recognise the injustice of disadvantage while being, in some respects, its beneﬁciary (for example, men, white people, brahmins), and those who recognise the injustice from the position of being at its effect (women, ethnic minorities,dalits), we would privilege the importance of a shared political commitment to equality as the basis for negotiating such differences. Our argument here is that thinking through identity claims from the basis of understanding them as epistemological communities militates against exclusionary politics (and its asso-ciated problems) since the emphasis comes to be on participation in a shared epistemological and political project as opposed to notions of ﬁxed characteristics – the focus is on the activities indi- viduals participate in rather than the characteristics they aredeemed to possess. Identity is thus deﬁned further as a function of activity located in particular social locations (understood asthe complex of objective forces that inﬂuence the conditions in which one lives) rather than of nature or origin (Mohanty 1995:109-10). As such, the communities that enable identity should not be conceived of as “imagined” since they are produced by very real actions, practices and projects.

The aff inevitably involves discussions of micropolitics, but making larger normative judgments about the necessity of rights is key to success

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)

The foregoing discussion of the contestability of rights claims illustrates¶ another important feature of hegemonic struggles around ideas or values. Even more central is the contention that rights struggles are ultimately always struggles about social practices. These struggles **ultimately come down to how¶ people lead their lives** and how institutions behave. During the contested phase of hegemonic engagements ideological contests between competing¶ rights-claims take centre stage; the ultimate test lies in the field of social and institutional practices. All such struggles are uneven and outcomes are rarely¶ stable or guaranteed. The struggle over access to effective contraception is a¶ case in point. The primary struggle for the generalized 'right to contraception'¶ is behind us; in the most general terms the ideological battle has been won.¶ But at the same time it is true that local resistance remains strong and there¶ are major regional variations. Hegemonic struggles, **whether for local or¶ societal hegemony,** are about **securing basic shifts in the centre of gravity of¶ contested issues;** struggles to anchor and secure such victories almost¶ inevitably involve the most microscopic struggles around individual and¶ institutional practices.

The implications of my position can be illustrated by comparing it with Mark Tushnet's argument that the discourses of rights lack political utility. In place of rights discourses he argues the case for a political discourse grounded on interests and demands. He argues that: ... people need food and shelter right now, and demanding that those needs be satisfied... strikes me as more likely to succeed than claiming that existing rights to food and shelter¶ must be enforced.31 Tushnet's claim seems counter-intuitive. Starting from a shared concern that¶ the hungry get fed, it is **necessary to make some judgment** about how that¶ objective is to be secured. In struggles over the distribution of resources each interest pressed must, as a minimum step, advance and sustain some legitimation of the claim. Why should the hungry be fed? Why do they have¶ some claim against the resource of the community? It is a key requirement of the discourse of rights-claims that it provides an appropriate and socially¶ persuasive rationale or justification for any 'demand' advanced. The 'demand strategy' advocated by Tushnet singularly fails to provide the¶ required legitimation. The interests of the poor are not self-legitimating. If¶ that were the case, such interests would not be politically controversial. A¶ 'demand strategy' makes no sense. If when asked why a demand should be¶ satisfied we merely reply 'Because we demand it' we fail to answer the¶ challenge. Social claims, especially new ones, **require legitimation**. The¶ deployment of the discourse of rights has a special and distinctive role in the¶ historical process of the legitimation of social interests.

The state can be redeemed!

Brubaker 4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The existence of habeas petitions promoting human rights proves that an institution can be caught up in systems of whiteness and imperialism 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

We should recognize intersections in oppression – tracing all exclusion back to a singular starting point is historically reductive—that’s a reason to prefer our methodology to solve the end point

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

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

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

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

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

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

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

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

The aff’s approach is a good starting point---normative policy prescriptions are educationally valuable

Richard Ellis et al 9, Ph.D. University of California, Berkeley, degree completed December 1989, M.A. University of California, Berkeley, Political Science, 1984, B.A. University of California, Santa Cruz, Politics, 1982, Debating the Presidency: Conflicting Perspectives on the American Executive, p. google books

In 1969 the political scientist Aaron Wildavsky published a hefty reader on the American presidency. He prefaced it with the observation that “the presidency is the most important political institution in American life” and then noted the paradox that an institution of such overwhelming importance had been studied so little. “The eminence of the institution,” Wildavsky wrote, “is matched only by the extraordinary neglect shown to it by political scientists. Compared to the hordes of researchers who regularly descend on Congress, local communities, and the most remote foreign principalities, there is an extraordinary dearth of students of the presidency, although scholars ritually swear that the presidency is where the action is before they go somewhere else to do their research.”1 Political scientists have come a long way since 1969. The presidency remains as central to national life as it was then, and perhaps even more so. The state of scholarly research on the presidency today is unrecognizable compared with what it was forty years ago. A rich array of new studies has reshaped our understanding of presidential history, presidential character, the executive office, and the presidency’s relationship with the public, interest groups, parties, Congress, and the executive branch. Neglect is no longer a problem in the study of the presidency. In addition, those who teach about the presidency no longer lack for good textbooks on the subject. A number of terrific books explain how the office has developed and how it works. Although students gain a great deal from reading these texts, even the best of them can inadvertently promote a passive learning experience. Textbooks convey what political scientists know, but the balance and impartiality that mark a good text can obscure the contentious nature of the scholarly enterprise. Sharp disagreements are often smoothed over in the writing. The primary purpose of Debating the Presidency is to allow students to participate directly in the ongoing real-worldcontroversies swirling around the presidencyand to judge for themselves which side is right. It is premised philosophically on our view of students as active learners to be engaged rather than as passive receptacles to be filled. The book is designed to promote a classroom experience in which students debate and discuss issues rather than simply listen to lectures. Some issues, of course, lend themselves more readily to this kind of classroom debate. In our judgment, questions of a normative nature —asking not just what is, but what ought to be—are likely to foster the most interesting and engaging classroom discussions. So in selecting topics for debate, we generally eschewed narrow but important empirical questions of political science—such as whether the president receives greater support from Congress on foreign policy than on domestic issues—for broader questions that include empirical as well as normative components—such as whether the president has usurped the war power that rightfully belongs to Congress. We aim not only to teach students to think like political scientists, but also to encourage them to think like democratic citizens. Each of the thirteen issues selected for debate in this book’s second edition poses questions on which thoughtful people differ. These include whether the president should be elected directly by the people, whether the media are too hard on presidents, and whether the president has too much power in the selection of judges. Scholars are trained to see both sides of an argument, but we invited our contributors to choose one side and defend it vigorously. Rather than provide balanced scholarly essays impartially presenting the strengths and weaknesses of each position, Debating the Presidency leaves the balancing and weighing of arguments and evidence to the reader. The essays contained in the first edition of this book were written near the end of President George W. Bush’s fifth year in office; this second edition was assembled during and after Barack Obama’s first loo days as president. The new edition includes four new debate resolutions that should spark spirited classroom discussion about the legitimacy of signing statements, the war on terror, the role of the vice presidency, and the Twenty-second Amendment. Nine debate resolutions have been retained from the first edition and, wherever appropriate, the essays have been revised to reflect recent scholarship or events. For this edition we welcome David Karol, Tom Cronin, John Yoo, Lou Fisher, Peter Shane, Nelson Lund, Doug Kriner, and Joel Goldstein, as well as Fred Greenstein, who joins the debate with Stephen Skowronek over the importance of individual attributes in accounting for presidential success. In deciding which debate resolutions to retain from the first edition and which ones to add, we were greatly assisted by advice we received from many professors who adopted the first edition of this book. Particularly helpful were the reviewers commissioned by CQ Press: Craig Goodman of Texas Tech University, Delbert J. Ringquist of Central Michigan University, Brooks D. Simpson of Arizona State University, and Ronald W. Vardy of the University of Houston. We are also deeply grateful to chief acquisitions editor Charisse Kiino for her continuing encouragement and guidance in developing this volume. Among the others who helped make the project a success were editorial assistants Jason McMann and Christina Mueller, copy editor Mary Marik, and the book’s production editor, Gwenda Larsen. Our deepest thanks go to the contributors, not just for their essays, but also for their excellent scholarship on the

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Debating legality of specific executive-branch policies teaches us the skills to influence real policy-making

Aziz Z. Huq 12, Chicago law prof, “binding the executive (by law or by politics)”, August, <http://www.law.uchicago.edu/files/file/400-ah-binding.pdf>

The interaction of law with political commitments can be observed in granular form within the executive. American political culture has developed in a path-dependent fashion that invests legal rules with normative significance. With notable outliers on both sides of the aisle, most officials express sincere normative preferences for legality and constitutionalism.207 Legality has its own standing constituency. That lobby is cultivated by law schools and by law professors who profess to teach what the Constitution and federal statutes command. This has consequences for the breadth of presidential discretion because lawyers trained in this tradition currently staff the length and breadth of the executive branch. These lawyers’ preferences for legality impose frictions on executive initiatives that run afoul of legal limits. At the limit, these lawyers are likely aware of the leverage they have by dint of the fact that their noisy exit would inflict damage on the government’s policy projects. As one scholar of executive branch legal interpretation has recently observed, good-faith lawyering by attorneys within the Justice Department and other components of the executive will constrain presidential options so long as “the press, the lawyerly public, and Congress [] care about preserving the traditional structures of executive-branch legal interpretation.” 208

Engaging the law through in-depth debate is critical to solve their impacts

Harris, professor of law – UC Berkeley, ‘94

(Angela P., 82 Calif. L. Rev. 741)

CRT has taken up this method of internal critique. Like the crits, race-crits have tried to go beyond espousing Doctrine X over Doctrine Y, claiming instead to show that both doctrines are biased against people of color from the outset. n33 For example, as Brooks and Newborn note, the CRT critique of equal protection law challenges not only the "intent" test of Washington v. Davis, n34 but the understanding of racism on which that test is based. n35 And, as Farber notes, the CRT critique of affirmative action challenges the very notion of "merit." n36 This commitment to conceptual as well as doctrinal critique is CRT's radicalism - its attempt to dig down to the very roots of legal doctrine, in contrast with the more reformist bent of traditional civil rights scholarship. Following the first wave's announcement that law is not separate from politics, the second wave of CLS moved to the study of law as "rhetoric" - [\*748] the ways in which legal reasoning accomplishes its ideological effects. n37 Second wave crits have attempted to examine how binary thinking in the law is produced and how it reflects larger historical processes of bureaucratization and commodification. In so doing, the second wave of CLS has found no "there" there beneath the rhetoric of law. Where first wave crits assumed that beneath law's indeterminacy was a "fundamental contradiction" in the human condition itself, n38 or relied on the existence of moments of unalienated, authentic "being" in the world, n39 second wave crits have begun to question whether the very assumption of a human condition separate from the language we use to talk about it makes sense. I call this mood of profound doubt and skepticism "postmodernist." There are as many different definitions of postmodernism as there are postmodernists. n40 As law professors have understood the term, n41 however, [Postmodernism] suggests that what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself. n42 Postmodernism's strength is in its corrosiveness. First wave crits insisted that law functions as a mask for power; second wave crits question the first wave's faith in "unmasking" itself. The effort to expose law as ideology assumed that it was possible, through the force of critique, to suddenly see the way things "really" are in a flash of enlightenment. But the [\*749] second wave crits doubt this very reliance on a "real reality" underlying ideology. Instead, they suggest that ideology is all there is. n43 Postmodernist critique is congenial to race-crits, who had already drawn from history the lesson that "racism" is no superficial matter of ignorance, conscious error, or bigotry, but rather lies at the very heart of American - and western - culture. In one of the foundational articles of CRT, Kimberle Crenshaw notes that the civil rights movement achieved material and symbolic gains for blacks, yet left racist ideology and race-baiting politics intact. n44 In Crenshaw's view, the crits' critiques did not go far enough to expose the racism in legal reasoning and legal institutions. Derrick Bell argues that racism is a permanent feature of the American landscape, not something that we can throw off in a magic moment of emancipation. n45 And in a moment of deep pessimism, Richard Delgado's fictional friend "Rodrigo Crenshaw" has suggested that racism is an intrinsic feature of "The Enlightenment" itself. n46 **The deeper that race-crits dig, the more embedded racism seems to be**; the deeper the race-crit critique of western culture goes, the more useful postmodernist philosophy becomes in demonstrating that nothing should be immune from criticism. By calling everything taken for granted into question, postmodernist critique potentially clears the way for alternative accounts of social reality, n47 including accounts that place racism at the center of western culture. Thus, Gerald Torres has identified postmodernism as a useful position from which to criticize both theories of interest-group and "communitarian" politics. n48 Anthony Cook sees deconstruction, a postmodernist method of reading texts, as potentially "liberatory" for progressive scholars of color. n49 [\*750] And Robert Chang argues that post-structuralism is useful in order to understand the interaction between Asian American political action and the law. n50 Postmodernist thought refuses to accept any concept, linguistic usage, or value as pure, original, or incorruptible. Postmodernist narratives, as used by race-crits, contend that concepts like neutrality and objectivity, and institutions like law, have not escaped the taint of racism, but rather are often used to perpetuate it. Postmodernist narratives emphasize the ways in which "race" permeates our language, our perceptions, even our fondest "colorblind" utopias. n51 CRT tells postmodernist narratives when it digs down into seemingly neutral areas of law and finds concepts of "race" and racism always already there. B. CRT and Modernist Narratives Even while it exposes racism within seemingly neutral concepts and institutions, however, CRT has not abandoned the fundamental political goal of traditional civil rights scholarship: the liberation of people of color from racial subordination. Although, like crits, race-crits have questioned concepts of neutrality and objectivity, they have done so from a perspective that places racial oppression at the center of analysis and privileges the racial subject. This commitment to antiracism over critique as an end in itself has created rifts between CRT and CLS. For example, in a symposium published by the Harvard Civil Rights-Civil Liberties Law Review, race-crits broke with crits over the efficacy of "rights talk." n52 CLS writers had argued "that rights were malleable and manipulative, that in practice they served to isolate and marginalize rather than empower and connect people, and that progressive people should emphasize needs, informality, and connectedness rather than rights." n53 Patricia Williams, Richard Delgado, and Mari Matsuda, however, all rejected this yearning to go beyond rights to more [\*751] direct forms of human connection, arguing that, for communities of color, "rights talk" was an indispensable tool. n54 This argument between CRT and CLS was more a matter of strategy and tactics than of fundamental disagreement. Both sides agreed that progressive political action should be antiracist and that human connection was a good thing. But a comparison of CRT work with the second wave of CLS work also indicates a more serious tension. In its commitment to the liberation of people of color, CRT work demonstrates a deep commitment to concepts of reason and truth, transcendental subjects, and "really-out-there" objects. Thus, in its optimistic moments, CRT engages in "modernist" narratives. n55 Modernist narratives assume three things: a subject, free to choose, who can be emancipated or not; an objective world of things out there (a world "the way it really is" as opposed to the way things appear to be in a condition of false consciousness); and "reason," the bridge between the subject and the object that enables subjects to move from their own blindness to "enlightenment." Modernist narratives thus call on a particular intellectual machinery, a methodology Brian Fay describes as "critical social science." Critical social science requires the following: First, that there be a crisis in a social system; second, that this crisis be at least in part caused by the false consciousness of those experiencing it; third, that this false consciousness be amenable to the process of enlightenment ...; and fourth, that such enlightenment lead to emancipation in which a group, empowered by its new-found self-understanding, radically alters its social arrangements and thereby alleviates its suffering. n56 [\*752] In its optimistic moments, CRT is described very well by "critical social science." The crisis in our social system is our collective failure to adequately perceive or to address racism. This crisis, according to CRT, is at least in part caused by a false understanding of "racism" as an intentional, isolated, individual phenomenon, equivalent to prejudice. This false understanding, however, can be corrected by CRT, which redescribes racism as a structural flaw in our society. Through these explanations, readers will come to a new and deeper understanding of reality, an enlightenment which in turn will lead to legal and political struggle that ultimately results in racial liberation. Under CRT, as Fay remarks of critical social science in general, "the truth shall set you free." n57 This project fits well with the kind of scholarship most often found in law reviews. As several scholars have recently argued, one characteristic of conventional legal scholarship is its insistent "normativity": the little voice that constantly asks legal scholars, "So, what should we do?" n58 Normativity is both a stylistic and a substantive characteristic. At the stylistic level, normativity refers to how law review articles typically are structured: the writer identifies a problem within the existing legal framework; she then identifies a "norm," within or outside the legal system, to which we ought to adhere; and finally she applies the norm to resolve the problem in a way that can easily translate into a series of moves within the currently existing legal system. n59 At the substantive level, normativity describes the assumption within legal scholarship of a coherent and unitary "we" - a legal subject who speaks for and acts in the people's best interest - with the power to "do" something. Legal normativity also confidently assumes "our" ability to reason a way through problems with neutrality and objectivity: to "choose" a norm and then "apply" it to a legal problem. n60 Whereas second-wave CLS work sits very uneasily with this scholarly method, n61 both traditional civil rights scholarship and CRT adhere for the [\*753] most part to stylistic and substantive normativity. Although the "we" assumed in these articles and essays is often "people of color" and progressive whites rather than a generic "we," the same confidence is exhibited of "our" ability to choose one norm over another, to apply the new principle to a familiar problem, to achieve enlightenment, and to move from understanding to action. n62 Even when the recommended course of action goes beyond adopting Doctrine X over Doctrine Y, as CRT makes a point of doing, the exhortation to action often still assumes that liberation is just around the corner. CRT's commitment to the liberation of people of color - and the project of critical social science (generally) and normative legal scholarship (in particular) as a way to further that liberation - suggest a faith in certain concepts and institutions that postmodernists lack. When race-crits tell modernist stories, they assume that "people of color" describes a coherent category with at least some shared values and interests. They assume that the idea of "liberation" is meaningful - that racism is something that can one day somehow cease to exist, or cease to exert any power over us. Modernist narratives assume a "real" reality out there, and that reason can bring us face to face with it. And modernist narratives have faith that once enough people see the truth, right action will follow: that enlightenment leads to empowerment, and that empowerment leads to emancipation. Modernist narratives, then, are profoundly hopeful. They assume that people of color and whites live in the same perceptual and moral world, that reason speaks to us all in the same way despite our different experiences, and that reason, rather than habit or power, is what will motivate people. Modernist narratives also can be profoundly romantic. They imagine heroic action by a formerly oppressed people rising up as one, "empowered" to be who they "really" are or choose to be, breathing the thin and bracing air of freedom. This optimism and romanticism, though easy to caricature, cannot be easily dismissed. As Patricia Williams and Mari Matsuda have pointed out, faith in reason and truth and belief in the essential freedom of rational subjects have enabled people of color to survive and resist subordination. n63 Political modernism, more generally, has been a **powerful force** in the lives of subjugated peoples; as a practical matter, politically liberal societies are [\*754] vastly preferable to the alternatives. n64 A faith in reason has sustained efforts to educate people into critical thinking and to engage in debate rather than violence. n65 The passionate and constructive energy of modernist narratives of emancipation is also grounded in a moral faith: that human beings are created equal and endowed with certain inalienable rights; that oppression is wrong and resistance to oppression right; that opposing subjugation in the name of liberty, equality, and true community is the obligation of every rational person. In its modernist moments, CRT aims not to topple the Enlightenment, but to make its promises real. n66

Effective scenario analysis results in paradigm shifts as new info is presented – this is a reason the permutation is able to rethink the 1ac’s justifications

Pierre Wack 85, retired head of the business environment division of the Royal Dutch/Shell Group, Scenarios: shooting the rapids, Harvard Business Review, November-December, <https://faculty.washington.edu/socha/css572winter2012/Scenarios%20-%20shooting%20the%20rapids.pdf>

In times of rapid change and increased complexity, however, the manager's mental model becomes a dangerously mixed bag: rich detail and understanding can coexist with dubious assumptions, selective inattention to alternative ways of interpreting evidence, and illusory projections. In these times, the scenario approach has leverage and can make a difference. In today's world, a management microcosm shaped by the past and sustained by the usual types of forecasts is inherently suspect and inadequate. Yet it is extremely difficult for managers to break out of their worldview while operating within it. When they are committed to a certain way of framing an issue, it is difficult for them to see solutions that lie outside this framework. By presenting other ways of seeing the world, decision scenarios allow managers to break out of a one-eyed view. Scenarios give managers something very precious: the ability to reperceive reality. In a turbulent business environment, there is more to see than managers normally perceive. Highly relevant information goes unnoticed because, being locked into one way of looking, managers fail to see its significance (see the insert, "Seeing 'Rabbits in the Hat' "). It has been my repeated experience that the perceptions that emerge when the disciplined approach of scenario analysis is practiced are richer and often critically different from the previous implicit view. The scenario process of converting information into fresh perceptions has something of a "breeder effect": it generates energy, much more energy than has been consumed in time and effort during the process. A mere high or low around a baseline can never achieve a conceptual reframing. The reperception of reality and the discovery of strategic openings that follow the breaking of the manager's assumptions (many of which are so taken for granted that the manager no longer is aware of them) are, after all, the essence of entrepreneurship. Scenario planning aims to rediscover the original entrepreneurial power of foresight in contexts of change, complexity, and uncertainty. It is precisely in these contexts-not in stable times-that the real opportunities lie to gain competitive advantage through strategy.