# 1AC

## Plan

First, a good idea:

The United States federal government should limit the war power authority of the president for self-defense targeted killings to outside an armed conflict.

## Clarity

US targeted killing derives authority from both armed conflict (jus in bello) and self-defense (jus ad bellum) legal regimes—that authority overlap conflates the legal regimes

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2012, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

For the past several years, the United States has relied on both armed conflict and self-defense as legal justifications for targeted strikes outside of the zone of active combat in Afghanistan. A host of interesting questions arise from both the use of targeted strikes and the expansive U.S. justifications for such strikes, including the use of force in self-defense against non-state actors, the use of force across state boundaries, the nature and content of state consent to such operations, the use of targeted killing as a lawful and effective counterterrorism measure, and others.7 Furthermore, each of the justifications—armed conflict and self-defense—raises its own challenging questions regarding the appropriate application of the law and the parameters of the legal paradigm at issue. For example, if the existence of an armed conflict is the justification for certain targeted strikes, the immediate follow-on questions include the determination of a legitimate target within an armed conflict with a terrorist group and the geography of the battlefield. Within the self-defense paradigm, key questions include the very contours of the right to use force in self-defense against individuals and the implementation of the concepts of necessity and imminence, among many others.

However, equally fundamental questions arise from the use of both justifications at the same time, without careful distinction delimiting the boundaries between when one applies and when the other applies. From the perspective of the policymaker, the use of both justifications without further distinction surely offers greater flexibility and potential for action in a range of circumstances.8 To the extent such flexibility does not impact the implementation of the relevant law or hinder the development and enforcement of that law in the future, it may well be an acceptable goal. In the case of targeted strikes in the current international environment of armed conflict and counterterrorism operations occurring at the same time, however, the mixing of legal justifications raises significant concerns about both current implementation and future development of the law.

One overarching concern is the conflation in general of jus ad bellum and jus in bello. The former is the law governing the resort to force—sometimes called the law of self-defense—and the latter is the law regulating the conduct of hostilities and the protection of persons in conflict—generally called the law of war, the law of armed conflict, or international humanitarian law. International law reinforces a strict separation between the two bodies of law, ensuring that all parties have the same obligations and rights during armed conflict to ensure that all persons and property benefit from the protection of the laws of war. For example, the Nuremberg Tribunal repeatedly held that Germany’s crime of aggression neither rendered all German acts unlawful nor prevented German soldiers from benefitting from the protections of the jus in 6bello.9 More recently, the Special Court for Sierra Leone refused to reduce the sentences of Civil Defense Forces fighters on the grounds that they fought in a “legitimate war” to protect the government against the rebels.10 The basic principle that the rights and obligations of jus in bello apply regardless of the justness or unjustness of the overall military operation thus remains firmly entrenched. Indeed, if the cause at arms influenced a state’s obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons hors de combat, states would justify all departures from jus in bello with reference to the purported justness of their cause. The result: an invitation to unregulated warfare.11

Authority overlap destroys both the self-defense and armed conflict legal regimes

Laurie Blank, Director, International Humanitarian Law Clinic, Emory Law School, 2012, Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications, http://www.wmitchell.edu/lawreview/Volume38/documents/11.BlankFINAL.pdf

In contrast, human rights law’s requirement that force only be used as a last resort when absolutely necessary for the protection of innocent victims of an attack creates an obligation to attempt to capture a suspected terrorist before any lethal targeting.101 A state using force in self-defense against a terrorist cannot therefore target him or her as a first resort but can only do so if there are no alternatives—meaning that an offer of surrender or an attempt at capture has been made or is entirely unfeasible in the circumstances. Thus, if non-forceful measures can foil the terrorist attack without the use of deadly force, then the state may not use force in self-defense.102 The supremacy of the right to life means that “even the most dangerous individual must be captured, rather than killed, so long as it is practically feasible to do so, bearing in mind all of the circumstances.”103 No more, this obligation to capture first rather than kill is not dependent on the target’s efforts to surrender; the obligation actually works the other way: the forces may not use deadly force except if absolutely necessary to protect themselves or innocent persons from immediate danger, that is, self-defense or defense of others. As with any law enforcement operation, “the intended result . . . is the arrest of the suspect,”104 and therefore every attempt must be made to capture before resorting to lethal force.

In the abstract, the differences in the obligations regarding surrender and capture seem straightforward. The use of both armed conflict and self-defense justifications for all targeted strikes without differentiation runs the risk of conflating the two very different approaches to capture in the course of a targeting operation. This conflation, in turn, is likely to either emasculate human rights law’s greater protections or undermine the LOAC’s greater permissiveness in the use of force, either of which is a problematic result. An oft-cited example of the conflation of the LOAC and human rights principles appears in the 2006 targeted killings case before the Israeli Supreme Court. In analyzing the lawfulness of the Israeli government’s policy of “targeted frustration,” the Court held, inter alia, that [a] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. . . . Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.105

The Israeli Supreme Court’s finding that targeting is only lawful if no less harmful means are available—even in the context of an armed conflict—“impose[s] a requirement not based in [the LOAC].”106 Indeed, the Israeli Supreme Court “used the kernel of a human rights rule—that necessity must be shown for any intentional deprivation of life, to restrict the application of [a LOAC] rule—that in armed conflict no necessity need be shown for the killing of combatants or civilians taking a direct part in hostilities.”107 Although the holding is specific to Israel and likely influenced greatly by the added layer of belligerent occupation relevant to the targeted strikes at issue in the case,108 it demonstrates some of the challenges of conflating the two paradigms.

First, if this added obligation of less harmful means was understood to form part of the law applicable to targeted strikes in armed conflict, the result would be to disrupt the delicate balance of military necessity and humanity and the equality of arms at the heart of the LOAC. Civilians taking direct part in hostilities—who are legitimate targets at least for the time they do so—would suddenly merit a greater level of protection than persons who are lawful combatants, a result not contemplated in the LOAC.109

Second, soldiers faced with an obligation to always use less harmful means may well either refrain from attacking the target—leaving the innocent victims of the terrorist’s planned attack unprotected—or disregard the law as unrealistic and ineffective. Neither option is appealing. The former undermines the protection of innocent civilians from unlawful attack, one of the core purposes of the LOAC. The latter weakens respect for the value and role of the LOAC altogether during conflict, a central component of the protection of all persons in wartime.

From the opposing perspective, if the armed conflict rules for capture and surrender were to bleed into the human rights and law enforcement paradigm, the restrictions on the use of force in selfdefense would diminish. Persons suspected of terrorist attacks and planning future terrorist attacks are entitled to the same set of rights as other persons under human rights law and a relaxed set of standards will only minimize and infringe on those rights. Although there is no evidence that targeted strikes using drones are being used in situations where there is an obligation to seek capture and arrest, it is not hard to imagine a scenario in which the combination of the extraordinary capabilities of drones and the conflation of standards can lead to exactly that scenario. If states begin to use lethal force as a first resort against individuals outside of armed conflict, the established framework for the protection of the right to life would begin to unravel. Not only would targeted individuals suffer from reduced rights, but innocent individuals in the vicinity would be subject to significantly greater risk of injury and death as a consequence of the broadening use of force outside of armed conflict.

This degrades the entire collective security structure resulting in widespread interstate war

Craig Martin, Associate Professor of Law at Washburn University School of Law, 2011, GOING MEDIEVAL: TARGETED KILLING, SELFDEFENSE AND THE JUS AD BELLUM REGIME, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1956141

The United States has been engaging in this practice of using drone-mounted missile systems to kill targeted individuals since at least 2002.98 An increasing number of countries are developing drone capabilities, and other countries have employed different methods of targeted killing that constitute a use of force under jus ad bellum.99 The evidence suggests that the United States intends to continue and indeed expand the program, and there is a growing body of scholarly literature that either defends the policy’s legality, or advocates adjustment in international law to permit such action. There is, therefore, a real prospect that the practice could become more widespread, and that customary international law could begin to shift to reflect the principles implicit in the U.S. justification andin accordance with the rationales developed to support it**.**

Some of the implications of such an adjustment in the jus ad bellum regime are obvious from the foregoing analysis. As discussed, there would be a rejection of the narrow principle of self-defense in favor of something much closer to the Grotian concept of defensive war, encompassing punitive measures in response to past attacks and preventative uses of force to halt the development of future threats. The current conditions for a legitimate use of force in self-defense, namely the occurrence or imminence of an armed attack, necessity, and proportionality, would be significantly diluted or abandoned. Not only the doctrine of self-defense, but other aspects of the collective security system would be relaxed as well. Harkening back to Grotian notions of law enforcement constituting a just cause for war, the adjusted jus ad bellum regime would potentially permit the unilateral use of force against and within states for the purpose of attacking NSAs as such, in effect to enforce international law in jurisdictions that were incapable of doing so themselves.100 This would not only further undermine the concept of self-defense, but would undermine the exclusive jurisdiction that the U.N. Security Council currently has to authorize the use of force for purposes of “law enforcement” under Chapter VII of the Charter. Thus, both of the exceptions to the Article 2(4) prohibition on the use of force would be expanded.

In addition, however, the targeted killing policy threatens to create other holes in the jus ad bellum regime. This less obvious injury would arise from changes that would be similarly required of the IHL regime, and the resulting modifications to the fundamental relationship between the two regimes. These changes could lead to a complete severance of the remaining connection between the two regimes. Indeed, Ken Anderson, a scholar who has testified more than once on this subject before the U.S. Congress,101 has advocated just such a position, suggesting that the United States should assert that its use of force against other states in the process of targeted killings, while justified by the right to self-defense, does not rise to such a level that it would trigger the existence of an international armed conflict or the operation of IHL principles.102 If customary international law evolved along such lines, reverting to gradations in the types of use of force, the change would destroy the unity of the system comprised of the jus ad bellum and IHL regimes, and there would be legal “black holes” in which states could use force without being subject to the limitations and conditions imposed by the IHL regime.

The structure of Harold Koh’s two-pronged justification similarly implies a severance of this relationship between jus ad bellum and IHL, albeit in a different and even more troubling way. His policy justification consists of two apparently independent and alternative arguments—that the United States is in an armed conflict with Al Qaeda and associated groups; and that the actions are justified as an exercise of self-defense. The suggestion seems to be that the United States is entitled on either basis to use armed force not just against the individuals targeted, but also against states in which the terrorist members are located. In other words, the first prong of the argument is that the use of force against another sovereign state, for the purposes of targeting Al Qaeda members, is justified by the existence of an armed conflict with Al Qaeda. If this is indeed what is intended by the policy justification, it represents an extraordinary move, not just because it purports to create a new category of armed conflict (that is, a “transnational” armed conflict without geographic limitation),103 but because it also suggests that there need be no jus ad bellum justification at all for a use of force against another state. Rather, the implication of Koh’s rationale is that the existence of an armed conflict under IHL can by itself provide grounds for exemption from the prohibition against the threat or use of force under the jus ad bellum regime.

This interpretation of the justifications cannot be pressed too far on the basis of the language of Mr. Koh’s speech alone, which he hastened to explain at the time was not a legal opinion.104 The two justifications could be explained as being supplementary rather than independent and alternative in nature. But the conduct of the United States in the prosecution of the policy would appear to confirm that it is based on these two independent justifications.105 The strikes against groups and states unrelated to the 9/11 attacks could be explained in part by the novel idea that force can be used against NSAs as such, wherever they may be situated. But even assuming some sort of strict liability for states in which guilty NSAs are found, that explanation still does not entirely account for the failure to tie the use of force against the different groups to specific armed attacks launched by each such group. This suggests that the United States is also relying quite independently on the argument that it is engaged in an armed conflict with all of these groups, and that the existence of such an armed conflict provides an independent justification for the use of force against the states in which the groups may be operating.

While the initial use of force in jus ad bellum terms is currently understood to bring into existence an international armed conflict and trigger the operation of IHL, the changes suggested by the policy would turn this on its head, by permitting the alleged existence of a “transnational” armed conflict to justify the initial use of force against third states. Whereas the two regimes currently operate as two components of an overall legal system relating to war, with one regime governing the use of force and the other the conduct of hostilities in the resulting armed conflict, the move attempted by the U.S. policy would terminate these independent but inter-related roles within a single system, and expand the role and scope of IHL to essentially replace aspects of the jus ad bellum regime. This would not only radically erode the jus ad bellum regime’s control over the state use of force, but it could potentially undermine the core idea that war, or in more modern terms the use of force and armed conflict, constitutes a legal state that triggers the operation of special laws that govern the various aspects of the phenomenon. There is a risk of return to a pre-Grotian perspective in which “war” was simply a term used to describe certain kinds of organized violence, rather than constituting a legal institution characterized by a coherent system of laws designed to govern and constrain all aspects of its operation.

There is a tendency in the U.S. approach to the so-called “global war on terror” to cherry-pick principles of the laws of war and to apply them in ways and in circumstances that are inconsistent with the very criteria within that legal system that determine when and how it is to operate. This reflects a certain disdain for the idea that the laws of war constitute an internally coherent system of law.106 In short, the advocated changes to the jus ad bellum regime and to the relationship between it and the IHL regime, and thus to the laws of war system as a whole,107 would constitute marked departures from the trajectory the system has been on during its development over the past century, and would be a repudiation of deliberate decisions that were made in creating the U.N. system after the Second World War.108

The premise of my argument is not that any return to past principles is inherently regressive. A rejection of recent innovations in favor of certain past practices might be attractive to some in the face of new transnational threats. The argument here is not even to deny the idea that the international law system may have to adapt to respond to the transnational terrorist threat. The point, rather, is that the kind of changes to the international law system that are implicit in the targeted killing policy, and which are advocated by its supporters, would serve to radically reduce the limitations and constraints on the use of force by states against states. The modern principles that are being abandoned were created for the purpose of limiting the use of force and thus reducing the incidence of armed conflict among nations. The rejection of those ideas and a return to older concepts relating to the law of war would restore aspects of a system in which war was a legitimate tool of statecraft, and international armed conflict was thus far more frequent and widespread.109

The entire debate on targeted killing is so narrowly focused on the particular problems posed by transnational terrorist threats, and how to manipulate the legal limitations that tend to frustrate some of the desired policy choices, that there is insufficient reflection on the broader context, and the consequences that proposed changes to the legal constraints would have on the wider legal system of which they are a part. It may serve the immediate requirements of the American government, in order to legitimize the killing of AQAP members in Yemen, to expand the concept of self-defense, and to suggest that states can use force on the basis of a putative “transnational” armed conflict with NSAs. The problem is that the jus ad bellum regime applies to all state use of force, and it is not being adjusted in some tailored way to deal with terrorism alone. If the doctrine of self-defense is expanded to include preventative and punitive elements, it will be so expanded for all jus ad bellum purposes. The expanded doctrine of self-defense will not only justify the use of force to kill individual terrorists alleged to be plotting future attacks, but to strike the military facilities of states suspected of preparing for future aggression. If the threshold for use of force against states “harboring” NSAs is significantly reduced, the gap between state responsibility and the criteria for use of force will be reduced for all purposes. If the relationship between jus ad bellum and IHL is severed or altered, so as to create justifications for the use of force that are entirely independent of the jus ad bellum regime, then states will be entitled to use force against other states under the pretext of self-proclaimed armed conflict with NSAs generally.

We may think about each of these innovations as being related specifically to operations against terrorist groups that have been responsible for heinous attacks, and applied to states that have proven uniquely unwilling or unable to take the actions necessary to deal with the terrorists operating within their territory. But no clear criteria or qualifications are in fact tied to the modifications that are being advanced by the targeted killing policy. Relaxing the current legal constraints on the use of force and introducing new but poorly defined standards, will open up opportunities for states to use force against other states for reasons that have nothing to do with anti-terrorist objectives. Along the lines that Jeremy Waldron argues in chapter 4 in this volume,110 more careful thought ought to be given to the general norms that we are at risk of developing in the interest of justifying the very specific targeted killing policy. Ultimately, war between nations is a far greater threat, and is a potential source of so much more human suffering than the danger posed by transnational terrorism. This is not to trivialize the risks that terrorism represents, particularly in an age when Al Qaeda and others have sought nuclear weapons. But we must be careful not to undermine the system designed to constrain the use of force and reduce the incidence of international armed conflict, in order to address a threat that is much less serious in the grand scheme of things.

Robust support for the impact—legal regime conflation results in uncontrollable conflict escalation

Ryan Goodman, Anne and Joel Ehrenkranz Professor of Law, New York University School of Law, December 2009, CONTROLLING THE RECOURSE TO WAR BY MODIFYING JUS IN BELLO, Yearbook of International Humanitarian Law / Volume 12

A substantial literature exists on the conflation of jus ad bellum and jus in bello. However, the consequences for the former side of the equation – the resort to war – is generally under-examined. Instead, academic commentary has focused on the effects of compliance with humanitarian rules in armed conflict and, in particular, the equality of application principle. In this section, I attempt to help correct that imbalance.

In the following analysis, I use the (admittedly provocative) short-hand labels of ‘desirable’ and ‘undesirable’ wars. The former consists of efforts that aim to promote the general welfare of foreign populations such as humanitarian interventions and, on some accounts, peacekeeping operations. The latter – undesirable wars – include conflicts that result from security spirals that serve neither state’s interest and also include predatory acts of aggression.

4.1.1 Decreased likelihood of ‘desirable wars’

A central question in debates about humanitarian intervention is whether the international community should be more concerned about the prospect of future Kosovos – ambitious military actions without clear legal authority – or future Rwandas – inaction and deadlock at the Security Council. Indeed, various institutional designs will tend to favor one of those outcomes over the other. In 1999, Kofi Annan delivered a powerful statement that appeared to consider the prospect of repeat Rwandas the greater concern; and he issued a call to arms to support the ‘developing international norm in favor of intervention to protect civilians from wholesale slaughter’.95 Ifoneassumesthatthereis,indeed,aneedforcontinuedorgreatersupport for humanitarian uses of force, Type I erosions of the separation principle pose a serious threat to that vision. And the threat is not limited to unilateral uses of force. It also applies to military operations authorized by the Security Council. In short, all ‘interventions to protect civilians from wholesale slaughter’ are affected.

Two developments render desirable interventions less likely. First, consider implications of the Kosovo Commission/ICISS approach. The scheme imposes greater requirements on armed forces engaged in a humanitarian mission with respect to safeguarding civilian ives.96 If that scheme is intended to smoke out illicit intent,97 it is likely to have perverse effects: suppressing sincere humanitarian efforts at least on the margins. Actors engaged in a bona fide humanitarian intervention generally tend to be more protective of their own armed forces than in other conflicts. It is instructive to consider, for instance, the precipitous US withdrawal from the UN mission in Somalia – code-named Operation Restore Hope – after the loss of eighteen American soldiers in the Battle of Mogadishu in 1993, and the ‘lesson’ that policymakers drew from that conflict.98 Additionally, the Kosovoc ampaign – code-named Operation Noble Anvil – was designed to be a ‘zero-casualty war’ for US soldiers, because domestic public support for the campaign was shallow and unstable. The important point is that the Kosovo Commission/ICISS approach would impose additional costs on genuine humanitarian efforts, for which it is already difficult to build and sustain popular support. As a result, we can expect to see fewer bona fide interventions to protect civilians from atrocities.99 Notably, such results are more likely to affect two types of states: states with robust, democratic institutions that effectively reflect public opinion and states that highly value compliance with jus in bello. Both of those are the very states that one would most want to incentivize to initiate and participate in humanitarian interventions.

The second development shares many of these same consequences. Consider the implications of the British House of Lords decision in Al-Jedda which cast doubt on the validity of derogations taken in peacekeeping operations as well as other military efforts in which the homeland is not directly at stake and the state could similarly withdraw. The scheme imposes a tax on such interventions by precluding the government from adopting measures that would otherwise be considered lawful and necessary to meet exigent circumstances related to the conflict. Such extraordinary constraints in wartime may very well temper the resolve to engage in altruistic intervention and military efforts that involve similar forms of voluntarism on the part of the state. Such a legal scheme may thus yield fewer such operations and the participation of fewer states in such multilateral efforts. And, the impact of the scheme should disproportionately affect the very states that take international human rights obligations most seriously.

Notably, in these cases, the disincentives might weigh most heavily on third parties: states that decide whether and to what degree to participate in a coalition with the principal intervener. It is to be expected that the commitment on the part of the principal intervener will be stronger, and thus not as easily shifted by the erosion of the separation principle. The ability, however, to hold together a coalition of states is made much more difficult by these added burdens. Indeed, as the United States learned in the Kosovo campaign, important European allies were wary about the intervention, in part due to its lack of an international legal pedigree. And the weakness of the alliance, including German and Italian calls for an early suspension of the bombing campaign, impeded the ability to wage war in the first place. It may be these third party states and their decision whether to join a humanitarian intervention where the international legal regime matters most. Without such backing of important allies, the intervention itself is less likely to occur. It is also those states – the more democratic, the more rights respecting, and the more law abiding – that the international regime should prefer to be involved in these kinds of interventions.

The developments regulating jus ad bellum through jus in bello also threaten to make ‘undesirable wars’ more likely. In previous writing, I argue that encouraging states to frame their resort to force through humanitarian objectives rather than other rationales would, in the aggregate, reduce the overall level of disputes that result in uncontrolled escalation and war.100 A reverse relationship also holds true. That is, encouraging states to forego humanitarian rationales in favor of other justifications for using force may culminate in more international disputes ending in uncontrolled escalation and war. This outcome is especially likely to result from the pressures created by Type I erosions of the separation principle.

First, increasing the tax on humanitarian interventions (the Kosovo Commission/ICISS approach) and ‘wars of choice’ (the Al-Jedda approach) would encourage states to justify their resort to force on alternative grounds. For example, states would be incentivized to invoke other legitimated frameworks – such as security rationales involving the right to self-defense, collective self-defense, anticipatory self-defense, and traditional threats to international peace and security. And, even if military action is pursued through the Security Council, states may be reluctant to adopt language (in resolutions and the like) espousing or emphasizing humanitarian objectives.

Second, the elevation of self-regarding – security and strategic – frameworks over humanitarian ones is more likely to lead to uncontrolled escalation and war. A growing body of social science scholarship demonstrates that the type of issue in dispute can constitute an important variable in shaping the course of interstate hostilities. The first generation of empirical scholarship on the origins of war did not consider this dimension. Political scientists instead concentrated on features of the international system (for example, the distribution of power among states) and on the characteristics of states (for example, forms of domestic governance structures) as the key explanatory variables. Research agendas broadened considerably, however, in subsequent years. More recently, ‘[s]everal studies have identified substantial differences in conflict behavior over different types of issues’.101 The available evidence shows that states are significantly more inclined to fight over particular types of issues that are elevated in a dispute, despite likely overall material and strategic losses.102 Academic studies have also illuminated possible causal explanations for these empirical patterns. Specifically, domestic (popular and elite) constituencies more readily support bellicose behavior by their government when certain salient cultural or ideological issues are in contention. Particular issue areas may also determine the expert communities (humanitarian versus security mindsets) that gain influence in governmental circles – a development that can shape the hard-line or soft-line strategies adopted in the course of the dispute. In short, these links between domestic political processes and the framing of international disputes exert significant influence on whether conflicts will eventually culminate in war.

Third, a large body of empirical research demonstrates that states will routinely engage in interstate disputes with rivals and that those disputes which are framed through security and strategic rationales are more likely to escalate to war. Indeed, the inclusion of a humanitarian rationale provides windows of opportunity to control and deescalate a conflict. Thus, eliminating or demoting a humanitarian rationale from a mix of justifications (even if it is not replaced by another rationale) can be independently destabilizing. Espousing or promoting security rationales, on the other hand, is more likely to culminate in public demands for increased bellicosity, unintended security spirals, and military violence.103

Importantly, these effects may result even if one is skeptical about the power of international law to influence state behavior directly. It is reasonable to assume that international law is unlikely to alter the determination of a state to wage war, and that international law is far more likely to influence only the justificatory discourse states employ while proceeding down the warpath. However, as I argue in my earlier work, leaders (of democratic and nondemocratic) states become caught in their official justifications for military campaigns. Consequently, framing the resort to force as a pursuit of security objectives, or adding such issues to an ongoing conflict, can reshape domestic political arrangements, which narrows the subsequent range of policy options. Issues that initially enter a conflict due to disingenuous representations by political leaders can become an authentic part of the dispute over time. Indeed, the available social science research, primarily qualitative case studies, is even more relevant here. A range of empirical studies demonstrate such unintended consequences primarily in the case of leaders employing security-based and strategic rationales to justify bellicose behavior.104 A central finding is that pretextual and superficial justifications can meaningfully influence later stages of the process that shape popular and elite conceptions of the international dispute. And it is those understandings that affect national security strategies and the ladder of escalation to war. Indeed, one set of studies – of empires – suggests these are mechanisms for powerful states entering into disastrous military campaigns that their leaders did not initially intend.

A strong, adaptive LOAC regime is key to regulate inevitable autonomous weapons – the impact is global war and tyranny

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Since the first lethal drone strike in 2001, the US use of remotely operated robotic weapons has dramatically expanded. Along with the broader use of robots for surveillance, ordnance disposal, logistics, and other military tasks, robotic weapons have spread rapidly to many nations, captured public attention, and sparked protest and debate. Meanwhile, every dimension of the technology is being vigorously explored. From stealthy, unmanned jets like the X-47B and its Chinese and European counterparts, to intelligent missiles, sub-hunting robot ships, and machine gun-wielding micro-tanks, robotics is now the most dynamic and destabilizing component of the global arms race.

Drones and robots are enabled by embedded autonomous subsystems that keep engines in tune and antennas pointed at satellites, and some can navigate, walk, and maneuver in complex environments autonomously. But with few exceptions, the targeting and firing decisions of armed robotic systems remain tightly under the control of human operators. This may soon change.

Autonomous weapons are robotic systems that, once activated, can select and engage targets without further intervention by a human operator (Defense Department, 2012). Examples include drones or missiles that hunt for their targets, using their onboard sensors and computers. Based on a computer’s decision that an appropriate target has been located, that target will then be engaged. Sentry systems may have the capability to detect intruders, order them to halt, and fire if the order is not followed. Future robot soldiers may patrol occupied cities. Swarms of autonomous weapons may enable a preemptive attack on an adversary’s strategic forces. Autonomous weapons may fight each other.

Just as the emergence of low-cost, high-performance information technology has been the most important driver of technological advance over the past half-century—including the revolution in military affairs already seen in the 1980s and displayed to the world during the 1991 Gulf War—so the emergence of artificial intelligence and autonomous robotics will likely be the most important development in both civilian and military technology to unfold over the next few decades.

Proponents of autonomous weapons argue that technology will gradually take over combat decision making: “Detecting, analyzing and firing on targets will become increasingly automated, and the contexts of when such force is used will expand. As the machines become increasingly adept, the role of humans will gradually shift from full command, to partial command, to oversight and so on” (Anderson and Waxman, 2013). Automated systems are already used to plan campaigns and logistics, and to assemble intelligence and disseminate lethal commands; in some cases, humans march to orders generated by machines. If, in the future, machines are to act with superhuman speed and perhaps even superhuman intelligence, how can humans remain in control? As former Army Lt. Colonel T. K. Adams observed more than a decade ago (2001), “Humans may retain symbolic authority, but automated systems move too fast, and the factors involved are too complex for real human comprehension.”

Almost nobody favors a future in which humans have lost control over war machines. But proponents of autonomous weapons argue that effective arms control would be unattainable. Many of the same claims that propelled the Cold War are being recycled to argue that autonomous weapons are inevitable, that international law will remain weak, and that there is no point in seeking restraint since adversaries will not agree—or would cheat on agreements. This is the ideology of any arms race.

Is autonomous warfare inevitable?

Challenging the assumption of the inevitability of autonomous weapons and building on the work of earlier activists, the Campaign to Stop Killer Robots, a coalition of nongovernmental organizations, was launched in April 2013. This effort has made remarkable progress in its first year. In May, the United Nations Special Rapporteur on extrajudicial killings, Christof Heyns, recommended that nations immediately declare moratoriums on their own development of lethal autonomous robotics (Heyns, 2013). Heyns also called for a high-level study of the issue, a recommendation seconded in July by the UN Advisory Board on Disarmament Matters. At the UN General Assembly’s First Committee meeting in October, a flood of countries began to express interest or concern, including China, Russia, Japan, the United Kingdom, and the United States. France called for a mandate to discuss the issue under the Convention on Certain Conventional Weapons, a global treaty that restricts excessively injurious or indiscriminate weapons. Meeting in Geneva in November, the state parties to the Convention agreed to formal discussions on autonomous weapons, with a first round in May 2014. The issue has been placed firmly on the global public and diplomatic agenda.

Despite this impressive record of progress on an issue that was until recently virtually unknown—or scorned as a mixture of science fiction and paranoia—there seems little chance that a strong arms control regime banning autonomous weapons will soon emerge from Geneva. Unlike glass shrapnel, blinding lasers, or even landmines and cluster munitions, autonomous weapon systems are not niche armaments of negligible strategic importance and unarguable cost to humanity. Instead of the haunting eyes of children with missing limbs, autonomous weapons present an abstract, unrealized horror, one that some might hope will simply go away.

Unless there is a strong push from civil society and from governments that have decided against pursuing autonomous weapons, those that have decided in favor of them—including the United States (Gubrud, 2013)—will seek to manage the issue as a public relations problem. They will likely offer assurances that humans will remain in control, while continually updating what they mean by control as technology advances. Proponents already argue that humans are never really out of the loop because humans will have programmed a robot and set the parameters of its mission (Schmitt and Thurnher, 2013). But autonomy removes humans from decision making, and even the assumption that autonomous weapons will be programmed by humans is ultimately in doubt.

Diplomats and public spokesmen may speak in one voice; warriors, engineers, and their creations will speak in another. The development and acquisition of autonomous weapons will push ahead if there is no well-defined, immovable, no-go red line. The clearest and most natural place to draw that line is at the point when a machine pulls the trigger, making the decision on whether, when, and against whom or what to use violent force. Invoking a well-established tenet of international humanitarian law, opponents can argue that this is already contrary to principles of humanity, and thus inherently unlawful. Equally important, opponents must point out the threat to peace and security posed by the prospect of a global arms race toward robotic arsenals that are increasingly out of human control.

Humanitarian law vs. killer robots

The public discussion launched by the Campaign to Stop Killer Robots has mostly centered on questions of legality under international humanitarian law, also called the law of war. “Losing Humanity,” a report released by Human Rights Watch in November 2012—coincidentally just days before the Pentagon made public the world’s first open policy directive for developing, acquiring, and using autonomous weapons—laid out arguments that fully autonomous weapons could not satisfy basic requirements of the law, largely on the basis of assumed limitations of artificial intelligence (Human Rights Watch and International Human Rights Clinic at Harvard Law School, 2012).

The principle of distinction, as enshrined in Additional Protocol I of the Geneva Conventions—and viewed as customary international law, thus binding even on states that have not ratified the treaty—demands that parties to a conflict distinguish between civilians and combatants, and between civilian objects and military objectives. Attacks must be directed against combatants and military objectives only; weapons not capable of being so directed are considered to be indiscriminate and therefore prohibited. Furthermore, those who make attack decisions must not allow attacks that may be expected to cause excessive harm to civilians, in comparison with the military gains expected from the attack. This is known as the principle of proportionality.

“Losing Humanity” argues that technical limitations mean robots could not reliably distinguish civilians from combatants, particularly in irregular warfare, and could not fulfill the requirement to judge proportionality.1 Distinction is clearly a challenge for current technology; face-recognition technology can rapidly identify individuals from a limited list of potential targets, but more general classification of persons as combatants or noncombatants based on observation is well beyond the state of the art. How long this may remain so is less clear. The capabilities to be expected of artificial intelligence systems 10, 20, or 40 years from now are unknown and highly controversial within both expert and lay communities.

While it may not satisfy the reified principle of distinction, proponents of autonomous weapons argue that some capability for discrimination is better than none at all. This assumes that an indiscriminate weapon would be used if a less indiscriminate one were not available; for example, it is often argued that drone strikes are better than carpet bombing. Yet at some point autonomous discrimination capabilities may be good enough to persuade many people that their use in weapons is a net benefit.

Judgment of proportionality seems at first an even greater challenge, and some argue that it is beyond technology in principle (Asaro, 2012). However, the military already uses an algorithmic “collateral damage estimation methodology” (Defense Department, 2009) to estimate incidental harm to civilians that may be expected from missile and drone strikes. A similar scheme could be developed to formalize the value of military gains expected from attacks, allowing two numbers to be compared. Human commanders applying such protocols could defend their decisions, if later questioned, by citing such calculations. But the cost of this would be to degrade human judgment almost to the level of machines.

On the other hand, IBM’s Watson computer (Ferruci et al., 2010) has demonstrated the ability to sift through millions of pages of natural language and weigh hundreds of hypotheses to answer ambiguous questions. While some of Watson’s responses suggest it is not yet a trustworthy model, it seems likely that similar systems, given semantic information about combat situations, including uncertainties, might be capable of making military decisions that most people would judge as reasonable, most of the time.

“Losing Humanity” also argues that robots, necessarily lacking emotion,2 would be unable to empathize and thus unable to accurately interpret human behavior or be affected by compassion. An important case of the latter is when soldiers refuse orders to put down rebellions. Robots would be ideal tools of repression and dictatorship.

If robot soldiers become available on the world market, it is likely that repressive regimes will acquire them, either by purchase or indigenous production. While it is theoretically possible for such systems to be safeguarded with tamper-proof programming against human rights abuses, in the event that the world fails to prohibit robot soldiers, unsafeguarded or poorly safeguarded versions will likely be available. A strong prohibition has the best chance of keeping killer robots out of the hands of dictators, both by restricting their availability and stigmatizing their use.

Accountability is another much-discussed issue. Clearly, a robot cannot be held responsible for its actions, but human commanders and operators—or even manufacturers, programmers, and engineers—might be held responsible for negligence or malfeasance. In practice, however, the robot is likely to be a convenient scapegoat in case of an unintended atrocity—a technical failure occurred, it was unintended and unforeseen, so nobody is to blame. Going further, David Akerson (2013) argues that since a robot cannot be punished, it cannot be a legal combatant.

These are some of the issues most likely to be discussed within the Convention on Certain Conventional Weapons. However, US Defense Department policy (2012) preemptively addresses many of these issues by directing that “[a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”

Under the US policy, commanders and operators are responsible for using autonomous weapons in accordance with the laws of war and relevant treaties, safety rules, and rules of engagement. For example, an autonomous weapon may be sent on a hunt-and-kill mission if tactics, techniques, and procedures ensure that the area in which it is directed to search contains no objects, other than the intended targets, that the weapon might decide to attack. In this case, the policy regards the targets as having been selected by humans and the weapon as merely semi-autonomous, even if the weapon is operating fully autonomously when it decides that a given radar return or warm object is its intended target. The policy pre-approves the immediate development, acquisition, and use of such weapons.

Although the policy does not define “appropriate levels,” it applies this rubric even in the case of fully autonomous lethal weapons targeting human beings without immediate human supervision. This makes it clear that appropriate levels, as understood within the policy, do not necessarily require direct human involvement in the decision to kill a human being (Gubrud, 2013). It seems likely that the United States will press other states to accept this paradigm as the basis for international regulation of autonomous weapons, leaving it to individual states to determine what levels of human judgment are appropriate.

Demanding human control and responsibility

As diplomatic discussions about killer robot regulation get under way, a good deal of time is apt to be lost in confusion about terms, definitions, and scope. “Losing Humanity” seeks to ban “fully autonomous weapons,” and Heyns’s report used the term “lethal autonomous robotics.” The US policy directive speaks of “autonomous and semi-autonomous weapon systems,” and the distinction between these is ambiguous (Gubrud, 2013). The Geneva mandate is to discuss “lethal autonomous weapon systems.”

Substantive questions include whether non-lethal weapons and those that target only matériel are within the scope of discussion. Legacy weapons such as simple mines may be regarded as autonomous, or distinguished as merely automatic, on grounds that their behavior is fully predictable by designers.3 Human-supervised autonomous and semi-autonomous weapon systems, as defined by the United States, raise issues that, like fractal shapes, appear more complex the more closely they are examined.

Instead of arguing about how to define what weapons should be banned, it may be better to agree on basic principles. One is that any use of violent force, lethal or non-lethal, must be by human decision and must at all times be under human control. Implementing this principle as strictly as possible implies that the command to engage an individual target (person or object) must be given by a human being, and only after the target is being reliably tracked by a targeting system and a human has determined that it is an appropriate and legal target.

A second principle is that a human commander must be responsible and accountable for the decision, and if the commander acts through another person who operates a weapon system, that person must be responsible and accountable for maintaining control of the system. “Responsible” refers here to a moral and legal obligation, and “accountable” refers to a formal system for accounting of actions. Both elements are essential to the approach.

Responsibility implies that commanders and operators may not blame inadequacies of technological systems for any failure to exercise judgment and control over the use of violent force. A commander must ensure compliance with the law and rules of engagement independently of any machine decision, either as to the identity of a target or the appropriateness of an attack, or else must not authorize the attack. Similarly, if a system does not give an operator sufficient control over the weapon to prevent unintended engagements, the operator must refuse to operate the system.

Accountability can be demonstrated by states that comply with this principle. They need only maintain records showing that each engagement was properly authorized and executed. If a violation is alleged, selected records can be unsealed in a closed inquiry conducted by an international body (Gubrud and Altmann, 2013).4

This framing, which focuses on human control and responsibility for the decision to use violent force, is both conceptually simple and morally compelling. What remains then is to set standards for adequate information to be presented to commanders, and to require positive action by operators of a weapon system. Those standards should also address any circumstances under which other parties—designers and manufacturers, for instance—might be held responsible for an unintended engagement.

There is at least one exceptional circumstance in which human control may be applied less strictly. Fully autonomous systems are already used to engage incoming missiles and artillery rounds; examples include the Israeli Iron Dome and the US Patriot and Aegis missile defense systems, as well as the Counter Rocket, Artillery, and Mortar system. The timeline for response in such systems is often so short that the requirement for positive human decision might impose an unacceptable risk of failure. Another principle—the protection of life from immediate threats—comes into play here. An allowance seems reasonable, if it is strictly limited. In particular, autonomous return fire should not be permitted, but only engagement of unmanned munitions directed against human-occupied territory or vehicles. Each such system should have an accountable human operator, and autonomous response should be delayed as long as possible to allow time for an override decision.

The strategic need for robot arms control

Principles of humanity may be the strongest foundation for an effective ban of autonomous weapons, but they are not necessarily the most compelling reason why a ban must be sought. The perceived military advantages of autonomy are so great that major powers are likely to strongly resist prohibition, but by the same token, autonomous weapons pose a severe threat to global peace and security.

Although humans have (for now) superior capabilities for perception in complex environments and for interpretation of ambiguous information, machines have the edge in speed and precision. If allowed to return fire or initiate it, they would undoubtedly prevail over humans in many combat situations. Humans have a limited tolerance of the physical extremes of acceleration, temperature, and radiation, are vulnerable to biological and chemical weapons, and require rest, food, breathable air, and drinkable water. Machines are expendable; their loss does not cause emotional pain or political backlash. Humans are expensive, and their replacement by robots is expected to yield cost savings.

While today’s relatively sparse use of drones, in undefended airspace, to target irregular forces can be carried out by remote control, large-scale use of robotic weapons to attack modern military forces would require greater autonomy, due to the burdens and vulnerabilities of communications links, the need for stealth, and the sheer numbers of robots likely to be involved. The US Navy is particularly interested in autonomy for undersea systems, where communications are especially problematic. Civilians are sparse on the high seas and absent on submarines, casting doubt on the relevance of humanitarian law. As the Navy contemplates future conflict with a peer competitor, it projects drone-versus-drone warfare in the skies above and waters below, and the use of sea-based drones to attack targets inland as well.

In a cold war, small robots could be used for covert infiltration, surveillance, sabotage, or assassination. In an open attack, they could find ways of getting into underground bunkers or attacking bases and ships in swarms. Because robots can be sent on one-way missions, they are potential enablers of aggression or preemption. Because they can be more precise and less destructive than nuclear weapons, they may be more likely to be used. In fact, the US Air Force’s Long Range Strike Bomber is planned to be both nuclear-capable and potentially unmanned, which would almost certainly mean autonomous.

There can be no real game-changers in the nuclear stalemate. Yet the new wave of robotics and artificial intelligence-enabled systems threatens to drive a new strategic competition between the United States and other major powers—and lesser powers, too. Unlike the specialized technologies of high-performance military systems at the end of the Cold War, robotics, information technology, and even advanced sensors are today globally available, driven as much by civilian as military uses. An autonomous weapons arms race would be global in scope, as the drone race already is.

Since robots are regarded as expendable, they may be risked in provocative adventures. Recently, China has warned that if Japan makes good on threats to shoot down Chinese drones that approach disputed islands, it could be regarded as an act of war. Similarly, forward-basing of missile interceptors (Lewis and Postol, 2010) or other strategic weapons on unmanned platforms would risk misinterpretation as a signal of imminent attack, and could invite preemption.

Engineering the stability of a robot confrontation would be a wickedly hard problem even for a single team working together in trust and cooperation, let alone hostile teams of competing and imperfectly coordinated sub-teams. Complex, interacting systems-of-systems are prone to sudden unexpected behavior and breakdowns, such as the May 6, 2010 stock market crash caused by interacting exchanges with slightly different rules (Nanex, 2010). Even assuming that limiting escalation would be a design objective, avoiding defeat by preemption would be an imperative, and this implies a constant tuning to the edge of instability. The history of the Cold War contains many well-known examples in which military response was interrupted by the judgment of human beings. But when tactical decisions are made with inhuman speed, the potential for events to spiral out of control is obvious.

The way out

Given the military significance of autonomous weapons, substantial pressure from civil society will be needed before the major powers will seriously consider accepting hard limits, let alone prohibition. The goal is as radical as, and no less necessary than, the control and abolition of nuclear weapons.

The principle of humanity is an old concept in the law of war. It is often cited as forbidding the infliction of needless suffering, but at its deepest level it is a demand that even in conflict, people should not lose sight of their shared humanity. There is something inhumane about allowing technology to decide the fate of human lives, whether through individual targeting decisions or through a conflagration initiated by the unexpected interactions of machines. The recognition of this is already deeply rooted. A scientific poll (Carpenter, 2013) found that Americans opposed to autonomous weapons outnumbered supporters two to one, in contrast to an equally strong consensus in the United States supporting the use of drones. The rest of the world leans heavily against the drone strikes (Pew Research Center, 2012), making it seem likely that global public opinion will be strongly against autonomous weapons, both on humanitarian grounds and out of concern for the dangers of a new arms race.

In the diplomatic discussions now under way, opponents of autonomous weapons should emphasize a well-established principle of international humanitarian law. Seeking to resolve a diplomatic impasse at the Hague Conference in 1899, Russian diplomat Friedrich Martens proposed that for issues not yet formally resolved, conduct in war was still subject to “principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience.” Known as the Martens Clause, it reappeared in the second Hague Convention (1907), the Tehran Conference on Human Rights (1968), and the Geneva Convention additional protocols (1977). It has been invoked as the source of authority for retroactive liability in war crimes and for preemptive bans on inhumane weapons, implying that a strong public consensus has legal force in anticipation of an explicit law (Meron, 2000).

Autonomous weapons are a threat to global peace and therefore a matter of concern under the UN Charter. They are contrary to established custom, principles of humanity, and dictates of public conscience, and so should be considered as preemptively banned by the Martens Clause. These considerations establish the legal basis for formal international action to prohibit machine decision in the use of force. But for such action to occur, global civil society will need to present major-power governments with an irresistible demand: Stop killer robots.

It’s an ethical obligation – everything bad the state can do gets infinitely worse with unregulated AWS

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Tom Malinowski, Washington director of Human Rights Watch, Lawfare, December 5, 2012, "Tom Malinowski Responds on Autonomous Lethal Systems", http://www.lawfareblog.com/2012/12/tom-malinowski-responds-on-autonomous-lethal-systems/

Even if, in some distant future, advances in artificial intelligence give robots an artificial conscience (something most experts we consulted doubt), many nations, including US adversaries, will be able to deploy effective autonomous robots far sooner. Could such machines (particularly the first generations to be deployed) distinguish between combatants and civilians in societies where combatants don’t wear uniforms, and civilians are often armed? Will we ever be comfortable letting machines make calculations about proportionality, which would require them to weigh the value of a human life? Could robots recognize surrender? Show mercy? Interpret the behavior of, and listen to appeals from, the civilians they encounter, and exercise the wisdom and judgment to adjust their behavior accordingly?

To me, perhaps the most irreplaceable quality human soldiers possess is the capacity to refuse orders. Even the worst dictators, who commit atrocities with little fear of being held accountable, must weigh the possibility of their troops rebelling, or simply failing to carry out their duty. That check on tyranny would be removed if the Qaddafis and Assads of the world could command autonomous robots programmed to search out and kill protest leaders or strike at groups of congregating civilians in times of unrest. The development and proliferation of autonomous offensive weapons would give them something no tyrant in history has had: an army that would never refuse an order, no matter how immoral.

Autonomous combat regulation provides a tool for moral growth

Kenneth Anderson, professor of international law at Washington College of Law, American University, and visiting fellow at the Hoover Institution, and Matthew Waxman, a professor of law at Columbia Law School and an adjunct senior fellow at the Council on Foreign Relations, 4/9/13, Law and Ethics for Autonomous weapon Systems: Why a Ban Won’t Work and How the Laws of War Can, http://www.hoover.org/publications/monographs/144241

The first is a broad claim that machine programming will never reach the point of satisfying the fundamental ethical and legal principles required to field a lawful autonomous lethal weapon.30 Artificial intelligence has overpromised before, and once into the weeds of the judgments that these broad principles imply, the requisite intuition, cognition, affect, and judgment look ever more marvelously and uniquely human—especially amid the fog of war.31 This is a core conviction held by many who favor a complete ban on autonomous lethal weapons. They generally deny that, even over time and, indeed, no matter how much time or technological progress takes place, machine systems will ever manage to reach the point of satisfying the legal or moral requirements of the laws of war. That is because, they believe, no machine system can, through its programming, replace the key elements of human emotion and affect that make human beings irreplaceable in making lethal decisions on the battlefield—compassion, empathy, and sympathy for other human beings.

These assessments are mostly empirical. Although many who embrace them might also finally rest upon hidden moral premises denying in principle that a machine has the moral agency or moral psychology to make lethal decisions (a separate argument discussed next), they are framed here as distinct factual claims about the future evolution of technology. The argument rests on assumptions about how machine technology will actually evolve over decades or, more frankly, how it will not evolve, as well as beliefs about the special nature of human beings and their emotional and affective abilities on the battlefield that no machine could ever exhibit, even over the course of technological evolution. It is as if to say that no autonomous lethal weapon system could ever pass an “ethical Turing Test” under which, hypothetically, were a human and a machine hidden behind a veil, an objective observer could not tell which was which on the basis of their behaviors.32

It is of course quite possible that fully autonomous weapons will never achieve the ability to meet the required standards, even far into the future; it is quite possible that no autonomous lethal weapon will pass the “ethical Turing Test.” Yet the radical skepticism that underlies the argument is unjustified. Research into the possibilities of autonomous machine decision-making, not just in weapons but across many human activities, is only a couple of decades old. No basis exists for such sweeping conclusions about the future of technology.

We should not rule out in advance possibilities of positive technological outcomes—including the development of technologies of war that might reduce risks to civilians by making targeting more precise and firing decisions more controlled (especially compared to human-soldier failings that are so often exacerbated by fear, panic, vengeance, or other emotions—not to mention the limits of human senses and cognition). It may well be, for instance, that weapons systems with greater and greater levels of automation can—in some battlefield contexts, and perhaps more and more over time—reduce misidentification of military targets, better detect or calculate possible collateral damage, or allow for using smaller quanta of force compared to human decision-making. True, relying on the promise of computer analytics and artificial intelligence risks pushing us down a slippery slope, propelled by the future promise of technology to overcome human failings rather than addressing the weaknesses of human moral psychology directly.

But the protection of civilians in war and reduction of the harms of war are not finally about the promotion of human virtue and the suppression of vice as ends in themselves; human moral psychology is a means to those ends. If technology can further those goals more reliably and lessen dependence upon human beings with their virtues but also their moral frailties—by increasing precision, taking humans off the battlefield and reducing the pressures of human soldiers’ interests in self-preservation, and substituting a more easily disposable machine—this is to the good. Articulation of the tests of lawfulness that any autonomous lethal weapon system must ultimately meet helps channel technological development toward those protective ends of the law of armed conflict.

Simulating and debating the hypothetical implications of new technologies is a powerful tool for moral growth

**MacKinister 10** - Associate Professor of Education Education Department Environmental Studies Hobart and William Smith Colleges (http://www.springerlink.com/content/x661773353m04162/fulltext.html The Inclusion of Environmental Education in Science Teacher Education Jim MaKinster )

The role-play simulation helped students to see that politics is much more than how laws are made in Washington, D.C. Politics and political agendas refer to groups of real people who share common concerns and agendas. At times, such stakeholders might organize themselves into special interest groups in order to exert significant influence over legislation and funding. Having a diverse set of special interest groups assisted most students in developing an appreciation for the diversity of legitimate perspectives on a particular issue. Finally, the students came to see how issues such as Bt Corn touch their own lives and the lives of people in their community. As one group represented the New York State Farm Bureau, students increased their awareness of how genetically modified foods affect local farmers. We were fortunate that one of the students in this group grew up on a New York state farm. She was able to talk to her father about the issues presented. This provided an additional level of authenticity to her experience. Implications The Senate Subcommittee hearing on Bt genes in corn facilitated these students in expanding their conceptions of science and helped them to develop a greater appreciation for how science is applied to environmental problems. Environmental role-play simulations are a powerful way to put students in a context that challenges them on many levels. The context forces them to explore the science behind an issue, understand the social and environmental ramifications of a particular technology, and develop not only an appreciation for the topic, but an ability to make a convincing, logical, and coherent argument to their peers. This simulation role-play falls within the realm of what Zeidler, Sadler, Simmons and Howes (2004) and others refer to as the socioscientific issues domain (SSI) of science education. This movement refers to scientific topics that lead to the “consideration of ethical issues and construction of moral judgments about scientific topics via social interaction and discourse.” **Issues that cut across these constructs can powerfully motivate students**. More importantly, bridging the scientific, ethical, moral, and often very personal boundaries within which students operate can lead to greater and more broadly defined scientific literacy. Experiences such as a simulation role-play around a socioscientific issue are extremely valuable for future teachers. Having a broader view of science and the application of scientific knowledge will help them think about ways to help their future students develop an appreciation for the nature of science and the real-world applications of science.

## Solvency

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

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

The concept of simulations as an aspect of higher education, or in the law school environment, is not new.164 Moot court, after all, is a form of simulation and one of the oldest teaching devices in the law. What is new, however, is the idea of designing a civilian national security course that takes advantage of the doctrinal and experiential components of law school education and integrates the experience through a multi-day simulation. In 2009, I taught the first module based on this design at Stanford Law, which I developed the following year into a full course at Georgetown Law. It has since gone through multiple iterations.

The initial concept followed on the federal full-scale Top Official (“TopOff”) exercises, used to train government officials to respond to domestic crises.165 It adapted a Tabletop Exercise, designed with the help of exercise officials at DHS and FEMA, to the law school environment. The Tabletop used one storyline to push on specific legal questions, as students, assigned roles in the discussion, sat around a table and for six hours engaged with the material.

The problem with the Tabletop Exercise was that it was too static, and the rigidity of the format left little room, or time, for student agency. Unlike the government’s TopOff exercises, which gave officials the opportunity to fully engage with the many different concerns that arise in the course of a national security crisis as well as the chance to deal with externalities, the Tabletop focused on specific legal issues, even as it controlled for external chaos.

The opportunity to provide a more full experience for the students came with the creation of first a one-day, and then a multi-day simulation. The course design and simulation continues to evolve. It offers a model for achieving the pedagogical goals outlined above, in the process developing a rigorous training ground for the next generation of national security lawyers.166

A. Course Design

The central idea in structuring the NSL Sim 2.0 course **was to bridge the gap between theory and practice by conveying** doctrinal **material and** creating an alternative reality in which students would be forced to act upon legal concerns.167 The exercise itself is a form of problem-based learning, wherein students are given both agency and responsibility for the results. Towards this end, the structure must be at once bounded (directed and focused on certain areas of the law and legal education) and flexible (responsive to student input and decisionmaking).

Perhaps the most significant weakness in the use of any constructed universe is the problem of authenticity. Efforts to replicate reality will inevitably fall short. There is simply too much uncertainty, randomness, and complexity in the real world. One way to address this shortcoming, however, is through design and agency. The scenarios with which students grapple and the structural design of the simulation must reflect the national security realm, even as students themselves must make choices that carry consequences. Indeed, to some extent, student decisions themselves must drive the evolution of events within the simulation.168

Additionally, **while authenticity matters, it is worth noting that at some level the fact that the incident does not take place in a real-world setting can be a great advantage**. That is, the simulation creates an environment where students can make mistakes and learn from these mistakes – without what might otherwise be devastating consequences. It also allows instructors to develop multiple points of feedback to enrich student learning in a way that would be much more difficult to do in a regular practice setting.

NSL Sim 2.0 takes as its starting point the national security pedagogical goals discussed above. It works backwards to then engineer a classroom, cyber, and physical/simulation experience to delve into each of these areas. As a substantive matter, the course focuses on the constitutional, statutory, and regulatory authorities in national security law, placing particular focus on the interstices between black letter law and areas where the field is either unsettled or in flux.

A key aspect of the course design is that it retains both the doctrinal and experiential components of legal education. Divorcing simulations from the doctrinal environment risks falling short on the first and third national security pedagogical goals: (1) analytical skills and substantive knowledge, and (3) critical thought. A certain amount of both can be learned in the course of a simulation; however, the national security crisis environment is not well-suited to the more thoughtful and careful analytical discussion. What I am thus proposing is a course design in which doctrine is paired with the type of experiential learning more common in a clinical realm. The former precedes the latter, giving students the opportunity to develop depth and breadth prior to the exercise.

In order to capture problems related to adaptation and evolution, addressing goal [1(d)], the simulation itself takes place over a multi-day period. Because of the intensity involved in national security matters (and conflicting demands on student time), the model makes use of a multi-user virtual environment. The use of such technology is critical to creating more powerful, immersive simulations.169 It also allows for continual interaction between the players. Multi-user virtual environments have the further advantage of helping to transform the traditional teaching culture, predominantly concerned with manipulating textual and symbolic knowledge, into a culture where students learn and can then be assessed on the basis of their participation in changing practices.170 I thus worked with the Information Technology group at Georgetown Law to build the cyber portal used for NSL Sim 2.0.

The twin goals of adaptation and evolution require that students be given a significant amount of agency and responsibility for decisions taken in the course of the simulation. To further this aim, I constituted a Control Team, with six professors, four attorneys from practice, a media expert, six to eight former simulation students, and a number of technology experts. Four of the professors specialize in different areas of national security law and assume roles in the course of the exercise, with the aim of pushing students towards a deeper doctrinal understanding of shifting national security law authorities. One professor plays the role of President of the United States. The sixth professor focuses on questions of professional responsibility. The attorneys from practice help to build the simulation and then, along with all the professors, assume active roles during the simulation itself. Returning students assist in the execution of the play, further developing their understanding of national security law.

Throughout the simulation, the Control Team is constantly reacting to student choices. When unexpected decisions are made, professors may choose to pursue the evolution of the story to accomplish the pedagogical aims, or they may choose to cut off play in that area (there are various devices for doing so, such as denying requests, sending materials to labs to be analyzed, drawing the players back into the main storylines, and leaking information to the media).

A total immersion simulation involves a number of scenarios, as well as systemic noise, to give students experience in dealing with the second pedagogical goal: factual chaos and information overload. The driving aim here is to teach students how to manage information more effectively. Five to six storylines are thus developed, each with its own arc and evolution. To this are added multiple alterations of the situation, relating to background noise. Thus, unlike hypotheticals, doctrinal problems, single-experience exercises, or even Tabletop exercises, the goal is not to eliminate external conditions, but to embrace them as part of the challenge facing national security lawyers.

The simulation itself is problem-based, giving players agency in driving the evolution of the experience – thus addressing goal [2(c)]. This requires a realtime response from the professor(s) overseeing the simulation, pairing bounded storylines with flexibility to emphasize different areas of the law and the students’ practical skills. Indeed, each storyline is based on a problem facing the government, to which players must then respond, generating in turn a set of new issues that must be addressed.

The written and oral components of the simulation conform to the fourth pedagogical goal – the types of situations in which national security lawyers will find themselves. Particular emphasis is placed on nontraditional modes of communication, such as legal documents in advance of the crisis itself, meetings in the midst of breaking national security concerns, multiple informal interactions, media exchanges, telephone calls, Congressional testimony, and formal briefings to senior level officials in the course of the simulation as well as during the last class session. These oral components are paired with the preparation of formal legal instruments, such as applications to the Foreign Intelligence Surveillance Court, legal memos, applications for search warrants under Title III, and administrative subpoenas for NSLs. In addition, students are required to prepare a paper outlining their legal authorities prior to the simulation – and to deliver a 90 second oral briefing after the session.

To replicate the high-stakes political environment at issue in goals (1) and (5), students are divided into political and legal roles and assigned to different (and competing) institutions: the White House, DoD, DHS, HHS, DOJ, DOS, Congress, state offices, nongovernmental organizations, and the media. This requires students to acknowledge and work within the broader Washington context, even as they are cognizant of the policy implications of their decisions. They must get used to working with policymakers and to representing one of many different considerations that decisionmakers take into account in the national security domain.

Scenarios are selected with high consequence events in mind, to ensure that students recognize both the domestic and international dimensions of national security law. Further alterations to the simulation provide for the broader political context – for instance, whether it is an election year, which parties control different branches, and state and local issues in related but distinct areas. The media is given a particularly prominent role. One member of the Control Team runs an AP wire service, while two student players represent print and broadcast media, respectively. The Virtual News Network (“VNN”), which performs in the second capacity, runs continuously during the exercise, in the course of which players may at times be required to appear before the camera. This media component helps to emphasize the broader political context within which national security law is practiced.

Both anticipated and unanticipated decisions give rise to ethical questions and matters related to the fifth goal: professional responsibility. The way in which such issues arise stems from simulation design as well as spontaneous interjections from both the Control Team and the participants in the simulation itself. As aforementioned, professors on the Control Team, and practicing attorneys who have previously gone through a simulation, focus on raising decision points that encourage students to consider ethical and professional considerations. Throughout the simulation good judgment and leadership play a key role, determining the players’ effectiveness, with the exercise itself hitting the aim of the integration of the various pedagogical goals.

Finally, there are multiple layers of feedback that players receive prior to, during, and following the simulation to help them to gauge their effectiveness. The Socratic method in the course of doctrinal studies provides immediate assessment of the students’ grasp of the law. Written assignments focused on the contours of individual players’ authorities give professors an opportunity to assess students’ level of understanding prior to the simulation. And the simulation itself provides real-time feedback from both peers and professors. The Control Team provides data points for player reflection – for instance, the Control Team member playing President may make decisions based on player input, giving students an immediate impression of their level of persuasiveness, while another Control Team member may reject a FISC application as insufficient.

The simulation goes beyond this, however, focusing on teaching students how to develop (6) opportunities for learning in the future. Student meetings with mentors in the field, which take place before the simulation, allow students to work out the institutional and political relationships and the manner in which law operates in practice, even as they learn how to develop mentoring relationships. (Prior to these meetings we have a class discussion about mentoring, professionalism, and feedback). Students, assigned to simulation teams about one quarter of the way through the course, receive peer feedback in the lead-up to the simulation and during the exercise itself. Following the simulation the Control Team and observers provide comments. Judges, who are senior members of the bar in the field of national security law, observe player interactions and provide additional debriefing. The simulation, moreover, is recorded through both the cyber portal and through VNN, allowing students to go back to assess their performance. Individual meetings with the professors teaching the course similarly follow the event. Finally, students end the course with a paper reflecting on their performance and the issues that arose in the course of the simulation, develop frameworks for analyzing uncertainty, tension with colleagues, mistakes, and successes in the future.

B. Substantive Areas: Interstices and Threats

As a substantive matter, NSL Sim 2.0 is designed to take account of areas of the law central to national security. It focuses on specific authorities that may be brought to bear in the course of a crisis. The decision of which areas to explore is made well in advance of the course. It is particularly helpful here to think about national security authorities on a continuum, as a way to impress upon students that there are shifting standards depending upon the type of threat faced. One course, for instance, might center on the interstices between crime, drugs, terrorism and war. Another might address the intersection of pandemic disease and biological weapons. A third could examine cybercrime and cyberterrorism. **This is the most important determination, because the substance of the** doctrinal portion of the course and the **simulation follows from this decision**. For a course focused on the interstices between pandemic disease and biological weapons, for instance, preliminary inquiry would lay out which authorities apply, where the courts have weighed in on the question, and what matters are unsettled. Relevant areas might include public health law, biological weapons provisions, federal quarantine and isolation authorities, habeas corpus and due process, military enforcement and posse comitatus, eminent domain and appropriation of land/property, takings, contact tracing, thermal imaging and surveillance, electronic tagging, vaccination, and intelligence-gathering. The critical areas can then be divided according to the dominant constitutional authority, statutory authorities, regulations, key cases, general rules, and constitutional questions. **This**, then, **becomes a guide for the** doctrinal part of the **course, as well as the grounds on which the specific scenarios developed for the simulation** are based. The authorities, simultaneously, are included in an electronic resource library and embedded in the cyber portal (the Digital Archives) to act as a closed universe of the legal authorities needed by the students in the course of the simulation. Professional responsibility in the national security realm and the institutional relationships of those tasked with responding to biological weapons and pandemic disease also come within the doctrinal part of the course.

The simulation itself is based on five to six storylines reflecting the interstices between different areas of the law. The storylines are used to present a coherent, non-linear scenario that can adapt to student responses. Each scenario is mapped out in a three to seven page document, which is then checked with scientists, government officials, and area experts for consistency with how the scenario would likely unfold in real life.

For the biological weapons and pandemic disease emphasis, for example, one narrative might relate to the presentation of a patient suspected of carrying yersinia pestis at a hospital in the United States. The document would map out a daily progression of the disease consistent with epidemiological patterns and the central actors in the story: perhaps a U.S. citizen, potential connections to an international terrorist organization, intelligence on the individual’s actions overseas, etc. The scenario would be designed specifically to stress the intersection of public health and counterterrorism/biological weapons threats, and the associated (shifting) authorities, thus requiring the disease initially to look like an innocent presentation (for example, by someone who has traveled from overseas), but then for the storyline to move into the second realm (awareness that this was in fact a concerted attack). A second storyline might relate to a different disease outbreak in another part of the country, with the aim of introducing the Stafford Act/Insurrection Act line and raising federalism concerns. The role of the military here and Title 10/Title 32 questions would similarly arise – with the storyline designed to raise these questions. A third storyline might simply be well developed noise in the system: reports of suspicious activity potentially linked to radioactive material, with the actors linked to nuclear material. A fourth storyline would focus perhaps on container security concerns overseas, progressing through newspaper reports, about containers showing up in local police precincts. State politics would constitute the fifth storyline, raising question of the political pressures on the state officials in the exercise. Here, ethnic concerns, student issues, economic conditions, and community policing concerns might become the focus. The sixth storyline could be further noise in the system – loosely based on current events at the time. In addition to the storylines, a certain amount of noise is injected into the system through press releases, weather updates, private communications, and the like.

The five to six storylines, prepared by the Control Team in consultation with experts, become the basis for the preparation of scenario “injects:” i.e., newspaper articles, VNN broadcasts, reports from NGOs, private communications between officials, classified information, government leaks, etc., which, when put together, constitute a linear progression. These are all written and/or filmed prior to the exercise. The progression is then mapped in an hourly chart for the unfolding events over a multi-day period. All six scenarios are placed on the same chart, in six columns, giving the Control Team a birds-eye view of the progression.

C. How It Works

As for the nuts and bolts of the simulation itself, it traditionally begins outside of class, in the evening, on the grounds that national security crises often occur at inconvenient times and may well involve limited sleep and competing demands.171 Typically, a phone call from a Control Team member posing in a role integral to one of the main storylines, initiates play.

Students at this point have been assigned dedicated simulation email addresses and provided access to the cyber portal. The portal itself gives each team the opportunity to converse in a “classified” domain with other team members, as well as access to a public AP wire and broadcast channel, carrying the latest news and on which press releases or (for the media roles) news stories can be posted. The complete universe of legal authorities required for the simulation is located on the cyber portal in the Digital Archives, as are forms required for some of the legal instruments (saving students the time of developing these from scratch in the course of play). Additional “classified” material – both general and SCI – has been provided to the relevant student teams. The Control Team has access to the complete site.

For the next two (or three) days, outside of student initiatives (which, at their prompting, may include face-to-face meetings between the players), the entire simulation takes place through the cyber portal. The Control Team, immediately active, begins responding to player decisions as they become public (and occasionally, through monitoring the “classified” communications, before they are released). This time period provides a ramp-up to the third (or fourth) day of play, allowing for the adjustment of any substantive, student, or technology concerns, while setting the stage for the breaking crisis.

The third (or fourth) day of play takes place entirely at Georgetown Law. A special room is constructed for meetings between the President and principals, in the form of either the National Security Council or the Homeland Security Council, with breakout rooms assigned to each of the agencies involved in the NSC process. Congress is provided with its own physical space, in which meetings, committee hearings and legislative drafting can take place. State government officials are allotted their own area, separate from the federal domain, with the Media placed between the three major interests. The Control Team is sequestered in a different area, to which students are not admitted. At each of the major areas, the cyber portal is publicly displayed on large flat panel screens, allowing for the streaming of video updates from the media, AP wire injects, articles from the students assigned to represent leading newspapers, and press releases. Students use their own laptop computers for team decisions and communication.

As the storylines unfold, the Control Team takes on a variety of roles, such as that of the President, Vice President, President’s chief of staff, governor of a state, public health officials, and foreign dignitaries. Some of the roles are adopted on the fly, depending upon player responses and queries as the storylines progress. Judges, given full access to each player domain, determine how effectively the students accomplish the national security goals. The judges are themselves well-experienced in the practice of national security law, as well as in legal education. They thus can offer a unique perspective on the scenarios confronted by the students, the manner in which the simulation unfolded, and how the students performed in their various capacities.

At the end of the day, the exercise terminates and an immediate hotwash is held, in which players are first debriefed on what occurred during the simulation. Because of the players’ divergent experiences and the different roles assigned to them, the students at this point are often unaware of the complete picture. The judges and formal observers then offer reflections on the simulation and determine which teams performed most effectively.

Over the next few classes, more details about the simulation emerge, as students discuss it in more depth and consider limitations created by their knowledge or institutional position, questions that arose in regard to their grasp of the law, the types of decision-making processes that occurred, and the effectiveness of their – and other students’ – performances. Reflection papers, paired with oral briefings, focus on the substantive issues raised by the simulation and introduce the opportunity for students to reflect on how to create opportunities for learning in the future. The course then formally ends.172

Learning, however, continues beyond the temporal confines of the semester. Students who perform well and who would like to continue to participate in the simulations are invited back as members of the control team, giving them a chance to deepen their understanding of national security law. Following graduation, a few students who go in to the field are then invited to continue their affiliation as National Security Law fellows, becoming increasingly involved in the evolution of the exercise itself. This system of vertical integration helps to build a mentoring environment for the students while they are enrolled in law school and to create opportunities for learning and mentorship post-graduation. It helps to keep the exercise current and reflective of emerging national security concerns. And it builds a strong community of individuals with common interests.

CONCLUSION

The legal academy has, of late, been swept up in concern about the economic conditions that affect the placement of law school graduates. The image being conveyed, however, does not resonate in every legal field. It is particularly inapposite to the burgeoning opportunities presented to students in national security. That the conversation about legal education is taking place now should come as little surprise. Quite apart from economic concern is the traditional introspection that follows American military engagement. It makes sense: law overlaps substantially with political power, being at once both the expression of government authority and the effort to limit the same.

**The one-size fits all approach** currently **dominating the conversation in legal education, however, appears ill-suited to address the concerns raised** in the current conversation. **Instead of looking at law across the board, greater insight can be gleaned by looking at** the specific demands of the different fields themselves. This does not mean that the goals identified will be exclusive to, for instance, national security law, but it does suggest there will be greater nuance in the discussion of the adequacy of the current pedagogical approach.

With this approach in mind, I have here suggested six pedagogical goals for national security. For following graduation, students must be able to perform in each of the areas identified – (1) understanding the law as applied, (2) dealing with factual chaos and uncertainty, (3) obtaining critical distance, (4) developing nontraditional written and oral communication skills, (5) exhibiting leadership, integrity, and good judgment in a high-stakes, highly-charged environment, and (6) creating continued opportunities for self-learning. They also must learn how to integrate these different skills into one experience, to ensure that they will be most effective when they enter the field.

The problem with the current structures in legal education is that they fall short, in important ways, from helping students to meet these goals. Doctrinal courses may incorporate a range of experiential learning components, such as hypotheticals, doctrinal problems, single exercises, extended or continuing exercises, and tabletop exercises. These are important classroom devices. The amount of time required for each varies, as does the object of the exercise itself. But where they fall short is in providing a more holistic approach to national security law which will allow for the maximum conveyance of required skills. Total immersion **simulations**, which have not yet been addressed in the secondary literature for civilian education in national security law, may **provide an important way forward**. Such **simulations** also **cure shortcomings in other areas of experiential education**, such as clinics and moot court.

It is in an effort to address these concerns that I developed **the simulation model** above. NSL Sim 2.0 certainly is not the only solution, but it **does provide a** starting point for moving forward. The approach draws on the strengths of doctrinal courses and embeds a total immersion simulation within a course. **It makes use of technology and physical space to engage students in a multi-day exercise, in which** they are given agency and responsibility for their decision making, resulting in a steep learning curve. While further adaptation of this model is undoubtedly necessary, it suggests one potential direction for the years to come.

Pragmatic potential is a controlling factor for evaluating simulations
**Shelby 7** – Tommie Shelby, Professor of African and African American Studies and of Philosophy at Harvard, 2007, We Who Are Dark: The Philosophical Foundations of Black Solidarity

But African American philosophy does not typically make public policy recommendations. Although engaged with social realities and historical events, its mode of inquiry still tends to be relatively abstract and somewhat tentative in its conclusions, often asking more questions than it answers. It operates at the level of general principles rather than offering concrete proposals for social change. The intellectual culture of the United States has a strong bias against speculative inquiry, and thus philosophical work of the kind I engage in here may frustrate some readers, especially those interested in ideas largely for their immediate practical application to concrete problems. Political philosophy in particular can appear as worthless pontification or superfluous splitting of hairs. Moreover, given that African American philosophy scrutinizes and defends basic normative ideals, it might seem to be hopelessly Utopian, as engaged in painting a picture of an ideal world in which none of us will ever live. Because of this, some who are eager to get on with the important work of changing the world and not merely interpreting it become impatient with philosophical reflection—often concluding that, at best, it is irrelevant to **practical matters** or, at worst, it is a meaningless form of recreation engaged in by a self-important cadre of the intellectual elite. This study hopes to vindicate African American philosophy of the charge of practical irrelevance by using philosophical techniques to analyze current social problems that African Americans face. The Structure of the Book Chapter 1 foreshadows my core themes and conclusions by offering a new interpretation of the political philosophy of Martin R. Delany, a mid-nineteenth-century radical abolitionist and one of the founders of black nationalism. Competing strands in Delany's social thought—"classical" nationalism and "pragmatic" nationalism—offer two different foundations for black political solidarity. I argue that the pragmatic variant is the more cogent of the two, and the one that can still serve usefully as a theoretical schema through which African Americans can understand and carry out important political projects. Chapter 2 takes up the challenge that class differentiation among black Americans poses for their solidarity, a subject Du Bois grappled with throughout his life. Focusing on his account of the relationship between black ideals, political solidarity, self-help strategies, and elite leadership, I argue that Du Bois, while never fully rebutting the charge of elitism often made against him, puts forward a conception of black solidarity that fuses moral principle, racial identification, and self-interest into a motivational basis for collective action across class differences. This account does not eliminate the threat of class-based fragmentation within the greater black population, but it does show that, despite growing class differentiation and social cleavages, black American political cooperation on terms of fairness and equal respect is still possible. It also helps us to better understand the significance of black pride and militancy for black politics. In Chapter 3 I examine the conception of black solidarity that was initially urged by Malcolm X and then later developed by Black Power advocates during the late 1960s and early 1970s. Despite several critical flaws, this thinking still shapes the political orientation of many African Americans today. I criticize the Black Power conception of black solidarity, focusing specifically on its commitment to black institutional autonomy, its social analysis of the black condition in terms of white supremacy, its treatment of the black population as a cohesive kinship unit that is capable of speaking with one voice, and its tendency to exclude, marginalize, and sometimes alienate needed nonblack allies. In light of the problems with Black Power but retaining its key insights, in Chapter 4 I offer an alternative conception of black political solidarity. I argue that black unity must operate across multiracial political organizations; it must recognize that the sources of black disadvantage cannot all be reduced to racism; and it should acknowledge the need for a decentralized network of black advocacy. This conception identifies the basic aims, political principles, and proper scope of black politics. It also suggests a way to conceive of the relationship between the demands of racial justice and the ideal of racial equality. In Chapter 5 I critically discuss black cultural nationalism (or cultural pluralism). I argue against including the goal of cultural autonomy among the basic aims of black political solidarity, and I suggest that the so-called politics of difference is not an appropriate model for contemporary black politics. I first provide a general characterization of the ideal of black cultural self-determination in the form of eight tenets, ranging from the claim that there is a distinct black culture to the thesis that blacks are, and should be regarded as, the foremost interpreters of the meaning and worth of their cultural ways. I then highlight the conceptual and normative errors that are frequently committed by those who defend this conception of cultural politics. Once again using Du Bois as a point of departure, in Chapter 6 I offer an extended discussion of the relationship between social identity and political solidarity. Relying on the analytical groundwork developed in previous chapters, I distinguish thin conceptions of blackness, which view black identity as a vague social marker imposed from outside, from thick conceptions, which view the marker as signifying something "deeper," perhaps even something that blacks can autonomously and positively embrace as a component of their self-conception. I show that a shared thick black identity, whether "racial," ethnic, cultural, or national, is not needed for political solidarity and that, in fact, the attempts to develop such an identity are counterproductive to blacks' emancipatory aims. In the conclusion I elaborate the pragmatic nationalist conception of political solidarity. I draw out the implications of the foregoing argument by integrating its various strands. In particular, I offer an interpretation of the ideal of black self-determination that demonstrates the coherence of the pragmatic nationalist outlook and its relationship to the broader nationalist tradition in African American political thought. This interpretation highlights a significant but often unnoticed connection between the value of individual autonomy and the emancipatory aims of black unity, revealing important common ground between political liberalism and black nationalism, which many scholars have overlooked.

Analysis of policy is particularly empowering, even if we’re not the USFG

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Nancy, PROFESSOR OF PUBLIC POLICY --- professor of Public Policy and Administration and director of the Institute for Higher Education Leadership & Policy (IHELP) at Sacramento State University, The Paradox of Policy Analysis: If It Is Not Used, Why Do We Produce So Much of It?, Journal of Policy Analysis and Management, Vol. 18, No. 2, 226–244 (1999)

In my view, none of these radical changes is necessary. **As interesting as our politics might be with the kinds of changes outlined by proponents of** participatory and **critical policy analysis,** **we do not need these changes to justify our investment in policy analysis.** **Policy analysis already involves discourse, introduces ideas** into politics, **and affects policy outcomes**. The problem is not that policymakers refuse to understand the value of traditional policy analysis or that policy analysts have not learned to be properly interactive with stakeholders and reflective of multiple and nontechnocratic perspectives. The problem, in my view, is only that policy analysts, policymakers, and observers alike do not recognize policy analysis for what it is. **Policy analysis has changed**, right along with the policy process, to become the provider of ideas and frames, to help sustain the discourse that shapes citizen preferences, and to provide the appearance of rationality in an increasingly complex political environment. Regardless of what the textbooks say, there does not need to be a client in order for ideas from policy analysis to resonate through the policy environment.10¶ Certainly there is room to make our politics more inclusive. But **those critics who see policy analysis as a tool of the power elite might be less concerned if they understood that analysts are only adding to the debate**—they are unlikely to be handing ready-made policy solutions to elite decisionmakers for implementation. Analysts themselves might be more contented if they started appreciating the appropriation of their ideas by the whole gamut of policy participants and stopped counting the number of times their clients acted upon their proposed solutions. And **the cynics disdainful of the purported objectivism of analysis might relax if analysts themselves would acknowledge that they are seeking not truth**, **but to elevate the level of debate with a compelling, evidence-based presentation of their perspectives. Whereas critics call**, **unrealistically** in my view, **for analysts to** present competing perspectives on an issue or to “**design a discourse among multiple perspectives,” I see no reason why an individual analyst must do this** when multiple perspectives are already in abundance, brought by multiple analysts. If we would acknowledge that policy analysis does not occur under a private, contractual process whereby hired hands advise only their clients, we would not worry that clients get only one perspective.¶ **Policy analysis is used, far more extensively than is commonly believed**. Its **use could be appreciated and expanded if policymakers, citizens, and analysts themselves began to present it more accuratel**y, not as a comprehensive, problem-solving, scientific enterprise, but **as a contributor to informed discourse**. For years Lindblom [1965, 1968, 1979, 1986, 1990] has argued that we should understand policy analysis for the limited tool that it is—just one of several routes to social problem solving, and an inferior route at that. Although I have learned much from Lindblom on this odyssey from traditional to interpretive policy analysis, my point is different. Lindblom sees analysis as having a very limited impact on policy change due to its ill-conceived reliance on science and its deluded attempts to impose comprehensive rationality on an incremental policy process. I, with the benefit of recent insights of Baumgartner, Jones, and others into the dynamics of policy change, see that **even with** these **limitations, policy analysis can have a major impact on policy. Ideas, aided by institutions and embraced by citizens, can reshape the policy landscape. Policy analysis can supply the ideas.**

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**.

Falsifiability is key – Method focus undermines scholarly action

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

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

# 2AC

No one’s roll playing

Michael **Eber**, former Director of Debate at Michigan State University, “Everyone Uses Fiat”, April 8th 20**05**, [http://www.opensubscriber.com/message/edebate@ndtceda.com/1077700.html](http://www.opensubscriber.com/message/edebate%40ndtceda.com/1077700.html)

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

Arguing that a current government policy is bad is not roleplaying

Scott Harris, Director of Debate, Kansas University, 2013, This Ballot, http://www.cedadebate.org/forum/index.php?topic=4762.0

While this ballot has meandered off on a tangent I’ll take this opportunity to comment on an unrelated argument in the debate. Emporia argued that oppressed people should not be forced to role play being the oppressor. This idea that debate is about role playing being a part of the government puzzles me greatly. While I have been in debate for 40 years now never once have I role played being part of the government. When I debated and when I have judged debates I have never pretended to be anyone but Scott Harris. Pretending to be Scott Harris is burden enough for me. Scott Harris has formed many opinions about what the government and other institutions should or should not do without ever role playing being part of those institutions. I would form opinions about things the government does if I had never debated. I cannot imagine a world in which people don’t form opinions about the things their government does. I don’t know where this vision of debate comes from. I have no idea at all why it would be oppressive for someone to form an opinion about whether or not they think the government should or should not do something. I do not role play being the owner of the Chiefs when I argue with my friends about who they should take with the first pick in this year’s NFL draft. I do not role play coaching the basketball team or being a player if I argue with friends about coaching decisions or player decisions made during the NCAA tournament. If I argue with someone about whether or not the government should use torture or drone strikes I can do that and form opinions without ever role playing that I am part of the government. Sometimes the things that debaters argue is happening in debates puzzle me because they seem to be based on a vision of debate that is foreign to what I think happens in a debate round.

Temporarily identifying with the state is a beneficial form of education

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

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.

## --Code Switching

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

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

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

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

Voting against us to endorse black intellectualism is an act of inadvertent colonization, where you as judges and we as debaters assume the mantle of anti-racist codes only to destroy their potential

Shannon Sullivan, Penn State, 2004, White World-Traveling, Journal of Speculative Philosophy, Vol. 18, No. 4

Lugones does not provide English translations of the Spanish portions of her essay co-authored with Elizabeth Spelman. She and Spelman require their readers either to travel to Lugones’ world to engage in dialogue or to realize that they are unprepared for genuine dialogue across racial and cultural differences and, as a result, are missing the full meaning of Lugones’ remarks. White/Anglo women’s lack of preparation for dialogue with women of color is not uncom- mon and, moreover, it goes beyond their typical ignorance of languages other than English. It often extends to ignorance of the history, geography, culture, food, politics, and other important features of nonwhite worlds. As Lugones and Spelman explain, “white/Anglo women are much less prepared for this dialogue with women of color than women of color are for dialogue with them in that women of color have had to learn white/Anglo ways, self-conceptions, and con- ceptions of them” (Lugones and Spelman 1983, 577). This asymmetrical pre- paredness is produced by an inverse relationship of power and knowledge. Latina and other women of color often have less power than white/Anglo women, but they also tend to have more knowledge precisely because their relative lack of power has forced them to learn about white/Anglo ways of life. Turning the tables, Lugones writes in Spanish and forces white/Anglo women to learn some- thing about Latino/a worlds.

While a white/Anglo person’s learning Spanish can begin to balance the relationship of power and knowledge between white/Anglo and Latino worlds, it also can have the opposite effect of increasing the hegemony of the white world. This occurs when white people learn a language other than Standard American Language—Spanish, African American Language, or otherwise—precisely to dominate the world that speaks that language. Certainly this happened during times of colonialist conquest, but it also continues today as business corporations and advertising firms in the United States learn (bits of) African American Language and Spanish to better market products that promise the “exoticism” of Blackness and the “spiciness” of Latino culture. (Standard, middle- class whiteness is so unhip nowadays, as Yancy notes [Yancy 2004, 276].) It also can happen in less insidious ways, however, such as when white people learn another language to (try to) break out of their white solipsism. Even in these well-intentioned instances, the protection provided to minority races by white people’s ignorance of their languages can be eroded once white people begin to understand and speak them.

This point was brought home to me when a Latina friend and philosopher explained that she did not want white/Anglo people to learn Spanish because their knowledge would intrude on the Spanish/Latina world that she and other Spanish-speaking philosophers are able to create in the midst of white/Anglo- dominated conferences.2 Opening up her world to white/Anglo philosophers tends to result in the destruction of a valuable point of resistance to white racism. Because of the dominance of white people in philosophy in the United States, she frequently is forced to travel to white worlds and wants to preserve a small space that is relatively free of white people and the issues of race and racism that their presence inevitably (though not necessarily deliberately) pro- duces.

Although he ultimately wants to risk inviting white people into Black semioticspace,Yancy clearly shares my friend’s concern.3 As he explains, African American Language and song often have functioned as powerful counterhegemonic expressions because they are a code that white people generally do not understand (Yancy 2004, 287–88). While white people thought that Black people were meekly singing of the glory of God and heaven, for example, Negro spirituals were surreptitiously encouraging and planning rebellious es- cape from slavery. The linguistic resistance of Negro spirituals was possible only because white people did not understand the language being spoken. Let “the ofay” (Yancy 2004, 287, 288, 296) into the secret of the code and an important form of resistance to white domination is eliminated.

Embrace a plurality of English-es rather than an insistence on the innate superiority of one linguistic strategy – the perm is the best option

David E. **Kirkland 10**, English prof at NYU, “English(es) in Urban Contexts: Politics, Pluralism, and Possibilities”, English Education, V42, N3

By definition, language once uttered begins to break apart. Its many pieces assemble a history from their various shards, which “from top to bottom . . . represent[s] the co-existence of socio-ideological contradictions between the present and the past, between differing epochs of the past, between different socio-ideological groups in the present, between tendencies, schools, circles and so forth” (Bakhtin, 1981, p. 291). These languages— Englishes, in this case—which have been traded on through various public and private transactions, have constructed a world of their own, governed by what Bakhtin calls “new socially typifying ‘languages’” (p. 291). These languages, Englishes housed in American cities and throughout the globe, have coalesced into what Nero (2005) sees as the lingua franca of the modern era. Hence, Englishes, as opposed to English, are relevant to the twenty-first century conversations of English education. This does not mean that the “old” English education is irrelevant. Conversations about English traditions continue as part of new English education (Kirkland, 2008). However, promoting linguistic pluralism means fully appreciating the hybrid and textured nature in which English is practiced and performed by inner-city youth (see Paris, 2009) as elemental to new English education. The exclusive foci on the study of high dialects can bastardize a language’s fluidity, marginalize its speakers who embody pluralistic identities through their troubled tongues (Ahmad, 2007), and presuppose the process of learning to teach by restricting students’ right to their own language (Kinloch, 2005; Kirkland & Jackson, 2009). Placed in this context, language as a monolithic construct loses importance in the pluralized/ hybridized linguistic lives of urban youth, and the processes of English education lose emphasis in postmodern classrooms. Indeed, we in English education should be concerned, for according to Bakhtin (1981), “It might even seem that the very word ‘language’ loses all meaning in this process—for apparently there is no single plane on which all these ‘languages’ might be juxtaposed to one another” (p. 291). In this way, Canagarajah (2003) expands the definition of English due, in part, to political concerns that grow out of such “language rights issues [that] are still vexing and controversial” (p. ix). For Canagarajah, “the scope of language issues [in the United States] emphasizes the ongoing presence of multiple versions of English in all our classrooms, linked to real issues of personal and ethnic identity” (p. ix). From this perspective, to understand English teaching today, one must recognize the pliant forces that tug at it and destabilize language standardization, generating an internal variability that locks diversity into any given language system (Fecho, 2003). Students are exposed to these forces whenever language(s) become the subject of classroom study. In his reflective study of critical language awareness practices, Fecho (2003) explains how his students were suspicious of language and the monolingual hegemony of “mainstream codes” in their city classroom: Robert grasped that many codes were within his reach, but also grasped that these codes brought advantages and costs. He came to realize that it was difficult at best to operate and sound natural in a language code with which one had little practice using or had mixed feeling about acquiring. . . . What I learned was that, for these students and others like them, it was a matter of if they were able to speak and write in the mainstream codes . . . but was more a matter of figuring out why they would feel disposed to do so. (p. 67; emphasis in original) Fecho’s student’s suspicion of a mainstream code is not surprising. For these students, appropriating this code was not a politically innocent act. Rather, it “brought advantages and costs.” That is, the appropriation of any code is about the politics of language, the competition among codes. It is also about relevance in a world that requires certain ways of speaking, certain sounds and social postures pronounced in various sociopolitical accents. A pluralistic view of English, then, is key for highlighting the sociopolitical tensions reflected in students’ worlds. Englishes (as opposed to English) seem to better capture the complexities of students’ lives for conceptualizing their worlds in words and “specific world views, each characterized by its own objects, meanings and values” (Bakhtin, 1981, p. 292). As languages hybridize, new Englishes emerge for students “to make sense of the world around [them] . . . [for] deepening their views on race and its impact in society” (Fecho, 2003, p. 67). Calls for extending the conversation in English education are far from new. It has been four years since Swenson, Young, McGrail, Rozema, and Whitin (2006) called for an evolved conception of English education due to “newer technologies [that] are reshaping our lives and communities” (p. 353), definitions of texts, and conceptions of reading and writing, of readers and writers. For Swenson et al., these “new literacies” invite English educators to rethink the evolving contexts of our work. Boyd and colleagues (2006) also express this need, arguing, “Never in the history of education in the United States has there been a more urgent need for educators to join forces to create literacy classrooms that meet the needs of linguistically and culturally diverse learners” (p. 329). The new English education is “crossing cultural boundaries” (p. 335), recognizing “student’s funds of knowledge” (p. 337) by fostering for students “varied educational experiences” (p. 340) through “socially responsive and responsible teaching” (p. 338). All students should be “taught mainstream power codes/discourses and become critical users of language while also having their home and street codes honored” (p. 344). While I find merit in Boyd et al.’s (2006) call for rethinking English education for the twenty-first century, I tend to agree with Smitherman and Villanueva (2003), who contend that paying tribute to linguistic diversity isn’t enough. English by definition is diverse, pluralistic, and always changing. And the dynamism of English (plural) can be witnessed from New York (Fisher, 2007) to Los Angeles (Alim, 2006), from the United States (Gee, 1996) to South Africa (Ball, 2009; Sailors, Hoffman, & Matthee, 2007; Smitherman, 2006) to Australia (Luke, 2004). In each context, brave new voices are emerging. These voices are evident among urban youth in the United States, who are bending vowels and verbs, shattering stale syntaxes and sounds, and embodying the vernacular Englishes that constitute new century spaces—online social communities (Kirkland, in press), multiethnic communities (Paris, 2009), and global communities (Nero, 2005). The transnational dispersion of Englishes into the urban, digital, global, and youth mainstreams has not taken place without complexities. These complexities usually appear in heated debates over what constitutes English and increasingly are highlighted in urban education language debates (Beykont, 2002; Kinloch, 2005; Kirkland & Jackson, 2009; Smitherman, 1999), where English can never be accurately described as stable, fixed, or singular. The pluralistic, dynamic, hybrid, and fluid nature of English swells, shifts, and is ultimately transformed in urban contexts, which are themselves complicated by linguistic legacies of survival and oppression.

We are not enforcing the discourse of the powerful, but recognizing that it needs to be changed

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)

Another significant objection that can be levelled against rights strategies is¶ that they require social movements to restrict or accommodate themselves to the discourses of the powerful and thereby limit the movement and, even¶worse, may result in the 'co-optation' of the movement within the orbit of dominant interests. There is no doubt that co-optation is always a possibility. But this is only one of the practical manifestations of the social consequences¶ of the real world of hegemony. What needs to be stressed is that all struggles¶ commence on old ground.

Ideology needs to be understood, as I have argued, not as the competition¶ between fully developed and mutually opposed systems of thought (Ideology),¶ but as the **protracted process** of the articulation of discrete discursive¶ elements into new configurations. Such a process has both positive and¶ negative dimensions. On the one hand, it involves the 'reworking', that is, doing 'new work' on old materials; here it may appeal to and mobilize elements that already exist. Since rights discourses are already in place, its appeal is to that which is familiar, to a taken-for-granted form in which¶ entitlement-claims are already in place. One sees this most readily in the general field of political contestation which revolves around a reworking of, that is a re-articulation of, elements already present in popular discourses: democracy, freedom, equality, liberty (and a few other key symbols)¶ constitute the whole territory of political discourse. What is decisive is the way¶ in which concrete political discourses generate and mobilize re-combinations¶ of these well-tried elements.

In order to underline the point, it is essential to insist that no discursive¶ symbol has a necessary political content. This point is easiest to illustrate if we¶ put it in terms of traditional Marxist analysis; in this context we may make the same point by saying that no political symbol has what Poulantzas called a 'necessary class belonging'.32 Take the example of 'nationalism': nationalism¶ is neither progressive nor reactionary, neither petty-bourgeois nor proletarian. Nationalism manifests itself, for example, in central America, in¶ the authoritarianism of Noriega and the radicalism of Ortega. Whether the¶ figurative discourse of nationalism takes a progressive or reactionary form¶ depends not on some essentialist concept of 'nationalism', but rather upon the way in which it is articulated with other discursive elements.

## 2AC Perm

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.

Oppositional views of the law and it’s use for war are inevitable – ONLY the permutation resolves academic conflict

Luban ’13 (David, University Professor in Law and Philosophy, Georgetown University Law Center, “Military Necessity and the Cultures of Military Law,” Leiden Journal of International Law, Volume 26, Issue 02, pp 315-349)

These arguments about military necessity are not meant as a ‘refutation’ of the LOAC version of the laws of war or anything resembling it. That would be silly. **Military necessities are real**, and law will not make them go away. The same is true of the other elements of the LOAC vision. States may no longer be the sole sources of international law, but we live in a world of states, which **remain the pre-eminent international lawmakers**. The laws of war must take the civilian point of view seriously, but it is still a long step from there to human rights. On all these points, humanitarian lawyers who pretend otherwise are fooling themselves both legally and practically. Legally, because the sources of law will not bear so much humanitarian weight, and practically because the only hope for the humanitarian project lies in militaries and military lawyers who believe in it and want to make it happen. Like it or not, the two legal cultures must live with each other, and that requires reasonableness, in the sense defined by John Rawls: a reciprocal desire for principles that could be accepted even by adherents of the other comprehensive view.

To illustrate with an example: Article 57 of AP I requires militaries to take all ‘feasible’ precautions to verify that their targets are legitimately military and to minimize civilian damage. Notoriously, there is no agreement on what ‘feasible’ means. Does it include anything technologically possible, regardless of cost or risk to the attacker? Alternatively, does it exclude anything that might increase military risk, no matter how slightly? Clearly, militaries could not reasonably accept the former, and humanitarians could not reasonably accept the latter – so, on my proposal, neither of these interpretations can be right, and lawyers should not advance them.

This conciliatory approach is not self-evident. In purely scientific pursuits, epistemologists offer powerful arguments that it is more rational both for individual researchers and for the scientific community at large if competing research programmes **forcefully press their own agendas**, even in cases when one programme is less likely than its rivals to be fruitful.101 Lawyers are, for obvious reasons, instinctively drawn to a similarly adversarial, competitive model of truth seeking. Why not let the LOAC and IHL versions of the law of war continue to compete for supremacy? Is that not the most likely way in which truth will out?

The obvious difference is that lawyers arguing about the interpretation of law are not pursuing hidden truths. They are not physicists hunting the Higgs boson or mathematicians vying for the honour of being first to solve a famous problem.102 They are trying to give concrete meaning to past lawmakers’ constructions**, in order to impose** discipline on violence **when collectivities go to war.** The obvious danger in an adversarial competition over who owns the law of war is one David Kennedy highlights: when legal interpretation turns into a political game, the players’ trust in each other's candour inevitably erodes, so that ‘as we use the discourse more, we believe it less – at least when spoken by others’.103 The result (Kennedy adds) is a law of armed combat that undermines itself and casts its own legitimacy into disrepute, even in the eyes of its practitioners. I wholeheartedly agree with this diagnosis, but not with Kennedy's cure, which is to downplay legality in favour of pure choice – to ‘be wary of treating the legal issues as the focal points for our ethics and politics’.104 In place of legalism, Kennedy calls for ‘recapturing the human experience of responsibility for the violence of war’ – accepting that ‘those who kill do “decide in the exception”, . . . [and] as men and women, our military, political, and legal experts are, in fact, free – free from the comfortable ethical and political analytics of expertise, but not from responsibility for the havoc they unleash’.105 His argument appears to be that debates over the laws of war are irredeemably strategic. Officers and political leaders – and, for that matter, humanitarians – find it all too convenient to fob responsibility onto lawyers and the law when in fact the law is ‘an elaborate discourse of evasion’.106

But suppose there were no LOAC or ICL. **Do we really believe that more responsible decisions would result, that fewer lives would be lost**, or that an alternative and better vocabulary than ‘the analytics of expertise’ would arise for deliberation? I see no reason to think so. Without some vocabulary for deliberation, the pure experience of responsibility floats in a vacuum and goes nowhere. Like it or not, and **no matter where we end up,** we must start with the vocabulary we have. **That is the legal vocabulary of the law of war**, heavily inflected with the just-war theory of past centuries. **Where else could we start?** In Quine's words, ‘We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom.’107

**The two cultures are stuck with each** other aboard the same wounded ship. The argument of this article has been that their differing comprehensive views arise from competing premises about the primacy of military necessity and human dignity. Both are reasonable premises, and mutual recognition that they are reasonable – more precisely, willingness to discard one's own interpretations if a similarly willing adherent to the alternative view could not possibly accept them – seems like a plausible canon of interpretation. It is also the most plausible strategy for achieving whatever convergence is humanly possible.

Scenario education

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Scenarios are both a matter of cognition and imagination. "Scenarios attempt to describe in more or less detail with more or less explanatory acumen some hypothetical sequence of events" (Kahn 1973: 119). The scenario builder is dealing with the unknown (and to some degree unknowable) future full of surprises. Analytical reason has serious limits in dealing with such circumstances and other intellectual faculties come to fore. Imagination has always been "one of the principal means for dealing in various ways with the future", and the scenario could be seen as "simply one of many devices useful in stimulating and disciplining the imagination". The "scenario" as a methodological device is nothing more than a systematic effort to generate by analysis and imagination, relatively plausible contexts in which the possible developments may be tested or at least discussed or evaluated (Kahn 1967: 262).

Scenarios emphasize different aspects of "future history" and may do that in many forms. Some scenarios may explore and emphasize one particular development or a particular element of a larger problem or trend. These are attempts to describe in some detail "a specific hypothetical sequence of events that could lead plausibly to various situations or a specific situation envisaged" (Kahn 1967: 262). Scenarios may also be used to produce, "perhaps in impression tones", the future development of a culture, a nation, of some group or class or of the world as a whole. Such scenarios are dealing with events taken together—integrating several aspects of a situation more or less simultaneously. Finally there are scenarios "used just as a context for discussing or as a 'named' possibility that can be referred to for various purposes". But irrespective of the type of scenario employed, Kahn considered that there are several general functions of the scenario as an aid to thinking, common to all: (i) They are calling attention, to the larger range of possibilities that must be considered. They encourage plunging into the unfamiliar and rapidly changing world of the present and the future by dramatizing and illustrating the possibilities they focus on. (2) They force the analyst to deal with details and dynamics which he might easily avoid treating if he restricted himself to abstract considerations. (3) They help to illuminate the interaction of psychological, social, political, and economic factors, including the influence of individual political personalities upon what otherwise might be an abstract analysis, and they do so in a form which permits the comprehension of many interacting elements at once. (4) They can illustrate forcefully, certain principles or questions that would be ignored or lost if one insisted on taking examples only from the complex and controversial real world. (5) They may also be used to consider alternative possible outcomes of certain real past and present crises. (6) They can be used as artificial "case histories" and "historical anecdotes" either to make up to some degree for the paucity of actual examples, or as "existence theorems" or examples to test or demonstrate the technical feasibility or plausibility of some possible sequence of events (Kahn 1973: 120; 1967: 264-65).

However, precisely because their unique usefulness, Kahn and his followers have been very keen to remind again and again that scenarios are not predictions about the future. Rather, scenarios are "tools for ordering one's perceptions about alternative future environments, in which **one's decisions might be played out**" (Schwartz, 1996) and an effective "device for organizing a variety of much seemingly unrelated information, economic, technological, competitive, political, societal—some quantitative, some qualitative, and translating it into a framework for judgment" (Wack 1985).

At Hudson, Kahn transformed scenarios into a tool for business strategy and introduced them to the corporate world. Shell Oil was one of the first corporations employing scenarios. At the beginning of the seventies Pierre Wack and others at Shell built on the Hudson method and used scenarios to warn Shell's executives of a possible dramatic rise in oil-prices. They realized scenarios should not aim only at just presenting systematic narratives about possible futures but also should be designed in such a way as to change the executives' view of reality or "unlock their mindsets". By using scenarios as a cognitive device to challenge their imagination and perceptions, they led Shell's executives out of their complacent world-view. When the oil-crisis occurred in 1973, Shell was ready. Shell's success drew attention to the scenario method and from there scenarios took off and become accepted as one of the most effective and robust decision support methods in business strategy and public policy.

The success was even more dramatic when the limits and failures of the "unified planning machinery" prediction-based approach came to disappoint the high expectations built into its models and methods in the '60 and 70 (Kleiner 1996: 139-80). If accurate prediction was impossible even when supported by sophisticated mathematical models and powerful computing technologies, what was then left was the awareness of the need to be always mentally prepared, conceptually equipped and alert for uncertain multiple alternative futures, i.e. precisely the scenario method's message and substance.

However despite its success in the practical world of business, the scenario method felt short of a similar victory in the academic world. It is at least intriguing that given their crucial role in decision making, administration and institutional order in general, and the fact that they are in fact a unique procedure that is practiced on such a large scale as a necessary condition for social action, scenarios have been so marginal to academic interest in social sciences, even after their triumph over the "unified planning machinery" prediction based approach.

# 1AR

Means we turn their impact

Clark, professor of law – Catholic University, ‘95

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

I must now address the thesis that there has been no evolutionary progress for blacks in America. Professor Bell concludes that blacks improperly read history if we believe, as Americans in general believe, that progress--racial, in the case of blacks--is "linear and evolutionary." n49 According to Professor Bell, the "American dogma of automatic progress" has never applied to blacks. n50 Blacks will never gain full equality, and "even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance." n51 Progress toward reducing racial discrimination and subordination has never been "automatic," if that refers to some natural and inexorable process without struggle. Nor has progress ever been strictly "linear" in terms of unvarying year by year improvement, because the combatants on either side of the equality struggle have varied over time in their **energies, resources, capacities, and** the quality of their plans. Moreover, neither side could predict or control all of the variables which accompany progress or non-progress; some factors, like World War II, occurred in the international arena, and were not exclusively under American control. With these qualifications, and a long view of history, blacks and their white allies achieved two profound and qualitatively different leaps forward toward the goal of equality: the end of slavery, and the Civil Rights Act of 1964. Moreover, despite open and, lately, covert resistance, black progress has never been shoved back, in a qualitative sense, to the powerlessness and abuse of periods preceding these leaps forward. n52