STUDIES IN LAW, POLITICS, AND SOCIETY

VOLUME 39

AUSTIN SARAT
Editor

STUDIES IN LAW, POLITICS, AND SOCIETY

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STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 39

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PART I:
CONFLICT, VIOLENCE AND LEGAL PROCESSES

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INDIVIDUAL VIOLENCE AND THE LAW

Patricia Tuitt

ABSTRACT

The political landscape that has been unfolding since the attacks on the World Trade Centre in September 2001 has created an urgent imperative for a reappraisal of the place of individual force within philosophies of violence, particularly those that are directed to law. An extensive critique of the relation between law and violence has emerged around the works of philosophers, such as Walter Benjamin, Franz Fanon, Jacques Derrida and Giorgio Agamben (1998, In: D.H. Roazen (Trans.), Homo sacer: Sovereign power and bare life. California: Stanford University Press), but it is questionable whether any of these provide us with the conceptual tools with which to address what is being presented (correctly or otherwise) as a particular problematic of the 21st century. Indeed, I would argue that a certain intellectual malaise surrounds discussion around individual force and that this state of affairs is in large measure due to the way in which critical theory and philosophy has addressed questions concerning the relation between individual violence and the juridical order. Without exception such accounts declare that individual violence undermines the authority of law itself. The following seeks to interrogate this contention and in doing so to begin to construct a more nuanced way of conceiving how the law preserves its authority.

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I

Philosophical interrogations on the relation between law and violence invariably begin with Walter Benjamin's (1921)'Critique of Violence', in which he sets out 'a criterion for violence itself as a principle' (p. 236). In Benjamin's account, the criterion for violence owes little or nothing to the desirability or just nature of the ends or objective of violence, but rather to its status as a means or instrument through which to create or preserve law. And, notwithstanding his rather opaque notion of 'divine violence' (esp. pp. 249–252), law-creation and law-preservation are the sole legitimate functions of violence. According to Benjamin's conception, law-creating violence is that violence which founds a juridical order – the establishment of a new legal and political order, most commonly through revolutionary violence. This is the ultimate expression of the paradox of law; the law is founded in violence but cannot be evaluated as legitimate *through* law. Derrida (2002) was later to refer to law-creating violence as the violence without 'ground' while at the same time bringing into dispute Benjamin's 'rigorous opposition between positing and preserving violence' (p. 272). Derrida argues that because each act of preservation is simultaneously an act of creation, it is meaningful to speak not of a distinction between the two functions of violence, but of 'a differential contamination' between them (p. 272). For Benjamin, however, the distinction has important values, as indeed it has for this account. Law-preserving violence is the violence that secures the established juridical order against change, whether such change occurs through revolution or through more peaceful means. It is legal regulation per se, 'the subordination of citizens to laws' (Benjamin, p. 240). As Robert Cover (1986) was to say, legal sanctions set into motion a series of violent acts, which bear no less the quality of violence because their formal legitimacy cannot be challenged.

In these accounts, violence that is legitimate in principle, i.e. irrespective of 'the cases of its use' (Benjamin, p. 236), sits uneasily within a frame of moral and ethical judgement. It is violence that cannot be simply assessed as being right or wrong, desirable or undesirable 'legal or illegal' (Derrida, 2002, p. 242). It is instructive that Benjamin describes such violence as 'mythic' (p. 249), at least in its law-making capacity, and Derrida characterises law's violence as a force revealing the 'mystical foundation of authority' (Derrida, 2002).

It is against this general framework that Benjamin addresses the relation between individual violence and the juridical order. For Benjamin – indeed for many philosophers that followed – the relation between individual

violence and the juridical order is deceptively simple. Individual violence undermines the authority of not merely a given legal order but of the law itself. Benjamin says, '… one might perhaps consider the surprising possibility that the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself; that violence when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence *outside the law*' (my emphasis) (p. 239). He propositions further that 'a system of legal ends cannot be maintained if natural ends are anywhere still pursued violently' (p. 239). Benjamin (and later Derrida) elaborates on this general contention concerning the relation between individual violence and the law, employing the figure of the 'great criminal' as illustrative of the danger brought about by the exercise of individual violence to the authority and existence of law. The danger is no less the danger of 'declaring a new law' (p. 241). Perpetrators of individual violence threaten to establish a new law, though, as Benjamin acknowledges, that threat is often 'impotent' (p. 241). The danger of new law 'can result not from his deed but only from the violence to which it bears witness' (Benjamin, p. 239). As Derrida (2002) was to say, the 'great criminal' in defying the law (*loi*), lays bare the violence of the juridical order itself (p. 267). Thus analysed, individual violence challenges not merely the authority of a particular established juridical order but the very notion of law as the enactment of force by those holding a monopoly of violence.

The idea that individual violence and the preservation and authority of law are fundamentally incommensurable is one that lies at the heart of western philosophies of violence. The idea perhaps finds its greatest expression and strongest endorsement within those works that hold out the criminal as the only subject truly liberated from law. In *Force of Law*, one of the most influential and important critique of law's violence to emerge in recent years, Derrida takes Benjamin to task on many fundamental questions concerning law, violence and justice, but demonstrates strong fidelity to that part of Benjamin's text that addresses the topic of the relation between individual violence and the law.

The effects of this almost universal critique of individual violence as being in opposition to the interests and authority of law is that discussion of individual violence is weakly theorised within works that address the relation between law and violence, for reasons that are rather circular in form. This is because such works, like Benjamin's, are preoccupied only with questions relating to sovereign violence; with sanctioned violence, with the way violence works as a means to create and sustain a legitimate order.

Achieving precisely the opposite end or result (or so these critiques suggest), individual violence inevitably falls outside the scope of such theorising, which, crucially, sets its analysis against an understanding that the 'grounding' of such violence exceeds the opposition between right and wrong, just and unjust. That the grounding of individual force lies, in present discourses, squarely within the moral, legal and ethical schema according to which a given community is fashioned is owed largely to the opposition, sustained in critical theory and philosophy, between individual violence and the authority of law. This is a regrettable current within critical theory and philosophy, whose effects are most in evidence when, as in present times, the 'great criminal' yields up the space of individual violence to other figures whose violent activities pose more complex questions for the legal system to resolve than does the activities of the 'great criminal' involved in the trafficking of drugs or the workings of the 'Mafia' (Derrida, 2002, p. 268).

II

Although I will argue that the relation between individual violence and the juridical order must be re-evaluated if philosophers are to confront squarely the troubling question of the use of individual force today; the basic premise upon which Walter Benjamin elaborates his critique of violence holds as good today as it did in the context in which he was to contemplate these difficult questions. That is to say I would agree that the justification for violence, including individual violence, as always with the question of violence, cannot be reduced to a question of necessity or affect but must commence from an examination of the legitimacy of violence within the philosophical tradition. Thus, Benjamin's contention that 'All violence as a means is either lawmaking or law preserving. If it lays claim to neither of these predicates, it forfeits all validity'(p. 243), remains an indispensable framework of analysis and in re-evaluating the relation between individual violence and the law here I would wish to retain this general framework.

The point of departure of this critique begins then with another proposition of Benjamin's which on the surface appears unexceptional: to whit that 'all violence as a means, even in the most favourable case, is implicated in the problematic nature of law itself' (p. 243). I suggest that it is the nature of law that Benjamin ultimately fails in his critique to sufficiently problematise – indeed, throughout the work his concept of law remains remarkably underdeveloped, particularly so in his idea that individual violence 'sits

outside the law' (p. 239). To adequately address the 'problematic nature of law itself' is to be open to the proposition that individual violence is a means through which is effected what Benjamin describes as the second 'function of violence … the law-preserving function' (p. 241). The problematic of law is precisely this: that which preserves it, as well as that which serves as a means of its creation, complicates the opposition between sanctioned and unsanctioned violence or between individual and legal force (Benjamin, p. 238). The true problematic of law is that it cannot gain meaning (purely) from the distinction between 'historically acknowledged, so-called sanctioned force and unsanctioned force' (p. 237) as Benjamin (and his followers) attempt to do, rather the authority and preservation of law, the very nature of law itself, is the coming together of sanctioned and unsanctioned force, that is the confrontation of the state's monopoly of violence with the 'impotent' violence of the individual.

Thus, it is through an elaborated understanding of the nature of law, specifically of the 'latent presence of violence in a legal institution' (Benjamin, p. 244); of that 'something rotten in the law' (Benjamin, p. 242) that we can work through the proposition that is the core of this counter-critique – viz – that the preservation of law – and let's take this to mean as Benjamin suggests, 'the subordination of citizens to law' (p. 240) – cannot be brought about by the pure exercise of executive force, and thus of legal force, for it is the 'impotent' violence of individuals that determines the nature the form and the exact measure of executive force. So, when in an attempt to underscore the destructive potential of *unsanctioned* individual violence, Benjamin states, 'by what measure violence can with reason seem so threatening to the law, and be so feared by it, must be especially in evidence where its application, even in the present legal system, is still permissible' (p. 239), he does not see that in that gesture of folding individual violence into the sphere of violence that is sanctioned, as in the example of the right to participate in an industrial strike – in the now *potency* of individual violence – there is no *greater* fear that the law can encounter in the world.

If the second function of violence is to reduce the potential of coming into being of what law most fears – a new law – then it is not by spreading the tentacles of legal regulation to the various spheres of individual activity, so that individual goals and legal goals coincide, whether by sanction or by negotiation and alliance (Derrida, 2002, p. 268). For there remains always the fear that this now potent individual violence can establish new law. Unsanctioned individual violence, 'impotent' violence in Benjamin's terms, though feared by law, is by reason of its 'impotence' the least of the law's fears. Let's work through the implications of this.

Law-preserving violence is the violence that constitutes both threat and necessary restraint. Few would dispute this. But it must combine not just a threat to citizens but also a threat to *legal* power. The process of subordinating citizen to law must begin, paradoxically, with the subordination of legal power itself. It is this aspect of the function of violence that is missing from most accounts of law and violence. It is said that the second function of violence is revealed as 'a matter of compulsory military service, the modern police or the abolition of the death penalty' (Derrida, 2002, p. 274) – in short, in those forms of executive force that compel citizen to law. But this cannot be a sufficient statement of the manifestation of law-preserving violence, for the second function of violence becomes *most* urgent not when the citizen threatens to challenge the law but when the law that is always violent and equally always *more* than violent, threatens to become no more than the external violent forces it seeks to repress, thereby inviting new law. Law-preserving violence is *then* revealed in unsanctioned individual force. Law-preserving violence is always 'subject to the restriction that it must not set itself new ends' (Benjamin, p. 243) and what but the 'impotent' violence of unsanctioned, individual force can combine both threat and necessary restraint? What but individual unsanctioned violence can be guaranteed not to set itself new ends? Individual unsanctioned violence is unable to conceive of ends that are fundamentally opposed to the existing legal order. On the contrary, when individual violence occurs, the legal order is forced to attend to the domestic and the parochial, to turn its mind to the mundane; the meting out of routine orders and sanctions. It is forced to turn itself to peaceful violence merely – to those things that are properly within its interests. Unsanctioned individual violence turns the law, if only momentarily, from thoughts of conquests and grave oppressions – thoughts wherein its 'rotteness' is most exposed and where consequently it faces its greatest threat of 'new law'.

III

A new law does not come about only when the existing legal order is irredeemably 'rotten' as where its latent violence becomes patent, endemic and all encompassing, but a new law is historically certain to come about under such conditions. Such an understanding lies at the core of Frantz Fanon's (2001) treatise on the necessity of violent resistance to colonial domination in *The Wretched of the Earth (1961).* In his view law's violence prompts 'a complete calling into question of the colonial situation' (p. 28).

The irredeemably rotten state of a law that founds colonialism is revealed in that such a law 'declares' the 'native' as 'insensible to ethics', as the enemy of 'values' as the 'depository of maleficent powers'. It is a state of law that reaches its 'logical' conclusion/direction in the 'dehumanisation' of the native (Fanon, 2001, p. 32).

Such a state of law exceeds the 'peaceful' violence that customarily prevails. It manifests more than the 'latent' violence that Benjamin declares necessary to any legal system that is not to fall into decay and disuse (p. 244). According to Fanon (2001), the inevitable result of such patent legal violence that the colonial situation exemplifies is expressed thus 'The violence of the colonial regime and the counter-violence of the native balance each other and respond to each other in an extraordinary reciprocal homogeneity. This reign of violence will be the more terrible in proportion to the size of the implantation from the mother country. The development of violence among the colonized people will be proportionate to the violence exercised by the threatened colonial regime' (p. 69). It is revolutionary violence (historically sanctioned violence) that brings such a state to an end, replacing it with new law, thus serving the first function of violence. It is the non-revolutionary, individual, always unsanctioned violence that 'corrects and represses' the excessive violence of the law, thereby protecting it from revolutionary violence and change, serving the second function of law.

The justification for individual unsanctioned violence as a matter of principle – leaving aside specific instances of unsanctioned individual violence – is that it checks the self-destructive violence of legal power. It functions as a means to stem 'something rotten in the law' through its, ultimately impotent, stabs, wounds and other violent gestures. To put the point in less Benjaminesque terms, there are particular forms of violence committed in the name of law and state that threaten to sever the law's often tenuous, uncertain and highly contingent relation to justice. I suggest further that it is this quality of law – its responsiveness to justice (this is not to equate law with justice) that ensures the stability of a constitutional order – that is to say it is that which protects the order from revolutionary assault and change. When violence of this kind is unleashed by the established order, the law's responsiveness to justice can only be re-established by acts of unsanctioned individual violence *by agents not aspiring to acquire nor capable of acquiring a monopoly of violence.*

So, acts of violence that constitute an unequivocal assault on justice are acts that can only be committed in the name of law. Such an assault on justice leaves law potentially 'seeped in violence'. When this circumstance threatens, the relation between law and justice – that which would normally

prevent law from being 'seeped in violence' – can only be restored by bringing the law to experience it's own violence – but to experience its own violence without fear of its authority being undermined by another act of law-making violence. This is why I advance the argument that the act of law-preserving violence must be unsanctioned, and not capable of acquiring a monopoly of violence. As Benjamin and Derrida correctly state the 'great criminal' brings the law to experience its own violence. But bringing the law to experience its own force, the work that individual unsanctioned violence plays, does not mean that the law is *inevitably* reduced of its authority. Rather, in a move that is metaphorically akin to a curative process of inoculation, the law through being confronted by a shade of its own violence is then made to pause, reflect and preserve itself from more serious threats to its authority. Individual unsanctioned violence that functions as a means to orient law towards justice is an act of deconstruction that cannot be accounted criminal in the proper sense.

IV

The problematic of law (the nature of law) is that it is violent but *more* than violent. It is more than violent in its responsiveness to justice. Sarat (2001) interpreting Fitzpatrick argues, 'Law must encompass and yet be in between the violent, finite particularity of action and the non-violent infinite responsiveness of interpretation, to all possibility and to justice itself' (p. 13). But this responsiveness, the thing that guarantees law *as law* and not 'numb' violence is not grounded in law itself and therefore cannot be guaranteed *through* law itself, but rather is guaranteed through the *deconstruction* of law, in the Derridean sense. It is guaranteed through putting into question law's grounds or indeed law's groundlessness. It is the constant calling into question *of* law, *together* with the regulatory force that compels citizens to law, that preserves the authority of law.

This calling into question is a violent process as is legal regulation. It is necessarily violent if it is to stem the inherent tendency of law towards 'numb' violence – the violence that threatens its responsiveness to justice. And there can be no more fitting place to begin discussion of the nature of such violence with what is perhaps the most familiar line of Frantz Fanon's (2001) collected works. 'Colonialism', he claims, 'is violence in its natural state and it will only yield to greater violence' (p. 48). Here, Fanon introduces for serious philosophical reflection the question of resistance in face of a particular species of violence that equates with the 'numb' violence that

threatens law with new law. Fanon calls this violence in its natural state. Violence in its natural state, I argue, is a form of violence that constitutes an unequivocal assault to justice and the idea that certain forms of violence are unequivocally in opposition to justice is crucial in establishing the normative case for unsanctioned individual violence.

Fanon offers the colonial state as the exemplar of violence in its natural state – a state that he depicts in powerfully descriptive terms. I do not wish to suggest that violence in its natural state is reducible to the colonial situation and would rather draw from his example the essence of the violence that is unequivocally opposed to justice. It is clear that the concept denotes a condition or state of violence, the existence of which denies or excludes the multiplicity of choices of avenues of resistance that contemporary political ideology would suggest are always open. It can be resisted only through violence.

What makes this form of violence so impervious to other forms of resistance according to Fanon is that it results in complete subjugation of a racial, cultural, ethnic, religious or other grouping, defined according to certain shared characteristics.

It is putting into effect the overwhelming desire for supremacy – a project typified in the colonial state that is impelled by a desire for supremacy of a particular race.

For our purposes, violence in its natural state constitutes the unequivocal assault on justice that I spoke of earlier. It is called so because justice is not *possible* within such a state. Even as he argues that 'one cannot speak *directly* about justice, thematise or objectivise justice, say "this is just", and even less "I am just", without immediately betraying justice' (p. 237) Derrida (2002) does concede that the 'condition of all possible justice' (p. 245) resides in the willingness to 'address oneself to the other' (p. 245). He says, 'one must know that this justice always addresses itself to singularity, to the singularity of the other, despite or even because it pretends universality' (p. 238).

This assertion to the effect that the other shall live and shall speak before justice, whatever its actual content, becomes possible is thus assaulted by putting into practice of the claim to supremacy, which precisely aims to silence the other. This claim to supremacy and the resulting removal of the conditions of all 'possible justice' is one that, as history informs us, the law is compatible, even comfortable with. Conversely, it is a claim that must be an anathema to justice that must proceed on the basis of an unassailable notion of equality between persons and respect for human subjects. And it is at the point when the responsiveness of law to justice is threatened so that the normative case for individual, unsanctioned violence arises.

V

Having already accepted the general caveat on all discourses on the justification of violence that they must be placed within history and the philosophical tradition – a tradition that asserts that for violence to be justified, it must serve as a means to create or preserve law – it finally remains for me to explain how individual unsanctioned violence effects the deconstruction of the law in a way that ensures its responsiveness to justice and through this its preservation. In *The Wretched of the Earth*, Fanon appears to suggest violence (albeit revolutionary violence) as a means by which to cure the colonised from the violence which suffuses as a result of their subjugation in the colonial state that 'breeds' violence. This argument, at least in terms of its general direction, holds some measure of appeal, however, I would argue that the sickness that threatens to engulf as a result of the enactment of the situation of violence that is violence in its natural state, and for which individual violence is advanced as *cure* – is a sickness that is proximate to law. And here we move closer to the crux of the argument. Walter Benjamin speaks of law's violence as revealing something rotten at its core. Frantz Fanon (2001) speaks of the violence that is bred through the colonial state onto the colonised, who will turn that violence on to himself and on to his neighbour and brother – violence that adopts many disguises (p. 45). 'Pathological metaphors are difficult to avoid' when speaking of violence, so states Etienne Balibar (1998, p. 11).

Interestingly, what Benjamin, Fanon and Balibar, though addressing widely different contexts, evoke is the idea of certain kinds of violence *surrounding and spreading* and thus leading to a totalising violence. There is in a sense a metaphor of the potentially spreading disease at work in each critique of violence. In relation to the colonial state and the rotten core of the law, the disease is the violence that threatens the health of the colonised and the health of the law, respectively.

The idea of law's violence, or rather the potential of law being *seeped* in violence, as like the imminent presence of a disease, activating law's rotten core, but capable of being cured with relative ease (relative to the totalising violence that threatens otherwise) through a form of deconstructive inoculation, as it were, begins to capture the essence of the function of unsanctioned individual violence. Through violence committed by those not aspiring to acquire a monopoly of violence, nor capable of so acquiring, nor granted a right to exercise violence, individual violence prevents the law from losing its responsiveness to justice by giving it back a minute proportion of its own violence, such that the law can recognise and reflect upon the

suffusing potential for violence and marshal internal resistance against this potential.

Still, why violence? No doubt there exist many mechanisms of restraint that take both violent and no-violent forms. However, in cases where the affront to justice is unequivocal – the only instance where unsanctioned individual violence is *necessary law-preserving* violence – the restraint placed on law's potential for suffusing violence must be immediate and effective – never was Derrida's claim that 'justice must not wait' more significant. The most immediate and effective restraint on law is for law to recognise and reflect upon its own violence – to be presented with the horror of its own force – for law's instinct for self-preservation would, in most instances, balk at removing itself entirely from the claims of justice, thereby opening itself to new law.

The subordination of law is effected through force. But the violence served to law cannot be served by legal subjects invested with law's violence, nor can the violence served be capable of becoming originary or founding violence, for in both cases what is at risk is the *destruction* of the constitutional order rather than its preservation.

In serving violence and allowing law to marshal resistance against potential suffusing violence, only so much of the law's own violence as to allow the law to reassert its link to justice must be infused. Just so much to stem the rottenness at its core; just so much as to allow law to recover its natural poise as 'violent but *more* than violent'. What is suggested here is not violence that parallels law's violence, but a finely tuned, highly delicate operation of violence that weighs with care and exactitude, as will the inoculating physician, the amount of law's violence that it mimics and lays before the law.

Thus, violence perpetrated by individuals or groups not capable of acquiring a monopoly of violence in response to an unequivocal assault on justice carries the indispensable element of threat and restraint that the law-preserving function of violence must have. To no other agent of violence can such a claim be made. Unsanctioned individual violence can *only* work as inoculation. Its law-preserving potential lies *precisely* in the fact that though it can confront the law with the realities of the constitutional order's violent force, it cannot overcome the constitutional order itself.

CONCLUSION

To elaborate by way of facts and examples of instances of law-preserving, individual unsanctioned violence is to fall into the trap, which Benjamin

cautions against, of confusing 'the criterion of violence as a principle' – the correct question underpinning any critique of violence – with 'cases of its use' (p. 238), the latter being of no less philosophical importance, but being a question that belongs to the sphere of ethics or morality rather than to the *legitimacy* of violence. Thus, this paper does not purport to comment on the specifics of the deployment of individual violence in any given case, rather it argues that individual violence cannot as a matter of firm principle be excluded as not being constitutive of the foundations of legal authority.

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FROM THE INSULAR CASES TO CAMP X-RAY: AGAMBEN'S STATE OF EXCEPTION AND UNITED STATES TERRITORIAL LAW[☆]

Charles R. Venator Santiago

ABSTRACT

Giorgio Agamben has used the notion of the state of exception to describe the United States' detention camps in Cuba. Agamben argues that the use of the state of exception in the U.S. can be traced back to President Lincoln's suspension of the right of habeas corpus during the Civil War. This paper suggests that this argument obscures more relevant legal and political precedents that can be found in U.S. territorial legal history. Moreover, while Agamben's argument obscures conceptual distinctions between a state of emergency and a state of exception, his argument also provides resources that can expose the limits of liberal interpretations of the relationship between the State, the citizen, and the law.

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1. INTRODUCTION

In the brief defending the legal and political status of United States (U.S.) detention Camps in the Guantanamo Bay Naval Base, Cuba, the Solicitor General Theodore B. Olson contended that U.S. Courts lacked jurisdiction to consider challenges to the detention of enemy combatants.[1] Likewise, international Courts, Olson argued, also lacked jurisdiction because the "President has determined that neither al Qaeda nor Taliban detainees are entitled to prisoner-of-war status under the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949."[2] One of the key premises informing these policy positions rested on a sort of tautological logic used to describe the legal and political status of the detention camps. Olson argued that U.S. Courts lacked jurisdiction over the U.S. camps because the enemy combatants were "being held by the U.S. military outside the sovereign territory of the United States."[3] Moreover, because the detention camps are *outside* the sovereign territory of the U.S., international law is inapplicable to the detainees.[4] Stated differently, according to the Bush Administration, detention centers such as Camp X-ray are outside the purview of law because they are places that are foreign in a domestic sense. The so-called enemy combatants, according to this logic should be subject to the executive orders of the President and the military guards interrogating them in these camps.

Partially drawing on the work of Carl Schmitt, Giorgio Agamben has been adapting the notion of the state of exception to the present (Agamben, 1998, 2000) and has argued that the political and juridical status of the U.S. post-September 11, 2001 detention camps are an expression of this notion (Agamben, 2004, 2005, pp. 3–4). Agamben contends that the Bush Administration has used the "War on Terrorism" to justify the acquisition of sovereign emergency powers that enable it to create a "juridical void" where the U.S. Constitution/law is suspended and the detainees are left at the mercy of their guards, in a condition resembling bare or naked life.[5] Places like Camp-X-ray (Cole, 2003) become "zones of indistinction" where the law is suspended and the political and juridical distinctions between inside and outside are blurred or erased (Agamben, 2005, p. 23). Agamben's language is clear; detention facilities like Camp X-ray are representative of "the topological structure of the state of exception," these are spaces that are "neither outside nor inside," or rather spaces that are "being-outside, and yet belonging" (Agamben, 2005, p. 35).

Agamben also suggests that "the essence of the camp consists in the materialization of the state of exception and in the subsequent creation of a space in which bare life and the juridical rule enter into a threshold of

indistinction, then we must admit that we find ourselves virtually in the presence of a camp every time such a structure is created, independent of the kinds of crime that are committed there and wherever its denomination and specific topography'' (Agamben, 1998, p. 174). Stated differently the sovereign or in this case the Federal government, creates a juridico-political state of exception, which enables the subsequent creation of a distinct juridico-political space where the law is suspended and where the inhabitants of that space are subject to the violence of the guardians of that space. For Agamben, the Nazi camp becomes the paradigm or rather the most extreme expression of this state of exception. It follows, that the Bush Administration's efforts to create a juridico-political state of exception in places like Guantanamo Bay, Cuba (GTMO) could lead to the creation of a juridico-political space where the law is suspended (e.g. Camp X-ray), and where various forms of violence can become the rule. The detainees held in these spaces could potentially be stripped of all legal and political protections and in turn would be subject to the raw force and violence of their guardians.

Of course, part of the problem with Agamben's arguments is that they often remain somewhat ambiguous and to some degree conceptually misleading. For example, while Agamben contends that the Nazi Camp provides the paradigm for the state of exception, he has also used this argument to suggest that places like the ''Hotel Arcade near the Paris Airport,'' ''even certain outskirts of the great postindustrial cities as well as the gated communities of the United States are beginning today to look like camps, in which naked life and political life, at least in determinate moments, enter a zone of absolute indeterminacy'' (Agamben, 2000, p. 42). Surely, anyone familiar with the atrocities committed in places like Auschwitz and Krakow can readily dismiss Agamben's exaggerations, as yet another example of his failure to distinguish between the effects of the attitudes of SS Guards (Levi, 1993) and some private rent-a-cops working for a private security firm. To be sure, having a confrontation with a rent-a-cop in a U.S. gated community and/or a French concierge at the Hotel Arcade is not necessarily going to result in the systematic extermination of the subject, guest, or detainee. Even in more extreme cases such as those of the U.S. military detention camps in Guantanamo Bay, Cuba, some detainees have been able to leave while others facing judicial proceedings have been granted some procedural rights.[6] Moreover it is not readily evident that attorneys were traveling to places like Auschwitz to represent Jewish and other detainees (Lewis, 2005).

Stated differently, the Camp paradigm is premised on a totalitarian legal and political conception of the state of exception, while the more contemporary examples often rely on juridical-political degrees of exception.

This is not to say that the use of a narrative of the state of exception in contemporary situations cannot lead to a totalitarian suspension of the law in certain political spaces. What I find useful in Agamben's argument, however, is the reliance on a narrative of a state of exception as a precondition for the creation of anomalous legal and political spaces such as detention camps. Agamben's argument highlights the conceptual role of juridico-political narratives of space in shaping the contours of the relationship between the sovereign and occupied spaces. The notion of a juridico-political state of exception can be useful because it can help to expose in a more nuanced manner the role of juridico-political narratives of space in shaping the contours of the relationship between the sovereign and the subordinated subject and/or citizen. In this article, I will use Agamben's notion of the state of exception as a point of departure for a more critical interpretation of the U.S. reliance on the creation of anomalous legal and political narratives of space to legitimate its own nation-state building agenda.

In addition, Agamben's more recent argument, as articulated in his book titled *State of Exception* and regarding the historical and conceptual emergence of the state of exception in the U.S., traces this notion to President Abraham Lincoln's suspension of the right of *Habeas Corpus* amidst the Civil War and under conditions of a state of emergency.[7] In my opinion, this Agamben's historical narrative is not only misleading, but it also obscures a series of events that are intertwined with the relationship between U.S. imperialism, territorial expansionism, and nation-state building. By this I mean to suggest that the U.S. government's use of various notions of a juridico-political state of exception has both preceded and followed President Lincoln's orders in ways that have not necessarily been contingent on a state of emergency, but have actually relied on competing narratives of a state of exception. More importantly, while the suspension of the right of *habeas corpus* during the Civil War was premised on a domestic state of emergency, the status of places like Camp X-ray is in many ways located in a zone of indistinction between the domestic and the international. This article suggests various cases that can be used to understand how the U.S. government employed competing degrees of a state of exception in order to construct a wide array of juridico-political spaces where the Constitution could be suspended to various degrees. I will argue that the detention camps in question are actuality an expression of a long tradition of a nation-state building logic that has been a permanent fixture of U.S. territorial expansionism. In other words, it is possible to identify various doctrinal precedents in U.S. jurisprudence, and other constitutional expressions of sovereign power, that have provided a foundation for the creation of the state of exception in question.

However, in the interest of time and space, I will limit my discussion to a reflection that emphasizes the case of Puerto Rico as a direct precedent to the current situation in Camp X-ray. The case of Puerto Rico is especially interesting because it provides us with a clear example of both the use of a state of emergency narrative to justify the occupation of Puerto Rico and its subsequent government as an unincorporated territory, as well as a clear example of the shift in the sovereign's use of a narrative of the state of exception to continue to justify the anomalous juridico-political status of Puerto Rico more than 100 years after the cessation of the Spanish-American War of 1898. I argue that the legal and political status of Puerto Rico, namely that of an unincorporated territory that belongs to but is not a part of the U.S. (Duffy Burnett & Marshall, 2001), can provide us with a clear precedent that can clarify the contours of the political and juridical logic of this U.S. detention camps in Cuba.[8] More importantly, while I want to offer a critique of Agamben's use of the state of exception to interpret U.S. legal history, I am also clear that the notion of the state of exception can offer distinct insights about the politico-juridical relationship between the State and spaces that have been placed in a state of exception.

Drawing on the latter conceptual and historical arguments, in this article, I want to offer an alternative interpretation of the relationship between U.S. imperialism and nation-building that challenges traditional liberal juridico-political narratives by emphasizing the role of spatial narratives in shaping the power of the law. In my opinion liberal narratives have had a tendency of emphasizing the relationship between the State and the subject/citizen, while simultaneously obscuring the role of spatial narratives as mediators of these relationships. I argue that the liberal narrative's focus on the relationship between the individual and the State is too narrow and it obscures distinct relationships of power that have been mediated by juridico-political narratives of space. In other words, constitutional notions of space have historically mediated the relationship between the individual and the State in ways that obscure distinct inequalities that cannot be resolved through traditional constitutional means. In many ways, the history of imperial expansionism introduces new relationships of power that require a different approach to the study of law and politics.

2. AGAMBEN'S STATE OF EXCEPTION

Agamben's discussion of the state of exception is premised on the notion that during times of war, civil, or otherwise, more generally when the polity

is threatened internally or externally by a violent threat, the Sovereign can create a space where the constitution or law may be suspended (Agamben, 2005, p. 5). As I have noted above, drawing on the work of Clinton Rossiter (Rossiter, 2004) Agamben traces the emergence of the state of exception in the United States to President Abraham Lincoln's invocation of emergency powers in order to suspend the right of *habeas corpus* and to impose martial law during the Civil War (Agamben, 2005, pp. 19–21). He states that "(a)lthough the paradigm is, on the one hand (in the state of siege), the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution (or constitutional norms that protect individual liberties), in time the two models end up merging into a single juridical phenomenon that we call the *state of exception*" (Agamben, 2005, p. 5). Agamben describes the resulting space in the following manner

> In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order. (Agamben, 2005, p. 23)

Thus, as I noted above, the topological structure of the state of exception is one of "*being-outside, and yet belonging*" (Agamben, 2005, p. 35). The contours of this new space are defined by the ontological transformation of a conception of space that initially relies on a boundary line demarcating the inside from the outside and eventually surrounds a space creating a conception of space that allows the sovereign power to exercise power both inside and outside the space. This narrative enables the sovereign, as well as the law, to arbitrarily declare a space, regardless of its physical location within the sovereign's jurisdiction, to belong to the polity, without necessarily being a part of the polity. This status can also be perpetuated by normalizing a state of emergency into one of perpetual security.

Ironically while Agamben's arguments obscure more complex and important historical uses of juridico-political notions of the state of exception in the legal history of U.S. nation-state building, it also provides a nuanced conceptual resource to think about the Sovereign's use of anomalous juridico-political narratives to legitimate U.S. imperialism and expansionism. Hence the irony, namely that while Agamben's use of legal history, continues to perpetuate a liberal legal narrative that obscures more relevant expressions of the use of competing notions of the state of exception, it also provides a nuanced conceptual resource that can be useful in rethinking the historical relationship of spatial narratives of law in the relationship

between U.S. nation-state building, territorial expansion, and imperialism. To be sure, his argument suggests that the Sovereign, or in this case the President, can draw upon a body of law (emergency powers) that authorizes him to create a state of exception in order to protect the polity in the face of a violent threat. To the extent that this logic explains the use of emergency powers to justify the use of martial law in the U.S. nation-state, Agamben's argument is consistent with the dominant legal narrative. It follows, that this argument can provide us with an interesting resource to re-think the North's occupation of the South after the Civil War, Jim Crow segregation, and the Japanese internment camps, among other examples of the suspension of law *inside* the nation's territory. The moment that Agamben tries to extend this logic to places like Camp X-ray, a juridico-political space that is clearly outside of the nation, yet within the jurisdiction of the State, Agamben introduces a new complexity in understanding U.S. legal history, namely the relationship of territorial expansion to U.S. constitutionalism. It is here, in the spatial juridico-political intersection of the inside/outside or domestic/international that the exploration of law demands more precision and clarity.

Agamben's argument privileges a liberal interpretation of the law that situates the emergence of the state of exception in the relationship between the state and the individual. Law and politics are in some ways constituted as the negation of civil liberties by the State, hence the suspension of the right of *habeas corpus*. However, Schmitt's original use of the state of exception, developed to criticize liberalism, sought to use spatial logic to understand legal regulations (Anderson, 1992, p. 11). One way to make sense of this argument is to suggest that juridico-political notions of space, which could mediate the relationship between the State/Sovereign and the individual subject or citizen. In my opinion, territorial jurisprudence provides one of the clearest examples of these relationships in U.S. legal history.

The Constitution only describes five types of legal spaces, namely the states, districts, territories, possessions, and Indian Tribes or Tribal territories. Ironically, while the Constitution has never contained an expressed provision authorizing the Sovereign or Federal government to acquire new territories and to expand its jurisdiction beyond the original compact of thirteen colonies/states, the history of U.S. nation-state building provides us with at least 37 instances where the Sovereign acquired and subsequently annexed various types of territories. My contention is that it is possible to locate an implied source of sovereign power that could rely on a notion of a state of exception in Article IV, Section 3 of the Constitution, which is generally known as the Territorial Clause. This clause has been interpreted

as a source of plenary power authorizing the Sovereign to govern the acquired territories, possessions, or other spaces, in various degrees of exception. By this I mean to suggest, that the Sovereign has relied on this clause to legitimate the creation of a wide array of anomalous juridico-political notions of space where the law/Constitution has been suspended to various degrees. Agamben's historical narrative neglects to engage this legal history, a legal history that is precisely concerned with the relationship of space to law in ways that do not require the invocation of emergency powers.[9] This is an important historical and conceptual problem because as I suggested above, Agamben's use of the notion of the state of exception obscures a distinction that Carl Schmitt emphasized in his argument, namely that unlike the Sovereign who may rely on the use of emergency powers to reestablish order, the law has historically relied on the state of exception to protect itself from internal or external challenges despite the clear absence of a violent threat (Schmitt, 2003).[10] For example, it is possible to argue that U.S. expansionism, and the government's reliance on the creation of territories as a precondition for the subsequence annexation of states, provides a clear example of the use of a state of exception to protect the polity against the challenges of unbalancing the State institutions like the Senate or destabilizing the nation by annexing states that could embrace undesired ideologies (Sheridan, 1985). In other words, while it is clear that the law may authorize the Sovereign to take the necessary measures to protect the State in the face of an emergency, the law can also provide the Sovereign with a power to create a necessary state of exception that can contribute to the protection of a legal and political order regardless of the presence of an emergency.

Yet, while Agamben's argument may obscure the historical complexities of U.S. territorial law and policy, it is also clear that his description of the state of exception provides an interesting and refreshing perspective that can be useful in describing anomalous juridico-political anomalies, such as Domestic Dependent Nations, unincorporated territories, and detention camps such as Camp X-ray. To this extent, and in this article, I will use Agamben's notion of the state of exception to rethink some aspects of U.S. territorial law and history as a way to clarify how Agamben's notion of the state of exception can be useful in understanding the creation of anomalous juridico-political spaces. Thus, while I will disregard Agamben's historical analysis, on account of the problems that I mention before, I will use his notion of the state of exception to explain some of the doctrinal antecedents informing or shaping the contours of the current use of the state of exception to create anomalous juridico-political spaces, like Camp X-ray.

3. ANTECEDENTS

As noted above, Agamben's argument situates Lincoln's suspension of the right to *habeas corpus* as the key precedent that enables President Bush to justify a state of exception that could enable the creation of anomalous juridico-political spaces, like Camp X-ray, where the Constitution or more precisely the Bill of Rights can be suspended. In my opinion, however, a more direct and relevant precedent for the creation of these detention camps can be located in U.S. territorial jurisprudence and more precisely in the precedent established by the case of Puerto Rico through the *Insular Cases*. Yet, in order to understand the context of this argument, it appears to me that it is important to provide some background information on U.S. territorial jurisprudence. Thus, this section is meant to suggest some ways in which we can make sense of these territorial antecedents. It is by no means meant to provide an exhaustive or complete history, nor is it meant to be read as a definitive interpretation of the relevant precedents. This lies beyond the scope of this article. What I want to suggest, however, is that U.S. territorial jurisprudence and policy can provide a wide array of examples that can lead to a more interesting interpretation of the relationship between competing notions of the state of exception and U.S. legal history.

3.1. The State of Emergency, Conquest, Occupation, and Civil-War

The basic relationship between the state of emergency and the state of exception is premised on the need to create spaces where the law is suspended in order to address the demands imposed by threats stemming from an emergency. However, I am interested in the relationship between these two juridico-political notions and the history of U.S. nation-state building project. To this extent, there are at least three examples, institutionalized by the State, and employed by the Sovereign to legitimate this relationship in the U.S. However, in the interest of time and space, I will limit my discussion to two of these traditions. The first tradition is one premised on territorial conquest, and more specifically premised on the conquest of the indigenous populations of what is now the United States. This tradition is of course different to a tradition of colonization, which I will address in the subsequent section. A second tradition or doctrine can be discerned from the U.S. position on occupied territories. Ironically, the doctrines developed by the court created a zone of indistinction between the international and the domestic. A third doctrine, as Agamben notes, emerged from efforts to maintain national unity amidst Civil War. Ironically, what Agamben does

not expound upon, was the continuation of the state of exception in the South after the war was won by the North. More importantly, it is also evident that this continuation of a state of exception drew upon a nation-state building logic. However, this latter argument is also beyond the scope of this article. Suffice it to say that the immediate aftermath of the Civil War and the reconstruction provides us with fertile terrain to reflect on the Federal government's use of competing notions of a state of exception to conquer and re-colonize the South and to further justify the re-unification of the country under the tenets of a distinct nationalist ideology. In addition, it should also be evident that the Japanese interment camps, as well as other camps constructed during World War II, provide a clear example of the use of a modified version of President Lincoln's emergency powers.

In my opinion, the experience of "American Indians"[11] with the Federal government provides the clearest example of the use of a notion of the state of emergency to subordinate non-white populations within the United States. However, part of the difficulty in describing this case lies in the fact that "(u)nlike other areas of jurisprudence, federal Indian law has little logical consistency in its substance" (Deloria & Wilkins, 1999). More importantly, I have a strong suspicion that the Federal government's State-Apparatus used a logic that was entrenched in the territorial doctrine to shape the contours of the Federal American–Indian relationship, however, this discussion is beyond the scope of my present argument. My contention is that it is possible to discern the use of a notion of the state of emergency from the transition of the Indian Boundary Line narrative to that of a Domestic Dependent Nation. This argument, however, is premised on a distinction between a U.S. imperialist policy that was informed by the conquest (state of emergency) of indigenous populations, and one that is premised on a different logic, namely on a logic of colonization (state of exception). Unlike the logic of conquest, which was premised on a narrative of emergency stemming from war, the logic of colonization could no longer be justified on a threat posed by indigenous populations willing to live within a U.S. nation and the law's empire.

The initial relationship between the United States empire and American Indians reproduced the prior British conception of space demarcating a separation between the inside/"civilized" notion of the *self* and the outside/ "barbarian/savage" conception of the enemy *Other*. It was premised on the recognition of American Indians as members of foreign nations capable of signing treaties with the U.S. and the possible re-conceptualization of American Indians as subordinated or "conquered" populations. Following this logic, the Sovereign could represent American Indians as "savages" that threatened the nation's borders. In a sense, it is possible to describe the

initial logic of conquest and war using a narrative of a state of emergency. Of course, part of the challenge lies in using a notion of the state of emergency to describe the Sovereign's policies that is the State had not developed an efficient juridico-political apparatus that could enforce it's will. Nonetheless, it is possible to use logic of a state of emergency to understand the Sovereign's attitude toward American Indians during the early formation of the State. Moreover, according to Max Farrand

> A definite line separating the Indians from the whites had be agreed upon, officially approved, and was a recognized feature of the British Indian policy. In treaties by which this was established it was agreed that neither whites nor Indians should make any settlements or encroachments upon the lands reserved to the other unless cessions of such had been previously made by persons authorized. (Farrand, pp. 788–789)

This racialized and ideological relationship was initially institutionalized in a series of treaty arrangements between the United States and various indigenous nations throughout the eighteenth and early nineteenth centuries (Getches, Wilkinson, & Williams, 1998; Prucha, 1994).

As the United States sought to expand its borders, the Federal government began to unilaterally transform this relationship. To be sure, as Farrand wrote

> The expansion of population to the Pacific, the adoption of regular routes of travel, the guarding with United States troops of those routes and of the settlements that were established, hemmed in the Indians first on one side and then on another. And when the Indians were completely surrounded, the reservation system was only a question of time. (Farrand, pp. 790–791)

Stated differently, U.S. expansionism led to the creation of enclaves where indigenous populations would often be contained in anomalous spaces or enclaves akin to detention camps where the law was suspended, and the inhabitants of these spaces were often subject to the whims of agents of either the Federal government or local states. More importantly, these enclaves were often governed by various legal arrangements that resulted from the normalization of military rules and executive orders. At the end of the day, these enclaves or rather camps were located somewhere between the international and the domestic, often times in a zone of indistinction between the two juridico-political notions of space.

It should also be noted that the founding of the U.S. was premised on the representation of the indigenous populations as savages and/or barbarians that needed to be subordinated or in some cases exterminated. To be sure, the language of the *Declaration of Independence* of the United States could not be any clearer

> He has excited domestic insurrections among us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions. (Urofsky & Finkleman, 2002, p. 57)

The normalization and institutionalization of this founding ideology would continue to enable the genocide of the indigenous populations of what is now the United States. In the mindset of some of the founding fathers, the Indian "savage" provided a justification for the declaration of a state of emergency that could allow for the creation of distinct detention camps and in many instances the indiscriminate extermination of the so-called barbarians. Again, what I want to emphasize is that the language of the *Declaration of Independence* provides a clear ideological foundation for the creation of spatial arrangements where the law was suspended and the indigenous captives were subordinated to a condition of naked or bare life.

A second example of this practice can be discerned from the U.S. occupation of Mexico and the subsequent annexation of what had become "Northern Mexico,"[12] which provided the legal and political context that resulted in the Supreme Court's adoption of a notion of the state of exception that was premised on various theories of occupation and conquest during the time of war. Unlike other forms of occupation and conquest, the nature of war provided a particular context that would allow the Sovereign to legitimate the creation notion of a constitutional state of exception in occupied territories as a direct result of a bellicose state of emergency. Moreover, the Mexican occupation was important because it provides a clear example of the collusion of U.S. foreign policy/imperialism, Manifest Destiny, territorial expansion, and U.S. nation-state building as an expression of a war that was initiated by the United States (Schoultz, 1999). As a doctrine, the theory of occupation was used to legitimate a shift in territorial law and policy that was premised on treating some spaces as foreign for certain constitutional purposes.

In *Flemming v. Page* (1850),[13] the court argued that occupied territories could be treated as foreign places for constitutional purposes and simultaneously as domestic for international interests.[14] This case arose out of a series of disputes between several U.S. merchants and various customhouses regarding the exportation and importation of goods between the Port of Tampico, Mexico; while the port was under U.S. military occupation during the war with Mexico. Writing for the majority, Chief Justice Taney provided a clear argument for the creation of an anomalous juridico-political status that is best reproduced in extenso

> It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.
>
> But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.[15]

Of course, the idea that a place can be foreign for constitutional and economic purposes, while simultaneously domestic for international purposes need not necessarily mean that the Mexican inhabitants were subjected to the traditional abuses and atrocities that U.S. soldiers are notorious for committing. Yet, in the event that they would have been subjected to these abuses, the logic of this argument suggested that the Bill of Rights did necessarily extend to the occupied territories, regardless of their domestic status for international purposes.

My point is that the Sovereign was willing to create a juridico-political state of exception during the time of emergency/war, which acquired legal standing and would set a juridical precedent for future cases. In fact, the *Flemming* precedent would subsequently be used to justify the expansion of special powers to the President in his capacity as Commander-in-Chief during the brief occupation and annexation of

California. In *Cross v. Harrison* (1854)[16] the court not only institutionalized this logic in the process of annexing California, but also created a precedent that would permit the creation of occupied territories that could be annexed to United States by-passing the territorial process(Sheridan, 1985; Grupo de Investigadores Puertorriqueños (GIP) 1984).

3.2. The State of Exception and U.S. Nation-State Building

As I noted above, the Constitution is silent on the matter of the acquisition of new territories. Individuals like Thomas Jefferson once argued that the Constitution should be interpreted as a compact among states, and that any effort to annex new territories should be authorized only by a constitutional amendment.[17] Notwithstanding the polemics surrounding this interpretation, it is clear that both legal and political actors have interpreted the Constitution in ways that have authorized the imperialist acquisition, and subsequent annexation, of vast amounts of populated and unpopulated territory throughout the world. The historical interpretations of various provisions of the Constitution in ways that have legitimated the acquisition and annexation of territories beyond the "original" thirteen, and perhaps beyond the Northwest Territories, can provide us with numerous examples of ways in which legal and political actors have used competing notions of the state of exception to legitimate expansionist agendas. More importantly, a careful study of the history of U.S. expansionism and imperialism can provide plenty of examples where the Sovereign has used juridico-political notions of the state of exception to impose order in the conquered territories, while avoiding the responsibilities imposed by the Constitution. More importantly, I would argue, the Constitution contains various ambiguous and anomalous provisions that can permit the creation of states of exception in order to protect itself from competing threats that do not rise to the degree of emergency.

My contention is that the use of various states of exception between 1789 and 1898 were guided by a distinct form of imperialism whose contours were shaped by a settler/colonialist ideology. By this I mean to suggest that prior to the Spanish–American War of 1898, legal actors interpreted constitutional provisions like the Territorial Clause (Article IV, §3, cl. 2) with an underlying concern for the colonization of new territories and the settlement of U.S. citizens. After 1898, U.S. territorial law and policy shifted in a direction that legitimated various forms of imperialism and expansionism without a colonial agenda. In this section, I will discuss four important currents or interpretations during the period anteceding the

Spanish–American War of 1898 and the subsequent acquisition of Puerto Rico. One of these interpretations can be discerned from the relationship between the Northwest Ordinance of 1787 and the Territorial Clause. A second example of the use of the state of exception for territorial acquisition can also be discerned from the court's adoption of the notion of the Domestic Dependent Territory, which was further premised on the creation of anomalous spaces that were foreign for state purposes, yet domestic for Federal interests. In addition, it is possible to argue that the historical relationships between Blacks and the State have also employed various notions of the state of exception, which merit a more sustained reflection. Finally, I would argue that the Guano Islands' polemics provide us with a further example of the ways in which the juridico-political notions of the state of exception were used to legitimate the raw violence of capitalism in the United States.

As I suggested above, the story of U.S. nation-state building has many simultaneous starting points, which are intertwined in the relationship between imperialism/colonialism, territorial acquisition, governance, and annexation, and Constitution making and interpretation (Lawson & Seidman, 2004). To be sure, while obvious starting points would be the Indian Boundary Line (Farrand, 1905) and the debates informing the conceptions of the civilized/friend and savage/enemy, the distinct creation of a spatial notion governed by a state of exception can be traced back to the U.S. efforts to remove native indigenous populations, colonize and settle the lands in which they lived, and annex these territories as part of the nation. The juridico-political logic that would shape this process, however, emerges from the use of the Northwest Ordinance of 1787 (Taylor, 1987; Onuf, 1987), which became the basic blueprint for the creation of organic acts used to govern the acquired territories and to provide guidelines for their subsequent admission into the Union. This is not to say that the Northwest Ordinance was used in every instance of territorial annexation, in fact the U.S. employed other initiatives like the "Tennessee Plan;" it unilaterally annexed two independent States, namely Texas and Hawaii. In the case of California, it by-passed the territorial process altogether and in the cases of Louisiana and Alaska it adopted a district development plan. However, in the majority of cases the basic juridico-political status of the territories in relation to the nation-state was based on the principles established by the Ordinance of 1787. More importantly, the Ordinance of 1787 was premised on a series of efforts to regulate social, economic, and political aspects of the nation's outward expansion, while attempting to temper the use of this colonization process for political maneuvering among the member states of

the Union. The ultimate goal was to avoid the fragmentation of the Union during its expansionist drive by regulating potential threats from within and without (Wallace, 1999) the nation.

The Northwest Ordinance was the first law to be adopted by Congress in 1789. It was initially created to provide some guidelines for the conquest, colonization/settlement, and development of the Northwest Territories and the subsequent creation of four states, namely Ohio, Indiana, Michigan, and Illinois. The Ordinance provided for a three-stage process of settlement that would place the territories in a temporary status of development. This meant that citizens residing in the territories would be subject to a different set of laws and norms from those residing in the states. In a sense, citizens who settled in the territories tacitly agreed to be governed by a different set of laws, albeit consistent with the spirit of the Constitution, during the process of territorial development. According to Justice Joseph Story, these principles were incorporated into the Constitution in the language of Article IV, Section 3, which basically gave Congress plenary power to establish a territory, create the conditions for a temporary territorial government, and eventually admit future states (Story, 1987, pp. 473–475). The civil government of the territories was essentially constructed from the exceptional organic laws used in the initial formation of the territories (Thorpe, 1909).

The Supreme Court institutionalized this notion of exception in a series of cases addressing the relationship between the Constitution and the disputes arising in the territories. The court's ruling on *American Insurance Company v. Canter* (1828)[18] is perhaps the most cited of these territorial cases. Writing for the court, Chief Justice Marshall argued that

> This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of citizens of the United States .... They do not however, participate in political power, they do not share the government till Florida shall become a state.[19]

In other words, while U.S. citizens were protected by the relevant civil rights guaranteed to citizens residing in the states, they lost their national political rights while residing in the territory so long as these spaces remained in a status other than statehood. The implication of this juridico-political status should be clear. United States citizens lost their ability to participate in the political realm so long as they resided in the territories, and they had no formal power to decide what would be the political status of their home until Congress decided to annex the territory in question as an equal state.[20] Not only did Chief Justice John Marshall and his court dismiss Lockean

principles of democratic consent (Locke, 1988, §87, pp. 323–324), but according to this ruling the sovereign had plenary power to decide what parts of the Constitution would apply in the territories, and what parts could be excluded. However, it is important to note that this argument rested on the premise that the constitutional exceptions adopted for the territories would only be temporary, and that as soon as these juridico-political spaces would become states, the status of the citizen would change in favor of equality under the law, at least in the political realm.

This argument was further modified in the court's position on *Dred Scott v. Sandford* (1856) where Chief Justice Roger B. Taney affirmed the principle that the Bill of Rights superseded Congress' power to enact legislation that infringed on the citizen's right to own property (e.g. slaves).[21] To be sure, Chief Justice Taney argued that

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.[22]

Of course, it must be noted that these protections only applied to citizens residing in the territories, not necessarily to aliens, slaves, and other non-citizens. Notwithstanding, the exclusions of these subjects, it is important to note that the court took a position that rejected limiting the extension of constitutional protections to citizens residing within the boundaries of the U.S. sovereignty. Ironically, this principle would only be abandoned in 1901 with the court's rulings in the *Insular Cases* (Fehrenbacher , 2001, pp. 585–586), which affirmed the notion that Congress could exercise plenary juridico-political powers over colonies and decide what parts of the Constitution could be extended to these.

The notion of the state of exception can be useful to tease out at least three undemocratic laws, policies, and practices that are inherent to the Constitution and that have been a constant companion to the U.S. nation and state building project. First of all, Article IV, §3 is inconsistent with an interpretation of the Constitution that is premised on a theory of democracy that would recognize the political equality of citizens. Territories place U.S. citizens in a position where they are unable to exercise political equality and are unable to consent to this status unless they are settlers who chose to move to the territories. Stated differently, the juridico-political status

afforded by the Territorial Clause is incompatible with any theory of democracy that is premised on a notion of political equality. Second, the history of territorial acquisition, governance, and annexation presents us with clear double standards, inconsistencies, and discontinuities that expose the authoritarian and anti-democratic character of the Federal government. Examples abound, but I would emphasize the experiences of the districts of Louisiana and Alaska, Californian anomaly, the role of cultural and linguistic difference in the Arizona and New Mexico experiences, the usurpation of Hawaii, the polemics surrounding the abrogation of women suffrage in the Utah and Wyoming territories, and the polemics surrounding the annexation of Oklahoma after the battle of Wounded Knee. I would also note that the departure in law and policy present in the adoption of the unincorporation doctrine in the *Insular Cases* provides a clear example to the dangers of U.S. territorial law and policy. The emergent doctrine is by definition anti-democratic because unlike a temporary territorial policy that may suspend democratic participation in the Federal realm, this new narrative suspends political rights indefinitely and without the consent of U.S. citizens residing in the emergent spaces.

A second and simultaneous use of a juridico-political notion of the state of exception can be discerned from the institutionalization of a colonizing narrative that was premised on privileging the property rights of White U.S. imperialists. This narrative was institutionalized in a series of cases generally known as the Marshall Trilogy,[23] which legitimated the invention of an anomalous juridico-political status known as the Domestic Dependent Nation. Federal and state government officials used this logic to legitimate the expropriation of American Indian lands and to validate the White settler's property claims, while simultaneously seeking to deny American Indian nations constitutional protections that would enable them to challenge the colonizing project.[24] Yet, as I noted above, what is distinct about the colonizing logic, is that the court created a state of exception in response to legal challenges posed by American Indians, not in response to, nor in the context of a state of emergency!

Read together, the Marshall Trilogy provides an interesting depiction of the ways that the sovereign legitimated the use of a notion of the state of exception to justify the colonization of territories within the purview of the states. To be sure, in *Johnson v. M'Intosh* (1823) Chief Justice Marshall arbitrarily and unethically (D'Errico, 2000, pp. 19–30) made a case to deny American Indians the use of the Constitution to make claims to a right to property over their lands and homes by invoking a doctrine of discovery. Chief Justice Marshall argued that

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.[25]

In turn, this argument was premised on the representation of the American Indian as an un-civilized savage that lacked sufficient reason to hold property. The language of Marshall speaks for itself

> … the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[26]

Marshall's reasoning would allow the State to impose "order" through a civilizing process that was premised on isolating American Indians into enclaves that could be externally controlled by the government, yet without guaranteeing the inhabitants of these enclaves access to constitutional rights that could be used to challenge the sovereign.

In the *Cherokee Cases* Marshall invented the notion of the Domestic Dependent Nation in order to legitimate the Sovereign's power. This narrative basically represented the American Indian communities, nations, and tribes as spaces that could be considered domestic for Federal and international concerns, yet foreign for constitutional purposes, at least with regards to states. Spatial invention can be readily discerned from the following passage contained in Marshall's opinion in *Cherokee Nation v. Georgia* (1831)

> The Indian Territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.[27]

Stated differently, and in Jill Norgren's words, Indian nations were *domestic* to the extent that their territories were located within the exterior

boundaries of the United States, they were *dependent* on the Federal government for military protection and with regards to foreign negotiations, and *national* because they were distinctly separate peoples outside the American polity (Norgren, 1996, p. 103). More importantly, because of this anomalous status, Marshall concluded, that American Indian nations were not entitled to sue states in Federal Courts. Thus, Marshall wrote

> If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.[28]

This bizarre logic was subsequently cemented in Marshall's affirmation of American Indian sovereignty and the ''ward-like status of Indians'' in *Worcester v. Georgia* (1832).[29]

My contention is that the Marshall Trilogy can be read as a notion of the state of exception to the extent that it allowed the Sovereign to declare that the Constitution or parts of the law need not apply to spaces inhabited by American Indians. Ironically, Domestic Dependent Nations while located within the sovereign territory of the United States could be treated as foreign nations when convenient, and domestic ward-ships when necessary. Stated differently, by situating the Domestic Dependent Nation in an anomalous juridico-political space, between the ''foreign'' and the ''domestic,'' the Sovereign has been able to exercise plenary power over American Indians, and justify the creation of a state of exception where the Constitution need not apply, at least not when it can threaten the Sovereign's interests in American Indian territories.

In addition, I believe that a careful reflection on the relationship between Blacks and U.S. territorial law and policy can also provide a wide array of examples where the various expressions of the State employed the use of spatial narratives shaped by competing notions of the state of exception to oppress and subordinate slaves, persons, and citizens. In fact the language of Article 6 of the Ordinance of 1787 is quite clear and explicit in its reliance on the demarcation of slave and free territories, while simultaneously affirming the powers of state funded fugitive slave bounty hunters. These debates are further made explicit in the penalization of free blacks and mulatos in ''free'' territories like Oregon (Hill, 1948). More importantly after the Civil War and during the reconstruction, territorial distinctions shaped by narratives contingent on Black slavery were replaced by other insidious spatial constructions shaped by Jim Crow laws, apartheid and segregation narratives. Suffice it to say here, that there are ample examples of how the Sovereign,

understood in the multiple expressions of his power, employed the use of competing notions of the state of exception to oppress and subordinate Blacks in the United States during the process of nation-state building.

A fourth example of how a notion of the state of exception that has been employed in the juridico-political history of U.S. nation-state building can be discerned from the experience of laborers in the so-called Guano Islands during the early nineteenth century. These islands were representative of an effort by the U.S. to engage in a distinct form of empire building that was premised on the temporary occupation of non-contiguous territories for the sole purpose of profit. In a sense, the legal and political policies arising from the occupation of these "territories" are representative of a distinct form of international capitalist expansionism without any concern for the permanent annexation of newly "discovered" territories. In fact, the islands were further represented as vessels or ships for legal and political purposes. However, unlike the prior examples, the Guano Islands were placed in a state of exception by omission, meaning that while there was a suggestion that the law was extended to the islands, there was no mechanism in place to enforce it. As a result, laborers brought to the island were often forced to work under conditions tantamount to slavery.[30] The Guano Islands were representative of the fusion between law and capitalist exploitation, enabling the creation of status of space where imported laborers, perhaps what Karl Marx called *human commodities* (Marx, 1975, p. 336), were left in a state of exception at the mercy of the islands' managers and company enforcers, who in turn were simultaneously functioning under the protection of the State.

While a formal discussion of the Guano Islands is beyond the scope of this paper, and others have already done a better job at this (Skaggs, 1994), it may be useful to contextualize these islands within the larger juridico-political narrative of U.S. nation-state building. The Guano Islands were essentially a source of bird manure that could be used to replenish eroded farmlands by providing rich nitrates. For the most part, these were uninhabited islands scattered throughout the Pacific Ocean and Caribbean Sea, and were generally subject to "discovery" by roaming merchant ships. Once "discovered," according to U.S. law, they could become "appurtenant" to the U.S., "harvested" by U.S. corporations, and protected by the U.S. military. In fact, Article 6 of the so-called Guano Act established that the law would protect citizens who discovered these islands and treat them as ships or vessels for the purposes of admiralty law jurisdiction.[31] Yet, while Congressional law extended to these islands and protected U.S. citizens were managing them, it is not clear whether the Bill of Rights protected the laborers working in these labor camps.[32]

The problem, however, was that corporations managing the islands did not necessarily follow any law, and in many instances treated Black and Chinese workers as indentured servants laboring under sub-human conditions.[33] In a sense, the Guano Islands became labor camps subject to the governance of unmitigated and unrestrained capitalists. Drawing on a U.S. Navy report, President Benjamin Harrison eloquently summarized the conditions in Navassa, one of the more controversial U.S. "territories," in the following manner "the discipline maintained on the island seems to be that of a convict establishment, without its comforts and clean linen, and that until more attention is paid to the shipping of laborers, by placing it under Government supervision to prevent misunderstandings and misrepresentations, and until some amelioration is shown in the treatment of laborers there, disorders will be a constant recurrence" (Harrison, 1891, p. 3). The Guano Islands became anomalous "territories," which while within the jurisdiction of the law, were simply left to the devises of the corporations that managed them. More importantly this had an effect of creating the conditions where laborers were treated as mere commodities in a condition akin to that described by Agamben as bare life.

President Benjamin Harrison's remarks describing the legal and political status of Navassa and the workers involved in the infamous "*Navassa Riots*," provides us with a clear depiction of how the Guano Islands acquired a distinct status of exception

> They were American citizens, under contracts to perform labor upon specified terms, within American territory, removed from any opportunity to appeal to any court or public officer for redress of any injury or the enforcement of any civil right. Their employers were, in fact, their masters. The penalties without any semblance of trial. These penalties extended to imprisonment, and even to the cruel practice of trioing [sic] men up for a refusal to work. Escape was impossible, and the state of things generally such as might make men reckless and desperate. (Harrison, 1891, p. 3)

President Harrison's statements echoed the position taken by the Supreme Court in *Duncan v. Navassa Phosphate Company* (1891) a few months earlier.[34] To be sure, Justice Gray noted that

> By the subsequent sections, the President is empowered to employ the land and forces of the United States to protect "the rights of the said discoverer or discoverers, or their assigns, as aforesaid;" the criminal laws of the United States, and the laws regulating the coasting trade, are extended to guano islands; and nothing contained in the act is to be construed as obligatory on the United States to retain possession of the islands after the guano shall have been removed. *Congress has not legislated concerning any civil rights upon guano islands;* but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own.[35] (Emphasis added)

The implications of this argument were two-fold. First, the President, acting as the Sovereign, was ultimately responsible for the enforcement of law. Second, the source of law, and more specifically civil rights, emanated from Congress and not necessarily from the Constitution. In other words, Congress was presumably empowered to decide what provisions of the Constitution could be extended to the islands, and presumably which did not extend. The effect, of course, was that the Sovereign had full authority to create a state of exception in the islands. In practice, Black and Chinese laborers were generally treated like indentured servants and/or slaves during their tenure in these island/camps.

In a sense, Guano labor camps became spaces where the Constitution's Bill of Rights was suspended, and the worker was reduced to a mere commodity subject to the whims of the manager. My point is that between 1856 and 1891, these islands were neglected to the extent that they were treated as places, with a distinct liminal status akin to a vessel or a ship, where the law would only extend to protect the interests of capitalist corporations seeking to profit from the exploitation of Guano. To this extent, it is possible to suggest that the Guano Islands provide an interesting precedent[36] that merits further study within the context of the more encompassing story of U.S. nation-state building. More importantly, the Guano labor camps became de facto states of exceptions created and managed by *private* corporations working under the protection of the U.S. government.

4. PUERTO RICO: THE DISEMBODIED SHADE

The creation of a distinct juridico-political status for Puerto Rico between 1899 and 1901 marked a formal departure in U.S. territorial law and policy. All territories acquired before the Spanish American War of 1898 were placed in a path toward statehood, and over time have been annexed as states on an equal footing to the original thirteen. This is not to say that the Federal government has not maintained some of its acquired spaces in an anomalous condition. In fact as the Supreme Court Justice Stephen Breyer has noted in recent years, the Cherokee precedent continues to be good law (Breyer, 2000). However, unlike Domestic Dependent Nations, which would remain in a state of tutelage with no possibility of becoming states, Puerto Rico could potentially become a state of the Union if it were granted the status of an incorporated territory. Since 1899, Puerto Rico has remained in an ambiguous juridico-politico status that is in a sort of zone of indistinction between the international and the domestic. Depending on the issue, Puerto

Rico can be a foreign country for constitutional and political purposes, while simultaneously remaining within the sovereignty of the U.S.

My main contention is that the case of Puerto Rico can provide us with a clear precedent that can shed light on the ways in which the U.S. has institutionalized a notion of the state of exception as a precondition for the creation of anomalous juridico-political spaces where the Constitution could be selectively applied. Unlike territories, which have been formally placed on a path to statehood, the precedents established in the case of Puerto Rico continue to serve as the basis for the creation of anomalous spaces that belong to the Sovereign, but are not a part of the nation. This case illustrates the ways in which a territorial possession was acquired as war booty, subsequently governed with a civil government that normalized a martial ideology, and has since remained in a perpetual state of juridical and political exception. Ironically, the case of Puerto Rico continues to provide a clear example of the anti-democratic policies that have shaped U.S. nation and state formation.

While Agamben's argument does not address the legal history anteceding the acquisition of Puerto Rico, and by extension does not provide a clear understanding of how the Sovereign has used the narratives of a state of emergency and a state of exception to demarcate the juridico-political contours of the U.S. nation-state, his conceptualization does provide a nuanced perspective that can help us disentangle the resulting status of Puerto Rico. By this I mean to suggest that the case of Puerto Rico provides us with a clear example of how the Sovereign used a narrative of a state of emergency to develop a civil government for Puerto Rico that has been treated as a place that belongs to the U.S. but is not a part of the nation-state. In other words, the Sovereign has used a narrative of the state of exception to treat Puerto Rico as an anomalous space where the Constitution or parts of the law extend to the island only when Congress chooses and to the extent that it desires to apply it. For example, U.S. citizens residing in Puerto Rico may find themselves without a constitutional right to trial by jury or without the right to vote in national elections. To this extent, Agamben's argument is useful in understanding the ways in which spatial narratives of law can mediate the relationship between the State and the citizen in oppressive and exceptional ways.

4.1. War and Conquest

The U.S. declaration of war against Spain was framed within a narrative of Anglo-American exceptionalism despite the claims that this was a response

to the suspicious sinking of the *U.S.S. Maine* of the coast of Cuba. This ideology was premised on the notion that Providence had given the Anglo-American civilization resources to civilize the Spanish colonies, which in turn were populated by savages akin to the North American indigenous populations (Roosevelt, 1990). It was also premised on a distinctly misogynist narrative that represented the Spanish Empire as governed by Amazons in need of proper subordination by Uncle Sam (Mendez Saavedra, 1992). This is not to say that the U.S. was not interested in conquering populated territories for the sake of joining the international community of empires, nor it is to say that some sectors of the business community were not interested in developing new sources of wealth, but rather I would argue that the unifying thread among the competing forces shaping the U.S. government's expansionist ideology was primarily one of Anglo-American exceptionalism. In turn this notion of exceptionalism enabled U.S. law and policy makers to legitimate the creation of a state of exception that would enable the acquisition and perpetual maintenance of anomalous populated territories, which could be selectively treated as foreign spaces for constitutional purposes. Congress was given a plenary power to select what aspects of the Constitution could be extended to these newly acquired territories.

Unlike Cuba, which received its "independence" after the war, Puerto Rico, along the Philippines and Guam, was acquired as part of war booty, and under the tenets of Article II of the *Treaty of Paris of 1898*.[37] According to the Supreme Court, at this time Puerto Rico became a formal territory of the United States,[38] and would presumably remain in this condition until the enactment of the Foraker Act of 1900.[39] This presented a problem for the United States because the inhabitants of Puerto Rico were Spanish citizens and the automatic naturalization of subjects that were not of Anglo-Saxon heritage was politically untenable. The President addressed these and other tensions through the enactment of Article IX, which essentially provided for the protection of Spanish subjects, invented a Puerto Rican national status, and ascribed Congress plenary authority over the civil and political rights of the residents of this new territory.

It is important to note that the ascription of plenary powers to Congress would represent a starting point for the repudiation of the *Dred Scott* principles, which subordinated Congressional powers to the Constitution and more precisely the Bill of Rights. In other words, not only did the Constitution did not follow the flag, but Congress was empowered to determine what aspects of the Constitution could be extended to the newly acquired territory. It should further be noted that unlike other occupation treaties,

the *Treaty of Paris* did not guarantee the eventual naturalization of U.S. subjects residing in the island. More importantly, this treaty provided the juridico-political context for the subsequent two-year military regime that would govern the island under the direct authority of the President.

Puerto Rico would be governed by a succession of military governors until the enactment of a civil government under the tenets of the *Foraker Act* in 1900. Brigadier General George W. Davis, U.S.V. stands out as one of the more influential military governors. His report on the *Civil Affairs of Puerto Rico* published in 1899 provided the essential blueprints for judicial and political aspects of the *Foraker Act* (Davis, 1900). It should be noted that Davis' arguments were clearly contingent on his White supremacist representation of Puerto Rico and its inhabitants, and a distinct notion of Anglo-Saxon exceptionalism that has been an underlying historical ideology guiding U.S. foreign policy-making. Moreover, recommendation for the adoption of a distinct juridico-political status for Puerto Rico further relied on a peculiar reading of U.S. history, and on a contemporary reflection of the case of Hawaii. To be sure, Davis argued that "(w)e have no American precedent to which we can refer as an aid to decide the form of civil government that should be set up (Davis, pp. 74–75)." The case of Hawaii, however, provided a useful alternative because

> Hawaii has remained more than a year without Congressional consideration of its status. It is not only not a State; it is not even in a legal sense a Territory. There seems to be no reason why it could not remain indefinitely as now (Davis, p. 75).

In other words, the ideal juridico-political status for an acquired possession, inhabited by non Anglo-Saxon subjects, was one of indefinite legal and political ambiguity or non-status. Stated differently, the state of emergency should provide the ideological foundations for the creation of an alternative juridico-political status for Puerto Rico and its inhabitants. The institutionalization of this ideology provides us with a clear example of how a state of emergency became a state of exception, which continues to endure in a modified fashion as of the time of this writing.

General Davis recommended that Puerto Rico should be treated as "a *Dependency* and placed under the executive control of the President, through the Secretary of State of the United States (Davis, p. 76)." For General Davis, this meant that Puerto Rico could occupy a legal and political space somewhere in between an English colony and an autonomous territory (Davis, p. 81). With regards to local laws, the island should be governed by a special legal regime that was not inconsistent with the Constitution. In time, General Davis reasoned, it would be possible to decide

whether Puerto Rico should be made a territory, and thus placed on a path toward statehood, or whether it should be made an independent nation. This military logic was normalized and institutionalized the following year with the creation of a civil government for Puerto Rico by the *Foraker Act.*

Beginning with the *Foraker Act* of 1900, Congress enacted a series of organic acts that would be used to provide civil governments for Puerto Rico until the island's lawmakers were able to push through the adoption of a local Constitution in 1952. For the purpose of my argument, it is important to note the ways in which various provisions of the *Foraker Act* contributed to the creation of an anomalous status or state of exception for constitutional purposes. These anomalous provisions not only limited the applicability of the Constitution but were also in violation of both the *spirit* and letter of the text. In the interest of time and space I will only refer to two provisions and the absence of a Bill of Rights.

The most obvious tension present in the *Foraker Act* lies in Section 4 of the text, which states that "the duties and taxes collected in Porto Rico in pursuance of this Act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Puerto Rico until the government of Porto Rico herein provided for shall have been organized."[40] Stated differently, the U.S. government created the equivalent of a *Stamp Act* for Puerto Rico, which not only provided for taxation without representation, but made it impossible for Puerto Ricans to exercise meaningful political power in any fashion consistent with any democratic principles. The ensuing debate over the relationship of the collection of duties, the effects on the juridico-political status of the island would be subsequently addressed in the *Insular Cases*. What is important to note, however, is the way in which Congress created the conditions that would not only destabilized Puerto Rico, but would also place the island in a distinct *state of exception*.

In addition, this organic act did not contain a Bill of Rights nor did it extend the U.S. Bill of Rights to the island. In fact, Congress would not create a Bill of Rights for Puerto Ricans until 1917, when it provided for the collective naturalization of the residents of the island through the *Jones Act*.[41] Until then, the residents of the island were governed by the existing Spanish laws to the extent that they were consistent with the U.S. Constitution. This becomes especially problematic because Section 7 invented a distinct Puerto Rican citizenship that placed the residents of the island in a

juridico-political limbo. Ironically, the Supreme Court would affirm this citizenship in *Gonzales v. Williams* (1904)[42] despite the fact that the Constitution of the U.S. only provides for one type of citizenship, namely a national citizenship. Puerto Ricans not only became citizens of an undefined space under the supreme jurisdiction of the United States, but were also unable to invoke the rights that U.S. citizens were entitled to claim.

In his memoirs, Senator Joseph Benson Foraker noted that the committee charged with drafting the organic act bearing his name was tasked with creating a civil government that could institutionalize the ambitions of the United States. According to Foraker, this organic law "had a general duty to govern that people in accordance with the spirit of our institutions, although outside constitutional restrictions and limitations" (Foraker, 1916, p. 66). This imperialist text represented an effort by the sovereign to create a law to govern a space placed in a state of exception, namely a space that had a juridico-political status that was "outside" the Constitution, yet within the purview of Congress. In a sense, Congress relied on a sort of circular logic, which created an anomalous status of space that would in turn enable Congress to justify the adoption of extra-constitutional powers to govern the island.

Of course, this made no sense legally given that Congress was a constitutional institution whose powers were defined and limited by the Constitution. Congress simply did not have the legal authority to make laws outside the restrictions and limitations imposed by the Constitution, much less in the absence of an emergency. Puerto Rico posed no significant threat to the United States. Yet, as Senator Foraker reminisced

> On account of this assignment the duty fell to my committee, and especially to me, as its chairman, to draft what proved to be the first organic law ever enacted for the government of territory belonging to the United States, and yet not part of the United States; – a distinction and honor I have always appreciated; especially in view of the successful results of my efforts. (Foraker, 1916, p. 66)

To this extent, Congress' embrace of plenary powers over Puerto Rico can be read as a further example of some of the ways in which the sovereign exercised control over the island and its population without constitutional authority. The law became Congress' will and it was legal because Congress simply said so.

Moreover, part of my contention is that while the *Foraker Act* was a further expression of U.S. imperialism, it did not necessarily represent a colonialist effort to the extent that the resulting juridico-political status was not designed to promote the settlement of U.S. citizens. In other words, U.S. imperialism was not necessarily contingent on the settlement of U.S. citizens

in the newly acquired territory and the legal and political status of the island would not be contingent on a policy deriving from this ideology. Rather this new juridico-political status was useful to legitimate a form of imperialism without responsibility to Puerto Rico or the Puerto Ricans that was premised on extending the Constitution to the island only to the extent that it would be useful to the State and the Sovereign's interests or agenda. The notion of the *state of exception* is useful because it provides an alternative interpretation of the *Foraker Act's* juridico-political invention that is not contingent on traditional U.S. territorial policy, but rather departs from this history in a new and nuanced ways.

4.2. The Court Follows the Sovereign

As I suggested above, the Supreme Court would begin to institutionalize the anomalies created by this collection of laws and decrees in a series of decisions generally known as the *Insular Cases*. My contention is that the *Insular Cases* provide an additional constitutional foundation that would permit the creation of a distinct state of exception that in turn would permit the Sovereign to exercise its power over the inhabitants of the island without the constraints or limits imposed by the Constitution. The degree of power exerted over the Puerto Rican citizens, and later U.S. citizens would of course be contingent on the Sovereign's prerogative. Likewise the degree to which the citizens and subjects inhabiting Puerto Rico are "undressed" or rather the degree to which their bodies become naked or bare in the Puerto Rican state of exception would also be contingent on the sovereign's will. To the extent that the court is the interpreter of the Constitution/law, it was merely legitimating the actions of the Executive and Legislative branches. However, given that the *Insular Cases* provided the juridical narrative that would shape the contours of State action in relation to Puerto Rico and its inhabitants, it is not unreasonable in my opinion to assert that the court was also acting as part of the Sovereign Leviathan. Perhaps the Federal government or the State, understood as a collection of institutions, could be understood as the Sovereign in this context.

The *Insular Cases* were comprised of a number of cases dating from 1901 to 1922 and addressed the relationship between the U.S. and its insular possessions (Rivera Ramos, 2001). The Supreme Court's opinion in *Downes v. Bidwell*[43] (1901) provides us with the clearest exposition of the Supreme Court's interpretation of the relationship of Puerto Rico to the U.S. Writing for the majority of the court, to the extent that it was possible to make such a claim, Justice Brown concluded that

> … the island of Porto Rico is a territory appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.[44]

Stated differently, according to Justice Brown, Puerto Rico could be treated as a foreign country for constitutional purposes, while simultaneously remaining under the sovereign power of the State. This argument would in turn affirm the juridical logic established by Congress that enabled the treatment of Puerto Rico as a state of exception where the parts of the Constitution need not apply. Politically, Justice White's concurring opinion provided the language that would since prevail in the subsequent development of an *Insular Cases* doctrine. To be sure, Justice White stated that

> The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of an was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.[45]

Hence, the legal construction of a Puerto Rican space can be understood as a zone of indistinction between the nation and international, the constitutional and international law, and simply as a space that was subject to the sovereign's will.

Yet, it is Chief Justice Fuller's dissenting opinion that provides us with an alternative narrative that represents the nature of the state of exception in the clearest manner. To be sure, he described the resulting spatial construction in the following manner

> But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.[46]

Stated differently, the "zone of indistinction," the state of exception could be understood as a "disembodied shade" or "an intermediate state of ambiguous existence for an indefinite period." Much like a detention camp, this spatial construction permitted the Sovereign to exercise a legal power that was tantamount to the "will of Congress." Additionally, Justice Harlan's dissent further described the powers that Congress adopted in the following manner

> The idea prevails with some-indeed, it found expression in arguments at the bar-that we have in this country substantially or practically two national governments; one to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction of the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution.[47]

In other words, under the logic of the *Downes*, Congressional plenary powers could claim a legal power that was outside the limits of the Constitution.

In his discussion of the history of the *Dred Scott* opinion, Don E. Fehrenbacher noted that

> In the *Insular Cases*, testing the constitutional status of the new island possessions, the Dred Scott decision received more attention as a precedent than at any other time before or after. It was cited and discussed by counsel on both sides, as well as by several justices. Delivering the nominal opinion of the court in *Downes v. Bidwell*, Justice Henry B. Brown acknowledged that if Taney's Dred Scott opinion were taken at full value, it would be decisive in favor of the plaintiff .... This was perhaps as close as the Supreme Court ever came to declaring the Dred Scott decision totally overruled. (Fehrenbacher, 2001, pp. 585–586)

Ironically, the *Dred Scott* defense of citizen's property rights, for all the wrong reasons, provided a more progressive interpretation of the relationship between the State, the territories, and the Constitution than the *Downes*! My point, however, is to emphasize that the *Insular Cases* not only contributed to the legal construction of Puerto Rico and its inhabitants, but also to the re-constitution of U.S. territorial law and politics in important ways. The *Insular Cases* are representative of a paradigmatic shift in law and policy that provided an important precedent for the Sovereign's invocation of the juridico-political power to create states of exception within the jurisdiction of the United States. Since then Puerto Rico has been categorized as an unincorporated territory for constitutional purposes.

Despite the collective naturalization of Puerto Ricans amidst World War I, the court continued to reaffirm the principle that Congress had plenary power to determine, which parts or provisions of the Constitution would be extended to protect U.S. citizens residing in the island. In other words, Congress had the power to decide whether U.S. citizens residing in Puerto Rico were entitled to the rights afforded to citizens residing in the continental U.S. under the Bill of Rights. An example of the court's posture can be discerned from its 1922 ruling in *Balzac v. People of Porto Rico* where the question of whether the Six Amendment's right to trial by jury was a

constitutionally guaranteed right extended to U.S. citizens residing in Puerto Rico was considered.[48]

Writing for the court, Chief Justice Taft invoked a tautological logic that affirmed the *Insular Cases* in order to justify the treatment of Puerto Rico as a sort *state of exception*, and a narrative of Anglo-American exceptionalism to cement his ideology. To be sure, the tautological argument suggested that Puerto Ricans were of a different race and therefore the island was made of an unincorporated territory by the *Insular Cases*. Simultaneously he argued that because Puerto Rico was an unincorporated territory, the U.S. citizens of Puerto Rican heritage, as well as Puerto Rican nationals, were not ready to assume the responsibilities entailed in serving on a constitutionally sanctioned jury. Thus, Chief Justice Taft noted that

> The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.[49]

However, Justice Taft did not only assert that the constitutional status of the Puerto Rican space was exceptional, he also invoked a notion of Anglo-American exceptionalism that was rooted on the distinctiveness of the Anglo-American soil, culture, and tradition. Hence, Taft further noted that

> The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. Hence the care with which from the time when Mr. McKinley wrote his historic letter to Mr. Root (1970) in April of 1900 concerning the character of government to be set up for the Philippines by the Philippine Commission, until the Act of 1917, giving a new Organic Act to Porto Rico, the United States has been liberal in granting to the Islands acquired by the Treaty of Paris most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it. We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the *American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights*.[50] (Emphasis added)

My point is that the court perpetuated the argument that Congress could create a state of exception where the Constitution, or parts of it, did not extend to protect citizens and persons alike. Congressional plenary powers allowed the sovereign to decide which provisions of the Constitution could apply to the unincorporated territory. It is also important to note that the court has neglected to overrule this opinion and it has yet to make a determination as to the source of constitutional due process applicable to U.S. citizens residing in Puerto Rico (United States General Accounting Office (USGAO) 1991, p. 33).

4.3. Incoherent Equality

There is a liberal counter argument,[51] which suggests that the *Insular Cases* restriction on the extension of rights to U.S. citizens residing outside of the United States was overturned 56 years later by the court's position in *Reid v. Covert.*[52] To be sure, speaking for the majority, Justice Black argued that

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all of the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[53]

It follows that all U.S. citizens and presumably persons within the purview of the sovereign power of the United States would be protected by the Bill of Rights or laws that were consistent with the language and content of the Constitution. Yet, while this liberal argument was premised on a direct relationship between the citizen and the State, or rather on the substantive rights of citizens, the status of the territory presented an un-reconcilable challenge for the court, which it sought to resolve by invoking the *Canter* territorial logic. Justice Black argued that "(t)he "Insular Cases" can be distinguished from the present cases in that they involve the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship."[54] Thus, while the Bill of Rights may not necessarily protect U.S. citizens residing in territories like Puerto Rico, this would be contingent on the *temporary* territorial status of the island.

Thirty-seven years later, and 92 years after Puerto Rico was conquered by the U.S., the court was still affirming the original principles of the *Insular*

Cases in rulings like *U.S. v. Verdugo-Urquidez*.[55] In this case the court grappled with the ability of U.S. sanctioned and funded bounty hunters to travel outside the United States and capture a suspected offender, remove him to the United States, and prosecute him there, while simultaneously denying him the protections of the Bill of Rights. To be sure, writing for the majority, Chief Justice Rehnquist argued that

> The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decision in the Insular Cases, which held that not every constitutional provision applies to the governmental activity even where the United States has sovereign power .... And certainly, it is not open to us in light of the Insular Case to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.[56]

Stated differently, the Bill of Rights and the Constitution more generally need not apply consistently throughout the sovereign jurisdiction of the United States. This can only be achieved if certain spaces acquire a distinct juridico-political status that, in my opinion, can best be described as a state of exception.

Part of my concern is that while imperialism may accurately describe the ideological force driving U.S. policy, it is not clear that the term colonialism accurately describes the ideology that shaped the juridico-political contours of the status of Puerto Rico and its relationship to the U.S. It is not readily evident that the United States had a settlement policy that aimed to colonize the island in contrast to its well-established policy initiatives for other territorial possessions. To this extent, as I suggested above, my contention is that a notion such as that of a state of exception can provide us with a more nuanced and accurate description of the anomalous juridico-political status that the U.S. government adopted in between 1898 and 1922. Of course, given the legal and political reality of the current relationship between the U.S. and Puerto Rico, it is clear to me that the paradigm of a camp is too extreme, thus I want to emphasize my reliance on a *notion* of the state of exception that is premised on arbitrary and misleading narratives of political equality.

5. FOREIGN IN A DOMESTIC SENSE?

My general contention is that the U.S. government, in all of its facets, arbitrarily invented a legal and political state of exception*,* which provided the conditions for the invention of an unincorporated territory. This logic has permitted the Sovereign to extend or suspend the extension of

constitutional rights and protections to Puerto Rico and the U.S. citizens residing in the island. It follows, that Puerto Rico can become foreign for constitutional purposes, yet domestic for political interests whenever it is convenient for the Sovereign. Puerto Rico can sometimes be outside the purview of the Constitution, while simultaneously within the realm of the Sovereign's political reach. This anomalous status not only provides a historical precedent that can help us understand the ways in which the Sovereign has used the law to govern distinct spaces in an anomalous manner, but also can help us understand the nature of a distinct form of imperialism that does not rely on a colonialist narrative, but rather relies on the creation of states of exception. The Bush Administrations efforts to legitimate its practices and policies in detention camps like Camp X-ray, draws on the same juridico-political logic, namely the creation of a state of exception that can then lead to the invention of anomalous spaces where the Constitution can be suspended. The difference, of course, is one of degrees.

Liberal interpretations of U.S. nation-state building have traditionally emphasized the relationship between the citizen/subject and the State. For example, even liberals like Rogers Smith have argued that Puerto Ricans were "thought suitable for citizenship, but only for something like second-class citizenship of blacks and Native-Americans, as well as women" (Smith, 1997, p. 430). The problem with this interpretation is that U.S. citizens of Puerto Rican heritage would be *de jure* second-class citizens regardless of their residence on the island or the mainland.[57] However, as I suggested before the legal and political status, Puerto Rico confers different legal and political rights to U.S. citizens residing in the island than to those who are residents of States of the Union.[58] Thus, by introducing the notion of the state of exception, it is possible to explain how the legal and political status of the space in which a citizen or subject resides determines or mediates the juridico political status of the citizen or subject within the United States.[59] This argument is especially important because it questions fundamental tenets of U.S. liberals, while simultaneously exposing the counter-democratic character of the Sovereign.

I would also like to emphasize that the creation of a state of exception illustrates an additional aspect of the anti-democratic nature of the U.S. Constitution. More importantly, the case of Puerto Rico provides a clear example of the anti-democratic policies and practices that continue to define the contours of U.S. politics today. Yet, what is more distressing is the fact that even liberal critics have a tendency of ignoring the legal and political ideologies that have shaped U.S. expansionism and nation and state formation. Take for example, Robert A. Dahl's discussion of the anti-democratic

character of the Constitution nowhere does he grapple with the place of territories or other possessions (Dahl, 2003). Like most U.S. scholars of democracy, he describes a nation-states comprised of a collection of states under a federal system. While he criticizes the limits on political equality posed by the Constitution on U.S. citizens, nowhere does he discuss the fact that millions of U.S. citizens have been unable to either consent to give up their right to participate politically, or vote in Federal or national elections because the status of their homes has been outside the scope of the Constitution.

I would also suggest that despite some of tensions present in Agamben's reflections on the state of exception, the suggestion that the Sovereign appeals to the creation of a space where the law is suspended and where the inhabitant may be subject to distinct forms of violence, is quite useful as a starting point for understanding some of the ways that the State, the Sovereign, or the people, can appeal to the legitimacy of the law as a precondition for the creation of a camp or other spatial constructions along this spectrum. To this extent, the use of the state of exception can help expose new insights about the relationship between the State/Sovereign and subordinated inhabited territories. As I say this, I want to emphasize the fact that while Puerto Ricans may not have some political rights, nor are they constitutionally entitled to some basic civil rights such as Trial by Jury, their status should not be equated to that of a detainee that has to endure the indignity, and in many instances torture, that the U.S. government and its military apparatus are imparting without restraint (Danner, Hersh, Mayer). All I want to suggest is that the legal and political ideologies that provide the foundations for the invention of terms like the un-incorporated territory or the Free-Associated-State is premised on the notion of a state of exception.

NOTES

1. *Rasul v. Bush*, Brief for the Respondents, Nos. 03–334 and 03–343, March 2004.
2. *Id.* at p. 8. Olson cites the Office of the White House Press Secretary, "Fact Sheet, Status of Detainees at Guantanamo," February 7, 2002 (www.whitehouse.gov/news/releases/2002/02/20020207-13.html).
3. *Id.* at p. 14.
4. *Id.* at p. 49.
5. Agamben's translators have used the terms bare and/or naked life to refer to the same concept. For the purposes of this paper I will use them interchangeably, although I prefer the term naked life for metaphorical purposes. For additional examples of how the U.S. government is subjecting detainees to conditions that are comparable with Agamben's claims about the U.S. policies and practices in GTMO, please see Danner's (2004) and Hersh's (2004) arguments about the use of torture in

detention facilities like Abu Ghraib. See also Mayer's (2005) arguments concerning extraordinary renditions.

6. *Rasul v. U.S.* 542 U.S.__ (2004).

7. One of the blind reviewers of this article has taken issue with my discussion of the state of exception by suggesting that Agamben's articulation in the his text *State of Exception* can be read as "a more detailed historical genealogy of the more general, philosophical arguments made in *Homo Sacer*." I am more inclined to believe that Agamben tends to be a bit less systematic in his writing and may have been making inconsistent arguments. However, in the interest of time and space I will limit my discussion to the historical argument articulated in his more recent text titled *State of Exception*. Thus, I will leave a more detailed response for the larger version of this project, but I will also circumscribe my discussion to the general historical argument articulated in Agamben's more recent work.

8. For an alternative interpretation, see also Kal Raustiala (2003), Does the Constitution Follow the Flag? Iraq, the War on Terror, and the Reach of the Law, Wednesday, April 9, 2003, (http://writ.news.findlaw.com/commentary/20030409_raustiala.html).

9. I should further note that Agamben's argument also obscures the differences that are inherent in a common and civil law traditions with regards to the sovereign's power to create and govern these zones of indistinction.

10. For an alternative interpretation see Farid Benavides Venegas's (2003) argument in his paper *Excepción, decisión, y la teoría del orden concreto en Carl Schmitt*.

11. I am using the term "American Indian" in order to be consistent with a generally accepted legal vocabulary and in order to represent an otherwise fragmented and plural "identity." I am by no means attempting to represent more than 2,000 communities, nations, and/or tribes as a single entity, but I am suggesting that the Federal government's narrative has indeed adopted some precedents that seek to represent American Indians as a homogeneous collectivity.

12. I am reluctant to demarcate what is today the Western part of the U.S. as part of Mexico despite the fact that the Mexican Republic inherited "title" over the "Spanish" territories. Recognition of this title is troubling because of the legal and political status of Indigenous populations inhabiting the West, and because it is not readily evident that the Mexican State had control over these territories. Notwithstanding the problems inherent with spatial/territorial demarcations, I am using the notion of the Mexican territories in a formal, yet fragile, manner to describe the legal and political conditions that created the conditions for the embrace of a juridico-political notion of the *state of exception*.

13. *Fleming v. Page*, 50 (9 HOW) U.S. 603 (1850).

14. There are some early cases that provide the legal "foundations" for this argument, but the arguments are not as developed in a substantive manner. See *U.S. v. Rice,* 4 Wheat. 246 (1819).

15. *Id.* at pp. 615–616.

16. *Cross v. Harrison*, 57 (16 HOW) U.S. 164, 189–190 (1854).

17. See his letters on the Louisiana Purchase. (Appleby & Ball, 1999)

18. *American Insurance Company v. Canter*, 26 U.S. (1 Pet.) 511.

19. *Id.* at p. 542.

20. For an alternative discussion of the *Canter* ruling, see Charles Warren, *The Supreme Court in United States History*. (Warren, 1923).

21. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

22. *Id.* at p. 447.
23. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).
24. I would venture to suggest that *Fletcher v. Peck* 10 U.S. (6 Cranch) 87 (1810) is an obvious starting point for this practice.
25. *Id.* at p. 587.
26. *Johnson v. M'Intosh*, 21 U.S. 543, at p. 590.
27. *Cherokee Nation v. Georgia*, 30 U.S. 1, at p. 17.
28. *Cherokee Nation v. Georgia*, 30 U.S. 1, at p. 20.
29. *Worcester v. Georgia*, 31 U.S. 515, at p. 562.
30. Anonymous (1891) "*Slaves Under Our Flag*," *New York Times*, May 14, 1891, p. 9.
31. 34th Congress, 1st Session. Chapter 164, *An act to authorize protection to be given to citizens of the United States who may discover deposits of guano*, *U.S. Statutes at Large,* 11(1856), 199–220.
32. *Jones v. U.S.*, 137 U.S. 202 (1890) (see also Anonymous (1889b) "*Jurisdiction in Navassa*," *New York Times*, October 6, 1889, p. 7).
33. Anonymous (1889a). "Driven to Desperation, A Story of the Riot at Navassa Island," *New York Times*, October 21, 1889, p. 2.
34. *Duncan v. Navassa Phosphate Company,* 137 U.S. 647 (1891).
35. *Id.* at p. 651.
36. It is also possible to contemplate the relationship between the law and the Guano Island's in light of the conception of "No Man's Land" as articulated in *Cook v. U.S.* 138 U.S. 157 (1891).
37. *Treaty of Paris*, December 10, 1898, United States-Spain, 30 Stat. 1754, T.S. No. 343.
38. See *De Lima v. Bidwell*, 182 U.S. 1 (1901) and *Dooley v. United States* 182 U.S. 222 (1901).
39. *Foraker Act,* Chapter 190, 31 Stat. 77 (1900).
40. *Foraker Act,* 31 Stat. 77, at p. 78.
41. *Jones Act* (Puerto Rico), Chapter 145, §5, 39 Stat. 951 (1917) [current version at 8 U.S.C. §1402 1976)].
42. *Gonzales v. Williams,* 192 U.S. 1 (1904). It would also be interesting to look at the relationship between gender, citizenship, and marital status in this case.
43. *Downes v. Bidwell*, 182 U.S. 244 (1901).
44. *Id.* at p. 287.
45. *Id.* at pp. 341–342.
46. *Id.* at p. 372.
47. *Id.* at p. 380.
48. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).
49. *Id.* at p. 309.
50. *Id.* at pp. 310–311.
51. Much has been said about the adoption of a "Commonwealth" or "Free-Associated-State" status that Puerto Rico adopted in 1952. While it is clear that from a political point of view this extra-constitutional rhetorical status gave Puerto Ricans a concrete degree of autonomy that placed the island in a status that can be situated somewhere in between a formal territory, a state, and a sovereign nation-state (depending on the issue), it is also clear that for constitutional purposes Puerto Rico continues to be an unincorporated territory.

52. *Reid v. Covert*, 354 U.S. 1 (1957).
53. *Id.* at pp. 5–6.
54. *Id.* at p. 14. (Emphasis added).
55. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
56. *Id.* at pp. 268–269.
57. This discussion becomes a bit more complicated in the discussion of the Puerto Rican citizenship (1898–1917). However, at present this reflection is beyond the scope of this article.
58. While it is not clear how much weight Smith places on the distinction between the Puerto Rican citizen and the naturalized Puerto Rican, my reference is to a conception of Puerto Ricans post-1917. I am not sure that whether it is possible to conceptualize the Puerto Rican citizen as a second-class U.S. citizen, but a substantive discussion of this tension is beyond the scope of this paper.
59. In a review of Agamben's book titled *State of Exception*, Malcolm Bull suggests that Agamben's argument reproduces the subject/state dichotomy, however, I am reluctant to accept this argument because I think that Agamben's discussion of the relationship between bare or naked life and the sovereign is mediated by the creation of a space whose contours are established by a *state of exception.* However, I need to reflect on this issue a bit more (Bull, 2004).

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RELIGIOUS PARADIGMS AND THE RULE OF LAW: THINKING IN RED AND BLUE

Sheila Suess Kennedy

ABSTRACT

Lawyers and political scientists focus upon explicitly religious components of American political polarization. A robust scholarship illuminates the nation's religious history. Nevertheless, we fail to appreciate the extent to which conflicting policy preferences are rooted in religiously shaped normative frameworks, or the extent to which scholarship in religious history, sociology, social psychology and culture might be synthesized to inform our understanding of contemporary policy disputes. Like the blind men and the elephant, we encounter different parts of the animal. We see a tree, a wall, a snake – but we fail to apprehend the size, shape and power of the whole elephant.

It is the thesis of this paper that, while the influence of religion on political behavior is widely recognized, (1) the extent to which theologically rooted norms, and the elites who hold or are influenced by them, frame and shape American policy choices is not sufficiently appreciated; and (2) disciplinary "silos" have prevented scholars from developing a sufficiently comprehensive synthesis of existing scholarship to adequately describe the nature and

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effects of the religious underpinnings of contemporary political disputes. While lawyers, political scientists and others certainly recognize the more explicitly religious components of America's current political polarization, and a long scholarly tradition continues to illuminate the nation's religious history, we nevertheless fail to appreciate the extent to which conflicting policy preferences are rooted in religiously shaped normative frameworks, or the extent to which existing scholarship in religious history, sociology and culture might inform understanding of particular policy disputes. Much like the blind men and the elephant, we encounter different parts of the animal. We see a tree, a wall, a snake – but we fail to apprehend the size, shape and power of the whole elephant.

SOURCES OF MEANING

A "paradigm" is a pattern of received beliefs that we use to make sense of the world. Originally a linguistic term, it owes its current popularity to Thomas Kuhn, a physicist who – in the course of research for his dissertation – picked up Aristotle's *Physics* and found that it made no sense to him. Since Kuhn assumed that neither he nor Aristotle was stupid, he concluded that they were operating from such different, and incommensurable, realities that communication was not possible, and he proceeded to write a book about the meaning and use of these conceptual frameworks and the way science adapts or "shifts" paradigms (Kuhn, 1962). Paradigm theory has been applied, misapplied and criticized in a number of contexts, and there are varying claims about how paradigms operate.[1] It has been suggested that anomalies falling outside one's paradigm, or frame of reference, are simply unseen – that is, if a fact is encountered for which there is no place in one's conceptual framework, that fact will not be willfully "disregarded," its existence simply will not be recognized. Whatever the difficulties with paradigm theory (or the blind-men-and-elephant analogy), it is one useful way of thinking about the normative belief structures that help humans make sense of the realities we encounter. Such worldviews need not be rigid (or even coherent) to perform this interpretive function; with respect to theologically rooted worldviews, evidence suggests that the filtering effect of normative paradigms may well persist in individuals who no longer consciously embrace the theologies that originally shaped them.[2] As Daniel Bell has written, "every theology embodies, either implicitly or explicitly, a *mythos*, a vision of how human communities ought to be organized" (Bell, 2004, p. 423). Because this is the case, theology and theologically based worldviews are inevitably political.

Of course, what constitutes a "religious worldview" is subject to considerable debate, and terms like "religious culture," "theology" and "religion" are extremely difficult to define. Furthermore, worldviews incorporate numerous "received beliefs" that are not religious in origin. When contemporary lawyers, journalists or political scientists discuss the relationship of church and state, we may differ profoundly on the contours of the relationship, yet all understand "state" to mean an institution that exercises public authority and has a monopoly on the legitimate use of coercive force. We forget that "the state so defined is of recent historical vintage." (Bell, 2004, p. 425). Our contemporary understanding of "religion" is equally attenuated; in medieval times, the ecclesial and civil authority was far more intertwined. Bell suggests that our particular way of construing social space is best described by Weber's distinction between "life spheres," each of which possesses its own laws and ethical functions. (Weber, of course, was hardly the first to suggest that the state's jurisdiction ought not extend to matters of conscience; in the United States, the phrase "wall of separation" goes back at least as far as Roger Williams, and the concept was central to the governing philosophy of James Madison, among many others.) The questions raised by our liberal democratic paradigm – a worldview that sees government and religion as different, if related, life-spheres and defines modernity in large measure by the secular nature of the state – are "what sort of moral consensus is necessary to sustain Western liberal society," and increasingly "is such a consensus possible?"[3]

Paradigms originally shaped in significant part by religious doctrines dictate our notions of public virtue, definitions of merit, and attitudes toward work, family and community. Theologically shaped worldviews[4] – often unrecognized as such even by those who hold them – frame our communal approach to issues of race, economic behavior, poverty, social justice, education, crime and punishment, philanthropy, bioethics, and influence just about every other public policy. Many of our most contentious public issues are rooted in differing normative concepts grounded firmly in theological beliefs into which participants in the debates have been socialized. The religious dimensions of debates over abortion, stem cell research, same-sex marriage and cloning are obvious – and both the religious dimensions of those issues and their use as "wedge issues" by those whose real motives are economic or political have been widely noted – but less obvious examples include responsibility for poverty, the appropriate role of the state, the meaning of law, the nature and importance of civil society and the role of the U.S. in international affairs.

As Perry Dane has usefully reminded us, religion and law are two of the many frames through which people perceive the world. "Like other modes

of thought – science and art, for example – they are frames of reference, ideational and affective approaches to subjects both in and beyond their literal domains'' (Dane, 1996, p. 114). Even when policy debates are couched in what John Rawls would call ''public reasons,'' the intractability of some perennially difficult issues comes not merely from differences about these public reasons – differences that might be compromised, or resolved by empirical investigation – but in deeper disagreements rooted in beliefs about the existence and nature of God, the role of humans in the universe, and fundamental concepts such as justice, charity and responsibility. Even our definitions of what beliefs should be considered ''religious'' are incommensurate: Winnifred Sullivan reminds us that ''The traditional American evangelical Protestant definition of religion as chosen, private, individual and believed'' now shares space in a pluralist culture in which many other traditions define religion as ''given, public, communal and enacted'' (Sullivan, 2004, p. 257). Facile references to a ''Judeo-Christian'' Americanism ignore or trivialize those profound distinctions. People who share a political community may nevertheless inhabit different realities; as a result, they literally ''talk past'' each other.

There has been a great deal of research devoted to aspects of religion and theology, church–state relations and political alignments based on doctrinal approaches to public issues, but very little consideration of the theological roots of many ostensibly secular public disagreements, or different methods of participating in public policy debate. James Morone's recent book, *Hellfire Nation*, traced American history through the lens of religious belief. Organizations like the Pew Forum for Religion and Public Life, the Marty Center for the Study of Religion in American Public Life, the Biosi Center for Religion and American Public Life, and *First Things: The Journal of Religion and Public Life*, among many others, address varying aspects of these questions. There is a void in the current scholarship, however, when we try to determine how public debates in specific policy areas are driven by theological assumptions, or how we might learn to identify and if possible compromise differences based upon our different realities.

FOUNDATIONAL QUESTIONS

Just as there are theologically rooted differences over specific public policies, there are deeply held religious differences over the proper role of the state, the nature of law and the primacy that should be accorded to legal structures and systems. Some religious traditions make law a ''central religious

category;" others have defined themselves in opposition to the worldview of law (Dane, 1996, p. 114). Judaism, Islam and Hinduism are among the former; Pauline Christianity and Confucianism among the latter. Traditions differ also on the relative weight to accord civil authority. "John Calvin argued that civil government was a response to human evil, designed to protect church and society and establish general tranquility" (Dane, *ibid.*). While the Kingdom of God came first, law was a necessity and a close second. Antinomians like Anne Hutchinson, on the other hand, believed that the Gospel freed Christians from required obedience to any law, even scriptural law, and that salvation was to be attained solely through faith and divine grace. Dane suggests that the contemporary disjunction between the "letter" and the "spirit" of the law grows out of that antinomian impulse, and that debates between positivists and natural law advocates raise largely religious questions about the existence of "transcendent, normative truths" and their relevance to law.

Religious worldviews frame legal discussion in other ways as well: questions like "what is the state, and what is its jurisdiction?" "from where does the state derive its authority?" "how far does that authority extend?" grow out of conflicting beliefs about the source of law's authority, the nature of human community and the definition of liberty. As numerous political philosophers have noted, the fundamental challenge to liberal democratic regimes comes from those unwilling to "privatize" hegemonic religious ideologies. If the goal of the law in liberal regimes is to achieve neutrality among differing conceptions of the good, as some assert, how should the law deal with those whose beliefs require that they be universally followed and who consequently experience equal treatment by government as discrimination?

An honest discussion of that dilemma should begin by recognizing what our American devotion to "equality" sometimes obscures: that the achievement of strict neutrality is not what our constitutional architecture was intended to provide. The Establishment Clause – indeed, the entire Bill of Rights – is itself a product of a particular worldview and value structure; it clearly privileges certain concepts of the good over others. The contemporary secular state does not represent an absence of a conception of the good; it represents a choice (conscious or unconscious) of one particular conception of the good. Arguably, the neutrality required under our system is equal treatment among those willing to accept that original choice, and operate within the confines of laws that flow from it.[5]

Even those who operate within the secular, liberal democratic construct, however, often do so for very different reasons, reasons that in turn lead

them to different conclusions about what a proper reading of those laws tells us about the intended role of the state. Howe (1965) has reminded us that separation of church and state was the result of two "opposing, but complementary, traditions: rationalist anti-clericalism, which feared the divisive and tyrannical potential of religion, and radical Baptist theology, which feared the corrupting influence of the state on salvation." Dividing jurisdiction of the church from that of the state was thus a common solution to two quite different concerns – concerns that continue to inform political discourse. Liberals, adopting variants of Enlightenment rationalism, tend to view the state as a *means* to civic peace and order. They believe that the threshold question about the propriety of government action is "who decides and how?" Communitarians and other critics of the liberal democratic construct tend to argue that the state should be more concerned with *ends*. These disputes about the proper role of the state are hardly new. In *City of God*, St. Augustine criticized Rome for its failure to create a "true" republic, on the grounds that it had not established the right sort of human community. John Winthrop, one of the early Puritans who has "been taken as exemplary of our beginnings" (Bellah, Madsen, Sullivan, Swidler, & Tipton, 1985/1996, p. 28) spoke of the "City on the Hill," in which liberty would be understood not as the freedom to do as one might wish, but rather as the liberty to do that "which is good, just and honest" (*ibid*., p. 29) – presumably as Puritans defined goodness, justice and honesty. Contemporary political philosophers often characterize Enlightenment liberalism's "who shall decide?" as a "thin" procedural inquiry, and describe the Communitarian question "what is to be decided?" as "thick" – a distinctly unhelpful framework. Labeling one approach as "thick" and one as "thin" mischaracterizes these important differences, and fails to recognize that the dispute reflects different, equally "thick," conceptions of the good.

Liberals who advocate limiting the power of the state to dictate substantive moral ends, and communitarians who favor greater state involvement in shaping a communal moral consensus can at least (usually) communicate with each other. Increasingly, inhabitants of different paradigms cannot. The most influential description of the political consequences of operating out of different realities also gave us a name for the conflict. In 1991, James Davison Hunter published *Culture Wars*, in which he described the contemporary manifestations of religiously rooted, competing worldviews as follows:

> I define cultural conflict very simply as political and social hostility rooted in different systems of moral understanding. The end to which these hostilities tend is the domination of one cultural and moral ethos over all others. Let it be clear, the principles and

> ideals that mark these competing systems of moral understanding are by no means trifling but always have a character of ultimacy to them. They are not merely attitudes that can change on a whim, but basic commitments and beliefs that provide a source of identity, purpose and togetherness for the people who live by them ....
>
> The divisions of political consequence today are not theological and ecclesiastic in character but the result of differing worldviews. That is to say, they no longer revolve around specific doctrinal issues or styles of religious practice and organization but around our most cherished assumptions about how to order our lives – our own lives and our lives together in this society. Our most fundamental ideas about who we are as Americans are now at odds (Hunter, 1991, p. 42).

Hunter noted that the differences are so profound that they extend to the legal processes we have established to mediate and adjudicate those differences – an observation supported by the escalating passions over the role of the judiciary, the appointment of judges and more recently, efforts to prevent the court-authorized removal of Terri Shaivo's feeding tube. While Hunter's thesis has been the subject of considerably scholarly debate, with Rhys Williams, N. J. Demarath III and Kevin Slack among those challenging Hunter's description and others, like Robert Wuthnow, and David Leege lending support, the critics tend to dispute the nature or extent of the problem rather than its existence.

Debates over the appropriate relationship between religious belief and government power are not new; they have been a feature of the American landscape since the pilgrims first landed at Plymouth Rock. However, these conflicts became considerably more acrimonious following passage of the 14th Amendment, as the Supreme Court decided – in a series of cases stretching over a number of years – that the Amendment required the incorporation of fundamental civil liberties into state law. As scholars have amply documented (Lowi, 1995; Amar, 1998), the consequent nationalization of the Bill of Rights, and in particular the First Amendment's religion clauses, meant that state and local governments were no longer free to pass laws privileging religious beliefs held by the majority of their citizens. Constitutional provisions that had hitherto been experienced as abstract principles applicable only to a distant federal government suddenly became all too real. The ensuing struggles have involved virtually all of the institutions of American government at one time or another: even citizens far less polarized than those described by Hunter continue to debate whether behaviors deemed sinful by theologians, from gambling and prostitution to shopping on Sundays, should be prohibited by the state; they argue about the propriety of using tax dollars to support parochial schools; they demonstrate for or against the posting of religious symbols or texts on public

buildings. Currently, impassioned efforts to avert legal recognition of same-sex marriages are grounded almost entirely in religious doctrine.

As government at all levels has grown, multiplying the points of contact between citizens and their governing agencies and institutions, these conflicts over when it is appropriate to give religious beliefs the imprimatur of the state have likewise increased. Nor is the federalizing of civil liberties the only reason for the increasing tensions around these issues: greater pluralism, and improvements in communications technology that make us much more aware of our differences and the ways in which those differences "play out" across the country and globe also undoubtedly contribute.[6] Nowhere is the sharpening of the conflict more evident than in the public schools, as Stephen Macedo has noted.

> American public schools have been, in many ways, where the tension between diversity and the felt need to promote shared values has played out most dramatically. This institution has, from its inception, been the principal direct public instrument for creating a shared political culture amid religious, racial ethnic and class diversity. Public schools are where what purports to be a liberal state has intervened between children and their parents and communities of birth to shape the deepest beliefs and commitments of 'private' communities and future generations (Macedo, 2000, p. 39).

Hunter, Macedo and others make valid and important contributions to our understanding of these conflicts. But there is a larger aspect to the dilemma they describe. These disputes do not just involve "religious beliefs" – difficult as those are to define. They involve religiously rooted ways of seeing the world that, as Hunter recognizes, are often no longer experienced as religious or theological in nature. As a result, these conflicts no longer fit into the (not-so) neat categories we have created for questions of church and state. Martin Marty has described ours as a polity in which "citizens in their various competitive groups do inhabit incommensurable universes of discourse," and to illustrate, he quotes the following passage from Alisdair MacIntyre's "Short History of Ethics."

> It follows that we are liable to find two kinds of people in our society: those who speak from within one of these surviving moralities, and those who stand outside all of them. Between the adherents of rival moralities and between the adherents of one morality and the adherents of none there exists no court of appeal, no impersonal neutral standard. For those who speak from within a given morality, the connection between fact and valuation is established in virtue of the meanings of the words they use. To those who speak from without, those who speak from within appear merely to be uttering imperatives which express their own liking and their private choices (Marty, 1997, p. 72).

George Marsden nicely captured the nature of such "incommensurable universes" in a passage describing the famous conflict between William

Jennings Bryan and Clarence Darrow over the Scopes trial: "Each considered the other's view ridiculous, and wondered aloud how any sane person could hold it"(Marsden, 1982, p. 213).

TALKING PAST EACH OTHER: THE CASE OF THE "FAITH-BASED" INITIATIVE

A brief illustration may suggest how worldviews rooted in different theological conceptions of the good currently manifest themselves in ostensibly secular policy contexts. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, reforming welfare "as we know it." Among the provisions of that bill was a provision later dubbed "Charitable Choice," requiring that states contract with "faith-based" providers of secular social services on the same basis as they contract with other nonprofit providers. The bill specified that such organizations were not to be discriminated against; they were to be allowed to maintain hiring policies based upon their religious dictates and could not be required to divest the premises where services were delivered of religious iconography. (Similar provisions have since been attached to Welfare-to-Work (1997), Community Services Block Grant (1998) and Substance Abuse and Mental Health Services Administration Legislation (2000), and President Bush has subsequently made his "Faith-Based Initiative" a cornerstone of his domestic agenda.

The ensuing arguments over the propriety and efficacy of these initiatives have focused upon explicit church–state issues, obscuring less obvious – and arguably more intractable – religious attitudes about the causes of poverty, the role of government and the definitions of discrimination and equal treatment. Proponents and opponents of these measures have consistently "talked past" each other. Proponents clearly used the term "faith-based" to mean "religious," in what was probably an effort to be inclusive, although the notion that "faith" is the central defining feature of religiosity betrays a narrowly Protestant conception of religion. Opponents – noting that there was no new money for social services, and that organizations like Catholic Charities, Jewish Family Service, Lutheran Social Services and the Salvation Army have partnered with government for decades – assumed that faith-based initiatives were really efforts to privilege certain (more evangelical) religious providers over others (Chaves, 1999) and to erode the legal doctrine of separation of church and state. For their part, proponents responded dismissively to evidence that religious providers had been

participating as contractors in government programs for decades on the grounds that those long-term providers had become "secularized" – defined as the adoption of professional norms, and programs providing services in which "faith" was not a central element. Opponents criticized the legislation for incorporating assumptions that were unsupported by any evidence; supporters responded with anecdotes and religious "success stories" or found such criticisms irrelevant.

A primary purpose of Charitable Choice, according to its sponsors, was the need to ensure a level-playing field. They charged that government's contracting processes had discriminated against religious organizations, a charge that appears to rest (at least in part) on the belief that holding faith-based organizations to the same standards as secular ones is discriminatory. Several Charitable Choice supporters have thus been critical of contracting agencies' insistence upon professional credentials and norms, arguing for "elimination of arbitrary rules that allow, for example, the use of professional therapy but not pastoral counseling" (Lenkowsky, 2001, p. 23). If an agency has issued a Request For Proposals for counseling services, and requires that successful bidders employ licensed social workers, or certified drug counselors, they argue that the state has discriminated against religious organizations offering unlicensed "pastoral counseling." Critics respond that the only "discrimination" is based on the capacity of a bidder to perform; they point out that states are accountable for the quality of the services they provide, and have a legal obligation to evaluate the ability of bidders to provide those services. If the bidder offers "pastoral counseling," in lieu of professional certification, how is the probable efficacy of that counseling – and thus the responsiveness of the bidder – to be assessed? Furthermore, if the state appears to relax or discard professional standards when the bidder is religious, secular nonprofits may justifiably object that an unconstitutional preference is being shown to religious organizations. Clearly, what looks "level" from the perspective of supporters looks decidedly "tilted" from the perspective of opponents, and vice versa.

Even the definition of "effectiveness" depends upon the paradigm being employed. Those who believe that the poor "need the internal pressure to [as Booker T. Washington said], live honored and useful lives modeled after our perfect leader, Christ" (Chernus, 2001, quoting Marvin Olasky), seek an end to poverty through individual transformation. Poverty, in their worldview, is a result of individual moral inadequacy, the lack of proper values and internalized norms. Organizations like Catholic Charities, on the other hand, argue that "the poor are no more in need of religious instruction and worship than the rest of society" (Daly, 2001). They believe that poverty is

predominately a social justice issue to be addressed by job-creation programs, educational reform or similar structural approaches. Those who hold to the necessity of personal transformation believe that organizations that do not equate poverty with a failure of values are neither authentically "faith-based" nor effective. They believe that "effective" programs address spiritual needs and transform the values of the client (or, more bluntly, bring the client to Jesus). Empirical studies comparing job placement rates of secular and faith-based organizations may be beside the point to those who approach poverty issues through this paradigm.

These debates about the nature of poverty and our communal obligation to the needy are not new; they can be traced at least to 1349, when England enacted the Statute of Laborers, prohibiting citizens from giving alms, or charity, to those who had the ability to work – that is, to "sturdy beggars" (Handler & Hasenfeld, 1997). The English law thus incorporated then-dominant religious distinctions between the "deserving" and "undeserving" poor. The belief that poverty is evidence of divine disapproval – that virtue is rewarded by material success – was held in one form or another by a number of the early Protestants who settled the colonies; it is a theological perspective that has continued to influence American law and culture. In the 19th century, Catholics and Protestants who may all have agreed with the abstract proposition that "true Christian stewards" would share their talents and material resources with others to benefit society, nevertheless had quite different perspectives on the reasons for stewardship, and significantly different beliefs about what such stewardship entailed. Those Protestants generally believed that they would be saved through faith, not works; they saw acts of benevolence not as a way to earn salvation, but as a way to manifest the depth of their faith (Oates, 2003). Catholicism, on the other hand, taught that salvation rested on good works as well as faith, and that charity was a religious duty incumbent on all believers. In the 1900s, Protestant moral opprobrium directed at the poor found an ally in science, and poverty issues were caught up in the national debate between Social Darwinists like William Graham Summer and their equally religious critics – notably, William Jennings Bryan (Walsh, 2000).

As with so many other issues in a diverse polity, there is no one "religious" or "faith-based" approach to social welfare issues. Social Darwinists and proponents of the Social Gospel both justify their policy preferences as expressions of "true" Christian theology. One of the least edifying aspects of public debates over the Faith-Based Initiative has been the virtually unquestioned assumption by people on all sides of the issue that "religion" is a distinct and undifferentiated "faith-based" commodity.

CONCLUSION

None of the foregoing discussion constitutes a new insight. We know a great deal about religious history and conflict, about religion's role in shaping culture and the tensions and dynamics of pluralist societies. There is also a growing literature dealing with the influence of religion on culture and worldviews – Clifford Geertz, Victor Turner, Rhys Williams and Richard Hughes have all made important contributions to our understanding of the ways in which religious assumptions shape cultures and political systems. What we lack is a "whole elephant," a cross-disciplinary synthesis of what we already know that will allow us to understand the full extent and operation of these fundamental disagreements, to pinpoint what we must still learn and to construct – if and where possible – an honest and respectful conversation that will neither denigrate profound religious beliefs, nor grant them hegemony.

What areas of inquiry should be included in such a theoretical framework? The following is an admittedly partial list:

- The formation of worldviews, and the transmittal of cultures, is not linear. People raised within the confines of particular traditions routinely reject the premises of those traditions and adopt others. We need to understand how and why. We need a better understanding of how the processes of political and cultural socialization work, and the psychological and social mechanisms involved.
- We need to identify and "map" the competing worldviews that are shared by significant numbers of our citizens, and determine how and when they motivate action. If we can see the influence of particular ways of believing, we will be better able to understand the sources of social conflict. This inquiry would necessarily include questions of saliency: that is, the extent to which individuals' self-images and understandings are invested in and dependent upon particular paradigms. Many years ago, in *The Nature of Prejudice*, Gordon Allport (1954) distinguished between attitudes uncritically accepted from the larger community and those that were central to the individual's conception of personhood. Allport believed those who accepted generally held social biases could be educated to think otherwise, but those for whom the beliefs were central could not. This sort of nuanced distinction will be necessary if we are to understand the operation of different worldviews or have any chance of successfully mediating among them.
- We need to know how religion shapes political culture, and vice versa; that is, we need to understand the ongoing dialectic between liberal and

theological norms in a highly diverse polity. Philip Goff has noted an intriguing phenomenon: "regional religion, unlike cuisine, clothes and styles, seems immune from outside change. Instead, people change to conform to it when they move to a new area" (Goff, 2004). Other religion scholars have highlighted differences between American Catholics or Muslims and Catholics and Muslims living in other countries. (It is often remarked that, in America, even the Jews and Catholics are Protestant.) What aspects of religions' confrontation with diversity and plurality operate to modify or "shift" existing paradigms? What aspects harden them? Clearly, religious paradigms change over time, and are significantly influenced by interactions with science, and with other beliefs and cultures – what we do not understand sufficiently is how that process occurs and what it means for the American experiment.

- Many years ago, S. I. Hayakawa suggested that the intransigence of the conflicts in the Middle East were at least partially attributable to the fact that Arabic languages were ill-suited to conveying nuance – that people who speak languages having few symbols for moderation, uncertainty or "shades of gray" have difficulty conceptualizing compromise. He argued that we have no way to think about things for which we lack words and symbols. While Hayakawa's construct is deeply contested among linguists, it is obvious in today's America that words and symbols often do mean quite different things to different people. We need to understand why. We need to know how the use of language and the framing of issues can help or hinder genuine communication.
- In this context, we need to consider the role of the media, and the effect of the significant changes that are occurring in journalism and mass communication. Pundits remind us that the politicization of the press is not new; today's newspapers are descendents of highly partisan and argumentative handbills and circulars of earlier times. However true that is, we live in a very different world. This is the age of the 24 hour news-hole, talk radio, the Internet and ubiquitous entertainment media, all of which convey culturally loaded messages. New technologies allow us to prescreen much of the information we receive, raising concerns that – rather than mediating among conflicting views – we are using these media to contribute to and harden them. (Cass Sunstein takes note of empirical research suggesting that groups with shared identities and individuals with extremist tendencies become more firm in their convictions, and more extreme, after deliberating with those who are like-minded (Sunstein, 2000). What are the implications of that phenomenon in an era where we are increasingly able to talk to – and hear from – only those who confirm

our pre-existing worldviews?) Journalism's old role as gatekeeper – i.e. "mediator" – is rapidly becoming obsolete, and individuals have more access to "raw" news – but less confidence in the gatekeeper's competence to tell us what sources are credible. If our respective worldviews have replaced journalists as our filters and gatekeepers, if new technologies are enabling us to indulge our growing polarization by "tailoring" the information we receive, how is that fact contributing to our further polarization and what can we do about it?

- Scholars of conflict resolution need to help us understand how much agreement a polity requires in order to establish and administer a viable social contract. Just how much "overlapping consensus" of worldviews is necessary to the creation of effective and stable governing institutions?

Before we can synthesize insights from different disciplines and construct that necessary, overarching conceptual framework, we also need to acknowledge that liberal democratic values reflect a worldview – one that accords primacy to the rule of law, and to values of individuality, authenticity, personal autonomy and limited state power. If liberal democracy is to survive, it must find a way to respect belief systems that elevate values inimical to those core principles without granting them the hegemony they demand. Such a resolution may not be satisfactory to those holding certain religious beliefs, but as Stephen Macedo has written, "Hobbesian justification may be the best we can do" (Macedo, 2000, p. 167).

If men are from Mars and women from Venus, are red states from Mercury and blue states from Pluto? If it is not possible to bridge the chasm between our increasingly divergent worldviews, if members of the American polity are not willing to abide by the "Hobbesian bargain," the culture wars will escalate until one side or the other overpowers the other. It is not an encouraging prospect.

NOTES

1. Recent scholarship in cognitive sociology has added to our understanding of the ways in which culture "frames" our normative understandings of the world. For an excellent introduction to that field, see Zerubavel, Eviatar's *Social Mindscapes: An Invitation to Cognitive Sociology*, Harvard University Press, 1997.

2. See, for example, the remarkable consistency of political opinion within religious denominations, documented by Green et al. in *The Diminishing Divide: Religion's Changing Role in American Politics* (Brookings, 2000).

3. David Gerlenter has asserted that "Americanism is in fact a Judeo-Christian religion," and that the "Bible is not merely the fertile soil that brought Americanism

forth. It is the energy source that makes it live." Those who view America in this way – and there are many – argue that devotion to a specifically biblical moral vision is necessary to American survival *as* America (Gerlenter, 2005). Many Europeans have a similar view of "Americanism," albeit somewhat less sanguine; Eberhard Bohne has suggested that U.S. national identity is constructed around the concept of "a chosen people" and an American exceptionalism which is then used to justify the U.S. claim to "benevolent global hegemony built on American values" (Bohne, 2004).

4. It is important to acknowledge the lack of precision of this term. As a colleague who read a draft of this paper has noted, how do we explain why Americans who are religious so often act in ways that are unrelated to – or at actual odds with – their purported beliefs? If our passively inherited worldviews are not experienced as religious, have they become something else? Where do culture and religion differ?

5. Theorists of rule of law differ on whether "rule of law" requires only formal characteristics – i.e. the law must be "publicly declared, with prospective application, and possess the characteristics of generality, equality and certainty, but not necessarily requirements with regard to content and those who believe that the rule of law also necessarily entails protection of individual rights. The latter view, incorporated in American constitutional processes, is, tellingly, labeled "substantive." Bishop Thomas Curry has argued that the Constitution and especially the First Amendment must be treated as "theological statements," that is, pronouncements incorporating substantive beliefs about the nature of the good society (Curry, Thomas, 2003).

6. It remains to be seen what the consequences will be of our improved ability to "niche" media; increasingly, Americans listen to radio talk shows, visit Internet sites, choose television networks and purchase print publications that simply reinforce their pre-existing worldviews.

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PART II:
DECIDING CASES, CHARTING PROGRESS

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DID THE BURNING CROSS SPEAK? VIRGINIA V. BLACK AND THE DEBATE BETWEEN JUSTICES O'CONNOR AND THOMAS OVER THE HISTORY OF CROSS BURNING

Robert A. Kahn

ABSTRACT

The Supreme Court's recent cross burning case – Virginia v. Black (2003) – saw dueling historical narratives. Justice O'Connor, writing for the majority, painted a history in which the Klan often burned crosses to intimidate, but also did so for other, "expressive" reasons. Justice Thomas, in dissent, related a history in which the burning cross never speaks. Interestingly, O'Connor and Thomas used many of the same historical sources. How did they reach such different results? While both O'Connor and Thomas interpreted (and stretched) the historical sources in different directions, their dispute ultimately turned on their diverging doctrinal views.

INTRODUCTION

The recent Supreme Court case involving cross burning, Virginia v. Black (2003) is noteworthy for its dueling historical narratives. In concluding that

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states have the power to ban those cross burnings that intimidate others – but not those that have "expressive" purposes – Justice O'Connor presented a short history of cross burnings. She concluded that "a burning cross does not inevitably convey a message of intimidation," even though the cross burner "often" intends to intimidate the recipient (p. 357). Justice Thomas, in dissent, argued that cross burning is never expressive. Drawing on the same history used by O'Connor, he concluded that "cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence" (p. 391).

Justices O'Connor and Thomas describe the same historical events, draw on many of the same sources, but reach opposing results.[1] How is this possible? Does one or the other read the sources more accurately? What accounts for their diverging histories of cross burning? To explore these questions, this essay examines O'Connor and Thomas's narratives. To that end, this essay looks at the sources each side uses (primarily books and newspaper articles) as well as the arguments justices draw from the sources. As we shall see, both O'Connor and Thomas stretch the sources to make their points, but this by itself does not explain why their accounts read so differently.

Instead, the differences in the two narratives turn on the doctrinal preferences of each justice. The Virginia statute held that cross burning is punishable only when done with "intent to intimidate" (Virginia v. Black, 2003, p. 348). However, the statute contained an evidentiary provision stating that the jury could infer intimidation from the burning of the cross itself (*id.*). O'Connor, who held the evidentiary rule unconstitutional, found a past full of situations in which Klan members, and others, burned crosses without wanting to scare anybody. Conversely, Thomas, who wanted to keep the inference in place, found a past in which most of those who burned crosses intended to intimidate their victims.

JUSTICE O'CONNOR AND EXPRESSIVE CROSS BURNING

After briefly referring to fourteenth-century Scotland, where tribes used burning crosses as a signaling device, Justice O'Connor asserts that cross burning "is inextricably linked with the history of the Ku Klux Klan" (p. 353). Over the next few pages, O'Connor relates this history, relying primarily on two sources Wyn Wade's (1987) *The Fiery Cross: The Ku Klux*

Klan in America and Stetson Kennedy (1946/1991) *Southern Exposure*.[2] She begins by pointing out how during Reconstruction the first Klan "imposed 'a veritable reign of terror' throughout the South" (*id.*).[3] She then takes up the "second" Klan, and discusses how Thomas Dixon's *The Klansman* (1905) – later popularized in the 1915 film *The Birth of a Nation* – planted an "indelible" association between the Klan and cross burning, even though the Reconstruction-era Klan did not burn crosses (pp. 353–354).

Having linked cross burning with the Klan, O'Connor then states her thesis "From the inception of the second Klan, cross burnings have been used to communicate *both* threats of violence *and* messages of shared ideology" [italics added] (p. 354). She then describes the first two known cross burnings (i) the burning of a 40-foot cross on Stone Mountain in what she refers to as an "initiation ceremony" and (ii) a cross burned while a mob "celebrated" the lynching of Leo Frank (*id.*).

Over the next several paragraphs, O'Connor details the use of cross burnings "as a tool of intimidation and impending violence" (*id.*).[4] To that end, she makes use of a list of Klan violence in Florida in the early 1940s provided by Kennedy, carefully selecting those instances in which a burning cross was accompanied by either threats or violence (pp. 354–355).[5] Turning to the post-World War II era, O'Connor notes how incidents of cross burnings – she gives an example of an African–American family targeted for moving into a white-only block – led Virginia to pass the first version of its cross burning law (p. 355). She concludes her historical overview by describing how Klan members targeted "those associated with the civil rights movement" with cross burnings, bombings, and murder (pp. 355–356).

At this point, the tone of O'Connor's narrative changes. After having shown how cross burning often communicates violence, she devotes the last third of her history in demonstrating that this is not always so. She describes a typical Klan initiation rally, which would begin with a prayer, move on to the singing of *Onward Christian Soldiers,* and conclude with a cross burning and the singing of *The Old Rugged Cross* (p. 356).

She follows this with specific examples of crosses burned for purposes other than intimidation. For example, she relates how in 1940 two Klan members were married at a joint Nazi–Klan rally under a burning cross (*id.*). She claims that the Klan burnt crosses in response to laws banning masked demonstrations (*id.*). She describes how, in 1960, the Klan held a series of cross burnings throughout the South as part of a membership drive (*id.*).[6] She notes how, in response to the third Nixon–Kennedy debate, at which Nixon repudiated the Klan's support; Klan members burned crosses to show their support for Nixon (pp. 356–357). Finally, O'Connor states that "cross

burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration'' (p. 357).

From this overview, O'Connor concludes that ''a burning cross has remained a symbol of Klan ideology and Klan unity'' (*id.*). This conclusion reflects her doctrinal view that at least some instances of cross burning deserve First Amendment protection.[7] It also reflects her narrative, which holds that while some (or most – O'Connor is unclear about this) cross burning intimidates, some does not. How persuasive is this position? What about her source materials? Does she read them fairly? Or does she stretch them to support her perspective?

My answer to the last question is ''a little of both.'' On the positive side, Justice O'Connor's page citations are almost always accurate and the sources she cites generally support the gist of what she is saying. This is especially true for the first two thirds of her narrative, which describes those instances where the Klan uses cross burnings to intimidate. On the other hand, even in this first section, O'Connor goes a bit further than her sources allow. For example, she uses the phrase ''initiation ceremony'' to describe the 40-foot cross burning on Stone Mountain, a phrase that Kennedy, who she cites for this purpose, does not mention (p. 355; Kennedy, 1946/1991, p. 163). Likewise, Wade does not use the word ''celebrate'' when describing how the mob reacted to the burning cross erected after Leo Frank's lynching (*id.*; Wade, 1987, p. 144).

While these examples may sound like semantics when taken in isolation, they foreshadow difficulties that arise when O'Connor attempts to show that some cross burnings do not intimidate. One example involves Nancy MacLean's (1994) *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan*. She cites pages 142 and 143 of MacLean to establish that Klan rallies ''often featured a Klan member holding a cross'' (Virginia v. Black, 2003, p. 356). This is reasonable, because space between pages 142 and 143 of MacLean's book contains a photo insert, which includes a picture of a Klan member with a cross.[8] The difficulty arises when one consults the Amicus Brief of the United States, which includes a quote from MacLean that describes cross burning as ''the means to terrify'' (Olson, 2002, p. 3; MacLean, 1994, p. 150). O'Connor should have responded to this citation, since her own text could be read as if MacLean supports her view that cross burning is not necessarily violent, when MacLean appears to take a different position.[9]

O'Connor also makes connections between cross burning and expressive (i.e. non-threatening) behavior that her sources do not support. While the references to the Klan wedding, the membership drive, and the pro-Nixon

cross burnings rest on fair readings of her sources, this is not true of her other examples. For instance, O'Connor says that the Klan burnt crosses "in protest" against anti-mask laws (Virginia v. Black, 2003, p. 356). For this statement, she cites page 340 of Chalmers, *Hooded Americanism*. However, Chalmers does not draw the connection between the new laws and the cross burning as tightly. After describing the anti-masking laws, he writes that "A summer of cross burnings ... proved an ineffectual rejoinder" (Chalmers, 1980, p. 340). The difference in language is critical. O'Connor's phrasing paints an image of crosses burnt outside of state buildings, while Chalmers leaves open the possibility that some of these "rejoinder" cross burnings were, in fact, intimidatory.

A similar problem arises with O'Connor's statement that the Klan resorted to cross burnings as the civil rights movement shifted to non-violent means. This statement support O'Connor's position since a less violent Klan is likely a less threatening one. But the sources O'Connor relies on – numerous citations from Wade and Chalmers – do not support her claim (Virginia v. Black, 2003, p. 356; Wade, 1987, p. 323; Chalmers, 1980, pp. 368–371, 380, 384). For example, the pages cited from Wade notes that the Klan is becoming less violent and mentions cross burning but does not link the two.[10] The pages cited from Chalmers refer to non-violent Klan activities, and the conclusion of the Florida Klan that violence does not pay, but this is not linked back to cross burning.[11]

None of these "errors" by themselves foreclose the possibility that some Klan rallies were non-threatening. They do, however, weaken O'Connor's credibility. Rather than admitting (or bewailing) the weakness of her sources, she pushes through to a conclusion. Not that this is unusual. As Robin Collingwood (1968, p. 43) points out, judges must reach a conclusion, unlike the historian they lack the luxury of time. Justice O'Connor lacked this luxury. As we shall see, so did Justice Thomas.

JUSTICE THOMAS: BURNING CROSSES ALWAYS INTIMIDATE

In his dissent, Justice Thomas takes the majority to task for "imputing an expressive content" to cross burning (Virginia v. Black, 2003, p. 389). This view, he argues, ignores reality. To demonstrate this point, Justice Thomas presents his own account of cross burning, one that places far greater emphasis on the connection between cross burning, threats and intimidation.

As noted, he uses many of the same sources O'Connor relies on. But the questions he asks and the rhetoric he uses are quite different.

For example, while O'Connor begins her account in medieval Scotland, Thomas starts with the recent past, as the following quote from his dissent demonstrates

> The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing and murdering in the United States … . (p. 388)[12]

The link between the Klan, cross burning and terrorism remains a constant theme – in the seven pages of his historical overview, he uses terms such as "terror" and "terroristic" nine times.[13] For instance, he notes that O'Connor's account "reinforces this common understanding of the Klan as a terrorist organization" (p. 389). At other points he shows how sources from the late 1940s and early 1950s, primarily newspaper articles, refer to the Klan as "terroristic" (p. 392)[14] and cross burning as "evidence [ ] of terrorism" (p. 393).[15] Finally, Thomas uses the term himself to emphasize the Klan's violence as, for example, when he distinguishes between "terroristic conduct" and "racist expression" (p. 394).

Thomas uses historical sources to make specific thematic points about cross burning and Klan violence. First, he lists the many victims of the Klan including "racial minorities, Catholics, Jews [and] Communists" (p. 389).[16] In a long footnote that spans several pages, he gives examples of how Jews, labor leaders, Vietnamese fishermen and a federal judge all experienced cross burnings and either violence or threats of violence (p. 389, n. 2).[17] To reaffirm his point, Thomas states explicitly that the "threat and precursor of worse things to come" symbolized by the burning cross "is not limited to blacks." He backs up this assertion with a reference to Newton and Newton (1991) *The Ku Klux Klan: An Encyclopedia*, a source he cites eight times (Virginia v. Black, 2003, p. 391; Newton & Newton, 1991, p. ix).[18] Then, borrowing from the brief of Virginia, he argues that even a conservative, white, middle-class person would interpret a burning cross as threatening (Brief for Petitioner (Virginia), 2002, p. 26).

Thomas also discusses the victim's perspective. To that end, he includes a lengthy quote from *United States v. Skillman* (1991), which describes a mother "crying on her knees in the living room" after seeing a burning cross because she "feared for her husband's life" (Virginia v. Black, 2003, p. 391; *United States v. Skillman*, 1991, p. 1378). Thomas quotes her view that, to her as a black American, the cross symbolized "Nothing good. Murder,

hanging, rape, lynching. Just anything bad you can name'' (pp. 390–391; *United States v. Skillman*, 1991, p. 1378). Even seven months after the incident, the family still feared for their lives. This part of the opinion Thomas thought worthy of italics ''Seven months after the incident, the family still lived in fear ... . This is a reaction reasonably to be anticipated from this criminal conduct'' (p. 391; *United States v. Skillman*, 1991, p. 1378).[19]

Thomas then turns to Virginia. He begins by relating the history of the Klan in the state.[20] Even though the Klan disbanded in 1944, Virginia saw a wave of cross burnings in the late 1940s and early 1950s (p. 392). Thomas uses newspaper articles to describe the number of cross burnings,[21] and other relevant facts about them. For instance, according to Thomas, ''[m]ost of the crosses were burned on the lawns of black families who were business owners or lived in predominately white neighborhoods'' (*id.*).[22] At least one was accompanied by a shooting (*id.*; *Richmond Times-Dispatch*, 1/26/51, ''Cross Burned in Manakin, Third in Area''). Thomas also described how one newspaper characterized these acts as ''terroristic'' and ''un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens'' (*id.*; *Richmond Times-Dispatch,* 1/23/49, ''Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week.'').[23]

Thomas shows how these concerns were shared by the legislature that passed the initial version of the cross burning law. He does this with newspaper articles.[24] He shows how Governor Battle suggested that Virginia passes a bill restricting the Klan's activity (p. 393; *Richmond Times-Dispatch*, 2/6/52, '''State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments''). He also mentioned Mills E. Goodwin, a former FBI agent, who presented the bill to the floor with the warning that ''law and order in the State were impossible if organized groups *could create fear by intimidation*'' (*id.*; *Richmond Times-Dispatch,* 3/8/52, ''Bill to Curb KKK Passes House, Action is Taken Without Debate''). Finally, the law itself appeared to target ''the burning of crosses and other similar evidences of *terrorism*'' (*id.*; *Richmond News Leader*, 2/23/52, ''Name Rider Approved by House'').

Having laid out the facts, Thomas concludes that in Virginia of the 1950s ''the people ... viewed cross burning as creating an intolerable atmosphere of terror'' (*id.*). Therefore, even if the cross carried a religious meaning in the 1920s – a circumstance he attributes to a connection between the Klan and ''certain southern white clergy'' – in the ''postwar era'' the Klan returned to ''its original function 'as an instrument of intimidation''' (*id.*; Wade, 1987, pp. 185, 279). In supporting this view, he cites Wade, *The Fiery Cross*, the work O'Connor heavily relies on.

Thomas supports his view with an interpretative argument. The same Virginia legislature that banned cross burning in 1952 maintained a comprehensive system of segregation[25] and would, later in the decade, embrace the ''massive resistance'' campaign against the desegregation of schools (pp. 393–394). From these two facts, Thomas concluded that ''a state legislature that adopted a litany of segregationist laws'' would not at the same time seek ''to squelch the segregationist message'' (p. 394). To the contrary ''even segregationists understood the difference between intimidating and terrorist conduct and racist expression'' (*id.*). Therefore, when the Virginia legislature acted, it was doing nothing more than ''penalizing conduct it must have viewed as particularly vicious'' (*id.*).

As a result, Thomas concluded that the First Amendment did not apply because the cross burning law only reached conduct, not expression (pp. 394–395). While he lost on the doctrinal question – a majority of the Supreme Court accepted Justice O'Connor's position that cross burning is expression – here the concern is with Thomas's treatment of the sources. Was he faithful to them? Or did he, at times at least, go where the sources do not?

Once again, Thomas's record with the sources is mixed. On the one hand, most of the citations to secondary sources are accurate – especially the large number of court cases, books and newspaper articles stressing the links between the Klan, cross burning and violence. While there are a few problems with the sources, these are minor and do not always hold against his position.[26] Occasionally, Thomas stretches his sources to support his position, but usually the infractions are minor.[27] Perhaps, a little more serious is his treatment of the newspaper articles, some of which attribute the cross burnings to juvenile pranksters or fail to discuss motives at all.[28] Here, however, Thomas could argue that the victims surely did not experience these events as mere pranks.

Thomas runs into more difficulty in his treatment of Wade and his failure to respond directly to the points raised by Justice O'Connor. As we have seen, Thomas relies on Wade for his claim that after 1945 the Klan reverted to its original role ''as an instrument of intimidation'' (p. 303: Wade, 1987, p. 279). However, Wade's claim is slightly different. His formulation – ''The fiery cross had now become *more* an instrument of intimidation than a religious icon'' – leaves open the possibility that the burning cross, even after 1945, served an expressive function [italics added] (Wade, 1987, p. 279).[29]

Not only that, Thomas fails to address any of the specific examples of ''non-threatening'' cross burning brought up in O'Connor's narrative. In particular, he does not refer at all to the Klan wedding, the membership

drive or the crosses burned in support of Richard Nixon. Thomas's refusal to admit contradictory evidence, let alone to explain it, damages his credibility.

Thomas had at least two responses to O'Connor's examples. First, he could argue that from the victim's perspective some of these events could be quite threatening. For example, victims may well have found the synchronized cross burnings of March 26, 1960 intimidating. (Granted the crosses burned at the wedding may present a greater obstacle.)

Second, Thomas could have conceded that while some crosses were burned for "expressive" reasons, but argued that these were exceptions that proved the rule. Thomas hints at this response at the end of his historical discussion when he writes "In *our culture* cross burning has *almost invariably* meant lawlessness and understandably instills in its victims well-grounded fear of physical violence" [italics added] (Virgina v. Black, 2003, p. 395). The shift is from a historical survey of cross burnings to how "our culture" responds to them. On this view, a few stray "expressive" cross burnings do not change the cultural equation of cross burning and violence.[30]

The same logic is at work in Thomas's argument about the Virginia legislature. When he says it "strains credulity" to believe that a segregationist legislature would have intentionally restricted its own expression, he is not making an argument about every cross burning. He is making an argument about how historical actors understood cross burning. In other words, he has shifted from facts, to worldviews. In doing so, he provides an indirect response to some of O'Connor's specific examples.

DUELING NARRATIVES

So, who has the more persuasive narrative? This question remains up in the air for me. To some extent, Justice O'Connor is probably right that cross burning has some benefits for the Klan that go beyond simply intimidating its victims. Wade speaks of the "religious ecstasy" that accompanied Klan rallies in the 1920s (Wade, 1987, p. 185). MacLean's observation that Klan officers banned other sources of light – such as matches – at nighttime cross burnings reinforces this point (MacLean, 1994, p. 161). If the sole purpose of cross burnings was to intimidate others, why ban matches? One can also agree with O'Connor that cross burnings "convey messages of shared solidarity" (Virginia v. Black, 2003, p. 354), especially since some of the cross burnings coincided with membership drives.

That said, at times O'Connor displays a tone deafness that recalls Scalia's opinion in *R.A.V. v. St. Paul*. Can a Klan wedding in 1940, and a few crosses burned in 1960 to embarrass Richard Nixon sever the connection Justice Thomas makes between cross burning and acts of violence? This is not to question O'Connor's ruling in *Virginia v. Black*. She could have found the provision that allowed a jury to infer intimidation unconstitutional without engaging in history.[31] However, her historical narrative, while doing a very good job describing the history of cross burning in general (and, thereby supporting her position that cross burning is punishable expression), does not respond to the argument, raised at least implicitly by Justice Thomas, that *most* cross burning is intended to intimidate others.

Thomas's argument depends not on individual facts but generalizations. This is his great strength. He does a very good job showing how authors of secondary sources, newspaper reporters and politicians of the immediate postwar era saw cross burning as intimidating, "terroristic" behavior. His argument that a Virginia comfortable with white supremacy nonetheless banned cross burning merits a response from O'Connor. One possibility was open to her. Perhaps the Virginia legislature banned cross burning out of embarrassment. The same newspaper article that carried Governor Battle's call to ban cross burnings, also noted that the Klan "long considered dead in Virginia, is being revitalized in Richmond" (*Richmond Times-Dispatch*, 2/6/52, "'State Might Well Consider' Restrictions on Ku Klux Klan, Governor Battle Comments"). This would tend to suggest that the people who banned cross burning did so for "expressive" purposes, rather than simply a concern for law and order.

Thomas's use of "terror" is an interesting tactic. On the one hand, any attempt to invoke 9/11 directly would be anachronistic, since no one (not even Newton & Newton writing in 1991) understood the meaning the word would acquire after 2001. That said, Thomas's use of the term is a powerful rhetorical strategy and raises the perspective of the victim.[32] Likewise, Thomas makes good use of *Skillman* to show how the intended targets respond to cross burning. Both of these tactics lead the reader to overlook his failure to address O'Connor's specific examples or, more generally, the argument that cross burning has a religious element. But because O'Connor did not press this issue, the damage to Thomas's narrative is minimal. So, if O'Connor has the stronger position, Thomas presents the better narrative.

CONCLUSION: THE USES OF HISTORICAL NARRATIVE

What were O'Connor and Thomas doing with their *Virginia v. Black* narratives? Neither is a professional historian, nor is this a situation where either justice is using the past to make an Originalist argument, even though aspects of Thomas's account lean in this direction – especially his discussion of the Virginia state legislature.[33] The goal here was different. The justices were testing an inference – "Does a burning cross by its very nature intimidate others?" To some extent, this puts the judges in the same position as social scientists who use historical data to test their theories (Banner, 1998).[34] Like a good social scientist, the justices strive to make their theories as parsimonious as possible. Speech is either "expressive" or it "intimidates." The former is protected; the latter is banned. Neither justice has a place for speech that combines both is both expressive and intimidates others.

There is good reason for this. Too detailed a look at the facts will unsettle the legal categories the justices rely upon. Take the crosses burned on behalf of Richard Nixon, for example. While there was surely an expressive purpose, did this make them any less frightening to passers by? Likewise, even if Virginia's 1952 decision to ban cross burning grew out of embarrassment at the Klan's re-emergence, does this make the cross-burnings themselves, any less frightening? These situations – where the burning cross both speaks and scares – could force the justices to rethink the dichotomy between "expression" and "intimidation." But neither O'Connor nor Thomas took this opportunity.[35]

Instead, both justices stayed within the scope of their legal theories. Perhaps, however, was for the best. While opposed at many points, O'Connor and Thomas's narratives shared one important commonality – a frank recognition of the sinister role of the Klan and cross burning in the nation's past. In this regard, their narratives recall post-war German decisions in Holocaust-denier cases.[36] In both instances courts use their position as "exemplar of public reason"[37] to confront the nation with unpleasant aspects of its past. Had the justices used *Virginia v. Black* to overhaul First Amendment theory, the opportunity for playing this role may well have been lost.

NOTES

1. The turn to history reflects, at least on O'Connor's part, an intent to repair the damage to the court caused by Justice Scalia's tone deaf ruling in *RAV v. St. Paul*

(1992), in which discussed cross burning in the idiom of political correctness (by, for example, likening a ban on cross burning to 'Marquis of Queensberry rules' (p. 392)). The case has been roundly criticized. Butler observes that Scalia's opinion "refuses … the racist history … of cross burning" (Butler, 1997, p. 55).

2. Of the 27 cites to secondary sources in O'Connor's opinion, 12 are to Wade and 7 are to Kennedy. She also cites to Douglas Chalmers (1980), *Hooded Americanism: The History of the Ku Klux Klan* four times. One note about Kennedy although O'Connor uses a 1991 version in her opinion, the book was originally released by Doubleday in 1946.

3. The internal quote is from Kennedy (1946/1991, p. 31).

4. She also described the violence itself, noting the results of a 1921 investigation by the New York World, which revealed "4 murders, 41 floggings and 27 tar-and-featherings" (*id.*; Wade, 1987, p. 166).

5. Kennedy (1946/1991) lists these acts to rebut a claim by the Klan's then leader that the "new" Florida Klan no longer intimidates (pp. 174, 175–180). Interestingly, many of the victims described by O'Connor (and Kennedy) were Jews and labor leaders. However, O'Connor, unlike Thomas (as we shall see), does not use this to make the explicit point that the Klan targets more than just African Americans.

6. The cross burnings all took place at 10:00 pm on March 26, 1960 (Wade, 1987, p. 305).

7. More specifically, she concludes (i) cross burning is an act of "symbolic expression," which is therefore subject to First Amendment analysis (even though she later argues that cross burning intimidates can be banned as a "true threat") (pp. 360, 363) and (ii) the Virginia statute's provision that allows a jury to infer intimidation from the act of cross burning itself is unconstitutional because at least some cross burnings do not intimidate (pp. 365–366).

8. On the other hand, the cite is a bit confusing because the text of pages 142 and 143 does not talk about the photos, but rather about the Klan and sexuality (MacLean, 1994, pp. 142–143).

9. Likewise, O'Connor relies on Wade for her description of the cross burning ceremony, but leaves out his comments – on the same page – that these ceremonies were "grotesque" and would be unequaled until Berlin of the 1930s (*Virginia v. Black*, (2003), p. 356; Wade, 1987, p. 185).

10. Wade juxtaposes "cross-lit gatherings in the cow pastures of Dixie" to decision of the UKA (United Klans of America) to adopt the tactics of the Civil Rights movement, but this appears to be a stylistic device rather than a claim of causation (Wade, 1987, p. 323).

11. Chalmers (1980) describes a rally at the base of Stone Mountain (p. 371) and sentiment in Florida Klan that violence had proven "unprofitable and dangerous" (p. 368). Not all rallies, however, were peaceful. Page 380 of Chalmers, cited by O'Connor, describes a Klan rally in St. Augustine, Florida at which "beatings and injuries became … severe."

12. The quote is from Newton and Newton (1991, p. vii).

13. References to "terror" or grammatically similar terms occur on pages 388, 389, 391, 392, 393 (three times) and 394 (twice).

14. Thomas quotes the *Richmond News Leader*, 1/21/49, "Cross Fired Near Suffolk Stirs Probe."

15. Thomas quotes the *Richmond News Leader*, 2/23/52, "Name Rider Approved By House."

16. The internal quote is from Justice Thomas's dissent in *Capitol Square Review and Advisory Bd. v. Pinette* (1995, p. 770). In *Pinette* a town refused to let the Klan hold a demonstration because the cross-violated separation of church and state. While the court easily rejected this argument, Justice Thomas added his view that the Klan was not a religious but a political organization.

17. The footnote, which Justice Thomas took almost verbatim from a similar footnote in Theodore Olson's Amicus Brief for the United States, contains a list of seven court cases linking cross burning and violence as well as a law review article describing the role of cross burning in enforcing informal housing segregation (Olson, 2002, p. 4, n. 2; Rubinowitz and Perry, 2001). The practice of borrowing from appellate briefs raises an interesting question What happens to our notion of Thomas as an author when one of the most distinctive parts of his opinion is taken from somewhere else?

18. Most of these come in the long footnote. Thomas also cites Wade 4 times and interestingly cites 11 times to newspaper articles from the 1940s and 1950s, included as part of the appellate record.

19. I have removed the internal quotations and italics from Thomas's quotes from *United States v. Skillman*.

20. Here Justice Thomas gets himself into a bit of trouble. He takes the following passage from Newton and Newton without providing quotation marks "where there were reports of scattered raids and floggings" (p. 391; Newton & Newton, 1991, p. 585). The rest of the sentence, which describes how the Klan garnered strength in the 1920s in southeastern Virginia, is a paraphrase.

21. For instance, Justice Thomas cites an article in the Richmond Times-Dispatch, which states that eight cross burnings occurred in Virginia "during the past year," six of these in Nansemond County (p. 392; *Richmond Times-Dispatch*, 1/23/49, "Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week").

22. Thomas cites two Richmond News Leader (1/21/49 and 4/14/51) articles and the article mentioned in the previous footnote from the *Richmond Times-Dispatch*.

23. The italics in this quote, and in the quotes in the next paragraph were added by Justice Thomas.

24. Apparently Thomas had to use newspaper articles because there were no records of the legislative debate over the passage of the cross burning law (Kligore, 2002, p. 22), which notes the absence of a legislative preamble, committee reports or any record of floor debates).

25. In a separate footnote, Thomas lists ten separate legal provisions that enforced segregation (p. 393, n. 2). Thomas drew both the footnote and the larger argument in the text from Virginia's brief on the merits (Kligore, 2002, pp. 22–23).

26. For example, Thomas incorrectly states that Juan Williams, *Eyes on the Prize: America's Civil Rights Years*, 1954–1965 (1987) was published in 1965 (*Virginia v. Black*). I have been unable to locate one of his references. Thomas refers to a cross burning directed at a high school principal (2003, p. 389, n. 1), which he cites to page 378 of Richard Kluger's (1975) *Simple Justice.* However, a close reading shows that page 378 (and those pages near to it) makes no reference to such an incident. Thomas, however, is not the only one deserving of blame here; the same citation appears in Olson's Amicus Brief for the United States.

27. For example, Thomas (and Olson) refer to Robert Caro's (2002) *The Years of Lyndon Johnson: Master of the Senate*, which describe a wave of bombings, cross burnings and the like in response to efforts at desegregation, when actually Caro has these events occurring on the eve of the 1957 session of Congress, which could suggest a more political (and hence expressive) purpose (*Virginia v. Black* (2003), p. 389, n. 1; Caro, 2002, p. 847).

28. For example, one of the articles cited by Thomas for his statement that most cross burnings involved African Americans moving into white neighborhoods or setting up businesses, actually raises neither motive (*Richmond News Leader*, 4/14/51, ''Cross is Burned at Reedville Home''). Another article, albeit one raised to show the connection between cross burning and violence, has a heading entitled ''Pranksters Suspected'' and quotes the sheriff as suspecting that the acts were the ''vandalism'' of ''bad boys'' (*Richmond Times-Dispatch,* 1/26/51, ''Cross Burned at Manakin: Third in Area'').

29. Thomas states earlier in the same sentence that the Klan's religiosity – to the extent it existed – drew its support from ''southern white clergy'' (*Virginia v. Black* (2003), p. 393). In fact, page 185 of *The Fiery Cross*, cited by Thomas in this context, compares the burning cross to ''pagan fire rituals of Central Europe during the Middle Ages.''

30. The use of the word ''our'' raises an interesting point. Is Thomas referring to American culture or African American culture? The same ambiguity is found in his opening sentence ''In every culture certain things acquire meaning well beyond what *outsiders* can comprehend'' [italics added] (p. 388). Who are the ''outsiders?'' I thank Douglas Dow of the University of Texas at Dallas for bringing this point to my attention.

31. For example, Justice Souter, who dissented because he found the entire statute unconstitutional, made his points without discussing history (pp. 382–387). He was joined by Justices Kennedy and Ginsburg.

32. Compare ''terrify'' to ''beating'' – the former word leads the reader to form an image of a victim in a way the latter does not.

33. This reflects Thomas's more general penchant for Originalism (Graber, 2003). Likewise, one can trace O'Connor's support of the inference at issue in *Virginia v. Black* to her willingness – or perhaps even preference – to make fact-based exceptions to bright-line rules (Maveety, 2003, p. 106).

34. Banner (1998) raises this comparison but argues that ''academic law'' – unlike social science – has no theories to test (p. 42). While this may apply to the ''law office history'' that often attends debates over Originalism (for more, see Reid, 1993), it is not true where, as here, the justices are using history to test theories of free speech protection.

35. Likewise, neither O'Connor nor Thomas took up the possibility that the real danger posed by burning crosses was the mobilization of people to commit violent acts. This form of ''indirect intimidation'' seems particularly evident in connection with the crosses burned at the 1960 Klan membership drive and the 1940 Nazi–Klan rally (Kahn, 2004).

36. I discuss this at length in my work Holocaust Denial and the Law: A Comparative Study (2004).

37. Rawls (1993) says this of the United States Supreme Court (p. 231).

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RADICAL CHANGE, LEGAL PRAGMATISM, AND INDIVIDUAL PATHS TO PROGRESS

Michael Ilg

ABSTRACT

This paper addresses the theory of legal pragmatism from the vantage of evolutionary metaphor. Legal pragmatism tends to incorporate a progress narrative with similarities to both evolutionary biology and classical economics, in which social developments are thought to be determined by competition among techniques and ideas. The difficulty with such competitive views of social change is that they obscure the extent to which successful solutions of the past – now the status quo – may be less adept at meeting new and future problems. Drawing on the evolutionary and economic variant theory of path dependence, it is argued that an assumption that the best, most efficient technique always wins out unduly sanctifies the present and inhibits awareness of unmet challenges. Ultimately, the encouragement of social change and advancement would be more securely located in the legal promotion of individual attempts at originality, rather than an assumption that competition is constantly moving toward perfection.

The complexity of philosophy is not a complexity of its subject matter, but of our knotted understanding.

– Ludwig Wittgenstein (1980)

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I

Arguably not since Newton's *Principa Mathematica* has a scientific text captured the imagination of social scientists to the extent of Darwin's *The Origin of Species*. Initially used to justify all manner of inequality and depravation with the hackneyed claim of 'survival of the fittest,' evolutionary metaphors also came to symbolize a liberating receptiveness to change. When taken up by the early pragmatists, evolution would inspire a uniquely American philosophy, and an optimistic view to the open-ended social possibilities of American life. Under pragmatism, the practical expediencies required in the here and now were to take priority over the ancient dilemmas and fixed assumptions of the old world philosophies. The prospect of loosening the hold of the past over the present provided by pragmatism has been an appealing one for legal theorists.

In addressing a profession normally and willfully bound to the rule of the past, or the government of the living by dead in Holmes famous words, legal pragmatism has often contained an element of radicalism. Modern neo-pragmatists who call for the approach to be used to challenge oppressive legal institutions may be seen as continuing a radical strand that reaches back through Critical Legal Studies (CLS) and legal realism to the early legal pragmatists. This essay advises caution in these modern pragmatic hopes. Legal pragmatism, though it may often glorify social change, can never instigate it nor protect its possibility. In lacking a principled foundation apart from what most people currently believe, legal pragmatism tends to impose status quo beliefs in a Panglossian view that what exists must be the best of all possibilities.

The latest legal reacquaitaince with pragmatism is limited in the same fashion as Holmes early celebration of the 'marketplace of ideas.' As demonstrated by an impasse in the work of Richard Rorty, who has arguably done more than anyone to breath new life into pragmatism, (Williams, 1992) the pragmatic vision of law as competing social beliefs endorses all change in the past, while remaining silent on whether or how new change is to occur. No matter how enlightened or well-meaning a pragmatist may be, and as Rorty surely is, there is no independent key for triggering or encouraging development. Of course, people may eventually believe differently, but until that time the present is unduly sanctified by having won out over all that came before. In drawing an analogy between legal pragmatism and economic theory, perhaps the field most given to evolutionary metaphor, I wish to accentuate the tendency of theories of competitive change to end up as an

apologia for biases of the status quo. Past change is embraced as the precursor to what is now, for having providing the present through competitive struggle, evolving to perfection. Seen in this light, the threat is that a victorious practice of the past may easily become an unquestioned ought in the present.

The danger in a pragmatic endorsement of evolution to perfection is that solutions to old problems configure our thoughts so that new problems, and their potential solutions, are not even contemplated. These dangers of evolution to perfection are well illustrated by the theory of path dependence, a radical variant in evolutionary and economic thought. The theory of path dependence offers the lesson that past successes were often the result of specific and chance circumstances that have no rational connection with fitness or ability in meeting current challenges. Evolution to perfection celebrates this past variation at the expense of questioning whether a new, or even previously defeated, technique may not serve better.

There are times when it may be impossible to undo the advantages given to past techniques, but we need not revel in the inevitable perfection of all the paths that led to where we presently are. Between the caution deserved by evolution to perfection and the simultaneous need to have others adopt around a better solution, lies a difficulty of how to balance the growth of new ideas, while remaining neutral as to the ends of the system. Though path dependence warns against assumptions of the present as perfection, it remains that there are surely times when a certain path should be followed over others. Rather than encourage individuals to follow divergent paths despite the undeniable success found by another, there must be a clipping point when all should follow and build upon a new practice. The object is distinguishing between convergence based on improvement and convergence based upon a minimal race to the bottom. A regulatory system should not impose success or strategies upon its members, but it should promote the ability of each to offer up their own attempt at success.

A potential bridge across the gulf between pragmatic convergence and path dependence may be found, perhaps ironically, in a pragmatic source. Throughout his work, Rorty joins his pragmatic philosophy with a fascination with the strong poet (Rorty, 1989, p. 53). Such prophetic figures as the strong poet are the individual agents of social change, who rise up and offer up their unique personality and ideas to society as models of what ought to be. These individuals are the motivators, the providers of new content, in a marketplace of ideas. Rorty's pragmatism is purposively neutral: a method for viewing what works best by way of popular belief. But why limit it so? If change arises from individuals, prophetic or otherwise,

why not encourage the supply of ideas rather than assume that the market will determine the best automatically? For if the pragmatic description of legal change is correct, then followed to its logical conclusion, the promotion of the greatest number of contributions should be the legal pragmatist's constant goal.

Assuming an efficient market for ideas is a descriptive story of limited value when compared with a method for actively encouraging the supply of what this market is supposedly to choose between. With a progressive evolutionary system, the focus would rest on alleviating the impediments to individuals contributing their own vision of success. In constraining visions of new possibilities, evolution to perfection becomes an impediment to progress, not its pinnacle. Future solutions may well come from those who are currently excluded, ignored in the congratulatory noise surrounding what exists presently.

II

The great American jurist and legal philosopher Oliver Wendell Holmes Jr. is usually credited with giving pragmatism its earliest and most articulate introduction to the law. Holmes' work challenged traditional assumptions on the law as an independent system connected through time and guided by reason. It was an ambitious deconstruction. In tearing down and clarifying the structures of the past, it was hoped that the law could become a straightforward practice of the present. Prophetically, in an article from 1895 entitled *Learning and Science*, Holmes states "the law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. But the present has a right to govern itself so far as it can" (Holmes, 1921, pp. 138–139).

In a bold statement at the outset of *The Common Law*, Holmes claims that "The life of the law has not been logic: it has been experience" (Holmes, 1938). Although modern eyes may find nothing revolutionary in this statement, that which has been made commonplace through the extent of its influence should not lose its proper place in legal history. The belief that the law was primarily an exercise in logical reasoning had gone unquestioned for centuries, allowing Sir William Blackstone to state authoritatively in 1765:

> What the law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable … . The judgment, though pronounced or awarded by the judges, is not their determination or

> sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law fact … which judgment or conclusion depends therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. (Blackstone, 1821)

The longstanding ideals of judicial objectivity and neutrality may be seen to follow directly from a conception of law as logical system. If legal principles act as logical axioms, judicial interpretation is constrained in a manner consistent with the conclusion that judges discover rather create the law (Aichele, 1990). Logic contains the past flow of legal decision, and new fact situations are placed via analogy within this developing stream of precedent. Thus, the law is discovered; as the natural development of its inherent logic is uncovered and extended in each new circumstance.

Though expressed in practical terms, Holmes' priority of experience over logic undermined dramatically the theoretical connection of law and higher principle. In the monumental article *The Path of the Law*, Holmes states a simple enough definition of the law: ''The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'' (Holmes, 1897). Interesting aspects of Holmes' definition of the law are to be found in the limitations on where judges are supposed to find guidance. Most especially, Holmes is intent on undoing the belief ''that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct'' (Holmes, 1897). Holmes then deigned to relieve students of the law of their well intended, but ultimately misguided delusions: ''And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion and repose is not the destiny of man'' (Holmes, 1897).

Holmes' assault upon the law as a logical system corresponds well with the pragmatic rejection of objective and absolute truth. But there is, and must be, more to pragmatism than a void of foundation, and the tearing down of a previous era's philosophical monuments. If legal pragmatism rejects theory, as an anti-theory as it were, but does not replace old methods with the new, it still must offer a location of value. Truth may not be objective in the pragmatic view, but it has a place in social usage nonetheless. The founding American pragmatists, such as Pierce, James, and Dewey, were quite focused upon the physical sciences, and in an evolutionary sense were observant of the changing nature of knowledge (Wolfe, 1998, p. 199). This evolutionary process of knowledge, wherein new ideas and assumptions are seen to replace old certainties, came to influence an instrumental view of truth in pragmatic thought. A priority of social usage may be discerned in William James' oft quoted sentiment: ''The true is the name of

whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons" (James, 1907).

A philosophy of truth defined by what is good by way of belief is uniquely open-ended, allowing for what works presently to be true regardless of the past assumptions and certainties. While Holmes' call for the future to determine itself may be seen to echo the pragmatist's rejection of past truths, his work would also contain hints on how this present social usage was to be located or found. The first element of Holmes' prescriptive pragmatism (as I term it) was the claim that the law was to be found not in logical discovery, but simply in the person of judges. Hence, the later and now well-known claim of legal pragmatists that the law is merely what 'judges say it is' (Brint & Weaver, 1991, p. 1). This liberation from logical legal aspirations was not perceived to be without danger, however. The renowned analytical legal philosopher H.L.A. Hart, for instance, chastised the legal realists for ignoring the extent to which the 'rule' – always paramount for Hart – of the law usually proceeded upon a following of clear precedents, and without the need for judicial creation or legislating.[1]

In a different vein, a danger welcomed by many amongst the early legal realists and the subsequent CLS school, was the demystification of law invoked by reducing law from principle to actual individuals. A more politicized view of law would emerge, which concentrated on the perceived biases that longstanding legal doctrines had come to enshrine as principle. Articulated mainly from a liberal basis, the early legal realists would challenge the sense of legal creations like the corporation, and in doing so connect the notion of a legal fiction with the political and economic preferences which underlie the status quo. Apart from the legal political activism engendered by pragmatism, much of which would probably have been distasteful to Holmes had he known the course of his influence, it remains that this judge based focus lies at the heart of pragmatism to this day (Aichele, 1990). As Posner, for one, has detailed, legal progress occurs as individual judges pick and choose from surrounding ideas to find what society currently requires (Posner, 1990, p. 1656). Judges, in this interpretation, may be seen to be the individual representatives of social usage; the arbiters of what works best by way of belief.

If judges are to be the ones selecting amongst social ideas, the provision of these ideas are addressed in the second, and arguably more significant, element of Holmes prescriptive pragmatism. Though judges are the repository of so much selective power, in a largely undemocratic fashion, Holmes was ultimately concerned with the restraint of judicial interference in the social forces beyond the law. In Holmes' vision, the legal arbitration over

social usage should allow ideas to compete for ascendancy in the 'marketplace of ideas'—perhaps the most well-known concept within legal pragmatism. As Cass Sunstein has observed in an often cited article on the seminal *Lochner* case, Holmes famous dissent seemed to exude personal forbearance, and the suppression of his personal predilections, for the sake of allowing social forces to contest each other in the safe confines of the law (Sunstein, 1987). What might seem more personally compelling to Holmes was secondary to the systemic need to provide the space for ideas and factions to battle it out in the private realm for supremacy (Sunstein, 1987). The undemocratic nature of judicial selection is thus balanced against a pluralistic need to let competing interests and ideas clash.

Holmes' legal pragmatism joined three elements consistent with the American pragmatists: (1) rejecting past absolutes, in favor of (2) social usage, and (3) competitive valuations of truth. While the work of Holmes occurred over the years surrounding the exchange of the 19th for the 20th century, according to Richard Posner, legal pragmatism has not advanced significantly since (Posner, 1990, p. 1653). In its essence, pragmatism remains an anti-theory, a method against methodological certainty, or certainty of any kind. As Posner observes perceptively, pragmatism "clears the underbrush; it does not clear the forest" (1990, p. 1670). While most pragmatists agree that the approach does not offer solutions, a hallmark of pragmatism remains its attempted receptivity to change. As Stanley Fish states: "Pragmatism is the philosophy not of grand ambitions but of little steps; and although it cannot help us to take those steps or tell us what they are, it can offer the reassurance that they are possible …" (Fish, 1998, p. 433). For those who find reassurance on the availability of change preferable to its active promotion, a legal pragmatism consistent since Holmes is no doubt comforting.

III

Modern pragmatism as defined by the likes of Posner and Fish may be representative of the current parameters or mainstream of the approach, but it is not conclusive of the attempts to make it otherwise. Pragmatism by its very definition remains without content, without a theory as to what is correct or preferable. Unsurprisingly, there have been legal scholars of late who have tried to make pragmatism more socially active – a tool to be used against oppressive assumptions that exist within the current legal regime. The potential for new legal truths is understandably appealing to those who

are reform minded. That the assumptions of the past, in this case viewed as oppressive, have no claim to objective truth or social priority is a potential recipe for radical change, and newfound equalities. And though this appeal for new beginnings may be undeniable, to understand pragmatism as a philosophy is to realize that such radical or equitable claims have no special place within it. That the attempt at such radical solutions has even made is no doubt a testament to the modern influence of Richard Rorty and his revival of the Romantic tradition within pragmatism. Yet, whatever Rorty's influence, it remains that the basis of pragmatism is a methodless view to social change, located in what people currently believe. The inability of radical approaches to be reconciled within pragmatism in a meaningful way is an inevitable lesson that the Romantic strand of pragmatic influence must lose out to the core belief of evolutionary competition.

The evolutionary influence upon American pragmatism is well-known. Darwin provided not only a scientific theory to replace old assumptions; he did so in a way particularly well suited for absorption into social theories. Darwin's theory of natural selection indicated that one's environment was determinate, selecting out variations as better fit for success, leaving these genetic advantages to be handed down to subsequent generations. The environment is thus the field against which competition is measured, providing the fuel of reward, while internal variation provides the diverse and divergent attempts at attaining this goal. It is not a far leap conceptually from Darwin's environmental selection to that of pragmatism, whereby what works best in the present is good enough by way of belief and usage, and the marketplace of ideas selects the most fit idea for survival.

The Romantic strand of pragmatism, on the other hand, concentrates more on the possibility to construct the social world anew, and forge ahead despite the preferences of the past. Though rejected by such prominent pragmatists as Fish for an undue amount of glorification, aspirational content, this Romantic strand is precisely that which has inspired many modern legal neo-pragmatists. Authors associated with the radical Left, in the words of William Weaver, tend to "believe the influence of philosophy has provided intellectual cover for unjust power arrangements perpetuated by law" (Weaver, 1992, p. 742). A large number of reform-minded authors have taken up an activist use of pragmatism (Matsuda, 1990; Minow & Spelman, 1990; Radin, 1990; Singer, 1990; Williams, 1992). The initial inspiration given by Rorty is not difficult to understand when considering the reformists goals these neo-pragmatists have in view. As Weaver observes, "The radical Left sees in pragmatism what it needs to cut law free from philosophy, thereby facilitating the attack on traditional legal justification. Many on the

radical Left see the pragmatist's assault on foundationalist philosophy as preparing the ground for a new politics'' (Weaver, 1992, p. 742). When considering this second, aspirational goal of neo-pragmatists it is perhaps unsurprising that many find Rorty somewhat uninspiring (West, 1990; Minow & Spelman, 1990; Singer, 1989).

While many modern pragmatists of an activist bent have been influenced by Rorty, there is also within these modern pieces a pronounced criticism of a perceived conservatism in Rorty's acceptance of liberal democracy and its economic institutions. For example, Rorty has in turn been called a 'complacent pragmatist' (Radin, 1990; Minow & Spelman, 1990) and charged with ''reinforce(ing) existing power relations that illegitimately oppress and exclude large segments of the population'' (Singer, 1989, p. 1759). Although Rorty's work is replete with fair-sounding pronouncements and expressed hopes that would be appealing to an egalitarian ear, this optimism is attached to no method or philosophical claim radical enough to support actual change, nor appease his more radical followers. The degree to which these neo-pragmatists remain both indebted to and dissatisfied with Rorty's position is a testament to the often appealing, enticing failings of legal pragmatism. As Lynn Baker notes perceptively, the dissatisfaction with Rorty on the part of those on the Radical Left is due to an essential distinction in Rorty's work between pragmatism as his central method and his personal, aspirational hopes for that same method (1992, p. 697). Rorty, in his work, is a pragmatist first, and a liberal second. What appealing principles extend from Rorty as liberal should not be confused with the philosophy, theory, he espouses (Baker, 1992, p. 706). And those who generally espouse change as a social good should not be confused the possibility of change with its active, principled promotion.

A relatively easy entry point into Rorty's distinction between method and belief may be found in addressing his well-known strong poet ideal. Like the early American pragmatist philosophers, and such later legal pragmatists as Richard Posner, Rorty embraces a negative view of philosophy. Accordingly, truth is not absolute, knowledge is not objective, and legal decision-making is not bound to or explained by abstract principle. In the space provided by these negations, practical and new solutions are thought to thrive. Rorty goes further than this pragmatic foundation, however, to envision the actual motivators in this social movement of change. In keeping with his literary perspective, Rorty equates the motivation of social change with the individual, or the individual archetype, of the strong poet (Rorty, 1989, pp. 20, 26, 53). The 'prophetic' individual represented by the strong poet draws on the ''anxiety of influence'' characterized by Harold Bloom, the renowned literary

critic, who observed that the Romantic poetics were motivated by an obsession to escape the thought that were but a "copy or replica" (Rorty, 1989, p. 26). The desire of Romantic poets to fashion themselves as unique and autonomous individuals through artistic expression, an outward claim of uniqueness, Rorty extends to social change in general.

Thomas Grey, another noted legal pragmatist, has written to emphasize and remind that early pragmatism was inspired by not only empiricism, but also the Romantics of art and literature (Grey, 1991, p. 9). While this Romantic feature of pragmatism has been rejected by some, most notably Stanley Fish (1991), as being outside of pragmatism's neutral foundation of simply equating truth as social usage, I believe Rorty's balance across this fissure within pragmatism is emblematic of his theoretical limits. So long as Romantic aspiration remains tied to a notion of truth as social usage, the supposed originality of constant change and redefinition does not escape the social, majoritarian measure of value. An initial claim of uniqueness, and the outward manifestation of one singular poetic personality, is inevitably met and judged by an audience. Social progress, and the idealized march of revolutionary ideals, is thus a product of individual expression meeting the wider society. While each radical new idiom of thought may issue from a solitary individual, the acceptance and implementation of this new idiom must be endorsed by a wider group of individuals. For no matter how much we may glorify the lone prophet, poet, revolutionary, it is the following herd, which sanctifies a revolutionary idea through the act of belief. Without this essential element of engaging the belief of others, of convincing them of the coming rightness of an idea, a revolutionary notion remains an unrealized hope, drifting in a historical void like so many before it.

So, where does this notion of the strong poet leave us – the theoretical, academic observer? Exactly where it leaves Rorty. Either we as individuals become strong poets, prophetic persons trying to convince others of our enlightened designs, or we are bound to watch on the sidelines. Rorty himself is an overly modest intellectual, inhabitant of the sidelines, who acknowledges that society's new ideas lie beyond him; a result of his own lack of prophetic imagination (Baker, 1992, p. 707). Without explicitly offering a new ideal or method for reorganizing society, without a revolutionary or poetic ideal, Rorty is content to reside in his pragmatic belief that such ideals will be offered by others. Seen in this light, the radical left's dissatisfaction with Rorty's perceived conservatism is both inevitable and unfair. Rorty's well-known and well-liked liberal stands are simply his *personal* hopes of how future developments *might* occur; he is not offering the answers himself.

In one of Rorty's few articles explicitly about law, he states: "I think of *Brown* [*v. Board of Education*] as saying that, like it or not, black children are children too. I think of *Roe* [*v.* Wade] as saying that, like it or not, women get to make hard decisions too, and some hypothetical future reversal of *Bowers v. Hardwick* as saying that, like it or not gays are grown-ups too (Rorty, 1990). Again this is an admiral position to be sure, but it must be stated that Rorty is not offering a guide to this final goal. Instead, Rorty is simply offering commentary on how the practical language of pragmatism explains change, with an added ingredient of personal hope and valuation. The added valuation, expectation contained in the hypothetical reversal of *Bowers* should not be confused with what Rorty's, or pragmatism's, neutral method can yield alone. Open to change but never demanding of it may be an accurate assessment of Rorty's position, placing him firmly within the pragmatist mainstream.

When shorn of the often pleasing and admirable personal hopes that flavor his work, Rorty's criticized acceptance of the status quo may seen as the result of his philosophical, not his personal choices (Baker, 1992). Placed within the two extremes of prophet, the convincer, and the market of ideas, the people to be convinced, is Rorty's neutrality toward what currently exists. Rorty must necessarily embrace present beliefs as what was most recently convinced into being: the most recent victor in the marketplace of ideas. Despite his liberal personal views, Rorty's theoretical hands are tied by his pragmatic method: he can no more reject what currently is as endorse what was once before. Pragmatism is bound to a competitive and majoritarian vision of truth, and until such time as a new vision is offered and accepted, Rorty, the pragmatist must equally acknowledge these current beliefs as what works best by way of belief and practice.

IV

While the claims of Rorty's conservatism are normally leveled against an acquiescence in the legal and economic institutions of the status quo, there is a deeper, arguably more substantial, concept of evolutionary knowledge at stake. In true pragmatic style, legal structures may be viewed as merely the most noticeable points of reference or outcroppings in a wider debate over fundamental social concepts and ideas. Therefore, when Rorty is criticized for favoring what exists by way of belief in legal institutions that are thought to promote unjust power relations, he might be criticized equally for accepting a certain economic, western worldview. The extent to which our

current systems, institutions, prejudices, and their supporting legal rules, are alterable is dependent upon our wider social view of knowledge. Assuming a pragmatic view to a competition among ideas on the grandest stage possible, it is an economic definition of thought that is currently ascendant within western, and increasingly world society. It is this economic vision of thought that not only flavors and informs current conceptions of individuality, it also plays a substantial role in defining how thought is translated into social acceptance.

Much has been made of the economic definition of individuality, and of how the economic model of rational maximization has come to dominate social science and legal studies of individual behavior (Amadae, 2003). In these brief pages, I instead concentrate on the influence of economic thinking on the prevalent view to social knowledge as an evolving system. If Rorty's Romantic pragmatism may be said to fall into the perennial pragmatic trap of endorsing what is best by way of current economic institutions and distributions, it is an economic worldview that underlies, and gives life to these current preferences. The economic view of evolution is by definition simple, perhaps deceptively and enticingly so. A brief and excellent statement on the qualities of classical economic evolution is given by Mark Roe:

> The classical evolutionary paradigm has a strong grip on law and economics scholarship. What survives is presumptively efficient: if it were inefficient, the practice, the law, or the custom would be challenged by its more efficient competitors. The success of the more efficient practice or law allows it to prosper, while its less efficient competitors wither and die. Entrepreneurs without a clear understanding of what they are doing can stumble on an efficient practice. They make money and their firms grow at the expense of firms that failed through bad luck or poor skill to adopt the efficient practice ... (Roe, 1995, p. 641).

Notice the prominence of the word efficient in the selection above, now an almost hallowed legal concept thanks to the modern ascendance of law and economics. But what does efficiency mean beyond the realm of the entrepreneur? One may readily imagine a new baking or candle-making technique leading to a better, cheaper good produced. But is law-making an efficient system? Public Choice theory would tell us that this is not always the case. And the law and economics claim that the common law has always been evolving toward economic efficiency, even if judges did not know they were doing so, has been rejected as hopelessly improvable or even fanciful (Kelman, 1987, pp. 115–116). Yet, even should legal evolution rest solely upon private market assumptions absorbed from microeconomics, this is still a formidable basis. And perhaps no more evolutionary symbolism is needed for classical economics than individuals competing for the

recognition and reward given by their peers, with the invisible hand of the market rewarding each according to the worth of their activity as determined by others.

Apart from any historical lineage linking economic thought with Darwin or pragmatism, it remains that economics contains a certain connection with evolution.[2] As with Darwinian natural selection, economics is based upon the environment selecting, determining success. The market, arguably the central concept in modern economics, is a powerful environmental equivalent or symbol, wherein others assign value to an individuals' activity by their willingness to trade their own output for it. Further, an evolutionary quality of individual variation is displayed in the economic attempts that each individual contributes, providing the activity, which the market environment then selects between. While this is no doubt a persuasive combination, with democratic allusions of choice throughout, there remain significant difficulties this evolutionary view of knowledge.

While there is a voluminous number of criticisms of classical economic assumptions on the equation with markets and democratic choice, the focus here, shall be on the shortcomings of classical economics as evolutionary theory of knowledge. When viewed through an evolutionary lens, it appears that a classical joining of the market and individual capitalist will not necessarily further a comprehensive theory of change. This is not to say that a theory must be appropriately evolutionary, nor consistent with Darwinian biology, to be valid. Rather, the limitations revealed here through an evolutionary lens indicate detriments that also lie at the heart of such modern societal requirements as progress and individuality. To understand how such apparent tenets and provisions of classical economics may be limiting requires a two-stage analysis, divided thematically by environment and individual. Environmental and individual issues within economic evolution will be discussed in the following sections, en route to the proposal of a pragmatic solution based upon individual rights.

V

Classical economics tends to entail an imperial view to the past. That which now exists, must exist because it has succeeded to this point. The present practice, technique or strategy, has won out over others to assume its rightful place as the dominant solution. Echoing the above words of Mark Roe, were the present practice not the most efficient solution it would already have been supplanted by something else. Evolution to perfection

thus equates with classical economics, endorsing a competitive view to history within which that what is now has won its way to ascendancy. I should clarify that I refer to evolution to perfection as a Panglossian *tendency*, not a literal imputation of belief unto scholars associated with either legal pragmatism or classical economics. I do not mean to imply that the present *is* deemed to be perfect, but am instead concerned with how the process of advancement is viewed: it is the *to* perfection that is my focus here. Specifically, the receptiveness of a particular theory – or anti-theory – to change may be found to extend in part from how the past itself is considered. A competitive view of the past, in which techniques or ideas battle it out for supremacy, tends to sanctify what currently exists for having won this past battle. However, as the theory of path dependence cautions, the techniques that have won out in the race to solve past problems may be less adept at meeting new or future ones. Not only does path dependence raise the prospect that previously vanquished techniques may actually be better at solving a newer problem than the dominant technique of the present, what is seemingly of far greater import, is that faith in this dominance may impede our very recognition of new problems and challenges.

Path dependence is a radical strand within mainstream economics, growing in prominence of late. As with all evolutionary thought, path dependence begins with the banal assumption that the past determines the present. Why path dependence is a radical variant in economics, and why it is different from the evolutionary model of classical economics, is a matter of historical interpretation. Path dependence, simply, argues that past circumstances – such as pure chance or initial advantages – are often determinative of what is the currently dominant practice. Whereas classical economics assumes evolution to perfection, path dependence elevates the vicissitudes of life and competition that may result in random and initial advantages. Once locked in, these initial and random advantages can become so ingrained, and invested in, that they continue in prominence long after new and more efficient practices are identified.

A common example of path dependence is that of the QWERTY keyboard – named after the uppermost left row of letters, illogically placed to slow early typists who were too fast for the early, crude mechanisms that would jam repeatedly when pressed.[3] Word processing having obviously surpassed this mechanical impediment, the debilitating delay designed into the keyboard is no longer necessary or efficient. Yet the old form remains, a sign of an initial economic advantage long since having worn out its rationale. The cost of retraining, and of retooling, replacing hardware and

software is so exorbitant, prohibitive, as to make any short-term efficiency gains of modernization beyond realization.

As another example, consider a physical allegory of path dependence.[4] A road winds through a hilly landscape, a dark strip appearing and disappearing through green fields until the far-off horizon. Your car out of fuel, and forced for once to exchange walking for driving, you notice the distances of this inefficient, bending road. You need to reach point B, and wonder why the area between there and your starting point of A contains so many bends unexplained by the landscape or any observable features. What you do not see is the trapper, who, two and a half centuries ago, had to make his way through the same terrain while having to avoid wolves' dens spotted throughout.

A trader followed the trapper, now able to hunt perhaps, but unwilling to break a new path even though he need not fear the wolves. It was easier to follow a winding path in the woods than to break a new one. Travelers and then merchants found this same path, following the same reasoning as the trader before them. The trader's path came to be the established route, with settlements and towns spotted along it long after the wolves had been eliminated from the surroundings. In the subsequent century, industry and cities solidified themselves in concrete along the way. Skipping forward to modern times, local authorities would have been faced with many budgetary questions and strategies regarding the road. At each stage, they could have resurfaced the worn road or built it more efficiently – kept the winding path, now inefficient, or pave in a straight line between A and B, leaving ghost towns and empty factories along the way. The choice of each succeeding municipal administration would have been clear, and hence the winding path you now find yourself meandering along.

The immediate lesson of path dependence, as indicated by the simple example above, is that past chance is often a greater factor in present forms than evolution as perfection implies. It is a lesson that goes to the heart of modern economic theory, for without the certainty that the competitive environment selects out the most efficient practice, the mysteries of the invisible hand of the market may no longer be assumed to yield the best results. The flow of market competition, usually idealized to hold that each pursing their own self-interest produces the best result, may instead follow arbitrary routes, and favor arbitrary advantages that solidify the success of practices which are not necessarily the most efficient for present needs. In general, path dependence questions the environmental determination of success that is the private market. Beyond issues of explanatory or historical analysis, path dependence questions our assumptions on the ability of our

present solutions to meet new and future demands. The more significant issue raised by path dependence, however, is the potential for solutions to become locked in, constricting our ability for envision the widest array of answers to meet future problems.

The winding path example above is more than simply a metaphor for the historical vicissitudes that have led to the present, and often remain beyond their usefulness, it should inspire caution for how current and past practices limit our adaptability and imagination. For what may matter more than the investment given to a practice, whether infrastructure of the physical or political, is the ingrained quality these practices assume within the contemplation of what remains to be done, attempted to progress. As Mark Roe notes in relation to the winding road metaphor: "Once society reached that summit, the next – a straight road through the forest that is easy to travel – can be reached only by going down the evolutionary hill, by going backwards and re-making the road" (Roe, 1995, p. 644). The hill analogy of Roe's is well-chosen, for it captures the limiting nature of past success. The practice that is the most efficient and fit for its time may quickly achieve its purpose and then plateau by way of usefulness. What worked well enough before to succeed may not be able to evolve further than the tip of its particular hill. And while Roe's hill analogy is apt in describing locked in advantages, and the costliness of undoing the infrastructure of past techniques, I believe the greatest detriment lies in the hills that remain still unseen.[5]

The clouded mountaintop of evolution to perfection may be in reality but a small hill, with greater challenges and possibilities hidden by our unquestioned embrace of the current pinnacle. In my telling of the winding road example above I implied that municipal administrations made a conscious decision to remain with the existing road rather than opt for the cost of the most efficient solution in making a new road in a straight line. But what local administration is likely to even consider such a grand redesign when faced with more pressing and less abstract demands for expenditure? Much more likely, is that the road's path is taken for granted, an assumption firmly held in the subconscious of local inhabitants, as part of the natural course of things as the landscape itself. It may well be that given an overt cost benefit analysis that the result would be the same, and that dramatic reinvestment for present efficiency would not be undertaken. The difficulty, however, is when such an analysis and such possibilities are not even considered. This is why a pragmatic view of truth defined as what is currently believed is limiting to our vision of new hills to be climbed. The environment in question, whether it is defined socially as the market or the marketplace of

ideas, becomes static under such a pragmatic, myopic vision. The competitive environment is more fickle and fluid, requiring that we keep offering new techniques to meet the demand of what works best. Assuming mastery at any point is not conducive to an ongoing process for renewing possible solutions.

VI

As the environment selects for success, the second essential ingredient in evolution is the individual variation to be selected between. Under Darwinian evolution, as under modern refinements and alternative theories such as punctuated equilibrium, genetic variation is the essential mechanism of increasing group fitness (Eldredge, 1985). Whereas Darwin posited that evolution occurred in a long slow process, the theory of punctuated equilibrium claims that it occurs in sporadic bursts of activity fueled by the isolation of fragments from a species (Eldredge, 1985; Gould, 1992, p. 182). Regardless of these nuances in modern biology, evolutionary theory remains tied securely to the chance permutations that arise within individuals to give selected advantages. Economic theory, however, in keeping with a pragmatic view to evolution as perfection, adopts an inherited view of advantage. A brief example of this theoretical difference between biological and economic conceptions follows, which will hopefully indicate the troubling implications for individual potential that is entailed by the economic perspective.

Obviously, business firms and individuals maintain their built-up advantages long after an individual life span. Corporations are legal persons that never die, which possess assets, trademarks, techniques, and managers that are not contained in any one living person. Similarly, individuals may pass down their inherited wealth through inheritances. To account for the built-up advantages that firms maintain over time has led economic theory to adopt a Lamarkian view of evolution. An early evolutionary theorist, Lamark theorized that advantages among individuals were both inherited and the result of activity (Hodgson, 1999). Darwin, more famously, proposed that while individual advantages were inherited, these advantages were the result initially of random variations, permutations on a preexisting genetic pattern (Langlois & Everett, 1994, p. 31; Hodgson, 1999, pp. 164–165). Imagine the giraffe for instance, existing upon leaves and foliage found high in trees. Lamarkian evolution claimed that the long-necked giraffe was the ancestor of previous giraffes who strove harder, higher, for sustenance.

The fruits of these efforts, in the form of longer necks, were inherited by individuals who were thus more advantaged in the competition over scarce foliage – who were better able to reach food over the ancestors of lazier or less-inspired giraffes. Darwinian evolution, alternatively, proceeds by way of the idea that an initial genetic permutation, being born with a longer neck, translates into a greater ability to achieve sustenance. This greater advantage thus gives the longer neck giraffe a higher likelihood of survival, and a greater chance that it will procreate and have this genetic advantage handed down to later generations, while less adept, short-necked, individuals struggle and are eventually superceded.

Though crude, this summary of differing evolutionary theories may be illustrative of the divergent potential of legal norms on change. When thinking of normative views of progress, of how it is identified and promoted, the location of change in individual variation has two key aspects. First, the inherited or Lamarkian view of efficient advantages endorses what is as the best for a reason validated by history. What is currently best by way of belief, or of efficiency, is best because it has succeeded to this point – meaning that its ancestor path was successful and has yet to be supplanted by another. Even should this theory be often accurate as to historical circumstances of economics – with the important caveats and exceptions provided by path dependence – it remains that this says nothing of future needs. Second, the great metaphorical device provided by Darwinian evolution is that individuals each equally possess the potential for providing the *unpredictable* solutions to future demands. The essential element of Darwinian metaphor is that the universal potential of new developments lies in each individual, in ways that we cannot predict or foresee (Langlois & Everett, 1994, p. 31). Our social environment does not produce linear goals consistent through time, and neither do individuals produce the answers for all time. A system based upon the constant promotion and renewal of individual potential would not only be consistent with liberal ideals of individuality, it could also produce social benefits not as yet contemplated, and reveal unknown hills to be climbed.

VII

Although the strand of legal neo-pragmatism influenced by the Romantics may celebrate the possibilities and qualities of change, it is passively silent on its actual motivation. Neo-pragmatists in the radical fashion argue for a change of circumstances, but it is decidedly results, or ends oriented. A goal,

again admirable, is firmly in mind, but the pragmatic means of getting there are elusive, perhaps hopelessly so. Pragmatism is treated as a mechanism for change, a call to a certain goal, while it more aptly resembles a method for viewing how change does, and has, occurred. As Rorty's theoretical ideal of the strong poet illustrates, innovations most often arise in opposition to what the majority believes to be true. Indeed, history may well bare Rorty out in this regard, imprecise or unverifiable as this must be. For example, Einstein was once said to remark that he would not have had the audacity to challenge Newton's gravitational system had he not been influenced by Hume's philosophical skepticism of accepted truths.[6] Unfortunately, the waited for result of neo-pragmatism cannot be more than an expressed wish that someone will theorize a new and better system, convincing others out of their oppressive current beliefs. By concentrating on the individual motivators of change, rather than descriptive analysis of how change might or does occur a legal theory would be more open to adaptation, and fluid alteration.

The purpose in returning now to Romantic pragmatism, after an evolutionary discussion, is to connect these two together in an approach to evolutionary pragmatism based on individual rights. Allow me to align the disparate threads running up to this point in a sequence. First, pragmatism argues that truth is socially defined and evolving, based upon what most currently need or believe as best by way of belief. Second, the view to evolution as perfection endorsed by pragmatism and classical economics is flawed in its assumption of a predictable and linear environmental selection of success. Third, a metaphor of Darwinian evolution indicates that an essential feature of systemic evolution arises from individual agents themselves, as they contain the inherently unpredictable variations against the environment will select from. Without this final step of individual unpredictably, social progress would be as static as evolution to perfection assumes, leaving us on our small hilltop of ignorance forever.

The fourth point is that individual rights are the best means of ensuring the future of pragmatic progress. Drawing upon Rorty's strong poet ideal initially, it then remains to make this ideal a more widespread, universal call for individual participation in the act/art of convincing others. In this way, with this embrace of individual rights, it is possible to encourage both Rorty's pragmatic method of change and his personal hopes of radical change. The before-mentioned liberal content of Rorty's aspirations may be open to debate, but for the purposes here it is only necessary to concentrate on the method and possibility, not the content of change. Let us first assume that knowledge is evolving, that truth is only what is best by way of practice

and belief, and that law is simply what judges say it is. Surrounded in these pragmatic tenants, let us then imagine encouraging an active motivator within these belief structures. Rather than waiting for a strong poet to come along and convince others of the next great ideal and admittedly unable to produce the idea ourselves – why would we not, as hypothetical system designers, encourage the greatest availability of strong poets?

In a sense, the argument for evolutionary individual rights proceeds by way of an argument that pragmatism is unfulfilled logically. Whether through the strong, Romantic version of pragmatism, with individuals as the motivators of revolutionary change, or the minimal market version, with the marketplace of ideas determining the social winner, it remains that ideas of change originate with individuals. Followed to its logical conclusion, pragmatism should embrace the greatest number of possible contributions to the competition over social direction. Therefore, were pragmatism to be more than a apologia for what currently exists, it would actively need to promote the elements of change that it has consistently indicated.

The exact qualities of a marketplace of ideas may still be endorsed under such an individual rights approach to evolutionary progress. Ideas may compete in the same fashion for ascendancy in Holmes competitive vision of society, but the object of rules and governance is to ensure that individuals are not unduly restricted from participating. The shift within a rights-based view to pragmatic competition and evolution thus occurs in the measure of market supply. Whereas so much of pragmatic and economic thought has concentrated on the notion that the competition produces the best possibilities, an evolutionary system premised on individual rights would shift the focus to access to this exalted marketplace. As individuals are originators of new contributions and ideas, there are far too many waiting to have their say on what works best.

In general, an advance needs to be made beyond the recognition on the changing nature of truth yielded by pragmatism, to engage with the production and increased likelihood of the ideas that constitute new truths. Rorty, for one, has commented approvingly on legal pragmatism's rejection of Euclidean, axiomatic legal principle. Unfortunately, after this initial, now century's old realization on changeable knowledge, nothing more has developed (Posner, 1990, p. 1670). As Rorty has further noted, the insights of legal pragmatism have become essentially banal, so widespread in acceptance has the approach become. However, it may foolish to assume a century's long plateau with no advance in methodology. Posner is undoubtedly correct that pragmatism clears the underbrush without planting new trees (1990), but what of the qualities of the soil, its fertility, and receptiveness to new growth?

The notion that Einstein's revolution in relativity (an appealing metaphor for pragmatism no doubt) has undermined the possibility of absolute certainty does nothing to promote another instance of an Einstein-like insight or revolution. Pragmatism's fixation on the systemic possibility of change has detracted from its actual promotion. Extending a scientific metaphor, a university administrator must be concerned with the environment of intellectual pursuit in a way that the individual researcher need not on an everyday basis. Most scientists may proceed in their research oblivious to pragmatism, as most do, working to extend and test the established truths of their field as if they were absolute and fixed (Wolfe, 1998, p. 199). These researchers and scientists may either confirm or reject these established truths, but pragmatism will tell nothing on how to go about either. A good administrator, on the other hand, arguably should be concerned with pragmatic notions, and the systemic tendencies that may either support or detract from an individual researcher's ability to advance new ideas. In short, academic freedom as engine to new knowledge is premised upon the possibility of each individual to pursue ideas independently. Similarly, returning to wider thoughts on social knowledge, so too may progress be identified with the independent potential of individuals.

While it should necessarily not be the place of law or government to actively promote the content of knowledge, the general pursuit of knowledge itself can be a firm basis of individual liberty and potential. In this regard, an individual's need to actualization of themselves through competition is joined by social concern, as others benefit from a diversity of ideas on offer to be selected from. Therefore, every individual who is prohibited from participating is potentially a new idea, solution, left out of the current pragmatic mix. The penultimate and concluding sections which follow address this promotion of individual potential. First, individual potential is addressed through a basic liberal concept of autonomy, which is extended to consider the competitive dynamics that may impinge upon a basic entitlement to express oneself. The second and final point is more speculative, touching on the distributive issues that inhibit individual potential and participation in the marketplace of ideas. Though as significant as the first section on autonomous choice, and probably more so, these distributive issues are far beyond international norms, and entail a measure of socio-economic rights and entitlements that have yet to be given serious consideration for implementation. Accordingly, this essay concludes with a progression through presently unrealized ideas, in the name of shaking pragmatism from its embrace of what is and toward an active role in the consideration of change.

VIII

Until this point, I have concentrated on the connection between individual differentiation and the furtherance of possibilities for progress. I wish now to pause and stress that individuals often must, and should follow others. Though I will affirm readily that evolution to perfection, and the modern realities of economic liberalism unduly impose a singular worldview, or way of competing, upon everyone, it is oftentimes desirable that others should adopt the successes of others. A progressive system could hardly be advanced should it require that individuals pursue different paths to their own detriment in the face of other's success. But individuals also deserve the chance to offer up their own solutions to society, free from the closed possibilities of what most people currently believe.

A difficult, perhaps inescapable, tension may thus be seen to exist between the need to have innovators both convince the wider society and act in opposition to its dominant belief. This conflict may be placed within wider intellectual trends that encourage us to either accept the economic world as essentially linear and predictably, or variable and indeterminate. In terms of economic theory, the dilemma may be placed between a belief in convergence, the economic liberalism of evolution to perfection, and path dependence. As evolution to perfection embraces market beliefs as having selected out the fittest practice, path dependence challenges these assumptions on certainty. Though the classical economic theory is currently ascendant, neither it nor path dependence alone provide a persuasive holistic picture of how competition advances.

If there are clearly times when individuals should follow the success of others, it is less clear when they should be encouraged not to. Path dependence, though persuasive as to past imperfections economic evolution, cannot indicate when current believes will lead to future inefficiencies and locked in perspectives. At most, then, path dependence illustrates that the social environment is an evolving landscape, with achieved goals not always remaining the answer to changing problems. As noted above, a static environment is combined with an inherited view of individuality in classical economics. To approach a balanced position between convergence and path dependence, therefore, requires addressing the second aspect of evolutionary thought, that of individual variation.

The most significant obstacle is defining when individual choice to convergence is valid or not. This is a sensitive point, deservedly, for it implies government selection of individuals ends. An evolutionary, progressive

system should not impose solutions in a supply-side fashion without strict limitations. Competition must still select out winners and losers. Regulation should simply select out tendencies for alleviation. The tendencies of competition to be alleviated are those which infringe individual potential, and a legitimate opportunity for individual choice. While the market environment should not be imposed upon to the extent that the state is selecting winners, individuals must also be given the chance to escape harmful cycles of competition in which they have no real choice. The fine balance between copying an admirable competitor and racing to the bottom toward a base instinct is a gray area that may be enlightened by the availability of choice.

Theoretical examples of the limitations upon individual liberty occasioned by competitive dictates may be found in well-known anomalies of economic self-interest displayed by game theory. Classic game theoretic models such as the prisoner's dilemma and the tragedy of the common reveal a break down in traditional economic assumptions. In both games, an individual's rational pursuit of their own self-interest leads to worse results for both themselves and others involved. The famous prisoner's dilemma game is a classic example of when the rational strategy of each individual leads to a sub-optimal result. The game generally describes two accomplices charged with a crime who face the temptation to inform on each other. An interrogator addresses each detainee in isolation and offers them a similar deal. The deal is that if one confesses and informs on their partner they will receive a light sentence. If they do not confess and their partner informs on them they receive the maximum sentence. Fearing that the other shall inform, and that they will suffer by it with the maximum sentence, each prisoner predictably informs on the other. The best result for both individuals would occur if neither informed, and yet the best independent strategy for both would be to inform (Heap, 1992, p. 99).

Similarly, with an environmental Tragedy of the Commons example it would be most beneficial should each individual – farmer, herdsman, fisher, and so on – practice restraint and not offload their pollution costs on to the commons (Hardin, 1968). However, since it would be an advantage for another competitor to do so – to free ride and have the group carry the costs of their pollution, while they only receive a marginal cost of this pollution on their next crop – the rational strategy of each becomes the same, to pollute the commons. Unfortunately, when each individual comes to the same rational conclusion, the result is that each pollutes the commons to the detriment of everyone. As each must account for the best strategy of their competitors, pollute is the best strategy for each, even if restraint would have been to greater benefit for everyone.

These game theory examples demonstrate a situation of competitive insecurity. I define competitive insecurity as simply meaning that one must act in a certain, often detrimental, way for fear that a competitor will benefit by doing so first. Competitive insecurity is a completely rational strategy that, as with the prisoner's dilemma and tragedy of the commons, produces irrational results. The essential characteristic of competitive insecurity is a lack of choice: an individual must either take the detrimental (or sub-optimal) result for themselves or risk being even worse off should their competitor cheat alone. Competitive insecurity thus results in an individual entering into a knowingly sub-optimal strategy of -1, for example, because it matches their opponent's best possible strategy of -1. Had they opted instead for restraint, say a value of $+1$, their opponent's best strategy of cheating to –1 would leave them behind by 2. While it would be nice to assume that one's counterpart would also opt for $+1$, yielding 2 for both, economic and game theories of self-interested rationality tell us to form our strategies in response to our opponent's best possible move. Having calculated that our opponent's best strategy for answering our move is to defect, our rational strategy becomes to defect as well.

The case for government intervention in competition is no doubt a difficult case to make at most times, but the space to behave, compete freely in the first instance should be an entry point into this closed off realm. For example, if one has no choice but to follow a competitor or risk competitive suicide, this should not be a good claim to intervention. Too many variables might explain the disparities of success. The claimant might, after all, be horribly inept, or unable to recognize a competitor's superior technique or productivity. However, should the competitive race lead to both being be worse off, in a cycle of competitive insecurity, then there is surely cause to address rule change and an alteration of incentives. Similarly, the strategy of one competitor may make all other players worse off, as they then must in turn adopt the harmful strategy that the forerunner to the bottom benefits from first. Autonomy, if it is to have a political meaning connected to a higher ideal, such as individual liberty, must at least guarantee a basic chance to promote an individuality of expression. The world need not be forced into difference, but what may be done to relieve the imposition of competitive, individual homogeneity should be attempted.

Competitive insecurity is a quality of systemic methods, representing a break down in economic precepts, which should be overcome to allow greater potential. Alleviating competitive insecurity is but a first, essential, step in moving toward ever increasing competitive voices. Competitive insecurity, as with the theory of path dependence, signals that the present

certainties of pragmatism and economics are susceptible to stagnation. In the space of these pragmatic omissions, a new theory might hopefully develop, which embraces optimistic and open-ended social possibilities of modern life. Believing in the pragmatic view to a competitive history should also trigger an attempt to ensure that our generation is not unreceptive to that same ideal of change – ensconced in a smug belief that our ideas mark the end of history, leaving it to later generations to finally overcome our intransigence.

IX

Having begun this essay with an ambitious claim for a future of pragmatism furthered by individual rights, this concluding section may be an appropriate time to return to more heightened, aspirational thoughts. As the previous section canvassed the systemic, or game, tendencies that may lock individuals into strategies that exhibit no real choice, this section touches upon more fundamental exclusions to competition and the development of knowledge. A far greater difficulty may be said to face those who cannot, because of extreme material want or lack of basic educational needs, contribute to the competitive growth of knowledge – and what is worse, even realize that this potential, this knowledge, exists. Quite simply, it is arguably an easier proposition to face being prohibited from exercising choice for fear of competitive disadvantage than to be excluded from the game entirely because of abject poverty.

The claim that each individual by the very nature of their humanity is entitled to basic needs of life is at once inspiring for its universality, and presently remote because of its difficulty in achievement. And though the United Nations has adopted a noble principle supporting such socio-economic rights, it remains that coordinated, worldwide agreement on entitlements is not seemingly near to realization, or even contemplation. Indeed, it may be said that given the retreat of the welfare state, modern commitments to the basic economic needs and participation of the less fortunate has decreased in recent decades. For example, a well-received book on global poverty from 2005 by Jeffrey Sachs, calls for nothing more revolutionary than for developed countries to contribute 0.7 percent of their GDP to foreign aid (Sachs, 2005) – an idea originally proposed by Lester B. Pearson in the 1960s.

The cost of international poverty has normally been counted in terms of human life; a tragedy of individuals dying unnecessarily from a lack of basic needs, while others may enjoy in excess. The notion of socio-economic rights

builds upon circumstances of extreme inequality to identify basic entitlements to the ingredients of a viable life, such as health or education. Underlying, as a secondary benefit, these rights claims is the belief that successful societies require viable individuals, citizens, to build upon, for every member's benefit. By extension, the inability of pragmatism to engage with the supply of ideas, in a sort of a pragmatic malaise, misses the great waste that is occurring when so many are unable to contribute. For the individual's sake first, and for wider society second, the potential lost due to poverty is arguably unquantifiable.

While the call to include as many voices as possible has dramatic, even presently impossible, implications for the inclusion of the excluded worldwide, it may at least be the beginning to a philosophically consistent position. Both final sections, of autonomy and viability, are concerned with the provision of ideas in the pragmatic competition over evolving knowledge. And both sections also challenge the pragmatic malaise that allows so much potential to be lost without comment – without asking on what may make the for ideas soil more fertile. A concentration upon the supply of ideas, the fuel to change, must recognize the factors that serve to limit the market of individual potential. Were modern pragmatism to become concerned with the occurrence rather than the image of change, a concern for unheard voices would become central to advancing social knowledge.

NOTES

1. See, E. Hunter Taylor, Jr. (1972), *H.L.A. Hart's Concept of Law in the Perspective of American Legal Realism*, 35 Mod. L. Rev. 606; comparing the relationship between Hart and the American legal realists, and arguing that Hart overstates their differences in order to further extenuate his own theory – a 'staw-man' version of legal realism as it were. Though beginning from a similar basis, specifically a dissatisfaction with the moral claims of natural law and 'syllogistic' assumptions of law as derived from logic, it is the third element of legal realism/pragmatism that Hart cannot accept. Namely, the pragmatic view that lawyers are engaged in the art of predicting what judges – as individuals – are likely to do. This third element is antithetical to Hart's priority of rules, and the surrounding political, institutional structure that gives the law an authority beyond the individual bureaucrat or legal decision-maker.

2. The influence of economics, particularly the work of Thomas Malthus, upon Darwin is well-known. See, e.g., Hardy Hannappi (1994), *Evolutionary Economics* (Aldershot, UK: Avery), 7.

3. The Qwerty example was first used by Paul David to demonstrate the tendencies of path dependence. Paul A. David (1985), *Clio and the Economics of QWERTY*, 75 Amer. Econ. Rev. 332, 335. The accuracy of the Qwerty example has, however,

been question, see S.J. Liebowitz & Stephen E. Margolis (1990), *The Fable of the Keys*, 33 J.L. & Econ. 1, 3. Yet, as Oona Hathaway notes, "Despite the debate over its accuracy, the example continues to be considered one of the early illustrations of path dependence theory's central insights." Oona A. Hathaway (2001), *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 Iowa L. Rev. 111, at note 40.

4. The metaphor I describe is modeled on one found in Roe, 1995, pp. 643–644.

5. As Roe notes, "If society cannot think effectively about the alternative path because it lacks the vocabulary, concepts, or even belief that the other path could exist, they that society cannot consciously either to return to the branch point of the two paths (and then go down the other path) or jump to the other path" (Roe, 1995, p. 651).

6. As Hume (1975) eloquently put it, he offered "sceptical doubts about the operations of the understanding," not as "discouragement, but rather an incitement...to attempt something more full and satisfactory;" *Enquiry concerning Human Understanding*, in *Enquiries concerning Human Understanding and concerning the Principles of Morals*, edited by L. A. Selby-Bigge, 3rd edition revised by P. H. Nidditch, Oxford: Clarendon Press, p. 26. See also, e.g., John Stachel, et al. (eds) (1989), *The Collected Papers of Albert Einstein: Volume 2: The Swiss Years: Writing, 1900–1902.* Princeton: Princeton University Press. ("*Papers*, Vol. 2"), Headnote, pp. 253–274; Gerald Holton (1973), *Einstein, Mach, and the Search for Reality in Thematic Origins of Scientific Thought: Kepler to Einstein*. Cambridge, MA: Harvard University Press, pp. 219–259.

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CAUSE LAWYERING AND SOCIAL MOVEMENTS: CAN SOLO AND SMALL FIRM PRACTITIONERS ANCHOR SOCIAL MOVEMENTS?

Brenda Bratton Blom

ABSTRACT

As the demand for affordable legal services grows, law schools and the legal profession struggle to respond. By examining lessons from successful social movements in the last century, Cause Lawyering and Social Movements: Can Solo and Small Firm Practitioners anchor Social Movements looks at the Law School Consortium Project and its potential to participate in and anchor the social movements of our time. The collaboration of the law schools, networks of solo and small firm attorneys and activists at the local, regional and national level provide key elements for powerful change given the technological developments of the 21st century.

The question of whether solo and small firm practitioners can be cause lawyers has been discussed by many interested people in the topic of cause lawyering. In the first *Cause Lawyering* volume compiled and edited by Austin Sarat and Stuart Scheingold, several authors examine actual small and solo firms where the lawyers clearly meet the criteria articulated by

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Scheingold and Sarat in *Something to Believe In*: "At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service – be those ideals social, cultural, political, economic or indeed, legal" (Sarat & Scheingold, 2004, p. 3). It appears that this question is settled. What is not settled is whether solo and small-firm practitioners can anchor larger social movements in the United States. In an attempt to answer this question, this essay will first examine what differentiates social movements from causes, and what roles lawyers might play. Included in this discussion will be an analysis of the changes happening in social movements in the United States, and the implications for lawyering. Second, there will be an examination of the last century's most successful social movement in which lawyers played an integral role, trying to extract the elements that seem essential, paying particular attention to the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense Fund (LDF). Finally, this work will examine a model in development, the Law School Consortium Project (LSCP), to see if the critical elements exist or can be developed for supporting current social movements. It will look at the LSCP as the mechanism by which law schools and practitioners make it possible to meet the challenge of access to justice and create a space in which "attorneys ... unify profession and belief ... and ... maximize the consonance between moral values and professional practice" (*ibid.*, p. 73). It will also examine ways in which the LSCP might equip and support solo and small firm cause practitioners in social movements, and connect those practitioners to the movements themselves.

SOCIAL MOVEMENTS AND LAWYERS

Michael McCann (2004) uses Tilly's 1984 definition of a social movement:

> ... a sustained series of interactions between powerholders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support. (p. 508)

McCann clarifies by suggesting that "... social movements aim for a broader scope of social and political transformation than do more conventional political activities ... they are animated by more radical inspirational visions of a different, better society" (*ibid.*, p. 509). McCann goes on to use a legal mobilization theory by which to analyze the role of attorneys in social

movements. He asserts that there are three phases: the first phase, the "rights consciousness raising" phase that includes both agenda setting and defining the overall "opportunity structure;" the second phase of leveraging legal theories; and the final "legacy" phase during which there are attempts to institutionalize victories gained through leveraging. He asserts that lawyers are most helpful to social movements in the first and final phase, though most helpful in the first phase: "the first of these entails the process of 'agenda setting,' by which movement actors draw on legal discourses to 'name' and to challenge existing social wrongs or injustices … to make possible the previously unimaginable, by framing problems in such a way that their solution come to appear inevitable"(*ibid.*, p. 511).

A "cause," on the other hand, is something a little more ephemeral.

> Our basic premise is that a 'cause' is not an objective fact 'out there.' A cause, rather, is a socially constructed concept that evolves, if at all, through a process in the course of which experiences, circumstances, memories, and aspirations are framed in a particular way … Yet, inasmuch as the reality of a cause is a constructed and negotiated experience, it is in the very act of legal representation that a cause … is asserted or defused, comprehended or dissolved, recognized or silenced. Cause lawyers, in short, are not simply carriers of a cause but are at the same time its producers: those who shape it, name it, and voice it. (Shamir & Chinski, 1998, p. 231)

Shamir and Chinski suggest that a cause can be or is created in the interaction of a person or group of people and the lawyer with whom they interact. This process is, at its core, the framing of the problem to be solved in the language of justice and fairness that the legal system of the appropriate society can address. This may well be phase one of the building of a social movement, and critical to those who have an issue or grievance within the system. But it implies something narrower than a movement. I adopt this general frame for the purposes of this discussion. Cause lawyers, therefore, become those who are willing to engage in framing issues and fighting for those who bring injustices to them. But a social movement implies a more transforming process of both the group who identify with a particular cause and the society in which the movement is happening. It implies a momentum into the basic cultural mores and structures of the society that cannot be addressed in one particular case, statute or regulation. Instead, it is about using cases, statutes, regulations and much more for a transformational assertion of a fundamental restructuring of beliefs and actions of a society.

While there are elements of McCann's analysis that are helpful in thinking about the role of solo and small firms in social movements, there are several assumptions that seem to be implicit in his structure of analysis: first, both the movement and the opposition/power base are centralized; second, legal

responses are rational and consistent; and third, litigation theories and victories lead to a change in the policy and implementation of the institutions that represent the anti-cause of the movement. All of these assumptions, I would assert, emerge out of a 20th century and linear perspective of social engagement for change. Technology and globalization are changing our basic assumptions about organizing and what constitutes legal engagement with a social movement, therefore changing the role of lawyers and the clients.

TRANSFORMATION OF THE RULES OF ENGAGEMENT

Technological advances allow lawyers to take a more active role as co-producers of social movements. The 2004 United States presidential elections saw a shift in organizing and social activism that is still a little mind-boggling. It was the first time the power of technology was effectively used to create and respond to a need for organization and social dialogue. Millions of people relied on political and/or social commentary web logs or "blogs," websites and information not represented in the mainstream media, for their information and analysis. People met on the internet, worked together, voted for policies, chose media spots and set priorities on a daily (and sometimes hourly) basis. This organizing was highly decentralized in its character, took on some fundamental issues of democratic organization and interest, and, as the election unfolded, created localized communities of interest for engagement at the most local level as well as creating a national voice for collective interests as defined through both structured and unstructured dialogue. This direct contact and coordinated dialogue by and among like-minded individuals was new, invigorating and fast paced. While some of it became linked to a political campaign, this technique was used by both left and right wing activists alike. This dialogue was akin to an open-ended forum for issue development and discussion.

Another interesting element of this new reality was the quick cycling of stages, if they are stages at all. The "conversation" was open to all who were interested, and lawyers who were paying attention began to mobilize and develop legal resources to support, respond to, and take part in the conversation as it unfolded. There was timely mobilization of attorneys to critical states where legal challenges to citizen's rights to vote were expected. Many of those lawyers who responded to the call practice in solo practice and small firm settings. These cause lawyers were able to structure their

responses as the issues began to unfold, both in creating core groups who were researching and developing legal packets and strategies as well as those who were deployed and/or self-deployed to be available as necessary. They were also able to evaluate, shape, and be part of the coordinated response, feeding new information back into the conversation. These quick evaluations and reevaluations were near real-time, which changed not only the legal work but also the ability to be part of a team that includes a vast array of voices in the analysis, and the ability to mobilize resources to a point.

This ability to have access to information, social dialogue, strategic discussions, and model development allows for both a localized and efficient character to a social movement that is substantially different than what has been studied previously, and argues for new methods of analysis and models of response. While McCann's assessment that "legal mobilization politics typically involves reconstructing legal dimensions of inherited social relations, either by turning official but ignored legal norms against existing practices, by re-imagining shared norms in new transformative ways or by importing legal norms from some other realm of social relations into the context of the dispute" (McCann, 2004, p. 510), he overlooks the possibility that lawyers can be co-producers of both the process and the outcome of the social movement. While this was and is a method of work that is being implemented primarily in community change efforts at the local level, this model most effectively articulates the change in the process in which the social change efforts of the election worked. "Rather than an agent presenting a "finished product" to the citizen, agent and citizen together produce the desired transformation" (Whitaker, 1980, p. 240). In the context of social movements, technology allows us to implement a co-production strategy that from the beginning to the conclusion includes both attorneys and citizens in the conversation/dialogue about the social issue or cause, including long-term strategy and short-term tactics. Further, it allows linkages and deployment of resources for highest and best use of talent across a scope of issues.

This shift in process allowed by technology provides for a more rapid and cyclical response to problems that become causes (through definition and articulation of rights and remedies), but it also creates the mechanism to link the individual causes in near real-time to a significantly broader community of like-minded people who may then step up to the cause plate and turn it into a social movement – the transformational engagement of fundamental structures- in a much more timely manner. The painstaking organizing needed for a social movement in the 1940s may well be replaced with the model where, within days or weeks, substantial numbers of people around

the globe are mobilized to take to the streets to oppose an impending military action. In this model, the solo or small firm practitioner is not disadvantaged by her choice of practice venue if she is "linked" with like-minded attorneys working with those citizens bringing forth their problems. If those with grievances have access to lawyers who can articulate their grievance, then the possibility of a new cause, and a new (or revived) social movement arises.

THE ROLE OF SOLO AND SMALL FIRM PRACTITIONERS IN THE DELIVERY OF LEGAL SERVICES IN AMERICA

In the town where I grew up there were two lawyers serving all the interests of the community members. In cases brought to trial, one lawyer was appointed to prosecute, while the other worked on behalf of the defense. They handled all the criminal and civil matters in town, knew the basic outlines of the financial conditions of the families in the town, and provided a broad array of services, including pro bono services, to all who came in the door. As American communities become more economically isolated, the poor and working poor have an even more difficult time locating legal services. As Auerbach reminded us, "The country lawyer assured equal opportunity, social mobility, and professional respectability for the man of humblest origins, thereby preserving the democratic flank of the profession" (Sarat & Scheingold, 2004, p. 30).

The only solo and small firm practitioners that appear to be locating in low-income communities today are those with criminal practice areas. But the needs of low-income people are particularly fierce in areas of consumer protection and benefits, both job related and government sponsored, housing, family law matters, and issues surrounding immigration and residency. But establishing a solo or small-firm practice in a low-income community is difficult to do. Developing enough of a bread and butter practice to sustain the "low bono"[1] need is a challenge, in addition to understanding and responding to these matters as part of larger social movements that can nourish and link both the body and soul for the practitioner and the client.

In this country, a much higher percentage of minority and women law graduates begin their own practices right out of law school. The reasons for this phenomenon are multi layered, but include continued exclusion within the profession (Iwaton, 2004, p. B3), and perhaps continued challenges for

the students who are non-white and non-male to compete in a curriculum crafted by a predominately white male faculty (White, 2004, p. 8–10; Statistical Report Table 2004–2005 (AALS website)). But these graduates, many of whom are more likely to have come from low-income backgrounds, are also more likely to provide low bono and pro bono services to those who are in need. These are the cause lawyers examined by Aaron Porter (1998) in his article *Norris, Schmidt, Green, Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers*:

> Where the personal needs and the social needs of communities converge with the interests of the cause lawyers, the mutual needs of both can be addressed, as we see in the civil right movement's efforts against white domination of other racial groups. (p. 158)

Porter's examination of the role of the African American firm of Norris, Schmidt et al. in Philadelphia clearly shows the importance of the independent firm for African-American lawyers. While this examination was centered in the years between 1950 and 1980, statistics show that these lessons continue to hold true.

> As a consequence of racial and social inequities in our social structure, the practices of black lawyers, including the creation of their professional institutions and bar associations and their involvement in larger social movements against an oppressive white social system fall within the category of fighting for equality under the law and share that ethos. Black lawyers were in effect always involved in cause lawyering. (*ibid.*, p. 157)

While many of those firms are solo and small firm practices, they struggle to find economic success while continuing to serve those in their communities with the greatest need. For cause lawyers in solo and small firms that are rooted in minority communities, the struggle to survive will continue to intensify with the economic times we experience now and in the future.

Even if they are not minority and women practitioners, cause lawyers in private practice have been an important part of the social movement for justice in our country. John Kilwein's examination of the role of 29 lawyers in private practice in Pittsburgh, Pennsylvania is an important work in understanding the lives and choices of these attorneys.

> For this project, a cause lawyer is defined as an attorney, in private practice, who focuses on the cause of improving the condition of some identifiable portion of the low income community and other disadvantaged citizens of Pittsburgh. Added to this definition is Menkel-Meadow's notion that by engaging in this kind of work, the cause lawyer incurs personal, physical, economic, or social status risks. (Kilwein, 1998, p. 182)

Kilwein identifies several important elements of cause lawyers who choose private practice, one of which is the continuum of ways in which they practice (*ibid.*, p. 183–186). From individual representation to some

combination of individual representation and impact or mobilization lawyering, the spectrum of ways that they chose to deliver services was also linked to the way they understood the need. For those who provided primarily individual pro bono representation, they understood the primary issue to be lack of access to legal services, with the system of justice fundamentally sound (*ibid.*, p. 187). ''Through a steady supply of legal services, the poor would be able to take advantage of existing societal and governmental benefits that are more easily obtained by their financially secure neighbors'' (*ibid.*, p. 187). Most of their pro bono referrals came from the Bar association, and they did not participate in impact litigation and other referral networks.

Others were more directly involved in specialized referral networks and were connected to a cause or political organization that they participated in as a citizen member (*ibid.*, p. 188). They were more likely to participate in impact litigation and mobilization efforts, including

> litigation done in conjunction with the ACLU, Neighborhood Legal Services Corporation and other groups that forced state and federal penal institutions in western Pennsylvania to improve institutional conditions; a class action discrimination suit argued with many of the same organization that eventually forced several segregated suburban school district to merge into one more diverse district; and a suit undertaken with the Developmental Disabilities Law Project that resulted in changes in the way local schools dealt with students with various physical and mental challenges. (*ibid.*, p. 189)

Kilwein's findings show that these lawyers facilitated both increased direct service to the poor and work with larger issue and cause organizations.[2] Using Carrie Menkel-Meadow's (1998) definition, all certainly were engaged in cause lawyering:

> … cause lawyering is any activity that seeks to use law-related means or seeks to change laws or regulations to achieve greater social justice – both for particular individuals (drawing on individualistic 'helping' orientations) and for disadvantaged groups. Whether the means and strategies used are legally based 'rights' strategies or more broadly based 'needs' strategies, the goals and purposes of the legal actor are to 'do good' – to seek a more just world – to do 'lawyering for the good.' (p. 37)

Some were also involved in lawyering for social movements. The key elements in this differentiation appear to be (1) linkage to a larger network of people committed to a cause, (2) consistency between personal morality and practice, and (3) ability to work with those who worked deeply on specific issues in society.

"COOPERATING" SOLOS AND SMALL FIRM ATTORNEYS IN LAWYERING FOR SOCIAL MOVEMENTS

Even for national litigation organizations, the importance of local counsel has been acknowledged in many ways. The most powerful articulation of this was by Charles Hamilton Houston as he envisioned the role of the local lawyer in the redesign of Howard University Law School:

> Beginning in the early 1930s, Howard University Law School served as the West Point for a generation of Civil Rights lawyers … Houston's goal involved more than upgrading Howard's academic standing. He intended to train a generation of African-American lawyers who would lead the fight against discrimination. (Ware, 2001, pp. 635–636)

Years later Judge Robert Carter explained:

> The overriding theory of legal education at Howard during those years was that the United States Constitution – in particular, the Civil War Amendments – was a powerful force heretofore virtually untapped, that should be used for social engineering in race relations … A principal objective of the faculty at Howard was to produce lawyers capable of structuring and litigating test cases that would provide effective implementation of these guarantees on behalf of the black community. (*ibid.*)

These lawyers, highly skilled and trained in law that would assist with both the local work and the national challenges that would be needed, spread out across the south founding solo and small firm practices that would cooperate with the NAACP in its national, regional, and local efforts to use litigation strategies as part of the larger set of movement tactics to deliver justice and freedom to blacks in America.

The reorganization of the NAACP in the 1930s to position it as a national litigation organization was led by Charles Hamilton Houston and held within it his wisdom on the relationships between the law school, the national organization, and the locally based attorneys working across the south. He explained that his goals were: "(1) to arouse and strengthen the will of the local communities to demand and fight for their rights; (2) to work out model procedures through actual tests in courts which can be used by local communities is similar cases brought by them on their own initiative and resources …" (*ibid.*, p. 642). He set about to do that by both strengthening the national office's capacity to structure and bring cases that reflected the litigation strategy as decided by the Litigation Committee of the NAACP, and to strengthen the relationship between the national and the local chapters, and the attorneys who led them.

Houston developed a four pronged agenda for the running the legal campaign: "Houston's first tenet … go nowhere without local support, but at the same time to assume the responsibility for cultivating that support … The social and public factors must be developed at least along with and, if possible, before the actual litigation commences. Second, Houston emphasized loyalty to the cause of racial justice over loyalty to any particular organization or issue … The third salient feature of Houston's vision was his emphasis on using African-American attorneys … both in order to tap their creative energies and to build unity … Much of Houston's success can be traced to his extensive revision of Howard Law Schools' curriculum … Finally, Houston closely supervised the work of local attorneys … often solicited suggestions from the local attorneys and requested that they research specific aspects of the local situation" (Burch, 1995, pp. 135–138).

This agenda that blended the training received at the law school, the work of the national office and strategy with the work of the local, well-trained attorneys led to a winning strategy for the NAACP: "The Association needed the local leaders to build and maintain the grass-roots support essential to successful civil rights litigation … The local leaders also learned to defer to the NAACP attorneys on matters of legal strategy. The combined efforts protected the later success in the court room" (*ibid.*, p. 143). This model developed in the 1930s has remained the principal model for the NAACP though the significance of the litigation relationship began to change when the NAACP Legal Defense and Education Fund (LDF) was spun off in the 1950s. While operating as fundamentally integrated with the NAACP for a period of time, eventually (and pursuant to the appointment of Greenberg as the chief counsel of LDF) LDF became more independent and began to pursue its own litigation goals and organization building strategies.

Over and over again, the internship program has been referred to as the principal way in which the LDF won the hearts and minds of the attorneys who would become the cooperating attorneys for its work. This ability to acculturate and train the attorneys in the core values and principles of the organization serves the organization in much the way the 1930s training effort at Howard served the NAACP during the key litigation campaigns from the 1930s through the 1950s. This has been and continues to be key to LDF's ability to coordinate planned litigation strategies: "LDF retains close ties with the special set of cooperating attorneys which it trained and who had spent a year at headquarters before starting a law practice in southern communities; for many of them, the organization is the 'single largest

client''' (Wasby, 1984, p. 122). While LDF has a core of staff attorneys, they work one on one with the cooperating attorneys. ''Staff attorneys prefer to work with cooperating attorneys who do much work, but 'need support and help': this may include inexperienced attorneys whom the staff attorneys can thus train 'in civil rights and skills''' (*ibid.*) Further, LDF supports these cooperating attorneys financially as well as through training once they are in the field. This financial support is key for developing the loyalty and one on one relationships that allow the LDF to rely on these attorneys for consistent performance with LDF acting as ''a parent legal firm with law offices all over the country'' (*ibid.*, p. 123). But LDF also understands the importance to its reach and connection beyond implementing its own legal agenda. ''Cooperating attorneys … 'tend to know local people and problems better,' being local leaders with 'knowledge that is indispensable''' (*ibid.*). As Robert L. Rabin (1975) sees it, ''The LDF is a partnership – a mix of staff and cooperating attorneys managing a nationwide, heavy-volume caseload through a pooling of professional resources. It is the viability of the local cooperating attorneys that serves as a crucial link between the organization and its clientele'' (p. 218).

Other models of coordination of resources were developed in the 1900s. They used the work of national and local legal services organizations that coordinated with local attorneys in different causes. These models tended to rely on the pro bono resources of large firms, leading to a very different outcome.[3] While large firms have been and continue to be instrumental allies in social movements, they often find themselves at odds with transformational movements that challenge the core values and structures of society which often benefit their larger clients. Further, they are not the focus of this piece, and therefore this model will not be explored further herein.

Whether for the NAACP, the LDF or for other organizations that worked with and coordinated with lawyers not inside their organizations to meet the needs of the cause and deepen the work to respond to the developing social movement, there were several challenges to be met: training, coordination (both between the coordinator and those being coordinated and also between the social organizations and clients and the legal team itself), referrals and issue identification, legal theory development, and support (both financial and technical) for the lawyers in the field who were involved. As our society becomes more complex these challenges are multiplied. As our communities of interest become more dispersed, the natural lines of communication are tested. Houston's model for the NAACP benefited from the segregation it contested. Almost all African American lawyers were going to attend Howard University School of Law. Developing a

curriculum to train civil right lawyers meant training them in one location and in one curriculum. The network of African American lawyers was small and coherent, bound by social networks inside and by exclusion from those outside the network. Today's African American lawyers go to every law school in the country, live in almost every community and socialize in complex social circles. While there remains some cohesive networking, the complexity of coordination can no longer rely on the social bonds of alumnae or neighborhood connection.

The lessons of the LDF are similarly rich. The training model of the fellowship program shows the importance of being able to use deep research and training in a subject area "in house" to share and train in the field. The social relationships built while developing facts and theories that are implemented in the local areas by committed community-based lawyers strengthen and give nuance to the legal theories applied in the real world by those who have been given the luxury of deep theoretical exploration.

For both models, the linkage with local leadership has been critical to success. To develop a movement, the grievance that the client brings through the door must be given the language and remedy of a cause. When that cause is connected through larger reflection to similar or identical causes across the county and the globe, and linked to activist organizations that can bridge legal strategies and theories to the social theories and structures that live in the "microsites" of power in each local community, social movements emerge. The linking up and down the chain of training, coordination, and vision with the local leadership and resources to move forward people in the most local of ways that they live their lives is key to the success of the past, and I would posit, key to the success of the future. Doing this in our ever more complex and atomized world is the challenge of today's cause lawyers.

LESSONS OF COMMUNITY-BASED CAUSE LAWYERS

Community-based lawyers are integral to the life of the community in which they reside. They provide leadership in local organizations and a window into and a voice about the day-to-day struggles where our society is hammering out issues of justice:

> A poststructural rethinking of the democratic project does, however, afford some respite … Post-structural theories locate domination in cross-cutting social cleavages (race, gender, sexual orientation, age, etc.) and at microsites of power (the family, the workplace, schools, social service agencies, and the like). These microsites present less

> daunting targets for cause lawyers, who in effect turn away from high-impact, class action litigation and/or frontal assault on the institutions of the state. They focus instead on the empowerment of individual or perhaps small groups of clients. With less at stake politically and more at stake legally, legal institutions may well come closer to living up to their professed ideals.'' (Sarat & Scheingold, 1998, p. 9)

Understanding this opportunity for change in the positioning of both local and cultural struggles for justice out of a centralized and planned litigation strategy into the hearts and minds of the ''microsites of power'' may well be the best option for cause lawyers linked to social movements and their causes in this early part of this century.

As the NAACP learned in the 1920s and early 1930s, without a centralized process for reflection about what is happening in a larger context and people who are thinking about local activity in the context of the national and international picture, you risk actions that are effective for one client but bring about results that will, in fact, hurt the movement in the long run (Burch, 1995, p. 195). While there are some organizations and issue groups that have some coordination, the possibilities for solo and small firm cause lawyers that are being provided by the advances in technology are breathtaking.

TECHNOLOGY AND CAUSE LAWYERING FOR THE SOLO AND SMALL FIRM PRACTITIONER

The model that I would suggest is a powerful model and can be the basis of a cause lawyering network of solo and small firm practitioners. It begins with the same basic understanding of the central position of solo and small firm practitioners as has been said of all cause lawyers:

> Cause lawyering cuts against the grain of a widely accepted belief that law and lawyers are supposed to be apolitical agents for resolving society's conflicts while somehow remaining unsullied by them … Cause lawyering is not about neutrality but about choosing sides. Put another way, cause lawyers are focused on the broader stakes of litigation rather than on the justiciable conflict as such or on the narrow interests of the parties to that conflict. Cases have significance to cause lawyers not as ends in themselves but as means to advance causes to which the lawyers are committed. Cause lawyers choose cases, clients and careers according to what they stand for. The essential question is whether there is something at stake in which the cause lawyer believes and is, thus worth fighting for. (Scheingold, 1998, p. 118)

Because social movements are by their nature based in many actions and many locations, it is critical to provide a teeming array of entry points for

the delivery of services. This plethora of entry points was provided during the civil rights movement by solo and small firm practitioners on the ground all over the south. The NAACP and the LDF recognized this phenomenon and utilized and supported these practitioners through strategic placement of staff and resources to these firms to support the actions bubbling up across the region and the country.

The difficulty of working with solo and small firm practitioners in a decentralized manner raises many issues, not the least of which are training and coordination. Technology makes it much easier to accomplish each of these elements.

Training. One of the most difficult challenges for new solo and small firm lawyers is developing the practice and thinking skills to most effectively and efficiently represent their clients. If you begin their education by including opportunities for training while still in law school, you maximize the opportunity for success. First, if a curriculum includes law practice management courses, students begin to understand the business components necessary to support their cause-minded choice of clients. Further, by providing substantive courses in the areas that they are interested in pursuing, their legal education maximizes the possibilities that they will have the legal tools necessary to be creative co-producers of legal and social transformative work. Both of these components should be anchored in a deep and thorough appreciation of the technological uses that support practice and theoretical inquiry. This should include both the strengths and weaknesses of using technology.

Once practicing, linking with a local, regional, and national network of like-minded attorneys provides the opportunity to participate in a "virtual" firm that can provide mentoring, referrals, products, and personal support. These elements are critical to the successful practice of law and were clearly part of the successful strategy provided by the LDF for its cooperating attorneys. It is also possible for law schools to offer continuing legal education to the network members so that they can learn how to take on new matters, and work with older attorneys to monitor the work that is accomplished.

Coordination. For all cause lawyers, there is the desire to have the work done on any individual matter add up to more, and to be part of something more. This desire manifested itself in the "public interest law practice" during the late 1960s and 1970s (Becker, 1981, p. 1436). "Public interest lawyers made important contributions to civil liberties, civil rights, environmental and consumer protection law ... however, the fragility of public interest practice became startlingly apparent" (*ibid.*, p. 1437). Public interest

lawyers and organizations were criticized for provoking legal controversies when clients have not requested assistance, and "exploit[ing] the fact that their clients often lack the resources and skills needed to express their preference or to voice their complaints effectively," and "serve the financial supporters to the detriment of their client group" (*ibid.*, pp. 1438–1439). Suffice it to say, this was not a co-productive mode of legal representation and had some negative consequences in both the media coverage and in the minds of some clients.

But having a group of lawyers focused on the often complex legal needs of a client group provided a service that is difficult for those who are oppressed to access:

> This is the kind of legal resources that corporations enjoy. … 'the qualitative different type of assistance they receive gives them an advantage over people without ongoing assistance in the exploitation of all types of legal goods … they have a more accurate understanding of which actions will result in legal penalties … make more innovative demands on the legal system … alter their behavior to exploit particular legal benefits and protections … .' (*ibid.*, p. 1446)

Lawyers within those organizations also develop deep relationships and norms that actually effect the expenditure of legal resources, the decisions about the basic structure of the use of the legal resources, and the strategies for accomplishing the clients' goals.

Centralized public interest firms most closely mirrored this model. "In order to represent their client groups effectively, public interest lawyers must try to provide the same type of continuous assistance that corporate counsel provide to their clients" (*ibid.*, p. 1449). But there were challenges for the public interest lawyers: solicitation, continuous contact, an instrumental attitude (how can legal assistance advance the interests of the clients), a critical perspective and client education (*ibid.*, pp. 1450–1452).

Creating a national network of solo and small firm attorneys that are committed to increasing access to justice solves some of the problems identified with the public interest lawyers of the 1960s and 1970s. The solo and small firm practitioner is anchored somewhere in between. They serve the community in which they sit, or are networked with lawyers and groups who refer matters. Linking those practitioners with the resources of law schools that are actively engaged in developing effective and creative legal theories and strategies allows those practitioners access to both a community of like-minded attorneys and a bank of knowledge. By further linking this work nationally, it is possible to see larger trends in the law and link attorneys with activists and thinkers to create and co-produce comprehensive strategies of response to what might have appeared to be individual problems.

THE LAW SCHOOL CONSORTIUM PROJECT – A MODEL OF ORGANIZATION FOR SOLO AND SMALL FIRM CAUSE LAWYERS IN THE 21ST CENTURY?

In 1996, the Open Society Institute (OSI) funded the LSCP in response to an application from four law schools: the University of Maryland School of Law in Baltimore, Maryland; City University of New York in Flushing, New York; Northeastern University in Boston, MA; and St. Mary's Law School in San Antonio, TX. The Project was to address two identified needs: (1) post graduate support for solo and small firm practitioners who included increasing access to justice as part of their core mission (the longitudinal law school model) and (2) creating recognition and support for the role of solo and small firm practitioners in the legal service delivery system within the academy. Each school was to develop an implementation model, and together the four schools would begin to engage other law schools on a national level about their findings and their work. The grant provided three years of core funding for the local projects, and some funding for the coordination of the four projects.

Within a year, St. Mary's experienced a thorough and deep leadership shift and withdrew from the project. The three remaining schools held to the task and have developed three distinct models. With additional funding from OSI, they developed a national office and national work. The LSCP now includes 17-member law schools which have developed or are developing projects in their schools.

First, I will describe the models used by the founding schools and the national work, then I will look at why this project is an important addition to both the way we conceive of cause lawyering and to the capacity to deliver legal services to those who stand up for their rights, including those who coordinate their efforts in movements.

The University of Maryland School of Law (UM): UM's initial idea was to create a model law office that would be the center of the work of what is now Civil Justice, Inc., the non-profit organization created to house the work of the Maryland model. Initially, this office was located in the Baltimore Park Heights community, which was hard hit by disinvestment and drugs. Coordinating the work with more than one of the clinical opportunities at Maryland, the office opened with two staff people in 1999.

The Maryland model was to develop a network of solo and small firm practitioners who would be mentored by the Executive Director, an experienced general practitioner, who would also run this small firm and take

cases from the community. Some of the matters would be co-counseled with network members, some of them would be handled by Civil Justice itself, and some would be referred to either network members or other legal services providers. This demonstration office would model best practices and be available as well for network practitioners should they need to use office space, the conference room or other facilities.

This office was open for about two years. At that point, the project summed up that the office needed to be closer to the school, to deepen the relationships and strengthen the second part of the mission of the project. The Executive Director began teaching a law practice management course at UM in 2001. In 2002, UM began exploring ways that the General Practice Clinic could coordinate more directly with the network members.

Currently, the Civil Justice Network consists of over 70 network members. Over 50% of these members represent women or minority-owned businesses. There is an active list serve where practitioners share their knowledge with each other, ranging from reasonable costs of copying machines to information about practicing in a particular court to sample pleadings in practice areas. The network meets quarterly to support each other and learn about new practice areas as well as practice management. The network is making about 15 referrals a week to practitioners who take many matters on a pro bono and "low bono" basis.

City University of New York Law School (CUNY): Another of the founding members of the LSCP, CUNY has developed a model that sits inside the law school and is even more integrated into the core curriculum of the school. It is not separately incorporated, but now has several staff members supporting and working within the project. It is called Community Law Related Network (CLRN).

The CUNY network includes approximately 150 graduates. Members participate in one or more of five practice groups: Family Law, Immigration Law, General Practice, General Practice II, or Economic Development. Practice Groups meet every two to three weeks. They are initially part of a practice group that includes practitioners and students and receive intensive training and support. This training lasts up to a year and includes technical, moral and substantive support in opening and developing their law practices. The law school effectively acts as an incubator for solo and small firm practitioners. Upon "graduation," the attorneys become general members of the CUNY network, are on the listserve, and are invited to participate in trainings and other events. Clients are referred and opportunities for support and contracts with community organizations are developed and nurtured by the staff (Law School Consortium Project, 2004, website).

Northeastern School of Law (NE): The last founding member that continues in the LSCP, NE has had the most difficulty in finding the model that works for them on a sustained basis. NE initially decided to focus on two practice areas that were very strong within their clinical program: Domestic Violence and Community Economic Development. The Northeastern models were structured to examine how solo and small firm lawyers can sustain economically viable practices which promote community economic development and prevent family violence by working with non-legal community organizations and other institutions. These models were interdisciplinary in their conception and specialized in their practice (Law School Consortium Project, 2004, website). In summing up their experience, they have moved back to a more legally centered model, replicating the CUNY model with in-house legal clinics that draw on the network members that are trained. Students and practicing attorneys together work through legal issues and strategies, and they work jointly on some representation, some of it inside the law school and some in network members' offices.

THE NATIONAL CONSORTIUM

In 2002 a Consortium Director was hired. The hiring of this key person has been critical to help give identity and form to the national effort, turning this into a national endeavor rather than a localized experiment for law schools to better reach their graduates. There is also a national support person for the network and, when finances allow, an administrative staff person. These staff people are building the national infrastructure, both through computer networks and direct relationships, and are helping the national board clarify the vision and strategy for the national office and network that is different from the work of the local network members. They have worked with members to begin to develop law practice management curricula, receive low-cost services and training, and link members to each other to begin larger discussions. They are working to develop and share litigation modules, particularly in practice areas with federal jurisdiction like immigration, where the work of one member network group can be applied and used nationally. They are also working with law schools nationally to "open the conversation" about the role of the solo and small firm practitioners in the legal services delivery model. They are providing both a reality check (only 10% of grads of law schools end up in a big firm practice), and a vision of how schools can inspire and work with their grads who are committed to public interest. As Sarat and Scheingold reveal "… it

seems that is those with grand visions of what law and lawyers should and can do on behalf of social justice who are most likely to abandon cause lawyering …'' (Sarat & Scheingold, 2004, p. 69). Law schools now have an opportunity to provide space and support for students who reject the premise that ''… thinking like a lawyer requires that students substitute an allegedly objective, precise and rational mode of thought for value-laden, emotional and politically driven habits of mind'' (*ibid.*, p. 60).

The LSCP currently has a national advisory board with representation from member schools (including two deans), national legal service delivery organizations, successful and senior solo and small firm practitioners that have made key decisions about how to shape their practices to provide support for and participate in legal service delivery for justice initiatives and social movements, and key individuals who have worked in and around cause lawyering during their careers.

CONCLUSION

The most successful social movements of our time have been those for the protection of individual rights and for integration and the reduction of barriers to inclusion for African Americans in our country. While it is also obvious that there is much left to do in both of these areas, great strides have been made in the last 100 years in transforming our society and securing rights both through the implementation of laws and the transformation of our culture. Battles have been waged in the streets, in the courts, in the classrooms and journals, in the community, and over the dinner tables of millions of Americans. These issues have been, and continue to be, central to our understanding of democracy. The organizations that have been at the center of these movements have been the NAACP, and the LDF. There are several key elements to their success that can be summed up through an examination of their policies and practices: (1) they have a central staff that thinks about the issues in a thorough and broad way; (2) they have a network of attorneys that are based in communities all over the country; (3) the national offices, local, and regional offices work co-productively with the network attorneys and citizens to strategize and implement those strategies in courts, legislatures, and communities around the country; (4) there is attention paid to the economic viability of the network members through training and stipends to take and develop legal cases and strategies; and (5) there is an on-going and deep connection with the resources of law schools that help to think systematically about the training and legal theory

development needed to support new lawyers as well as provide mentoring and support for those lawyers in the field.

While the 1960s and 1970s saw the development of the public interest law firm that was centralized and supported by foundations, these organizations have more and more challenges in staying the course. They have been challenged as neither representative of the clients nor client centered in their approach, driven by funders rather that movements, and working in the interests of the lawyers who dedicate their lives to the cause rather than the clients who are affected by the policies. Their agendas have become limited by the amount of funding that is available, and as foundations trim their giving, the ability of a centralized vehicle is challenged. We can learn great lessons about the power of having a think-tank of sorts, but we can also see the limitations of reach, as the work is almost exclusively legal, and removed from the movements vying for the hearts and minds of our citizens.

The limitation of solo and small firm practitioners who are cause lawyers are several. First, they are at the mercy of the market – they make a living by selling their services. Today, that generally means developing a specialization, but the general practitioner does still exist. The second limitation is driven by the isolation of a small or solo practice. There is no backup, so the number of hours required to accomplish all the areas of a good practice are large. They must learn to be business people (not generally taught in law school) as well as learn the practice of law. They generally balance and juggle family, court schedules, administrative duties, and other professional and personal commitments. As a result, the opportunities for higher-level thinking and analysis are limited. The constraints of the day-to-day practice make theorizing difficult.

Technology, as we have seen, turns some of the challenges of small and solo firm practice into opportunities for entrepreneurial social movement organizations. Law schools and the LSCP have an opportunity to be leaders in this moment. By combining the resources of law schools, local networks of like-minded attorneys, goals for "doing good," and a national network of resources and inspiration, it is possible to create a virtual firm that both supports and inspires solo and small firms to take their activities to the next level.

> This case study suggests a number of reasons why cause lawyers are made and not born – that is, born with a specific role to play as they participate in movements against social injustices. Cause lawyering is something that you learn how to do: it works in unison with something that you experience, envision, and practice, acting through various strategies and with integrity. Cause lawyers develop and strengthen their skills and legal and political techniques over time, which enable them to engage in social causes, and in some cases, with specific objectives as a consequence of their indigenous experience,

> concerns, and being … Thus, although larger social and structural conditions may affect why and how lawyers become involved with social movements for change, their socialization process, experience, and vision play a vital role while specific reasons might influence their involvement in a social cause. (Porter, 1998, p. 173)

I would assert that social movements emerge as the connective tissue as like-minded cause lawyers join with the clients in a co-productive process of giving voice and definition to the injustice, strategizing for the legal and non-legal responses to the injustice and implementing and evaluating that strategy. With law schools providing the space and support, solo and small firm lawyers supporting each other, and networks to support and train, it seems eminently possible for solo and small firm lawyers to be able to participate in social movements in a more efficient and helpful way.

But can they anchor such movements? If technology can act as a vehicle by which lawyers and non-lawyers can become co-producers of strategy and tactics, then there is the potential for lawyers to become anchors. Their understanding of the systems of justice and the lack thereof can become critical and helpful in a fast-paced and non-linear conversation about the issues that are core to the movement at hand. Whether we can create and link solo and small firm lawyers to such microsites that create spaces for this dialogue is not yet known. Certainly, if the political activity of 2003 and 2004 is an indication, there will be plenty of "places" (virtual though they may be) where these conversations will take place. If there is access to the conversation and resources, support and training of a national network of like-minded solo and small firm practitioners, it may well be possible that they can assume a new significance in stabilizing and serving the emerging social movements of our new century. We must convince new public interest-oriented law students that this is a viable form of cause-driven practice, and then we must train and support them.

Co-production and problem-solving methods of work make lawyers part of the team to craft both the vision and the solution, participating in each as she might see fit. Co-producing and problem-solving outlooks linked with the power of technology make it possible for solo and small firm practitioners to join forces with people everywhere to think about problems and solutions in a new way. Virtual law firms make designing legal strategies and implementation mechanisms more effective and efficient, and cause lawyers can feel part of something larger than themselves in a sustained and real way. This empowerment and linkage makes the practice of law on behalf of those who are "… reconstructing legal dimensions of inherited social relations, either by turning official but ignored legal norms against existing practices, by remaining shared norms in new transformative ways or by

importing legal norms from some other realm of social relations into the context of the dispute'' (McCann, 2004, p. 510) into a natural, possible, and accessible option for every law student leaving law school. This network makes the potential pool of lawyers interested in lawyering for social movements much larger and more vital. It makes it possible for people striving for justice to access the skills and training of lawyers as an integral part of the movement more attainable. This linkage has the potential for powerful alliances that may, in fact, become critical anchors in turbulent legal times.

NOTES

1. The term ''low bono'' refers to the pricing structure, whereby attorneys work out a payment schedule with clients taking into account both the costs of the services, the clients' ability to pay, and options that include installments, unbundling of services, and ability of the attorney to subsidize. I have even heard of some use of informal ''time dollars'' and bartering for other goods and services.
2. I use issue and cause as interchangeable here. Issue organizations and causes are both subsumed within the previous discussion of causes and social movements.
3. The ACLU also has developed an extensive network of cooperating attorneys that work to implement a legal strategy that is consistent with their focus on ''battling restriction on the autonomy of the individual – threats to freedom of speech, religion and association, and governmental indifference to procedural due process'' (*ibid.*, p. 220). Because the organization litigates through local and statewide chapters who choose which cases to accept, and the highly reactive nature of the work, the organization has not developed a planned litigation strategy. Much of the work of the organization is done by cooperating attorneys, and much of the success of the organization has rested on its ability to capture the pro bono hours of the large firms. It has not reached out to the many solo and small firm practitioners available, and does not provide financial support for the cooperating attorneys unless there are awards of attorney fees.

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