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# CULTURALLY SIGNIFICANT SPEECH: LAW, COURTS, SOCIETY, AND RACIAL EQUITY

Larry Catá Backer\*

The University of Arkansas at Little Rock is engaged in a great mission. In the form of the Alzheimer Symposium on Racial Equity in the Twenty-first Century, this mission has brought us all together, each of us dedicated to the concept that we can and should be actively seeking new ideas in our quest for racial justice.<sup>1</sup> We each come, bringing with us our ideas and visions for balancing racial justice.

I here bring you my vision. My perspective is cultural. I engage the cultural foundations of race and language. I look to why we must *speak* race as we do now, and the means through which we can change our *speaking*—and mean it. For this purpose, my perspective focuses on the cultural substructure of law and difference. I will draw on that primal source of Western norms—the Bible—to elicit some lessons for modern America on the mutability of sameness and difference. I will speak to the possibility of justice within difference in a land in which people cling fiercely to their difference in order to create hierarchies among and between them.

For this exercise, the story of the Tower of Babel will be my guide:

And the whole earth was of one language, and of one kind of words. And it came to pass, as they journeyed towards the east, that they found a plain in the land of Shinar, and they dwelt there. And they said to one another: Come let us make bricks, and burn them thoroughly. And thus the brick served them for stone, and slime served them for mortar. And they said: Come, let us build us a city, and a tower, the top of which may reach unto heaven; and let us make ourselves a name, lest we be scattered abroad upon the face of the whole earth. And the Lord came down to see the city and the tower which the children of man were building. And the Lord said: Behold, it is one people, and they have all one language, and this is the first thing they undertake to do; and now shall they not be restrained in all which they propose to do? Come, let us go down, and confound there their

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1. As the announcement of the Alzheimer Symposium explains:

As we look to the 21st Century there are few issues as significant as the need for racial equity. The steps necessary to achieve racial equity can only be taken through innovative thought and discussion. The Alzheimer Symposium on Racial Equity in the 21st Century will focus on new ideas in the area of racial equity. This theme had its genesis in the President's Race Initiative and his effort to initiate dialogue to further the search for new ideas in this critical area.

THE BEN J. ALZHEIMER SYMPOSIUM: RACIAL EQUITY IN THE TWENTY-FIRST CENTURY.

language, that they may not understand one another's speech. So the Lord scattered them abroad from there over the face of the whole earth; and they left off to build the city. Therefore is the name of it called Babel, because the Lord did there confound the language of all the earth; and from there did the Lord scatter them abroad over the face of all of the earth.<sup>2</sup>

The story of the Tower of Babel is a gateway through which we can come to understand the fundamental and divinely inspired nature of difference. Difference is punishment imposed on a previously undifferentiated humankind by a power outside of humanity. This punishment was, for us in the West, an act of God, not something humankind sought for itself. Difference was the mechanism for dispersing humankind—*et unum pluribus*. Ironically, the dispersing, the creation of difference at the very root of Western thought—was done by the hand which had originally created humankind “of one language.”<sup>3</sup>

This confounding of language serves as the basis of the Western understanding of the origin of differences, and of barriers, between *groups of people*. Thus, though it deals literally only with language, this Biblical passage truly embraces all categories which cause difference between people. “[L]anguage, culture and nationality are highly linked. Culture is transmitted through the parent's language, language is the carrier of cultural ideology and cultural symbols, and language is a powerful symbol of culture.”<sup>4</sup> I am reminded of the Turkish singer, Ahmet Kaya, who was the most popular singer in Turkey for a time. At an awards ceremony held in part to honor him by Turkey's Magazine Journalist Association, he announced that henceforth he would sing only in Kurdish, the language of the people he considered his own. He would abandon his adopted language, Turkish. The result was both harsh and immediate. He was pelted with knives and silverware by all present at the awards and had to be escorted out by the police. He will be erased from the Turkish popular consciousness.<sup>5</sup>

2. *Genesis* 11:1-9.

3. *Genesis* 11:1.

4. SYLVIA R. LAZOS VARGAS, DECONSTRUCTING HOMO[GENEOUS] AMERICANUS: THE WHITE ETHNIC IMMIGRANT NARRATIVE AND ITS EXCLUSIONARY EFFECT 1493, 1581 (1998) (citing generally, among others, RALPH FASOLD, THE SOCIOLINGUISTICS OF SOCIETY 147-179 (1984) and EDWARD T. HALL, THE SILENT LANGUAGE 45-50 (1990)).

5. For a discussion of this story, see, for example, *Headline: Hour 1: Kurds Living in Turkey Hope to Be Able to Celebrate Their Culture, Which Has Long Been Outlawed* (National Public Radio (NPR): broadcast Feb. 23, 1999):

At a posh Istanbul hotel earlier this month, Turkey's Magazine Journalists Association(ph) held its annual entertainment awards dinner. Most popular singer of the year went to Ahmet Kaya, an established star with a trimmed beard and intense gaze who accepted his award with a shocking announcement. From now on, he would no longer sing in Turkish but in Kurdish, the mother tongue he'd long

Language is also racialized; language remains a strong proxy for race.<sup>6</sup> Language, as such, is deemed to mark the bodies of its speakers with distinctive physical characteristics. The connection between race and language is strong worldwide.

Indeed, the Bible is an inspired and extended discussion of difference, its dangers, benefits, consequences, tragedy and necessity. Consider the first words, words of separation, uttered by God: *Fiat Lux*—Let there be light.<sup>7</sup> “And God *divided* between the light and the darkness.”<sup>8</sup> Much of the beginning of *Genesis* is concerned with separation, and the consequence thereof for humankind—birth,<sup>9</sup> death,<sup>10</sup> dominion,<sup>11</sup> labor,<sup>12</sup> murder,<sup>13</sup>

suppressed.

Mr. AHMET KAYA (Singer): (Foreign language spoken)

LUDDEN: I have defended the indivisible unity of this country for years, he said, but this government must accept and recognize Kurdish reality. Suddenly, Kaya was under siege at his white linen-covered table. The room erupted as other artists grabbed their silverware and pelted Kaya with knives. Police moved in to protect him. As they whisked Kaya out a back door, the crowd rose to belt out a nationalist marching song.

*Id.*

6. Indeed, it was not so long ago that we in the West would speak, unconsciously of its significance, of the English or Italian or Polish “race.” Consider the richness, symbolism and cultural signals in so-called “Black English” and the resulting furor over its teaching. This latest furor arose after the Oakland California school board proposed that its teachers be trained in ebonics as part of a larger set of recommendations to improve student performance in the school district. See, e.g., Peter Applebome, *Dispute over Ebonics Reflects a Volatile Mix That Roils Urban Education*, N.Y. TIMES, Mar. 1, 1997, at A1. Some have ascribed core cultural links between language and identity. See, e.g., MOLEFI KETE ASANTE, THE AFROCENTRIC IDEA 35 (1987). Some linguists assert that Ebonics is “a legitimate language system featuring highly complex grammar and syntax that can be identified as originating from Africa and the Caribbean.” Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice into “Just Us” System*, 13 HARV. BLACKLETTER J. 1, 11 n.58 (1997). See also Jill Gaudling, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J. L. REFORM. 637 (1998), but see SHELBY STEELE, THE CONTENT OF OUR CHARACTERS: A NEW VISION OF RACE IN AMERICA (1991) (critiquing the idea that part of the essence of being Black in America is Black English).

7. See *Genesis* 1:3.

8. *Genesis* 1:4.

9. See *Genesis* 3:16 (“Unto the woman He said, ‘I will greatly multiply thy pain and thy travail; in pain thou shalt bring forth children . . .’”).

10. See *Genesis* 4:8. It is interesting that the first death recorded in the Bible is that of Abel, killed by the hand of his brother out of jealousy for Abel having found favor before God. The pronouncement of the mortality of humankind remained unfulfilled until the death of Abel. See *Genesis* 3:19 (“In the sweat of thy face shalt thou eat bread, til thou return to the ground, for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.”). See also *Genesis* 6:3 (“My spirit shall not always strive in me for the sake of man, for that he is but flesh; and his days shall be a hundred and twenty years.”).

11. See *Genesis* 1:26-28

And God said, Let us make man in our image, after our likeness; and they shall have dominion over the fish of the sea, and over the fowl of the heaven, and over the

alienation.<sup>14</sup> The Bible does provide faint hope against the scattering of Babel. We are blessed with the story of Esther and the story of Ruth. Yet the Ruth story provides powerful cultural support both for separation and assimilation,<sup>15</sup> and the Esther story suggests that in a society made up of different groups, the disadvantaged group is always in danger of assimilation or annihilation.<sup>16</sup>

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cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. And God created man in his image, in the image of God created He him; male and female created He them. And God blessed them, and God said unto them: Ye shall be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea, and over the fowl of the heaven, and over every living thing that moveth upon the earth.”).

*Id.* See also *Genesis* 3:16 (“Unto the woman He said: . . . and thy desire shall be to thy husband, and he shall rule over thee.”).

12. See *Genesis* 3:17-19 (“Because you have listened to the voice of your wife, and have eaten of the tree of which I commanded you, ‘You shall not eat of it,’ cursed is the ground because of you; in toil you shall eat of it all the days of your life.”).

13. See *Genesis* 4:1-16 (telling the story of Cain and Abel).

14. There is an abundance of alienation in the Bible; alienation poses the most significant problem in both the Hebrew and Christian versions of *Logos*. The beginning of course, is the action which Christians regard as original sin—the knowledge of good and evil. Its first incarnation was shame, *Genesis* 3:7 (“and they knew they were naked”); its second was murder, *Genesis* 4:8, and its third was impiety or the turning away from God, *Genesis* 4:26.

15. The story is recounted in the Book of Ruth. Naomi, her husband Elimelech and her sons settled in Moab to avoid a famine in Judah. After Elimelech died, Naomi’s sons each took a Moabite wife, one was Orpah and the other was Ruth. Both sons died and Naomi decided to go back to Judah with her daughters in law. See *Ruth* 1:1-5. Naomi, however, urged her daughters in law to return to their families. Orpah finally obeyed. See *Ruth* 1:14. But Ruth would not return. Naomi tried again to convince Ruth to return to her Moabite family:

And she said, “See, your sister-in-law has gone back to her people and to her gods; return after your sister-in-law.” But Ruth said, “Entreat me not to leave you or to return from following you; for where you go I will go, and where you lodge I will lodge; your people shall be my people, and your God my God; where you die I will die, and there will I be buried.”

*Ruth* 1:15-16. Ruth’s speech to Naomi is pregnant with the essence of modern notions of assimilation as a necessary corollary to immigration. It became plausible for Ruth to follow Naomi back to Judah only after she renounced her home culture.

16. The story of Esther is at the heart of the Jewish holiday of Purim. The story is recounted in the Book of Esther. Esther, a Jewish woman concealing her identity, was chosen to be the queen of the Persian King Ahasuerus. The King loved her dearly. Haman, the king’s chief minister, induced the King to command the murder of all of the Jews in Persia. “There is a certain people scattered abroad and dispersed among the peoples in all the provinces of your kingdom; their laws are different from those of every other people, and they do not keep the king’s laws, so that it is not for the king’s profit to tolerate them.” *Esther* 3:8. In order to prevent this destruction, Esther revealed herself to the King. Rather than permit the murder of his favorite consort, he ordered the execution of Haman. What makes the story timely is the lesson hidden by the happy occurrence of the deliverance. People who are deemed different can easily be smeared as enemies of the state. Worse, difference makes it easier to order the destruction of those who are different. But for the fortuity of a strategic marriage, the Jews would have been destroyed.

Yet more ironically still, God has not commanded a particular hierarchy of difference from the confounding of language and the scattering of human kind all over the earth. All humans remained equal to each other before and after the scattering. But humankind, it seems, has taken it upon itself to compound the Divine punishment by creating hierarchy out of difference.<sup>17</sup> The scattering of humankind has caused humans to attempt to find a reason for the scattering beyond the building of the Tower. Rather than consider the *hubris* of the building and the reaching toward heaven reason enough, humankind has sought to justify linguistic separation in judgments about the relative merits of the people thus scattered by act of the Divine. In that misinterpretation lies a great tragedy of humankind since the great scattering. For what humankind has created are societies which justify themselves and their scattering on the basis of the belief that what makes them different from others, and the same within their group, is *good*, and what makes others different is *bad*. Groups base their social, political and economic ordering on this basic judgment. It becomes the cultural common sense on which societies are built—all societies, not just this white European one.<sup>18</sup> Perhaps humans

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The negative implications of the story of Esther continue to haunt us. The notion of homogeneity as the basis of a nation state under international law continues to be articulated by European courts. See, e.g., J.H.H. Weiler, *Does Europe Need a Constitution: Reflections on Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995). For a discussion of the persistence of notions of homogeneity in the constructions of nations, see, for example, Vivian Grosswald Curran, *Herder and the Holocaust: A Debate About Difference and Determinism in the Context of Comparative Law*, in *THE HOLOCAUST: ART, POLITICS, LAW, EDUCATION* (Frederick De Coste ed., forthcoming 1999).

17. Social scientists have begun to study the way in which any group, no matter how arbitrary its creation, results in dominance and hegemony. See HENRI TAFJEL, *HUMAN GROUPS AND SOCIAL CATEGORIES* (1981); DAVID A. FUNK, *GROUP DYNAMIC LAW: INTEGRATING CONSTITUTIVE CONTRACT INSTITUTIONS* (1982). For a particular study see Henri Tajfel & J. Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 38 (W. Austin & S. Worchel eds., 1979). On the dynamics within groups, see, for example, Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49 (1971).

18. Antonio Gramsci is credited with the popularization of the understanding of this notion from the perspective of politics. He bases his notion of hegemony on the idea that social and caste orderings, and the dominance that springs from that, are embedded in the common system of beliefs of the population as its "common sense." See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Q. Hoare & G. Smith trans., 1971). Mainstream political science has come to accept the importance of this cultural notion of hegemony. In trying to explain the basis on which Germany could so easily construct a racialized caste society, and then use these racial core beliefs to first disadvantage and then murder, the dominated racial caste, Daniel Goldhagen explained that:

A powerful way to conceive of the cognitive, cultural, and even, in part, the political life of a society is as a conversation . . . . When a conversation is monolithic or close to monolithic on certain points—and this includes the unstated, underlying cognitive models—then a society's members automatically incorporate its features into the organization of their minds, into the fundamental axioms that they use

did not eat enough of the Tree of the Knowledge of Good and Evil.<sup>19</sup> Irony upon irony is piled onto the story of Babel. And yet we cannot help but continue to participate in the folly.<sup>20</sup>

My point is simple: humankind understands the world only as a function of difference. The Biblical basis of our language is difference. The first words uttered by humans were words of naming, and thus, of cataloging and separating.<sup>21</sup> It should be no surprise, then, that this initial action by humankind, prodded as it was by our Creator, should leak into every crevice of human perception. Race and ethnicity, like language and religion, have proven to be among the most persistent and significant markers of difference.

Consciousness of difference is, in its primal nature, a violent act of separation. This consciousness permits us to construct barriers equal to the importance we place on the preservation of the difference. Difference is not necessarily created by those who wish to construct themselves—it is also imposed on others.<sup>22</sup> Only emotive connection exists after separation, and within the ambit of racial connection, those emotions tend to be harsh, punitive, self-defensive, and negative. Difference as a cultural perception—that is the basis on which norms are built. Law is created to express and enforce these norms. Norms function in part to preserve and celebrate difference. Dominant groups impose preferences for themselves and those traits which separate themselves from others within the fabric of the society constructed in the land they control.<sup>23</sup> Perversely, then, race privileging is the

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(consciously or unconsciously) in perceiving, understanding, analyzing, and responding to all social phenomena . . . because that is all that is available for a developing mind to draw on.

DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 33-34 (1996).

19. That story, and the punishment for the feast, the expulsion from Eden, is recounted in *Genesis* 3:1-24.

20. For an interesting and provocative reading of the story of the tower of Babel, see HAROLD BLOOM, *THE BOOK OF J* 191-192 (David Rosenberg trans., 1990).

21. "And the Lord God had formed out of the ground every beast of the field, and every fowl of the heaven, and He brought them unto the man to see what he would call them; and whatsoever the man would call every living creature, that should be its name." *Genesis* 2:19.

22. Cf. Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 20 ISRAEL YEARBOOK ON HUMAN RIGHTS 243 (1990).

23. Critical race theorists have begun to examine the nature of this control in American racial structuring. See, e.g., Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 775-76 (1997) (discussing the need to dismantle the structures of racism); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the existence, nature, and effects of unconscious racism); RUTH FRANKENBERG, *RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996). What critical race theorists and others who consider this privileging fail to note is that this tendency is universal. Any dominant group, in

ultimate celebration of difference by dominant groups in the territories they control. It is also the ultimate self-punishment for a humanity which insists on imposing (false) hierarchy and divining hyper-difference from the original linguistic separation.

Humankind deals with difference in four culturally significant ways when two or more self-differentiating groups share the same physical space. Three of the methods—separation, annihilation, and assimilation—have led to tremendous suffering, and are grounded in notions of group hierarchy. Each requires a society which believes so strongly in its superiority based on those characteristics which distinguish it from other groups, that its relationships with others are guided principally by this sense of hierarchy. When coupled with the need for group self-preservation, and a fear of “corruption,” these methods can be used to justify any action by the stronger group against the weaker. Even when the weaker group is not eliminated, entirely, separation, annihilation, and assimilation can work to exacerbate hierarchy. Each can also work to diminish difference by eliminating those who are different; at least to the extent that the difference is disturbing.

The fourth method of group interrelation is grounded in the redefinition of difference to cultural insignificance. This is the only manner of intergroup interaction which offers hope in the context of group co-existence within a single political space in the context of difference. The redefinition of the context of difference can bring us face to face with the culturally significant possibility of *Logos*<sup>24</sup>—the promise that beyond human difference is a universal means of communicating above difference, of communion. *Logos*

any land they control, will weave the fabric of society to affirm the predominance of that group. This weaving necessarily requires the creation of precedence for those traits which make the controlling group different. For historical examples of this practice, see, for example, Christie Davies, *Religious Boundaries and Sexual Morality*, 6 ANN. REV. SOC. SCI. OF RELIGION 45 (1983) (describing the ways in which difference was preserved within the social and legal structure especially in times of political crisis using three historical examples).

24. *Logos*, of course, refers to the divine unity. “In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God; all things were made through him, and without him was not anything made that was made.” *John* 1:1-3. From the perspective of cultural significance here is set forth the divine and redemptive power of a single language, a language taken from humankind and reserved for God from the time of Babel. The unity of language is to be restored to humanity through divine intervention. Perhaps the notion of language in this guise can be related to the Christian concept of grace.

Some Protestant commentators have tied the Stoic notion of *Logos* to the Book of Wisdom as well. They note that the Stoic concept of the *Logos* (literally, “word”; here “reason”) which is at once the divine reason within man, enabling him to acquire knowledge of the physical constitution of the world and its ways (*Wisdom* 7:15 ff) and guiding him in his moral life (9:9b-13) and at the same time the principle of coherence immanent in the material universe (1:7; 7:24-27). See G. ERNEST WRIGHT & REGINALD H. FULLER, *THE BOOK OF THE ACTS OF GOD: CONTEMPORARY SCHOLARSHIP INTERPRETS THE BIBLE* 248 (1960).



offers the possibility of recasting difference as a culturally indifferent characteristic. Here I take as culturally significant the characterization of God as language—that is the *singular* language which we can all speak, should we be graced with the transcending spirit of the divine. This singular, transcending language puts in perspective the smallness, the fallibility, the very human limitations of multiple languages, and of difference, that is, of our cultural Babel. This is not necessarily a purely Christian notion and limited as such, though I speak of this contrast of language using substantially Christian terms and imagery.<sup>25</sup> Instead, the imagery of *Logos* correctly suggests that above difference, above Babel, there is a singular language available to us all and which treats as indifferent but not as invisible the differences which make us all collectively human.

What follows suggests the ways in which by engaging in culturally significant speech, humankind can speak to each other while acknowledging and respecting the differences among us. I will briefly discuss difference in the context of separation, annihilation and assimilation. I will concentrate on culturally significant redefinition.

In traditional society, difference was a problem relating only to foreigners—barbarians in both the eastern and western senses of the term.<sup>26</sup> “The ultimate onomatopoeia is ‘barbarian,’ which is based on the sound that Greeks thought foreigners made when they talked.”<sup>27</sup> Citizenship, or membership implied a belonging. Difference meant foreign, not of the group, and the rules applicable to the group need not be applied to the foreigner. But

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25. Christian imagery, and its insinuation into the bones of Western culture, is extremely rich. I do not suggest that I have exhausted the cultural possibilities of the Bible with my discussion. Thus, for example, the notion of the cultural meta-language resonates for some as *Pentecost* or as *grace*. There are others. I leave the richness of this analysis to another time.

26.

It had been well-noted that in ancient Greek and Latin, the terms for “barbarian,” “stranger,” and “enemy” were originally synonymous. Aristotle could write, after all, that strangers were slaves by nature and could be hunted down like beasts. And yet, in the same pages of his tract, Aristotle could recite no less than three instances in which foreigners were asked to restore law and order to Greek city-States wracked by civil disturbance.

David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis*, 10 EMORY INT'L L. REV. 1, 11 (1996). “Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians.” KARL LLEWELLYN, *THE BRAMBLE BUSH* 40 (4th ed. 1973) (1930). Even non-Westerners may be Greeks. “Chinese sources originally referred to the Europeans as ‘South Sea Barbarians,’ for that was the direction from which their ships had approached the Chinese coast.” Piero Tozzi, *Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?*, 64 FORDHAM L. REV. 1193 & n.98 (1995) (citing ARNOLD J. TOYNBEE, *CIVILIZATION ON TRIAL* 73 (1948)).

27. James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987 & n.67 (1990).

political society in the West, at least, was quickly confounded by the problem of *imperium*—how do you incorporate the foreign, the different, within a single political system. The early answer was simple—murder the men, take the women and children and incorporate them within the group.<sup>28</sup> Ethnic cleansing has been with the world for a long time. It has an honorable history all over the world and among all of its people, however low we may view any of them in the global hierarchy of difference.

A more contemporary answer is to assimilate the different. We can undo Babel by requiring those within a group entering the power of another to shed their difference to the extent that the controlling group deems the difference dangerous. The Official English movement in the United States, the Official French laws in Francophone Canada and France, the use of Official Castilian Spanish in Latin America each bespeaks this sort of assimilation.<sup>29</sup> Assimilation of difference is not limited to language, of course, nor merely the language spoken. It pierces every aspect of culture.<sup>30</sup> The failure to assimilate

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28. The Roman story of the rape of the Sabine women is well known in the West. It was not uncommon for European men to take native women as wives or concubines in French, English, and Spanish America. To a greater or lesser extent, the product of these unions would be incorporated into the dominant group. On modern manifestations of this process and its discontents, see, for example, Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classifications in an Era of Color Blind Jurisprudence*, 57 MD. L. REV. 97 (1998). Some people have suggested an analogous disciplining of the African American male population in the United States, pointing to the high rate of incarceration of African-American and Latino males. See, e.g., JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (1996). Others have suggested that the immigration system is used in a similar way against people of color, making it difficult for entry into the United States. See Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 165 (1997).

29. Thus, consider the way the problem of multilingualism in the United States is conceptualized in the popular press:

Underlying such changes is a larger, unresolved question about whether the Spanish spoken by Hispanic immigrants will really compete with English over decades to become a second American language, or whether Spanish use will gradually decline as immigrants adapt to their new culture, much as Italian and German faded from U.S. cities earlier this century as the children of immigrants grew up and adopted English.

William Branigin, *Sign of the Times: Amid an Influx of Hispanics, Some Georgia Towns Are Drawing the Line (in English)*, THE WASH. POST WKLY. EDITION, Feb. 15, 1999, at 29.

30. On the assimilationist model in the United States, see, for example, MILTON GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION AND NATIONAL ORIGIN* (1964); NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* (2d ed. 1970); JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION* (1995) (discussing data relating to the way in which Americans construct the "American Dream"); ANDREW GREELY, *ETHNICITY IN THE UNITED STATES: A PRELIMINARY RECONNAISSANCE* 15-34 (1974) (describing assimilation as the dominant paradigm, though

is used to explain the ill effects of difference, for example, the poverty of non-Europeans and poor whites, and policies are constructed to force such assimilation.<sup>31</sup> But this works only to the extent society tolerates the blending of groups.<sup>32</sup> "When believers dominate, when Truth [or Difference] is self-evident and unalterable, nonbelievers will be subordinated or converted. Conversion requires assimilation and conformity . . . and there is no 'freedom' of religion for those who depend on the dominant group for support where the dominant group is convinced that support is needed as a result of the refusal to conform—thus the imperative of assimilation."<sup>33</sup>

In cases where annihilation is not possible or desirable, and where assimilation is uncomfortably incomplete, difference might be overcome by rearranging it. And so is born the hierarchy of difference. Difference is translated into status. Those who dominate must be accorded a deference which accentuates the differences between them and those who are not permitted to be "them" under current understandings of difference. The *dhimmi*<sup>34</sup> of classical Islam, and the Roman conception of citizenship and citizenship rights,<sup>35</sup> are two examples which survive to this day.

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arguing for the importance of ethnicity); but see HOWARD M. KALLEN, *CULTURAL PLURALISM AND THE AMERICAN IDEA: AN ESSAY IN SOCIAL PHILOSOPHY* (1956) (affirming the importance of cultural difference). For a discussion of the assimilationist ideal at work in the area of social policy, see, for example, Larry Catá Backer, *Poor Relief, Welfare Paralysis and Assimilation*, 1996 UTAH L. REV. 1. For a view of the assimilation of sexual difference and the disciplining of sexual non-conformity, see, for example, Larry Catá Backer, *Constructing a 'Homosexual' for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in the United States and British Courts*, 71 TUL. L. REV. 529 (1997). For its effect on racial dialogue within academia especially, see Larry Catá Backer, *Pitied but not Entitled: The Normative Limitations of Scholarship Advocating Change*, 19 W. N. ENG. L. REV. 59 (1997).

31. For an example of this sort of assimilationist discourse in the social welfare policy, see, for example, LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* (1992).

32. "Pegging equality to cultural conformity while withholding the tools and the choice of conformity from African-Americans, liberal racism marked the Black mother, worker and child as essentially unassimilable." GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942*, 120 (1995).

33. Larry Catá Backer, *Poor Relief, Welfare Paralysis and Assimilation*, 1996 UTAH L. REV. 1, 36.

34. For a discussion of how the nature of the relationship between true believers and infidels developed during the classical period of Islam, see ANTOINE FATTAL, *LE STATUT LÉGAL DES NON-MUSULMANS EN PAYS D'ISLAM* (1958). But see ABDULLAHHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW* (1990) (noting the search for Qur'anic justifications for current formulations of international human rights norms).

35. In Republican Rome, "foreigners" were distinguished in part, by their lack of a vote, and a limited right to participate in the political life of the Republic.

As a result, foreign minorities, which made up a considerable section of the population of Rome, were not, as they have been in the United States, a group that could be manipulated in the elections. Groups of Phrygians and Mysians might

Yet, difference is a fluid concept. Race, like language, has been the object of much manipulation. Both sorts of difference evolve. The difference between the conception of language as "foreign" or as mere "dialect" is mirrored in the difference between ethnicity and race. Yet the border between them is fluid over time. Castillian Spanish and Italian were at one time dialects of Latin. Now each is a "language" in its own right. Are "Gallego" or "Mexican" today dialects of Castillian Spanish? Is Black English a dialect or a language?<sup>36</sup>

The evolution of language is mirrored in the evolution of race.<sup>37</sup> Italians, Irish and Norwegians were once thought to belong to different races. Some continue to hold to that view, though it is not now officially accepted by those with authority within dominant society. Today they are all are considered part of the "white" race.<sup>38</sup> Jews, and other "Semites" are considered white (with the exception, perhaps, of the unusual convert).<sup>39</sup> The old taint still exists, however, and even in this century Jews still have sometimes as a race been considered separate and sub-racial. The German experience with racial classification is both the most notorious and most recent example of highly nuanced categorization ostensibly based on racial difference.<sup>40</sup> The Germans,

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shout in the public meeting, and Jews might demonstrate around the tribunal in the Forum, as they apparently did when Cicero defended Flaccus and they did not like the defense, and plenty of men of foreign origin could be recruited from the urban mob to serve in the bands that kept the city in anarchy in the fifties [50's B.C.E.]. But, except under special conditions in the legislative assemblies . . . their votes did not count.

LILY ROSS TAYLOR, *PARTY POLITICS IN THE AGE OF CAESAR* 54 (1949). Modern manifestations of the use of difference to create hierarchies of political rights survive to our own day. See *Romer v. Evans*, 116 S. Ct. 1620 (1996). For a discussion of the use of morality to affirm the right of the people to affect the participatory rights of "others," see Larry Catá Backer, *Reading Entrails: Romer, VMI and the Art of Diving Equal Protection*, 32 *TULSA L.J.* 361 (1997).

36. As late as the 1970's black speech was not even considered a dialect, but rather evidence of lack of assimilation. See, e.g., WILLIAM LABOV, *LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR* (1972). It remains an object of parody. See, e.g., James Hannaham, *Ebonics for Travelers*, *VILLAGE VOICE*, Jan. 14, 1997, at 37.

37. Critical race theorists have focused on the mutability of definitions of race, especially at the margins. Consequently, scholars like Stephen Small use other terms to refer to the creation of cultural mutable definitions of race. See STEPHEN SMALL, *RACIALIZED BARRIERS: THE BLACK EXPERIENCE IN THE UNITED STATES AND ENGLAND IN THE 1980s* 36 (1994) (emphasizing that racial boundaries are by nature contingent and historical).

38. For interesting historical accounts of the transformation, see NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995).

39. For accounts of the Jewish experience with blending into the racial and ethnic fabric of American life, see Karen Brodtkin Sacks, *How Did Jews Become White Folk*, in *RACE 78* (Steven Gregory & Roger Sanjek eds., 1994); MATTHEW FRY JACOBSON, *WHITENESS OF A DIFFERENT COLOR* (1998); RIV-ELLEN PRELL, *INSIDER/OUTSIDER: AMERICAN JEWS AND MULTICULTURALISM* (1994).

40. For some interesting examples of the use of law and phony science (both hard and

of course, were merely the more ferocious intellectual children of the Spanish in this form of Jew-baiting racism.<sup>41</sup> Today people who are the children of parents of different races are more willing to call themselves "multi-racial."<sup>42</sup> The contours of difference are for us to make or re-make, or to be made and re-made for us, in a process without beginning or end. What constitutes difference today, and the importance ascribed to this difference, is radically unlike the American sense of difference even a century ago. The changes are reflected in the way we conceive of each other, and the separation between us, as much as it is reflected in the laws which bind us and keep us apart. Justice, like difference, modulates to suit the character and perceptions of each generation and each group. But it is a multi-edged sword. It was not a saint, but Lucifer-on-Earth, who so effectively uttered these words which many of us might be proud in turn to utter:

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social science) to support "racial" separation of the Jews, see the materials in GEORGE L. MOSSE, NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH 11, 13-14 (Salvatore Attanasio trans., 1966).

41. See ANTONIO DOMINGUEZ ORTIZ, LOS JUDEOCONVERSOS EN LA ESPAÑA MODERNA 11-67 (1992). Even "one drop" of New Christian blood would taint the individual. Indeed, English humorists preserve to some degree the incredible lengths to which Spaniards of that epoch would go to ensure the validity of their claims that they were not New Christians and had no New Christian blood. See W.S. Gilbert, *The Gondoliers or the King of Barataria*, in SELECTED OPERAS, FIRST SERIES 147 (1889) (Act 1 dialogue spoken by the Duke of Plazatoro) [the libretto may be accessed at <<http://www.idbsu.edu/gas/gondoliers/libretto.txt>>]. On the problem of "blood purity" (*limpieza de sangre*) in Hispanic culture, see ORTIZ, *supra*, at 137-172. On the path to assimilation of Jewish people in the United States, see, for example, ANDREW R. HEINZE, ADAPTING TO ABUNDANCE: JEWISH IMMIGRANTS, MASS CONSUMPTION, AND THE SEARCH FOR AN AMERICAN IDENTITY (1990).

42. Tiger Woods is the most high profile example of this trend. As official policy of the federal government, it is reflected in the recent effort to insert a new "racial" category to be called multi-racial. See Michael A. Fletcher, *Woods Puts Personal Focus on Mixed-Race Identity*, WASH. POST, Apr. 23, 1997, at A1. For critical discourse on the phenomenon of Woods and his importance to race difference, see, for example, Robert S. Chang, *Who's Afraid of Tiger Woods?*, 19 CHICANO-LATINO L. REV. 223 (1998); Tanya Kateri Hernandez, "Multiracial" Discourse: *Racial Classifications in an Era of Color-blind Jurisprudence*, 57 MD. L. REV. 97 (1998). Professor Hernandez questions:

the assumptions that underlie both levels of meaning in order to assess the continuing significance of the racial classifications that multiracial discourse challenges. This analysis reveals that although multiracial discourse may seem benign and appealing on a humanitarian level, its implementation will produce counter-egalitarian results in the struggle for racial equality. The MCM's campaign for color-blind treatment of racial hierarchy cloaks the racial significance of ostensibly race-neutral laws, as the Supreme Court's recent movement toward color-blind antidiscrimination jurisprudence has done.

*Id.* at 103-04. See also Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997) (arguing in favor of preservation of system shunting all people with even "one drop" of African blood into the category African-American because this has helped create the sort of group identity needed for solidarity and racial progress).

I was convinced that peoples which have been trodden underfoot by the whole world of their day have all the greater duty consciously to assert their own value before their oppressors, and there is no prouder proof of the highest rights of the people to its own life than immortal cultural achievements.<sup>43</sup>

We live in a world of our own making. Our differences, though very real to us, are neither built into the genetic structure of our bodies, nor into the body of our societies. Achieving racial justice is a never ending multi-function task. It's achievement at any one time also marks its doom. Visions of "race" and "justice" change with the passing of the generations. Yet to strive for even momentary consensus is to approach the divine within us. Such a striving cannot be a passive affair. Rather, we have the power, all of us, to create, and perhaps even sustain for a time, a common view of race and justice which accords with our idea fairness. That requires a cleansing not only of our view of the severity of the differences between us, but also of the unfairness built into our own parochial views of group membership and its consequences.

So we search for racial justice. We meet here, in the shadow of President Clinton's Race Initiative and his effort to initiate dialogue to further the search for new ideas in this critical area. Yet at this point we are confounded again—for discussion of race difference, hierarchy and equity must be made in the context of a language of sameness *which we do not yet share*. To every race, for every difference, there is a language. For difference is as much built into the Babel of our language, its difference, as it is built into the fabric of our races. To overcome race, to ameliorate the roughness of the hierarchy resulting from the construction of our difference, will require an attention to the language of culture rather than the language of compulsion. Thus, I concentrate today on the cultural language of racial dialogue.

The implications of this cultural view of racial justice are as simple as they are disappointing to those who hope for instant change or cultural obedience to the will of a temporal sovereign. Racial justice implies a primal choice—the acceptance of difference based on conceptions implicit in the fluid concept we have come to understand by the word "race."<sup>44</sup> This choice

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43. Adolf Hitler, Speech delivered at the opening of the House of German Art in Munich (July 18, 1937), in *I THE SPEECHES OF ADOLF HITLER, APRIL 1922—AUGUST 1939* 584-92 (Norman H. Baynes trans., & ed. 1942), *quoted from* GEORGE L. MOSSE, *NAZI CULTURE: INTELLECTUAL, CULTURAL AND SOCIAL LIFE IN THE THIRD REICH* 11, 13-14 (Salvatore Attanasio trans., 1966).

44. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995) (positing a best case scenario in which a culturally neutral state would create conditions under which difference will be accepted but will police the polity against the use of difference to effect social, political and

implies acceptance of the effect of our post-Babel scattering. If humankind is willing to accept, as a basis of cultural dialog, the existence of difference based on "race" then it must also accept the implication that "race" will have "effect" in the way in which people who are forced into one or the other categorizations of "race" are permitted to relate to each other.<sup>45</sup> Race, like other differences humankind chooses to single out and celebrate, will, to that extent, be with us.

Equity, and race equity in particular, suggests the culturally modest goal of ameliorating the negative economic, social and political effects of this division, while preserving the division in the first place. Such equity will not be accomplished by fiat of law or law making.<sup>46</sup> Equity will not be effected by case law. *Brown* has taught us that much.<sup>47</sup> Race equity in America will certainly not be effectuated directly through impact litigation.<sup>48</sup> Equity will

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economic disadvantage, *see id.* at 83-86, as long as the state somehow also promotes a unifying belief in a common identity, in effect creating a supra-group or culture, *see id.* at 188).

45. This is perhaps well illustrated by the negative implications of this acceptance of racial difference as an "effect." Christine Hickman's stories of the way in which race forced its effect on her relatives, provides a poignant example. Both relatives could pass, one of whom chose to affirm his "race" and suffered by operation of the law upholding restrictive covenants; the other affirmatively tried to pass but was treated as a member of the race to which the white community assigned him when it forced him to sell his home because of the color of his extended family's skin. *See Hickman, The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997). Ironically, *Plessy v. Ferguson*, 163 U.S. 537 (1896), also provides a formalized expression of this notion, which forms part of the multi-cultural ideal. One could argue, somewhat mischievously, that from a progressive perspective, the problem with *Plessy* may be more the result and the judgment about race-worthiness in the opinion than with the generalized sentiments in the opinion relating to how race ought to matter in law. Affirmative action provides another illustration, but from the opposite end of the race-worthiness spectrum.

46. Some critical race theorists have argued that legal rights are tenuous and will give way at the whim of racial majority. *See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); *but see* PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* (1991); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357-58 (1988).

47. As Girardeau Spann suggests, "the Court is institutionally incapable of doing anything other than reflecting the very majoritarian preference that the traditional model requires the Court to resist." GIRARDEAU SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 19 (1995). *See also* Richard Delgado, *Rodrego's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 93-94 (1996); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 35 (1991); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

48. This is a generalization which is easily deduced from *Brown*. *See supra* note 47. *See also* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (examining the limits of the use of litigation to effect change). This generalization is not limited to the American racial dialogue. It is as applicable in the context of social welfare reform. *See, e.g.,* Dorothy Roberts,

be accomplished, if we have the strength for the task, through engagement in the language of culture itself.<sup>49</sup> Babel provides the cultural model through which people can best approach difference—the strength and violence of our difference mimics that of *language* difference, the social difference that started it all.<sup>50</sup> A common language will make us as “color-blind” as we wish to be, or at least ameliorate the cultural effects of that division. Our cultural model for that effort, for the task of finding a common language, at least in the West, is tied to the archetype subsumed within our conception of *Logos*.

*My suggestion is thus as simple as my premise:* We must consciously speak in *culturally significant* ways. The common language of cultural dialogue is not word based. Rather, it is comprised of three elements, the effective use of which determines our perception of difference and sameness, of fairness and unfairness, of inclusion and exclusion, of toleration and suppression. These elements are *pain, power, and time*.

Pain provides us with the archetypes necessary for change—images of good, of bad, of suffering, and of fairness. Martyrdom is the most precious currency of socio-cultural change. Power is shorthand for volume and voice at the level of group “conversation.” To speak without being heard by those who express the norms of society is to remain silenced. Law, the mechanics of formal dispute resolution, legislation, and the police power are all manifestations of the way speaking, in a cultural sense, is heard. Yet, norm and culture shifting is not a function of the fiat of law. No one—person or

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*Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179; Larry Catá Backer, *Poor Relief, Welfare Paralysis and Assimilation*, 1996 UTAH L. REV. 1. Current dialogue on sexual difference has not fared better, regardless of the hope expressed in the power of litigation to *coerce* social change. See, e.g., Patricia A. Cain, *Litigating for Gay and Lesbian Rights: A Legal History*, 79 VA. L. REV. 1551, 1624-36 (1993). This strategy has been critically examined by Professor Case as a viable litigation strategy. See Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1680-1693 (1993). But see JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994); John Denver, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133 (1976).

49. The engagement in culture requires a consciousness of the grammar of culture. It requires people to speak using the symbols and judgments of our basic cultural postulates. For a consideration of the power of engagement in the language of sexual culture see Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, in *LEGAL QUEERIES* 185 (Leslie J. Moran et al. eds., 1998).

50. Understand, of course, that the Bible provides example after example of the creation of difference. The Bible sets out a taxonomy of difference every bit as complete as that attempted by Linnaeus millennia later, and from which has blossomed our “science” of taxonomy. The “big bang” of difference is spiritual. *Logos* tells us that “In the beginning God created the heaven and the earth.” *Genesis* 1:1. The Spirit is dominant, the flesh is the “Other.” The first six days of the Creation constituted the creation of all essential difference in the material and spiritual world in which the West inhabits. The divisions of humankind, and their ordering, merely presents a feeble mirror image of the great divisive cataclysm of creation.



group—has the power to proclaim such a thing. Time provides the last great factor in the forming and reforming of social consensus. Time is a way we express the locking in of shared meanings of difference and justice. Time is essence of our approach to divinity; time suggests a state as close to permanence as humankind will get.

Those who can effectively utilize these culturally significant elements of speech can tap into *Logos*—can overcome Babel. Everyone understands this language. Anyone, any group of humans living within a society, can learn to speak this language. These culturally significant modes of speaking can remake the basis on which we can understand the meaning of words uttered. Those who can speak the primal language of culture can, if they are lucky, and for a time at least, overcome Babel and bring closer together those who have been scattered. Let us examine each of these elements a little more closely.

**Pain.** Pain is either endured or those on whom endurance is imposed must seek the revaluation of pain-bringing norms. Pain encompasses the culturally significant act of *sacrifice*. Pain requires us to acknowledge the power of the hermeneutics of cultural modulation Christologically. Every change in the “common sense” of our understanding of the significance of difference, and especially racialized difference, requires its martyrs and saints—its crucifixion. There can be no Easter without Good Friday. Ours is a world which understands and responds to sacrifice. In the absence of culturally potent sacrifice, there can be little conversation between groups. Sacrifice is what gets groups to pay attention in a cultural sense. This applies both within and between groups where there exists a struggle to redefine common cultural understanding.<sup>51</sup>

We have accumulated saints and martyrs aplenty in the struggle to redefine the effect of racial difference in this country. It is the common

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51. An argument can be made that prior to emancipation, much of the conversation about race was *within* the dominant group and *about* the disadvantaged racialized group. African-Americans remained essentially outside the debate, an object but not an equal participant whose sacrifices were conveyed symbolically through the writings of members of the dominant group. Thus one can sense the irritation, and the remoteness of the characters of *Uncle Tom's Cabin*. See HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (Harper & Row 1965) (1852). This was a work designed to further the abolitionist cause, written by a Northern white woman, a stranger to slavery, about African-Americans, who existed as the object of her hope and honor. Indeed, “the Black man at the center of [this novel] is hardly visible at all . . . because the Black man's individual humanity has been for the most part veiled by an abstracted identity projected onto him by the white author's notion of what a Black man represents, or ought to represent.” William L. Andrews, *The Black Male in American Literature*, in *THE AMERICAN BLACK MALE: HIS PRESENT STATUS AND HIS FUTURE* 59, 61 (Richard G. Majors & Jacob U. Gordon eds., 1994). African-Americans of the time were not voiceless by any means. Frederick Douglas and others were active and influential, but the sacrifices of African-Americans were remote, theoretical, and essentially hidden. The underground railroad, on the other hand, was culturally potent.

currency of cultural dialog worldwide as the story of the Kurdish singer reminds us.<sup>52</sup> We now worship at the shrine of the Reverend Martin Luther King. Some of us may even indulge in the beatification of Malcolm X and the leaders of the Black Panthers. In the case of each of these, death has transformed political figures into cultural symbols with the power to speak to cultural fundamentals. Martin Luther King has joined the pantheon of American symbolic deities. He has been assigned a feast day equal in dignity to that of George Washington and Abraham Lincoln. Indeed, Martin Luther King day is more potent still, since the Washington/Lincoln birthdays have been consolidated and reduced to a muted generic "presidents" day.

Saints and martyrs, to the extent they are constructed as such by a racializing dominant group become powerful voices in our cultural conversations. The very act of death translates these figures and their messages into powerful cultural speech. The symbols of that speech go to issues of cultural self-conceptions of fairness. Society's reply to this sort of speech can be considered societal expiation. Penance and contrition have done more to change the judgment of the dominant group respecting the magnitude, as a matter of law and social ordering, of the disabilities of race than almost anything else this century.

Sacrifice can extend beyond the individual to encompass the group itself. But group sacrifice tends to occur at a level of abstraction too great to generate much immediate understanding of sacrifice. That, perhaps, helps explain the problem of slavery. The sacrifice was real, and great, but to people far away and not immediately affected, it had no immediacy and the pain was muted. Even the murders of over six million Jewish people in Europe in the 1940's, the murder of a large portion of the Cambodian population in the 1970's, or the murder of Tutsi people in Rwanda in the 1990's failed to generate the sort of immediate and sustained reaction that more personalized sacrifice, that personal martyrdom, has been able to elicit. Sacrifice is more potent when it can be focused on individuals, when it can be personalized. We need to see the faces of the dead or the wounded before we can hear them speak. James Byrd Jr.,<sup>53</sup> Rosa Parks,<sup>54</sup> bombed churches,<sup>55</sup> or

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52. See *supra* note 5 and text accompanying.

53. Mr. Bryd, of Jasper, Texas, was dragged to death behind a pickup truck driven by three white men. The crime was motivated by racial hatred. The murder caused a furor all over the nation. It attracted national attention in the popular press which followed the subsequent trial of the first of the men tried for the murder, John King, quite closely. Much of the analysis in the popular press focused on the nature of the relations between the races. See, e.g., Vern E. Smith, *A Time For Healing*, NEWSWEEK, Mar. 1, 1999, at 35; Dan McGraw, *Justice Delayed*, U.S. NEWS & WORLD REP., Mar. 1, 1999, at 28; Paul Burka, *Jewel of the Forest*, EBONY, Aug., 1998, at 9. *Jet Magazine* put forward, as one of the weeks best photos, the picture of Sgt. James Earl Carter and investigator Curtis Frame, members of the Sheriff's Department in Jasper, TX,

murdered activists<sup>56</sup> proved extremely important in getting cultural attention,

embracing upon hearing of the guilty verdict against John William King. See *The Week's Best Photos*, JET, Mar. 15, 1999, at 41. For a gentle articulation of skepticism in the wake of the martyrdom of Mr. Byrd, see Ellis Cose, *An Easy Sense of Outrage*, NEWSWEEK, Mar. 8, 1999, at 24:

There is certainly nothing wrong in using a tragedy like James Byrd Jr.'s murder to remind ourselves that our society no longer tolerates lynching, or that we have outgrown the need to revel in blood-drenched rites of racial domination. We should not confuse such activity, however, with honestly coming to grips with the more serious racial problems that challenge us today.

*Id.*

54. Mrs. Parks participated in a campaign of civil disobedience refusing to sit in the back of the municipal bus, the space reserved for non-whites on public vehicles. See, e.g., FRED D. GRAY, *BUS RIDE TO JUSTICE*. MONTGOMERY, ALABAMA (1995); Rev. Jesse L. Jackson, Sr., *America: Our Past, Present, and Possibilities*, in 31 LOY. L.A. L. REV. 1339, 1340 (1998).

55. The bombing of churches in the 1950's and 1960's was widespread. See, e.g., DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 115 (1995) (noting that over 200 Black homes and churches were attacked between 1948 and 1965). The church bombing in Alabama which killed four African-American children had an especially potent cultural effect. See, e.g., *45 Events That Changed You and Your World*, EBONY, Nov. 1990, at 48 (discussing the bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama, on September 15, 1963). Church burnings began again in the late 1990's, and continued to provide an especially potent focus of symbolic speech. See, e.g., Ann Scales, *'Pattern' Detected in Church Fires: Outraged Civil Rights Enforcer Gives Burnings Across South Top Priority*, BOSTON GLOBE, June 8, 1996, at 1; Michele M. Simms Parris, *What Does it Mean to See a Black Church Burning? Understanding the Significance of Constitutionalizing Hate Speech*, 1 U. PA. J. CONST. L. 127 (1998). Church burnings constituted martyrdom for the people killed in the violence. Church burnings were equally potent as a violation of a core dominant group taboo against the violation of places of worship as a place of sanctuary. See Theodore Meron, *Crimes and Accountability in Shakespeare*, 92 AM. J. INT'L L. 1, 33-35 (1998) (noting the legal notions of church sanctuary as reflected in the works of Shakespeare, in this case the legal position of Queen Elizabeth to seek sanctuary against the plotting of Richard III). The common understanding of the sacredness of church space is reflected in the works of modern existentialists as well. See, e.g., JEAN PAUL SARTRE, *The Flies*, in NO EXIT AND OTHER PLAYS 49 (Stuart Gilbert trans., 1955) (1943) ("Come, Lead me to Apollo's shrine. We will spend the night there, sheltered from men and flies.").

56. The murders of people working peacefully for social change created a sensation in the popular press and focus sustained attention on the subject of the work of the murdered people. The quantum of sacrifice seemed to increase as the martyrs appeared to belong to the dominant group itself. The effect is intensified where the murders are clandestine, rather than open killings in battle. It might be possible to argue that the murder of white activists from the Northeastern United States in the early 1960's provided a catalyst that the murders of African-Americans had failed to generate. It is interesting to note in that regard to near contemporary sympathetic collections about the race struggle place emphasis on white sacrifice. See 1961-1968; *The Burdens of Power*, 18 ANNALS OF AMERICA 407-426 (1968).

The climax of the program to register Negro voters in the South, and of the whole Southern campaign, came in early 1965 in Selma, Alabama. The drive was again met with violence; following the murder of Rev. James Reeb, a Boston minister, King led a protest march to the state capital. Brutal attacks by mobs and police ceased only when federal troops arrived. As demonstrators were dispersing, Mrs. Viola Liuzzo, a white marcher from Detroit, was shot and killed by Klansmen.

and permitting the creation of a space in which conversation could occur.<sup>57</sup>

Persecution sometimes seems to have a unifying and transformative effect (at least politically) on the persecuted as well.<sup>58</sup> The "crucifixion" of generations of Black men and the deleterious effects of the American form of apartheid, mobilized the African-American community, and then changed the common understanding of appropriate conduct between the races. We see its internal political manifestations in the emergence of a politics of disobedience. Critical race theorists now celebrate the racial "outlaw" and law breaker as the vanguard of cultural protest and resistance.<sup>59</sup> It is resistance and rumor.<sup>60</sup> The Biblical resonance of these sacrifices provide us with the roadmap for reaction.

Sacrifice also requires the linguistically significant symbol of devourer of sacrifice—of Evil. For every martyr and saint there must be a Lucifer, a Nero. The devil must also have a face to be culturally significant. The police in Southern states, "Bull" Connor with his water hosing of peaceful protests, the Klu Klux Klan, all play a critical role. John William King, one of the murderers of James Byrd, Jr., has recently joined the pantheon of personified (if in his case somewhat banal) evil.<sup>61</sup> Each of these individuals acts as a

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*Id.* at 414. Yet, murders of activists can cut the other way as well. Consider the different reaction to the police and prosecutorial efforts against members of the Black Panther Party which occurred soon after the murders of the activists in Mississippi. See, e.g., EDWARD M. KEATING, *FREE HUEY!* (1971); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering* 31 HARV. C.R.-C. L. L. REV. 297, 298 (1996) (discussing efforts to end police harassment of Black Panther Party Members in Los Angeles). Consider the judgment in the following quote from a recent article: "Suppression of such armed groups as the Black Panthers, white supremacist organizations, and Middle Eastern terrorists was accomplished by orthodox police forces with little resort to the extensive combat capabilities of the military." Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 675 (1995).

57. As Justice Kennedy has noted:

The story of Antigone's burying her brother in defiance of a tyrant's unlawful command; the reality of Rosa Parks' dignified refusal to change her seat on the bus; the picture of the young Chinese student who stopped the tank just before the tragic tears of Tiananmen Square; the searing criticism of political leaders, written in the most civil of tones, by Wei Jingsheng from his jail cell in China—all these protests resonate in the American spirit.

Anthony M. Kennedy, *Law and Belief*, 34 TRIAL 22, 26 (July 1998).

58. See Lisa C. Bower, *Queer Acts and the Politics of Direct Address: Rethinking Law, Culture and Community*, 28 L. & SOC. REV. 1009, 1015 (1994).

59. See Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992); Dorothy Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179; Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263 (1993).

60. See Rosemary J. Coombe, *Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies*, 21 POL. THEORY 411, 412 (1993).

61. For an example of the apotheosis of Williams as a character of sublime evil in the

cultural focus against which the more abstract rules of appropriate relations between dominant and subordinate difference can be discussed, and modified. The governors of Arkansas and Alabama, barring the way to education for racially disadvantaged groups, was cultural high drama indeed. These are cultural symbols we can relate to. Here is the pharaoh who knew not Joseph; here is Pontius Pilate; here are the archetypes of the villains of the Bible. This is the type of villainy which we understand as bad, even if the context of their evil is new.

But martyrdom cuts in all directions. For traditionalists, *Brown* represents a martyrdom which acted as a massive call to action against a revision of the cultural language, the cultural common sense of things, wholly at odds with the common sense which *Brown* seemed to enunciate. That counter view has proven powerful indeed.<sup>62</sup> It has been suggested that the murderer of James Byrd, Jr. is to become a symbol of white racial oppression within the prison system.<sup>63</sup> Moreover, even the legacy of martyrs can be appropriated.<sup>64</sup> For those who seek fundamental cultural change and a lessening of the detrimental effects of difference, without the loss of the significance of difference, "the 1990's saw the worst outburst of nativism and restrictionist legislation since early in the twentieth century."<sup>65</sup>

**Power.** Pain gets the attention of culture. It prepares people to listen. Power focuses the listener on the message. Effective cultural language, the overcoming of Babel, is an act of power. Power here refers to the strength to forge a different social common sense, a modification of what we all "take for granted." Revaluation is power; power is evidenced through internalized narrative. "[R]ight, as the world goes, is only a question between equals in power, while the strong do what they can and the weak suffer as they must."<sup>66</sup>

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popular press, see, for example, Matt Bai & Vern E. Smith, *Evil to the End*, NEWSWEEK, Mar. 8, 1999, at 22.

62. *Brown* appears to have contributed to an intensification of southern, and later northern, segregationist sentiment, first in the schools and then in housing patterns. For an account of this effect, see, for example, MICHAL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987); NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE 67-81* (1969) tracing the evolution of resistance touched off by *Brown*; & HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE 409-420* (1988). On housing, see, DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

63. See, e.g., Joseph L. Galloway & Bruce Selcraig, *Into the Heart of Darkness*, U.S. NEWS & WORLD REP., Mar. 8, 1999, at 18.

64. See, e.g., Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101 (1996).

65. Kevin Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1428 (1998).

66. THUCYDIDES, *THE PELOPONNESIAN WAR* ¶ 90 (Crowley trans., 1951) (411 B.C.).

This, really, is the central point of this article. The regulation of school conduct is quite illuminating in this regard. A particular result in sodomy jurisprudence is infinitely easier to achieve within the narrative created by the courts; a tightening of the private is possible when the protagonist archetype is disgust. "Representations . . . have an active power; they make things happen, usually by painting the world in such a way that certain policies . . . will appear justified. More importantly, perhaps, the very act of painting itself enacts the policy."<sup>67</sup>

A critically realist "hermeneutics" provides tools for the conscious entanglement with cultural power. I speak here of the deconstructive potential of philosophical hermeneutics. "[I]f a hermeneutic act produces meaning and empowers certain individuals and societal groups, it simultaneously represses and destroys potential meaning and disempowers other individuals and groups."<sup>68</sup> This exercise requires a critical openness to the multiple interpretive possibilities of any set of basic cultural ideas about difference and the requirements of group cohesion.<sup>69</sup> Hermeneutics of this kind requires exposing the political nature of the closure represented by any one of these possibilities, exposing the power articulating a choice masked by the illusion of reason. "Any misplaced nostalgia for or romanticization of the outside as a privileged site of radicality immediately gives us away, for in order to idealize the outside we must already be, to some degree, comfortably entrenched on the inside."<sup>70</sup>

For narrative to modulate there must be stories, problematizing ancient archetypes and the creation of alternative characterizations. That requires the power of voice<sup>71</sup>—and the will to speak. "In a world where the presence of power lies increasingly in the realm of the imaginary, . . . rumor[] may be understood as cultural guerrilla tactic—'political' in their significance, if not in their self-consciousness."<sup>72</sup>

Power is thus manifested by what I call *voice*. Voice becomes a prize more important than its underlying consequences. Voice is the measure of

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67. Michael Ryan, *Social Violence and Political Representation*, 43 VAND. L. REV. 1771, 1774 (1990).

68. Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996).

69. HANS-GEORG GADAMER, TRUTH AND METHOD 302, 477-91 (Joel Weinsheimer & Donald Marshall trans., 2d ed. 1989).

70. Diana Fuss, *Inside/Out*, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 5 (Diana Fuss ed., 1991).

71. See HERBERT MCCLOSKEY & JOHN ZALLER, THE AMERICAN ETHOS 235 (1984).

72. Rosemary J. Coombe, *Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies*, 21 POL. THEORY 411, 426 (1993); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 393-394 (1983).

power. Those who seek to speak, seek also to exclude, to limit the possibility that archetypes will be redrawn. We all understand the stakes involved in controlling the machinery of imagery. It implies the inherent advantage of the holders of power through their capacity to control not only the actions of those they dominate, but also the language through which those subjected comprehend their domination. Such miscognition is structurally necessary for the reproduction of the social order, which would become intolerably conflicted without it, those in control maintain the advantage of controlling "not only the actions of those they dominate but also . . . the language through which those subjected comprehend their domination."<sup>73</sup> Didi Herman has shown how even writers of the New Christian Right have begun to worry over the political significance of words and meaning. "'Words,' they argue, 'do matter, [they] are the currency of discourse'; words are the 'bullets' of 'war' used to 'advance the modernist agenda'."<sup>74</sup>

A significant tool of voice is government. Control of governmental voice is more important even than the control of norm breakers through the police power.<sup>75</sup> Governmental voice is norm setting. Government normalizes and amplifies voice. Government provides a source of approval and a power to coerce at least outward obedience to the implementation of cultural ideas of what is right.<sup>76</sup> The world of ideas, of thought, of right and wrong are no longer the predominant domain of the institutions of religion so much as of the institutions of government. The Christian Right would have been an inconceivable institution in a world in which the church remained the center of norm setting. But now the church must jostle with the unchurched of various creeds for the attention of the people.

Control of the cultural power of the political machinery provides the power to be heard. President Clinton understood this well in the context of

73. Richard Terdiman, *Translator's Introduction*, 38 HASTINGS L.J. 805, 813 (1987) (translating PIERRE BOURDIEU, *THE FORCE OF LAW: TOWARD A SOCIOLOGY OF THE JURIDICAL FIELD*).

74. DIDI HERMAN, *RIGHTS OF PASSAGE: STRUGGLES FOR LESBIAN AND GAY LEGAL EQUALITY* 93-95 (1994); JAMES DOBSON & GARY L. BAUER, *CHILDREN AT RISK: THE BATTLE FOR THE HEARTS AND MINDS OF OUR KIDS* (1990).

75. See Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 928.

76. The rise of totalitarianism, of governmental institutions seeking to control not only the bodies but the souls of its citizens is a new development, and follows from the fall of the churches in the 19th century. Nietzsche well understood the notion of the cultural demise of organized religion. See Friedrich Nietzsche, *The Antichrist*, *THE PORTABLE NIETZSCHE* 568 (Walter Kaufmann ed. & trans., 1968) (1895). Its meaning became clearer with the rise of Hitler, Stalin and Pol Pot. For a discussion of these regimes, see, for example, ALAN BULLOCK, *HITLER AND STALIN: PARALLEL LIVES* (1993); ALEKSANDR I. SOLZHENITSYN, *THE GULAP ARCHIPELAGO 1918-1956: AN EXPERIMENT IN LITERARY INVESTIGATION I - II* (Thomas P. Whitney trans., 1973).

President Clinton's Race Initiative.<sup>77</sup> This conference, much like President Clinton's Race Initiative,<sup>78</sup> represents a practical application of these notions. We are here to create new stories, new interpretations of our basic cultural text in the context of the sacrifices and martyrdoms which have created the cultural space in which we can speak. We do this well aware that there are other voices contending for the ear of our culture, who have a different view of a fair cultural common sense about difference and its effect socially, politically and economically.

Cruz Reynoso's notion of societal *assets*,<sup>79</sup> are also elements of power. These assets are all instruments for the amplification, the verification, of voice. Assets provide the societal mechanism for vouching for the cultural voice speaking. It makes that voice culturally significant. The amplification is almost unconscious. Bill Gates, the man who directs Microsoft, Inc. and among the richest men in the world in 1999 can, by virtue of his social and economic assets, speak with a culturally amplified voice. We will listen. We pay less attention to a school teacher. Her assets do not amplify her voice. We cannot hear a destitute African-American mother at all.

The intensity of this contest for the cultural control of governmental voice has become intense. At stake is control of the political authority to decree or coerce conduct. The nature and effect of difference, as a formal matter, that is as a matter of law and policy, is the prize. Thus we perpetuate and refine the language of difference. Thus we tattoo difference onto the bodies of those for whom difference is to have social, economic, and political effect. On the one side we see the push for punishment against hate speech,<sup>80</sup>

77. See *President Clinton's Initiative on Race*, U.S. NEWSWIRE, June 12, 1997, available in LEXIS, NEWS LIBRARY, Wire Service Stories File (outlining the goals and elements of the federal "One America" initiative) [hereafter *Clinton Race Initiative*].

78. The goals of the President's Race Initiative included articulation of: the President's vision of racial reconciliation and a just, unified America; . . . educat[ion of] the nation about the facts surrounding the issue of race; . . . promot[ion of] a constructive dialogue, to confront and work through the difficult and controversial issues surrounding race; . . . [and] recruit[ment] and encourage[ment of] leadership at all levels to help bridge racial divides.

*Clinton Race Initiative*, U.S. NEWSWIRE, June 12, 1997, available in LEXIS, NEWS LIBRARY, Wire Service Stories File. See also, Christopher Edley, Jr., *Color at Century's End: Race in Law, Policy, and Politics*, 67 FORDHAM L. REV. 939, 951-56 (1998) (Professor Edley is Senior Advisor to President Clinton for the Race Initiative and Consultant to President Clinton's Advisory Board on Racial Reconciliation).

79. Professor Cruz Reynoso defined assets as "that which enhances strength" in his Keynote Address.

80. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994). But see



restructuring of tax law,<sup>81</sup> environmental law,<sup>82</sup> social welfare legislation,<sup>83</sup> modification of sentencing in criminal law,<sup>84</sup> hate crimes,<sup>85</sup> and the institutionalization of affirmative action.<sup>86</sup> On the other side we see the enactment of welfare reform,<sup>87</sup> the tightening of controls over immigration,<sup>88</sup> resistance to hate crime,<sup>89</sup> and affirmative action legislation.<sup>90</sup>

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Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249 (1995).

81. See, e.g., Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996).

82. See, e.g., Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775 (1998) (using the efforts of Chester, Pennsylvania, residents to prevent clustering of waste facilities in their neighborhoods); see also RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 10 (Bunyan Bryant & Paul Mohai eds., 1992).

83. See, e.g., Larry Catá Backer, *Welfare Reform at the Limit: An Essay on the Futility of "Ending Welfare as We Know It"*, 30 HARV. C.R.-C.L. L. REV. 339 (1995).

84. See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996); Christopher M. Alexander, *Crushing Equality: Gender Equal Sentencing in America*, 6 AM. U. J. GENDER & L. 199 (1997); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1 (1995); Paul Butler, *Affirmative Action: Diversity of Opinions: Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

85. See Richard Delgado & Jean Stefancic, *Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice*, 27 CONN. L. REV. 773 (1995); David Todd Smith, Comment, *Enhanced Punishment under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259 (1994).

86. See Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18. See generally Symposium, *The Meanings of Merit: Affirmative Action and Proposition 209*, 23 HASTINGS CONST. L.Q. 921 (1996). For a discussion of the possible fate of affirmative action legislation in the United States, see, for example, Jennifer L. Hochschild, *The Future of Affirmative Action: The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997 (1998).

87. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

88. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

89. See, e.g., CAL. EDUC. CODE 94367 (prohibiting private universities from disciplining students for speech that would be protected by the First Amendment off-campus); Lisa S.L. Ho, Comment, *Substantive Penal Hate Crime Legislation: Toward Defining Constitutional Guidelines Following the R.A.V. v. City of St. Paul and Wisconsin v. Mitchell Decisions*, 34 SANTA CLARA L. REV. 711 (1994).

90. For example, Proposition 209, as enacted in California essentially dismantled state affirmative action efforts. See Proposition 209, California Ballot Pamphlet, General Election Nov. 5, 1996 (enacted as CAL. CONST. art. I, 31). For a defense of Proposition 209, see, for example, Gerard V. Bradley, *A Case For Proposition 209*, 11 NOTRE DAME J. L. ETHICS & PUB. POL'Y 97 (1997); Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 SANTA CLARA L. REV. 141 (1998). For a critique of Prop. 209 see, for example, Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997); Symposium, *The Meanings of Merit: Affirmative Action and Proposition 209*, 23 HASTINGS CONST. L.Q. 921 (1996).

Courts and litigation are also powerful sites of culturally significant speech. It is important to consider courts, in a cultural sense, as playing a role, other and more important than as places in which Law can be created and enforced against an unwilling population. Courts are culturally significant because they function as a space in which the non-judicial may speak with authority. For courts also provide a site for the articulation of prophetic voices. This is the place where the Biblical Jeremiah, Isaiah, and Ezekiel speak. This is the voice society has been culturally trained to respect, if not to harken to, except in the rare case. That is the way of the prophetic. For every moment when society acts like the cultural Hezekiah,<sup>91</sup> there will be countless times when society listens to the prophetic with the same disdain as the Biblical Jezebel.<sup>92</sup>

It is only in this culturally prophetic sense that courts exist as the place for the struggles and contestations which may produce cultural movement. It is the site where "losing" arguments are articulated and memorialized. Thus produced, these visions find their way back into non-judicial social discourse. In this function, and in this function only, might courts *indirectly* serve as a means of cultural movement. A good American example is Justice Harlan's voice of dissent in *Plessy v. Ferguson*.<sup>93</sup> Once articulated, this argument became a part of the *formal* cultural dialogue of the dominant group, suggesting an alternative vision of "what is." When that vision changed, the problem of the articulation of accepted social norms of race relations returned to the court in *Brown v. Board of Education*.<sup>94</sup> There the Court identified as norm the cultural construct rejected in *Plessy*. It did so not because the *Plessy* dissent now won the day as a matter of logic or jurisprudence, but because the popular culture had embraced the notions articulated in the opinion as their own. Thus, the *Plessy* dissent produced culture which produced law.<sup>95</sup>

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91. For the story of Hezekiah, among the last of the obedient kings of Judah, see 2 *Chronicles* 29:1-32:33.

92. Jezebel has assumed meta-Biblical proportions. She is part of the pantheon of our Biblical archetypes, though most of us no longer understand the origins of the story. For the original, see 1 *Kings* 16:31 (leading Israel to sin worshipping Baal); 2 *Kings* 9:30-35 (life of treachery and ignominious death).

93. 163 U.S. 537 (1896) (arguing against the affirmation of the racial separate but equal doctrine).

94. 347 U.S. 483 (1954) (rejecting constitutional protection for doctrine of separate but equal treatment of races); *but see* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

95. The function of courts as a site for prophetic speaking, and the place of the courts as sites for cultural production is explored in depth in Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process* (manuscript on file with author).

Yet this power to speak culturally is not limited either to the formal mechanics of law making or to the power given to culturally shifting voice within the courts. Speech is action as well. Taking to the streets has cultural effect. Sitting at a lunch counter has cultural effect. Operating a bank or commercial establishment and having the ear of the mayor has cultural effect. Running a city or state constitutes strong speech. Chairing the Joint Chiefs of Staff of the American Armed Forces is culturally significant. Mass disobedience, even non-violent disobedience, has cultural effect. Law, after all, is what the masses ultimately practice. Formal lawmaking, courts, and elites will inevitably bend to the reality of changing practice. That, if nothing else, should be a lesson that was brought home to us both by the impeachment of President Clinton and the subsequent failure to remove the President from office, relating to his relationship with Monica Lewinsky, a White House intern and the subsequent efforts to cover up that relationship.<sup>96</sup> Some of this form of speech lacks drama. Worse, much fails to produce immediate and immediately known effect. Shifts in perceptions of the common sense of difference do not move at the pace of a three act play or a two hour made-for-television movie which must produce result and aftermath within the allotted time. Yet this does not make speaking of this kind any less effective or important in the cultural life of a community made up of differences strongly felt.

Thus, power ought not to be confused with mere political power. Nor should it be confused with the divine power to speak, and by speaking, immediately create a new society more to the liking of the speaker. Indeed, those aiming to change cultural fundamentals should avoid the temptation to seek *political* power for its own ends. Though some critical race theorists

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96. Despite the best efforts of the cultural conservatives pushing the case against the President, the issue ultimately turned on societal common sense about marital fidelity and the common wisdom about how threats to exposure of infidelity are handled and marital infidelity's relation to fitness for public (or, for that matter, almost any) office. See, e.g., Walter Kirn, *When Sex is Not Really Having Sex*, TIME, Feb. 2, 1998; Daniel H. Pollitt, *Sex in The Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259 (1998) (citing accounts in the popular press that indicated that "only a third of those surveyed believed that the President shared the moral values that most Americans live by" and distinguishing private life from public performance; *Id.*, at n.14 & 15). For discussions of the Clinton impeachment, see, for example, Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 305-08 (1998); see Pollitt, *supra*. I believe that a generation ago, the mere exposure of Presidential scandal of this type might have driven the President from office. But I also believe that a generation ago it would have been hard to conceive of many people seeking actively to report instances of marital infidelity of the type chronicled by Ms. Lewinsky. President Kennedy is certainly an example of a President with a commonly known history of infidelity, whose activities were never exposed by the press or even his political enemies. See, e.g., Sunstein, *supra*, at 298. On the extra-marital sex life President Kennedy and its usefulness to J. Edgar Hoover, see, for example, ETHAN THEOHARIS, FROM THE SECRET FILES OF J. EDGAR HOOVER (1991).

suggest that social change can be effected through effective participation merely in the political process,<sup>97</sup> I suggest that this misses the point. As the Jewish experience with political emancipation in nineteenth century continental Europe has made very clear, participation in the political process is a necessary ingredient, but hardly the critical component of effecting social change, except as official pronouncement. There is no denying that official pronouncement, especially memorialized as law, is powerful—it adds weight to the felt necessity to change cultural “common sense.” However, political power which is not used to change the everyday understanding of the effect and place, the importance, of racial difference, becomes window dressing. It will merely cover up the ugliness of an unchanged cultural common sense. The result is that officially pronounced political change is always easily overturned. That, in part, may help explain both the easy victory and the early defeat of racial “preferences” or affirmative action before the courts,<sup>98</sup> and the legislature.<sup>99</sup>

**Time.** My category of time provides the reason for the cultural inefficacy of change by cultural or judicial fiat. Even the “correct” result, the best expression of culture can only be a temporary articulation. It can last only as long as we can read and reread our cultural text the same way, that is, as long as we give the same value to that which goes into the translation of cultural rules into enforceable reality. Time suggests longevity. Yet, this is not the longevity of a single act, but the longevity of repetition. Things that are done over and over and are affirmed again and again, become set more deeply within the language palette of the hearer. The more deeply thought and action are affirmed, the greater the quantum of pain and power necessary to dislodge it and the longer the period of repetition necessary to overcome it.

But those who seek to speak inevitably exclude in new ways and seek to limit the possibility that archetypes will be redrawn again. That, in turn will (ultimately) encounter resistance (image and judgment). Certainly, this is the lesson traditionalists have learned over the course of the last fifty years as our popular culture has begun to revalue the nature and importance of racial and ethnic roles, and that revaluation has permeated legislatures and courts. The

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97. See Girardeau Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990).

98. See *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 229 (1995) (supporting strict scrutiny of race preferences on basis of the notion that “a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980)); see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Classifications based on race carry a danger of stigmatic harm . . . [and] may in fact promote notions of racial inferiority.”).

99. See, e.g., Proposition 209, California Ballot Pamphlet, General Election Nov. 5, 1996 (enacted as CAL. CONST. art. I, § 31).

potential inherent in time, in repetition, is the positive moral of this article! It is not just racialized non-dominant groups who face challenges to normalization within popular culture; traditionalists have begun facing the same challenges. Traditionalists are far stronger, but the monopoly of imagery that they had, the monopoly that was taken for granted, has been lost.<sup>100</sup> The contest for voice which has resulted is as much an indication of the fluidity of cultural meaning as it is merely a condemnation of past division.

It is, thus, in the sustained control of social voice that jurisprudence will be crafted and images redirected, and then crafted again.

Time thus expresses the locking in of shared meanings. Time suggests a state as close to permanence as humankind will get. Time, thus, lays bare the greatest limitation of our search for justice and equity. Such a search will always be imperfect and temporary. Difference will always get in the way. Until group hierarchy disappears, until difference is a matter of indifference, every attempt to ameliorate the consequences of hierarchy and difference will, to some extent, replicate hierarchy and disadvantage those outside the norm.<sup>101</sup> The Universal Declaration of Human Rights was conceived as a hortatory statement with no power. It was to be relegated to the stack of forgotten thoughts. Yet by the end of the century it is becoming viewed as a standard

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100. Perhaps better put, this point can be understood to suggest that the latest iteration of the traditionalist vision of the boundary between tolerated and disadvantaged difference is now being challenged by a competing and inconsistent vision. For a historical view of the changes in the traditional vision of acceptable difference and its changes, see JOHN HIGHAM, *STRANGERS IN THE LAND* (3<sup>rd</sup> ed. 1994).

101. The limitations of equity in a world valuing difference are most evident in the area of welfare rights.

The question for me is . . . centered on . . . the notion of imposition inherent in any position where gender (or any other categorizing trait) matters. Even the radical position ultimately describes a new tyranny . . . . It is the nature of all groups—it is the defining characteristic of all social systems—to define a zone of deviance and to sanction those within its bounds.

Larry Catá Backer, *The Many Faces of Harmony: Patriarchy and Welfare as Woman's Issue*, 92 NW. U. L. REV. 327, 369 (1997) (reviewing MIMI ABRAMOWITZ, *UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES* (1996)).

of customary international law. Cultural divisions are potent because when they *survive*.<sup>102</sup> That which endures, prevails.

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Part of our task as participants in this Conference was to suggest solutions or mechanisms for achieving a greater measure of what we today would like to believe constitutes racial equity. We were encouraged to "think outside the box." This represents a literal effort in that direction. My suggestion is no magic trick, nor will it grant the practitioner instant gratification. It flows from the implications of my sense of the nature of cultural dialog and the possibilities for changing cultural common sense. My "solution," my suggestion for what is required to achieve a greater measure of racial equity, consists of the following six points:

*We must consciously speak in culturally significant ways.* We must preach in the manner of the Biblical prophets. We must use the symbols of sacrifice. We must acquire use the amplifying power of the courts, the legislature and celebrity. We must preach over and over in the hopes that our voices will become normative. For this effort, impact litigation is important—not for the purpose of coercing change through court action, but to acquire a culturally significant forum for preaching our views. Likewise, admission to the halls of government is important for the purpose of providing a forum for the expression of our understanding and the memorialization of those expressions as "law."

*Our object ought to be to become culturally indifferent to difference.* We must become blind to difference. I do not by this mean to suggest the color-blindness in recent writing of our Supreme Court.<sup>103</sup> Color blindness in a culture in which the

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102.

More ambitious legal requirements were not realistically achievable in 1948. Instead, the drafters of the Universal Declaration used what agreement they could muster to launch a more patient process. If the governments would not accept firm obligations girded with effective enforcement, they could at least be maneuvered into subscribing to broad statements that might help future efforts . . . . Ironically, the lack of immediate enforcement probably fostered clearer and more demanding norms, for governments then felt no need to burden the standards with intricate exceptions and qualifications. And in succeeding decades, many powerful leaders, apparently lulled by the limited enforcement mechanisms, repeated words of devotion to human rights. Unwittingly, they enhanced the declaration's stature, until it became the chief measuring stick for judging a nation's internal policies.

David Martin, *How Rhetoric Became Rights*, WASH. POST, Nov. 1, 1998, at C2.

103. See, e.g., ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992). Cf. Herbert

common understandings have taken difference into account to the disadvantage of some may not be blindness at all, but a disguised call for conformity, invisibility, and disappearance.<sup>104</sup> Color blindness requires that we all speak the same cultural language. Babel teaches us that for this purpose we must be aware of difference as we attempt to smother its deliterious effects. But this applies with equal force to dominate and subordinate groups. Revenge, or reverse hegemony is as odious as oppression of the smaller by the larger group.

*Our goal must be fairness.* Fairness is a condition with perhaps an immutable definition but with a complex and transitory application. Fairness tolerates difference, but fairness ought not to tolerate disadvantage, either within a group or between groups. Fairness can be a trap and a cover for promoting separation. I mention only one problem here, that of the measure of fairness. Much has been made of the difference between equality of opportunity and equality of result.<sup>105</sup> Both contain within them culturally significant risk. *Equality of opportunity* as a measure of fairness contains strong leanings toward sameness. It suggests unity and minimizes difference yet provides little in the way of mechanisms for mediating situations where difference has an effect on the quality of opportunity. It can provide less protection against abuse by the dominant in a society of difference. At its limit it can suggest *implosion of difference* and provide a potent cultural weapon for involuntary assimilation<sup>106</sup> and disappearance.<sup>107</sup> On the

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Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). See also Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 985 (1978).

104. For a classic critique of the recent "color-blind" jurisprudence of the Supreme Court, see Jerome Culp, *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 ("color-blind" legal discourse wrongfully treats as irrelevant the differential and discriminatory treatment of blacks in the American legal system); Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN L. REV. 1 (1991); J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980). See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

105. See Richard Delgado, *Review Essay: Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993). See generally RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995).

106. Voluntary assimilation is a freedom we should strive not to limit. We must avoid the tendency to turn a solicitude for difference into "a zookeeper's approach to culture. This approach to culture contains within it the possibility of what Jurgen Habermas describes as 'administrative preservation' of cultures like forms of endangered species." Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185, 209

other hand, *equality of result* as a measure of fairness contains strong leanings toward difference. It suggests separation and minimizes sameness yet provides little in the way of mechanisms for mediating situations where difference would overcome any sense of meta-group cohesion. It can provide less protection against abuse by non-dominant groups and can result in reverse hegemony. It suggests the power of cultural veto by the smallest minority. It thus contains the danger of providing little protection against the unfairness of the smaller (instead of the larger) groups. At its limit it can suggest *explosion of difference* and provide a potent cultural weapon for separation.<sup>108</sup>

*Fairness requires that we be willing to acknowledge as part of our cultural common sense that we all are part of the same group.* Without a master unity, our differences can overcome us. Concentrating on what pulls us together as a group vitiates the strength of what distinguishes us as people. This is no task reserved solely for the group suffering disadvantage, but is the greatest challenge to the group imposing disadvantage on others. To suggest that no such meta-commonality exists is to suggest separation and disunity. Without a commitment to cultural unity, there is no point in engaging in dialog.

*The penalty for rejecting an affirmation of sameness is the loss of the means of speaking in culturally significant ways; the ultimate penalty for rejection of sameness at some level is separation.* Unless we acknowledge our differences within a context of shared culture at some meaningful level (and not at some abstract level of meaninglessness) we increase rather than decrease the separation effects of difference. Groups listen in culturally significant ways only to "family." If you are not family, then you have nothing culturally significant to say. At its limit, rejection of sameness at a meaningful level suggests that *as a result of difference* we cannot

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(1997).

107. The Islam of the Taliban in Afghanistan is an extreme case; the Americanism movement of the early part of the twentieth century provides a more benign example. See, e.g., David J. Rothman, *The State as Parent: Social Policy in the Progressive Era*, in *DOING GOOD: THE LIMITS OF BENEVOLENCE* 74-76 (Willard Gaylin et al. eds., 1978); Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 L. & SOC. INQUIRY 541 (1998).

108. The ethnic convulsions of the former Yugoslavia provide an extreme example. Cf. MATHEW HORSMAN & ANDREW MARSHALL, *AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER* (1994); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1991); Michael Walzer, *The New Tribalism*, 39 DISSENT 164 (1992).



speaking the same cultural language. Babel and recent world history instruct us that the consequence is a scattering.

*We must expect to fail.* To speak in culturally significant speech is no guarantee that our vision of what ought to be will become what is. Perseverance is a necessary ingredient of meaningful culturally significant speech. But an equally necessary ingredient is the willingness to question the validity of one's own views of fairness. As important is the ability to hear the culturally significant speech of others. Groups must be as willing to effect change within one's own group as they are to seek change in others. In a world of fluid difference one cannot ask one group to do what another will not.

"All cultures are composed of groups [that] struggle for discursive power just as they struggle for political dominance; multiple, conflicting, polyphonic contexts are the rule rather than the exception."<sup>109</sup> I have explored the possibility of a universal language of cultural change and mutual understanding. I will suggest to you that such a language exists. I have suggested to you that humans have used this language, consciously and unconsciously, since the Babelite scattering. This language is symbolic, expressive, and relies, for its effectiveness, on actions and image, rather than just on ideas or words. Yet, even as we strive for racial or ethnic justice in a land occupied by groups self-consciously different, and on that basis irremediably separate because of those differences, we must understand the limitations of our quest for equity. The term "equity" is necessarily temporal—its meaning will shift with the generations. We will never be satisfied with the nature of the relationships between groups which are separated by difference. Our task must remain an endless one, to minimize the self-consciously perceived negative qualities of the hierarchies which we create to affirm our differences. The process is not perfect. As long as difference exists, as long as we can look at one another and find a way of distinguishing one from another, and as long as we make judgements on the basis of that difference, the problem of equity will exist.

The day we are willing to give up our clinging to the significance of those differences we now identify with the word "racial" is the day Babel will be overcome, equity will prevail, and we shall indeed become one people again. But we are unwilling to give up our difference today.<sup>110</sup> This is an age

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109. Collin O'Connor Udell, *Stalking The Wild Lacuna: Communication, Cognition and Contingency*, 16 L. & INEQ. 493, 500 (1998) (citing in part William W. Fisher, III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1072 (1997)).

110. This unwillingness is reflected in much contemporary race scholarship which seeks to emphasize difference while arguing that the effect of difference ought not to be significant, or

in which we revel in difference. What is left to us, then, is to ameliorate the economic, social and political effects of this difference, while preserving the value and viability of this difference. I question the value of this exercise but understand that this is the cultural mission we have chosen to undertake since the American Civil War.

The cultural detritus of half a millennium of African slavery cannot be overcome in a mere century. The formal work of lawyers, legislators and judges, the dismantling of the official markers of difference disparity is hardly enough to complete our project. We must capture the hearts of people and not be satisfied or fooled by their gestures.<sup>111</sup> This overcoming will require the blood of many martyrs. Much blood remains to be shed. It requires the voice of many millions repeating, by word and deed, a new cultural language of racial re-conception. Thus is the power inherent in the act of the scattering of language to keep us apart. Thus also is the human limitations of speaking shared conceptualization of sameness and difference. The brightest example of this power and these limitations remains the Jews. The transformation and re-transformation of the Jews during last two millennia is breathtaking.<sup>112</sup> They have been categorized as race, religion, ethnicity, language—and none of these—by the dominant societies in which the Jewish people have sought to settle. Today's model minority is yesterday's despised example of sub-humanity and tomorrow's lethal threat to the identity of the majority—and other minorities—with whom they share space.<sup>113</sup> The only sure solution, *the*

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that the effect of difference is significant because difference is not emphasized. See, e.g., Leslie G. Espinoza, *Legal Narratives, Therapeutic Narrative: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 927-36 (1997).

111. Those who struggle for racial equity must keep in mind the admonition "mankind prefers to see gestures rather than to hear reasons." FRIEDRICH NIETZSCHE, *THE ANTICHRIST*, Ch. 54 (1888), reprinted in *THE PORTABLE NIETZSCHE* 568, 639 (Walter Kaufmann ed. & trans., 1968).

112. There are mountains of books on this subject. Two recent works of particular interest to me are STEPHEN FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY AND ANALYSIS OF THE SEPARATION OF CHURCH AND STATE* (1997) (on the nature of Christian domination of the language of American socio-political culture) and DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 49-128 (1996) (the chapters on the evolution of eliminationist anti-Semitism in modern Germany, and on eliminationist antisemitism as the common sense of German society during the Nazi period).

113. Jews were our old model minority. For a thoughtful discussion of the nature of Jewish "success" in the United States and the utility, see Deborah C. Malamud, *Is Affirmative Action Fair? The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 59 OHIO ST. L.J. 915 (1998). Asians have recently ascended to this "honor." For an interesting collection of essays on the Jews and Chinese as overcoming their social disabilities to achieve economic success, see *ESSENTIAL OUTSIDERS: CHINESE AND JEWS IN THE MODERN TRANSFORMATION OF SOUTHEAST ASIA AND CENTRAL EUROPE* (Daniel Chirot et al. eds., 1997). For some recent critical work on the notion of model minority from "within," see, for example, RONALD T.

*final solution*, for difference is disappearance. Here again, the Jews teach us that even disappearance through assimilation, and the reconceptualization of difference may be illusory.<sup>114</sup>

Until humankind is willing to convince itself that difference does not exist difference will matter. Until we as a collective are able to overcome the fundamental disabilities of Babel—to re-create order from the chaos of the scattering (rather than to undo the scattering), that is, to *overcome ourselves*—all pronouncements of difference and sameness shall be as fruitless as the Tower which caused our scattering.<sup>115</sup> Self overcoming, for individuals, as well as for groups, requires the strength to sublimate the passions of difference into something greater, to order the chaos of difference for the greater empowerment of the whole.

The Latin word in question, *sublimare*, however, means—in German—*aufheben*, and Nietzsche's sublimation actually involves, no less than does Hegel's *aufheben*, a simultaneous preserving, canceling, and lifting up . . . . Sublimation is possible only because there is a basic force (the will to power) which is defined in terms of an objective (power) which remains the same throughout all the metamorphoses. . . . This essential objective is preserved no less than is the energy, which the immediate objective is canceled; and the lifting up consists in the attainment of greater power.<sup>116</sup>

For the religious, the Biblically inclined, perhaps the notion of sublimation can be translated. Sublimation is possible because the basic force, a will to unity with the Divine, defined in terms of the unifying force itself (God or *Logos*) remains unchanged as individuals and groups strive against the baser expressions of difference. The lifting up consists of the attainment of a greater unity with God or *Logos*, an overcoming of difference without eliminating difference.<sup>117</sup> The Biblical cards, however, are stacked against a lifting up of such a sublimated Tower without the help of the Divine in all of

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TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989); Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811 (1996).

114. See ANTONIO DOMINGUEZ ORTIZ, LOS JUDEOCONVERSOS EN LA ESPAÑA MODERNA 11-67 (1992).

115. Self-overcoming is a concept well developed by Nietzsche. For a thoughtful discussion of the notion of self-overcoming within the Nietzsche writings, see WALTER KAUFMANN, NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST 211-256 (4th ed. 1974).

116. *Id.* at 236.

117. Spanish mystics of an earlier age provide an example of this vision of self-overcoming applied by an individual. See, e.g., THE LIFE OF SAINT TERESA OF ÁVILA BY HERSELF 76-161 (J.M. Cohen trans., 1957) (1588).

us. For it is to the Divine (in whatever form or manifestation suits us), and not towards the Tower, to which we must direct our energies.

