The Effect of "Othering" on Public Policy Debates

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Abstract

The premise of this Article is that an underlying attitude of “othering” pervades current discussions about what the law should and should not do to address the conditions and needs of various categories of persons. Although we do not necessarily acknowledge it, the fact that our discussions proceed from a view of the people whose situations or problems being discussed as “other” makes a difference to how we evaluate various public policy initiatives.

This Article is not an effort to engage in a detailed discussion or resolution of any particular question of law and public policy. Instead its focus is the attitude of othering – where it proceeds from, how law and culture promote it, and how the law might help move us beyond it. The Article begins with a discussion of the prevalence of an attitude that views other people as “other” than the self and then talks about the social, cultural, political and legal forces that promote an attitude of othering. After using several examples to illustrate how the attitude of othering infects public policy debates, it address the question how to change the terms of the discourse, exploring the religious values that combat othering and ways the law might implement those values.

Introduction

Much of the debate over contentious public policy issues takes place at a very abstract and nonpersonal level. We often talk about “life” in the abstract, or about “illegal immigrants” or “criminals” or the “poor” in very categorical and very

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nonpersonal terms. We argue in the same fashion over whether particular legal changes are or are not justified to address issues concerning discrete groups like these.

Our view of the issues concerning the needs and condition of different groups of persons is very much affected by the fact that very often the groups we are talking about are groups that are not us, at least in the way we think of ourselves. They are “others.”

The premise of this Article is that an underlying attitude of “othering” pervades current discussions about what the law should and should not do to address the conditions and needs of various categories of persons. Although we do not necessarily acknowledge it, the fact that our discussions proceed from a view of the people whose situations or problems being discussed as “other” makes a difference to how we evaluate various public policy initiatives. The corollary is that if, instead of proceeding from a view of others as fundamentally “not us,” we possessed an attitude of valuing others and as seeing them as not separate or other, our views on any number of issues of public policy might be very different.

1 It is true that legal discussions can’t completely avoid categorization. My concern here, as the following discussion will elaborate, is the tendency of categorization to distance us from those whose categories are different from our own. At some point we must see beyond categories to the persons beyond. “Only in the response of person to person can Augustine’s sublime fusion be achieved, in which justice is defined as ‘love serving only the one loved.’” JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW xx (2002). In his book, Noonan speaks of “masks,” that is, “ways of classifying individual human beings so that their humanity is hidden and disavowed.” Id. at 19.

2 When I talk about the “other” and “othering,” I am not referring to the bare psychological process by which an individual establishes her identity by distinguishing between the self and other persons. Rather, I am talking about a process by which individuals and society view and label people who are different from them in a way that devalues and dehumanizes them. There has been some discussion of this process in social science literature. See, e.g., Alex Gillespie, Collapsing Self/Other Positions: Identification Through Differentiation, 46 BRITISH J. SOC. PSYCH. 579 (2007); Vivian L. Vignoles et al, Beyond Self-Esteem, Influence of Multiple Motives on Identity Construction, 90 J. PERSONALITY & SOC. PSYCH. 308 (2007); Jack K. Martin et al, Of Fear and Loathing: The Role of “Disturbing Behavior,” Labels, and Causal Attributions in Shaping Public Attitudes Toward People with Mental Illness, 41 J. HEALTH & SOC. BEHAV. 208 (2000). My focus here is on the effect of the attitude on public policy debates and the role the law might play in combating the othering tendency.

3 In Christian terms, this is spoken of as seeing all as part of one Body of Christ. See, e.g., Romans 12:5, 1 Corinthians 12:12-14.
If my premises are correct, then this is something that is both important in terms of how we view policies affecting, for example, the poor or criminals and relevant to our discussions of “life.” Only if we value others as ourselves can we move to broader acceptance of idea that all “life” has value.

That othering affects our evaluation of public policy issues also has implications regarding the role of law. That is, we need to be conscious of the ways the structure of law and society promotes either othering or a view of human persons as possessing equal dignity and being part of a communal whole.

I am not concerned in this Article with a detailed discussion or resolution of any particular question of law and public policy. Instead my focus here is the attitude of othering – where it proceeds from, how law and culture promote it, and how the law might help move us beyond it. Section I discusses the prevalence of an attitude that views other people as “other” than the self. Section II talks about the social, cultural, political and legal forces that promote an attitude of othering and Section III explores how the attitude infects public policy debates on any number of issues. Finally, Section IV address the question how to change the terms of the discourse, exploring both religious values that might work to combat othering and ways the law might help promote those values.

I. The Prevalence of “Othering”

In October of 1998, two men met Matthew Shepherd, a 21 year old gay University of Wyoming student, in a bar. The two pretended to be gay and lured Matthew into a truck. They pistol-whipped and then brutally beat and burned him. Then they tied him to a wooden fence and left him there. He was found eighteen hours later
and died after five days in a coma.\textsuperscript{4} According to FBI reports, fifteen percent of all hate crimes reported to police are based on perceived sexual orientation.\textsuperscript{5}

On March 21, 1981, two white men got upset that a jury had failed to convict a black man accused of murdering a white police officer. So they traveled around Mobile in their car until they encountered nineteen year old African American Michael Donald who was on his way home. Donald had nothing to do with the crime in question; he attended a local trade school and worked part-time for the newspaper, the Mobile Press Register. The two men forced Donald into their car, and drove him into the next county and then lynched him.\textsuperscript{6} Between 1982 and 1968, over 4500 people, mostly African Americans, were lynched in the United States.\textsuperscript{7}

In 1942, five year-old Janet Daijogo, a U.S. citizen and the daughter of a Hawaiian born Japanese farmer (also a citizen), was interned with her family at an internment camp in Topaz, Utah. She was forced to live for three years in a tarpaper barracks with no windows, waking up every morning covered with sand from dust storms during the night.\textsuperscript{8} During the 1940s, 120,000 Japanese and Japanese Americans (62% of


whom were U.S. citizens born in this country) were forcibly relocated to internment camps.\(^9\) When the United States finally apologized for this act in 1988, the official apology admitted that the government’s action had been based on “racial prejudice” as well as on war hysteria and a failure of political leadership.\(^{10}\)

In 1943, after the Warsaw Ghetto Uprising, Salomon Radasky was sent to the Majdanek concentration camp. He spent the World War II years imprisoned in several different concentration camps, including Auschwitz, narrowly escaping death on more than one occasion. Of the 78 members of his family, Salomon was the only one to survive the Holocaust.\(^{11}\) Five to seven million Jewish people were slaughtered in an attempt by the Nazis to systematically exterminate the Jews.\(^{12}\)

From April to July 1994, the people of Rwanda suffered a genocide that claimed almost a million lives as the Hutus slaughtered members of the Tutsis.\(^{13}\) The two groups shared the same language and the same culture, but the tall and thin Tutsis, who had been favored by the Belgians before Rwandan independence, were resented by the short and stocky Hutus and blamed for many problems that occurred after independence. So the

\(^{10}\) Civil Liberties Act of 1988, P.L. 100-383 (1988) (declaring that actions to inter Japanese-American citizens “were without security reasons and without any acts of espionage or sabotage documented by the Commission on Wartime Relocation and Internment of Civilians, and were motivated by racial prejudice, wartime hysteria, and a failure of political leadership”).
Hutus rose up and attempted to annihilate the Tutsis.\(^\text{14}\) I’m not suggesting here there may not have been abuse of the Hutus by the Tutsis at various time. The point, however, is that two ethnically similar groups that “[spoke] the same language, inhabit[ed] the same areas and follow[ed] the same traditions”\(^\text{15}\) came to view each other in a way that made annihilation of the other seem reasonable.\(^\text{16}\)

“Othering” comes in many forms and in various degrees. It appears as fascism, racism, misogyny, homophobia, and religious and ethnic hatred. Of course, most people don’t perpetrate the kinds of acts I just described. Nonetheless we are deluding ourselves if we fail to admit that each and every one of us is, at least to some degree, guilty of the same kind of “othering” that has the capacity, if left unchecked, to produce such horrific acts. We are being dishonest if we fail to admit that we make distinctions in how we feel about and how we react to people who seem different from us in one way or another – if not consciously, at least at some unconscious level.

Let me give some examples, starting with myself. I don’t think of myself as having any racist tendencies. I know that I do not believe that whites are better or smarter than people of color or that people of color are inferior in some way to whites. Yet I noticed some years ago – when I still lived in Manhattan and Brooklyn and often walked through the streets alone at night (arguably later than I should have) – that when I looked ahead on the street and saw a black man coming toward me, I had an immediate

\(^{14}\) Human Rights Watch, supra note 13.
\(^{15}\) BBC News, supra note 13.
\(^{16}\) The same dynamic operated in Bosnia in the early 1990s, where “the two groups of people who hated each other so much, Serbs and Bosnian Muslims, were all but indistinguishable in their facial traits. It was only by their names that you could tell them apart.” George M. Anderson, \emph{Roots of Genocide}, \textsc{america}, Feb. 9, 2009, at 16.
physical reaction of fear that was different in degree and kind from what I felt if I looked ahead and saw a white man coming toward me.

Where did that reaction come from? I don’t know what the actual facts are, but I had at the time no statistical knowledge that would indicate that as a white woman I would be more likely to face some kind of attack from a black man than from a white man. Nor was the reaction based on any perceived threat from the demeanor of the person, since the physical reaction generally occurred when the person was too far off for me to get any sense at all of his demeanor. In fact, quite often when the person who prompted the fearful reaction got closer, I was amazed at how nonthreatening his demeanor was. So the reaction came from some place deep inside me, some deep place that at some level felt: that person and I are not the same - and in that difference I am threatened. It is not a reaction I’m particularly proud of, but it was there and it bothered me when I realized it was there.

Sometimes the othering reaction is prompted by a particular incident. I think of an experience I had with a cousin with whom I am very close. This particular cousin had always been very upset at the treatment of Japanese-Americans during World War II and viewed the U.S. experience at Manzanar to be one of the greatest blights in American

\[\text{\footnotesize The factual truth of the matter is not issue the issue here. It may or may not be that a white women walking alone on the street at night is more likely to be attacked by a black man than by a white man. Whether true or not, the point is I had no knowledge that might justify or rationally explain my reaction.} \]

\[\text{\footnotesize I’d like to say I no longer have such reactions. But I had an experience some months ago that suggests I can’t really make that claim. Driving home from work, I often pass people begging for money near the entrance to the expressway. For about two weeks, I drove past the same black man, never once tempted to stop and give him money. One evening, the person standing there begging was a white women who looked like she could have been a mother in my neighborhood. Although I didn’t’ stop and give her money, I noticed that as I looked ahead and saw her, I had a thought that maybe I should. The point is not whether it is a good or not good idea to give money to beggars (there may be many good reasons not to hand money to someone standing by the entrance to the expressway); it is that my reaction to the two beggars was very different. How much of the reaction was gender and how much was race I can’t say, but it certainly wasn’t a judgment based on the relative need of the two individuals.} \]
I stood next to him at the gathering we held after the funeral service for our youngest uncle (a man barely six years older than my cousin and I), who was killed in the World Trade Center on 9/11. At one point my cousin turned to me, shook his head and said, “I never did before, but now I understand Manzanar.” I was chilled by those words spoken by that person. In a moment, the Japanese-Americans were no longer Americans who had been unfairly treated. Instead, they were “other” to my cousin, as were the Muslims who flew into the World Trade Center killing my uncle.

Another very spiritual person I know described her reaction when she heard someone say that many Muslims in America were upset at how they are being treated by many non-Muslims post 9/11. She said her neck bristled, and she was almost angry, thinking “How dare they be upset.” “They” having become part of an enemy – part of someone or something not us, and therefore not someone whose feelings matter. The person was immediately aware of her reaction and examined it, but it was there.

Sr. Helen Prejean (famous from her book Dead Man Walking and for her efforts to secure a moratorium on the death penalty) talks about her insensitivity as a child growing up in the South. She tells stories of accepting – of not seeing anything wrong with – a bus driver shouting obscenities at and literally kick a black woman off his bus. Black people sitting on the back of the bus was normal; it wasn’t anything to even think about. They were different, they were inferior, and they didn’t matter.

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19 In 1942, the United States ordered more than 100,000 Japanese American citizens and resident Japanese aliens to leave their homes and relocate to detention camps. One of the most famous of those camps was Manzanar. See generally WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II 31-34 (2002); National Park Service, Manzanar Historic Resource Study, available at http://www.nps.gov/archive/manz/hrs/hrst.htm.


Or think of Western reaction to reports of atrocities in places far away. One of the examples I opened with was the genocide in Rwanda. There is a very poignant scene in the movie *Hotel Rwanda* where Don Cheadle (playing the hotel manager Paul Rusesabagina, who risked his life trying to save as many Tutsis as he could) suggests that once the West has seen news reports of what is happening, they will stop it. Surely, he says, once they see what is going on they will not allow it to continue. The response of the world-weary and much more realistic Western reporter bursts the hotel manager’s hopes. The reporter shakes his head and says it won’t matter, that (in a line repeated by the movie’s director Terry George): “It’s simple, African lives are not seen as valuable as the lives of Europeans or Americans.” Written that way, the words sound harsh, but in fact, the international community turned a blind eye to what happened in Rwanda.

Afterwards, Western leaders vowed, “Never again.” Yet, how much clamor do you hear (in your own heart or on the streets) over the outrage occurring in the Darfur region of the Sudan? More than 200,000 killed or dead from hunger and disease; more than two million displaced. (And those numbers are climbing every day.) Where is the clamor? The same can be said for any number of other examples. How much of an outcry do we hear about the number of children dying around the world because of lack

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22 *Hotel Rwanda* (MGM 2005).
of access to health care or to clean drinking water\textsuperscript{25} or the numbers of young women transported for purposes of sexual trafficking.\textsuperscript{26}

I suspect the same may be at play in the attitudes of at least some people toward the war in Iraq and, further back in time, the withdrawal of American troops from Vietnam. Let me be clear: in my opinion there are legitimate reasons to oppose the war in Iraq and for having opposed the war in Vietnam. However, legitimate opposition does not include statements that suggest the Iraqis are not worthy of our attention because they are primitive or prone to violence.\textsuperscript{27} And I suspect swallowing the abandonment of the South Vietnamese was easier for many Americans to accept than abandonment of a Western nation would have been.

Closer to home, think about the early days of the AIDS epidemic. Early on, very little attention was focused on AIDs and not a tremendous amount of effort put into research for treatment and cure of the disease. Why? Because in the beginning, what did we call AIDs? It was the gay disease.\textsuperscript{28} Not only did this have nothing to do with “us,” but many people said and thought things like – “\textit{They} had it coming” or “That’s what they get for their unnatural behavior.” Or, worse, “AIDs is God’s punishment for

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\item \textsuperscript{27} See, e.g., Victor Davis Hanson, \textit{The Vision Thing}, \textsc{National Review Online}, Oct. 17, 2003, available at http://www.nationalreview.com/hanson/hanson200310170838.asp (suggesting that “[m]ost Americans, tragically so, do not find from 30-second film clips that the Iraqi people are all that sympathetic a lot, but rather — after the war, the looting, the suicide bombings, and the complaining — that they are not worth the billions of dollars and the lost lives”). Cf. David Pipes, \textit{An Iraqi [Cultural] Tragedy}, \textsc{N.Y. Post}, Apr. 22, 2003 (speaking of the “inherently violent quality of modern Iraqi society”).
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homosexuality.” The only people other than homosexuals who we heard of getting AIDs in those early days were drug addicts and Haitains, and they were no more “us” than were homosexuals. Only after there started to be significant numbers of AIDs cases among heterosexuals (heterosexuals like “us”) did the disease become something to be taken seriously.

Or think about your reaction when you read or hear news stories about crimes. One of my friends who teaches criminal law remarked that his students have no hesitance admitting that they pay more attention to crimes committed against people like them whether on racial or, more likely, socio-economic grounds as identified by neighborhood. They are less bothered about crimes committed against people who are different. One online news report of the murder of five prostitutes in England not that long ago painfully illustrates the extent to which our reaction to crime depends on our judgment of the victim. The article observed that, “in the scheme of things the deaths of these five women is no great loss. They weren't going to discover a cure for cancer or embark on missionary work in Darfur.” Like other marginalized groups, prostitutes are others; they simply matter less.

So none of us are guilty of lynching a black person, or beating a homosexual to death and none of us have participated in a decision to inter any American citizens or committed any of the other atrocities I described earlier. But all of us are guilty at some level of the kind of “othering” that at its worst has the capacity, if left unchecked, to

produce such acts. And even if it doesn’t produce such atrocities, it accepts and allows an indifference to the suffering of others.

Let me make two observations before turning in Section II to a discussion of the forces that promote othering. First, when I speak of “othering” I am speaking of something that is broader than stereotyping. Stereotyping puts others in particular categories that are then used “to simplify the task of perceiving, processing, and retaining information about people in memory.” It involves making judgments about a person based on perceived characteristics of the particular group to which the person belongs rather than on an individual assessment of the person. Othering does not depend on forming particular judgments about the characteristics of a particular group, or drawing conclusions about a particular person based on characteristics of the group of which he is

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30 It is easy to think of examples in the case of government officials. On the far end we have the torture activity that has been so much in the news. Less vicious, but no less serious, are the reports of treatments of certain foreign travelers coming into the United States. And lest one think it is only Arab visitors receiving adverse treatment, a recent New York Times article revealed the inexplicable imprisonment of an Italian young man coming to visit his fiancé. See Nina Bernstein, *Italian’s Detention Illustrates Dangers Foreign Visitors Face*, N.Y. TIMES, May 14, 2008, available at http://www.nytimes.com/2008/05/14/us/14visa.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1213707716-2+V0z65MF3ETJMCVCc4vPA.

31 My colleague Michael Paulson writes about the danger of the “sliding-scale of humanity” argument used in the abortion context, i.e., “[t]he contention that the same independent living being is not entitled to the moral status otherwise accorded a member of his or her species, because of the stage in development of that independent life.” He argues, that this sliding-scale argument is “one that should be frightening to liberals and conservatives alike. Such a proposition was, at some level, part of the Nazis’ justification for the moral permissibility of the mass murder of Jews. It was, at some level, the American argument for the moral permissibility of slavery. It is, at some level, the view of those who affirm the moral propriety of discrimination on the basis of race.” Michael Stokes Paulson, *Roe at 35; Death Toll at 50 Million*, Balkanization, January 21, 2009), available at http://balkin.blogspot.com/2008/01/roe-at-35-death-toll-at-50-million.html. See also John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984) (discussing the “masking” that underlay both the early legal approach to slavery and the approach of courts to abortion regulation).

People make similar sliding scale judgments in all sorts of circumstances, deciding on the level of someone’s value based on their income, education or any number of other factors.


33 “[O]nce in place, stereotypes bias intergroup judgment and decisionmaking…function[ing] as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.” *Id.*
a part. Rather, the judgment is more broadly a judgment that the other in question is “not me.” Stereotyping can be a manifestation of othering, and similarly operates more unconsciously than consciously, but is not as broad as what I am here speaking about.

Othering is much closer to what Judge Noonan calls “masks,” by which he means “the “legal construct suppressing the humanity of a participant in the [legal] process.” But even there, although he suggests that “masks may be seen as devices reflecting the structure of society and the degrees of its acknowledgement of humanity in different groups,” and therefore operates similarly to othering in its effect, for Noonan, it is the fact that there are points “where it is too much [for the legal system] to recognize that a human being exits” that results in the creation of masks. As I discuss in the next section, law and factors outside of the law help contribute to othering.

34 Stereotyping involves making associations between a particular group and particular traits. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CAL. L. REV. 945, 949-50 (2006) (defining a “social stereotype” as “a mental association between a social group or category and a trait”). Whereas othering says simply, that person (who may be poor, or Asian or black, or homosexual) is different from me, stereotyping involves judgments that, “the poor are lazy and shiftless” or “Asians are good in science,” etc. A recent study provides a good example of stereotyping. A group of people were asked to look at two pictures of an identical women, except that in one picture he woman was wearing an Islamic headscarf. Not only was the covered woman was perceived as more traditional and wealthier, but subjects displayed an aversion to her that they did not display toward the same woman without the scarf. See What a Difference a Shawl Makes, Jan. 4, 2008, available at http://www.mediacurves.com/Culture/J6652/.


36 Noonan, supra note 1, at 20.

37 Id. at 23.

38 Id. at 26.
Second, it would overstate it to suggest that othering operates universally; there clearly are exceptions. The Tsunami, for example, generated a tremendous charitable outpouring among Americans,\textsuperscript{39} despite the fact that it happened someplace a significant number of Americans probably couldn’t locate on a map. And people from all around the country sent money and goods to New Orleans, or traveled there themselves to help with the rebuilding, after Hurricane Katrina.\textsuperscript{40} It may be that natural disasters don’t so easily give rise to a response of othering: even thought the victims of a particular natural disaster are different from us, we could as easily be the victim of a natural disaster ourselves, so the victims are not inherently other. But, more broadly it may be that charitable impulses are just different. That is, it may be that people are simply willing to give notwithstanding the othering of the recipient of our charity. One can write a check while still maintaining a distance from the other, and while maintaining a sense of power and control over the other (not to mention getting a tax deduction for the act). In any event, even if one could find examples that suggest the othering tendency is not universal, it is clear that it exerts a strong pull on many people.

**II. Forces that Promote “Othering”**

What is the root of the capacity to declare that another group of human beings is fundamentally not us, and therefore expendable? Where does this reaction, this “othering” come from? This section explores some of the forces the promote othering.

**A. Pseudospeciation**


\textsuperscript{40} See id. (noting that Americans donated $226 million in the five days after Hurricanes Katrina and Rita).
In the most benign fashion and on an individual level, in some sense every time we define ourselves in some way, we exclude from us those who stand outside of that definition. When I say – I am a New York City born and bred, white, Catholic, female of Italian-American heritage, to at least some degree I exclude from me, from who and what I am, non-white, non-Catholic, male, Irish, Polish, non-New York, rural, and so on. I define myself in a way that makes others different from me.

The groups of which we are a part play an important role here. We place ourselves in various groups, ethnic, religious, racial, familial, etc., that “other” those who are not part of those groups. The psychologist Erik Erickson spoke of “pseudospeciation,” a term that “denotes the fact that while man is obviously one species, he appears on the scene split up into groups (from tribes to nations, from castes to classes, from religious to ideologies) which provide their members with a firm sense of distinct and superior identity and immortality.”

This behavior is transmitted from one generation to the next, forming different cultures. A group sees the similarities of its members and forms a culture, and when it does, it sees that culture as separate from those who do not fall into the group.

Jane Goodall observed a startling example of this in her study of chimpanzees. An extended family of chimps split into two groups, one moving to the south and another to the north. It took no more than a couple of years for the previous family to split into “us” and “others” and for tensions to mount so high that one group literally annihilated

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43 See generally Jane Goodall, Reason for Hope (1999); Jane Goodall, Through a Window (1990). See also Carol Lee Flinders, Enduring Lives 97-182 (discussing Goodall’s work).
the other and inflicted on them the kind of injuries that are generally only seen when chimpanzees are trying to kill a large prey animal of another species. Goodall observed that this was not a fear of strangers, since the members of the Kahama community were familiar to their aggressors. “The members of the Kahama community had, before the split, enjoyed close and friendly relations with their aggressors; in some cases they had grown up with them and had traveled, fed, played, groomed, and slept together.”

What accounted for this behavior? The answer, explains Goodall, is that he chimps had done what human beings do all the time. They had “pseudo-speciated.” Goodall writes, “By separating themselves, it was as though they forfeited their ‘right’ to be treated as group members.” They became strangers, others.

Pseudospeciation results in dehumanizing others based on cultural, behavioral and other differences. Goodall opines that “[o]ur tendency to form select in-groups from which we exclude those who do not share out ethnic background, socioeconomic position, political persuasions, religious beliefs, and so on is one of the major causes of war, rioting, gang violence and other kinds of conflict.” We may not necessarily have “conscious, intentional control over the processes of social perception, impression

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44 REASON FOR HOPE, supra note 43, at 130-131 (observing that when the Kasakela males attacked Kahama chimps, they “showed aggressive patterns not seen during fights with members of their own community yet seen regularly when chimpanzees are trying to incapacitate and dismember a large prey animal”); THROUGH A WINDOW, supra note 43, at 210 (observing that some of the patterns of attack had “never been seen during fights between members of the same community – the twisting of limbs, the tearing off of strips of skin, the drinking of blood” and was usually seen only when chimpanzees are trying to kill adult prey animals).

45 REASON FOR HOPE, supra note 43, at 130. See also FLINDERS, supra note 21, at 148 (noting that “[t]he Kasakela chimps weren’t just savaging members of their own species, they were killing friends, and probably cousins, with whom they had hunted and played and slept”).

46 REASON FOR HOPE, supra note 43, at 129-130.

47 THROUGH A WINDOW, supra note 43, at 210; REASON FOR HOPE, supra note 43, at 130-131 (observing that the Kahama chimps were treated as though “they were thoroughly ‘de-chimpized’”).

48 REASON FOR HOPE, supra note 43, at 131 (also suggesting that the reason Golding’s Lord of the Flies is “a terrifying novel [is] because we know that children, given the right (or, rather the wrong) environment, can behave barbarically” and that :cultural speciation is obvious in the terrifying evolution of modern gangs”).
formation, and judgment that creates othering. Nonetheless, seeing ourselves as part of certain groups has the effect of excluding others from our locus of concern.

B. Cultural Reinforcement of Pseudospeciation

Cultural forces also contribute to “othering. David Brooks wrote an op-ed in the New York Times a few years ago entitled The Segmented Society. In it, he suggested that we “live in an age in which the technological and commercial momentum drives fragmentation.” The particular example he explored was the fragmentation of the music industry and of the present musical culture’s loss of contact with its common roots. Music, however, is only one aspect of our increasing loss of cohesion and companies in industry after industry are “dividing the marketplace into narrower and more segmented life-style niches.” Brooks suggests that anxiety about fragmentation and a longing of cohesion are “the driving fear behind the inequality and immigration debates, behind worries of polarization” and talks about the need for “institutions that span social, class and ethnic lines.”

Nor is technology the only culprit here. Within the last few decades, the American ideal has shifted “from assimilation to ethnicity, from integration to separatism.” We see examples of this in the efforts to embrace Ebonics in American

49 Greenwald & Kreiger, supra note 34, at 946.
50 It also has other potential effects, for example, the danger that we view voting as “a tribalistic exercise in which we express our sympathy for the candidate who most reminds us of ourselves.” Don’t Vote ‘Yay’, COMMONWEALTH, Oct. 10, 2008, at 5.
51 While law has a tremendous power in shaping our lives, it is important to recognize that culture can often be as or more powerful than law in shaping our reactions. Much of our understanding of the meaning of concepts such as freedom, justice and truth, are a function of the culture that steeps our lives.
53 Id.
54 Id.
55 Id.
classrooms and other educational policies fostering multiculturalism as well as in strategies for integrating immigrants into American life.

Obviously, cultural pluralism is “necessary in an ethnically diversified society” such as exists in the United States today. Multiculturalism does not necessarily entail superiority of one group over another, and to the extent it takes the form of recognizing the value and contributions of each of the various subgroups that make up our culture, is both valuable and necessary.

However, there is a danger. Speaking in constitutional terms, Mark Tushnet writes, “In important ways the Constitution, with its opening words ‘We the People of the United States,’ is a document about national unity; a document that tries to create – at least through rhetoric – a single people of the United States, notwithstanding our wide differences. Certain kinds of multiculturalism deny the possibility that there could be a single people of the United States.” Thus, multiculturalism has the potential to foster a separatism that “corrodes all sense of community.”

“multiculturalism has become a dominant feature of the political and intellectual landscape of the West” since the 1960s.


59 SCHLESINGER, supra 56, at 40.

60 Thus, for example, a “multicultural curriculum [that] features Africa and African achievements…teach[es] some of the wonders of human achievement and substantiate the truth about innate black equality.” Maurice E.R. Munroe, Unamerican Tail: Of Segregation and Multicultural Education, 64 ALBANY L. REV. 241, 305-06.

61 Mark Tushnet, Thinking about the Constitution at the Cusp, 34 AKRON L. REV. 21, 34 (2000). See also SCHLESINGER, supra 56, at 58 (noting that “[t]he cult of ethnicity exaggerates differences, intensifies resentments and antagonisms, drives ever deeper the awful wedges between races and nationalities”).

62 George W. Dent, Jr., Secularism and the Supreme Court, 1999 B.Y.U. L. REV. 1, 36-37 (1999) (arguing that “[s]ocial rifts are deepened by multiculturalism, a theory that people should find meaning in their identity, which derives from sex, ethnicity, and sexual orientation”). See also Ayelet Schachar, Two
C. The Reinforcement Effect of Law and Politics

The law also plays a tremendous role in promoting othering. Law does more than simply regulate behavior. It also has both an expressive and pedagogic function.\(^{63}\) Whatever else it does, the law “imbues a vision of how the members of a particular society should live their lives together.”\(^{64}\)

By law here I mean not simply legislative enactments and judicial decisions, but also both the behavior of executive officials and of those charged with enforcing the law and the expression of views by other government officials about how law and society should function. Not only does positively enacted legislation have the potential to institutionalize pseudo-speciation, but judicial decisions and the behavior of individual government officials both itself often proceeds from an attitude of othering and effectively legitimizes such behavior, expressing to the citizenry that some people can be disregarded. Consider some examples.

1. Legislative and Judicial Law

Several examples illustrate the potential of legislative and judicial law to legitimate “othering.” First, the internment of Japanese-Americans during World War II, that I mentioned earlier, was effected pursuant to congressional legislation. That


legislation was upheld by the Supreme Court in *Korematsu v. United States*.\(^6^5\) In the words of Justice Roberts, who dissented from the majority opinion in *Korematsu*, the Supreme Court upheld the conviction of “a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence of inquiry concerning his loyalty and good disposition towards the United States.”\(^6^6\) Justice Murphy, in his dissenting opinion made reference to the government’s “blanket condemnation of all persons of Japanese descent,” with no evidence that such individuals were disloyal or had conducted themselves so as to constitute any menace to U.S. interests. He cited language in the military’s report on the evacuation of the Pacific Coast area referring “to all individuals of Japanese descent as ‘subversive,’ [and] as belonging to ‘an enemy race’ whose ‘racial strains are undiluted.’”\(^6^7\) The action of the legislature, the military and the judiciary legitimated the treatment of all Japanese-Americans as “other” and, therefore, as not entitled to the consideration we would demand for ourselves. The legal behavior constituted, in the words of Justice Murphy, the “legalization of racism.”\(^6^8\) The government does the same thing today when it approves of the use of the torture and otherwise inhumane treatment of Muslim detainees in the name of fighting a war against terrorism.\(^6^9\)

A second example is provided by Cathleen Kaveny in an article in which she discusses the pedagogical function of the law.\(^7^0\) She discusses laws colloquially referred

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\(^6^5\) 323 U.S. 214 (1944).
\(^6^6\) *Id.* at 226 (Roberts, J., dissenting).
\(^6^7\) *Id.* at 236 (Murphy, J., dissenting).
\(^6^8\) *Id.* at 242 (Murphy, J., dissenting).
\(^7^0\) See Kaveny, *supra* note 64.
to as the “Ugly Law,” statutes that existed in a number of states until the early 1970s that prohibited those who were “diseased, maimed, mutilated or in any [visibly] deformed” to appear in public places or on the public streets.\textsuperscript{71} It is not just that such laws had an effect on the activities of disabled persons on the streets. The bigger concern, notes Kaveny, is the message sent by the law. The law’s “concrete prohibitions and penalties are infused with a morally freighted vision of how human beings should live their lives together.”\textsuperscript{72} And the effect of the law extends beyond the actual prohibitions. “Assuming the citizens of Chicago internalize the normative vision of the worth of persons with disabilities presupposed by the law, how will they act in contexts not explicitly governed by it?”\textsuperscript{73} The law will clearly affect how people relate to persons with disabilities in whatever environment they confront them.

A third example of the law conveying an approval of othering, is the death penalty. I earlier mentioned Sr. Helen Prejean. One of her most telling realizations was that our society only allows the death penalty because we don’t believe that those who live on death row are human like us. They become so different from us that we don’t even recognize them as a human being. People, in fact, sometimes argue that certain criminals have forfeited their humanity by the crimes they commit.\textsuperscript{74} Certainly support for the death penalty is not expressed in those terms; people manage to frame support for the death penalty in terms of deterrence, self-protection or retribution.\textsuperscript{75} However, one

\textsuperscript{71} Chicago Municipal Code, § 36034 (repealed 1974).
\textsuperscript{72} Kaveny, supra note 64, at 340.
\textsuperscript{73} Id.
\textsuperscript{74} See, e.g., The Modern View of Capital Punishment: The Honorable Alex Kozinski vs. Professor Stephen Bright, 34 AM. CRIM. L. REV. 1353, 1355 (1997) (quoting as summation of sentiment shared by many who support capital punishment that “it is entirely appropriate for society to deem some acts so evil, to be so demeaning of human life, that we can say the perpetrator has forfeited his own life by committing them”).
\textsuperscript{75} There are a plethora of scholarly journals discussing the various justifications for the imposition of the death penalty. For some examples, see, Jason Borenstein, The Death Penalty: Conceptual and Empirical
frames the justification, the reality is that the criminal to whom the death penalty is given is viewed as not us.

2. The Language and Behavior of Government Officials

In 2007, President Bush made the audacious statement that no one was harmed by lack of health insurance because, after all, sick people can always go to the emergency room. Leave aside for a moment the fact that he was flat-out wrong in his conclusion. In fact, people who lack insurance do not get the care that they need. Apart from that, ask yourself – would you be happy if you or your relative had to sit for perhaps several hours in an emergency room every time you or they were sick? Do you think President Bush would think it acceptable if he or one of his family members or friends had to sit in an emergency room to receive medical care? Of course the answer is no.

Since the answer is no, one has to ask why it is acceptable to ask some people to rely on treatment we would not find acceptable for ourselves and those we feel a group connection to. I fear that comments like Bush’s reflect an underlying view about poor

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77 Several years ago, the American College of Physicians-American Society of Internal Medicine reviewed 124 scientific studies published over a 10 year period and found that uninsured people are: more than three times as likely to delay seeking medical care as people with health coverage; nearly three times as likely to report that they have not received needed medical care; more likely to need hospital treatment that could have been avoided for conditions such as diabetes asthma, hypertension and pneumonia; more likely to have a serious disease discovered too late to be treated successfully, e.g., more likely to be diagnosed with cancer at a late stage; and more than three times as likely to die in a hospital. It also found that children with no health insurance are up to 8 times less likely than insured children to have a regular source of care, up to six times more likely to go without needed medical care, up to four times more likely to delay seeking medical care and 40% more likely not to receive any medical attention for a serious injury.

78 In this vein, it will be interesting to see what response there will be to the fact that the use of emergency rooms by so many uninsured is resulting in increased waiting time in emergency rooms. Seriously ill patients are waiting longer and longer in emergency rooms to be seen. Emergency Room Delays, N.Y. TIMES, Jan. 19, 2008, at A.30.
people – essentially, they are not us. And because they are not us, it is acceptable to ask them to rely on treatment we would not find acceptable for ourselves and those we feel a group connection with. They are other and they matter less. What is important here is not just Bush’s belief; it may be that his statement is as much a product of his simply being out of touch with the reality of life for large segments of the population. My concern here is that his statement conveys the sentiment that it is acceptable to think of the poor as not us. It gives a stamp of approval to dehumanize others based on their lack of income. One news report noted the unfortunate consequence, suggesting that “[i]f lack of health insurance were truly a white middle-class crisis, then conservatives and liberals would long ago have joined together, carved out a compromise and done something…. The unofficial Republican attitude toward universal health care can be boiled down to the three "nots": not our voters, not our kind of solution and not our priority.”79

Another example is the failure to enforce civil rights laws. Think back to the long and arduous struggle to integrate schools (a struggle that in many respects is still going on). De facto school segregation continued to exist for years after the 1954 Supreme Court decision in Brown v. Board of Education.80 It continued because in people’s hearts and minds, African-American persons were “other,” were dehumanized based on the color of their skin. And that othering was fostered by the acts of executive officials in the South.81 George Wallace vowed in his first inaugural address as Governor

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79 Michael Millenson, Want Universal Health Care? The Operative Word is Care, WASH. POST, June 8, 2008, at B03.
80 See 347 U.S. 483 (1954); see also Barbara A. Noah, A Prescription for Racial Equality in Medicine, 40 CONN. L. REV. 675 n.107 (2008) (acknowledging that de facto segregation of schools continued through the 1980’s and 1990’s).
81 Prior to the Civil War and the subsequent enactment of the Thirteenth and Fourteenth Amendments to the U.S. Constitution, the othering of African-Americans was promoted by the law itself. “To put it bluntly,” in the words of John Noonan, “law was the medium and lawyers were the agents responsible for turning
of Alabama, “Segregation today. Segregation tomorrow. Segregation forever.” He pledged to “stand in the schoolhouse door” to prevent school integration and did exactly that: Think of what a powerful image that was – the Governor of the state standing at the door of a University of Alabama building, blocking the passage of two students of color. The Governor of the state, signifying to the people of Alabama – those two students are not us, they don’t belong with us.

The same message is conveyed when police engage in racial profiling, a not uncommon practice. What message is conveyed to citizens when we fail to disapprove one class of human beings into property. See Noonan, supra note 31, at 669, 669-671 (discussing early court decisions addressing the status of slaves).

George C. Wallace, Governor of Alabama, 1963 Inaugural Address (Jan. 14, 1963), available at http://www.archives.state.al.us/govs_list/inauguralspeech.html. Interestingly, almost lost to history is the fact that Wallace ran his first race as a pro-integration candidate, a position he discarded after losing the governor’s race. More significantly, also lost is the fact that while he was governor Wallace invested heavily in education and health care programs for blacks and established free clinics and vocational schools that helped black and other low-income residents of his state.

George C. Wallace, Governor of Alabama, Statement and Proclamation at the University of Alabama (June 11, 1963), available at http://www.archives.state.al.us/govs_list/schooldoor.html. This speech became widely known as the “stand in the schoolhouse door” speech.


The Department of Justice defines racial profiling as “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being or having been, engaged in criminal activity.” U.S. Dep’t of Justice, A Resource Guide on Racial Profiling Data Collection Systems, at p.3 (Nov. 2000), available at http://www.ncjrs.gov/pdffiles1/bja/184768.pdf.

For evidence of the extent of racial profiling, see, e.g., Dept’s of Justice, supra note 85, at 8 (citing statistics of racial profiling in New York City and suggesting that “racial profiling is not an isolated American experience”); Matthew Petrocelli et al., Conflict Theory and Racial Profiling: An Empirical Analysis of Police Traffic Stop Data, 31 J. CRIM. JUST. 1, 8 (2003) (finding evidence of racial profiling in frequency of police searches of African-American motorists compared to other motorists).
of such behavior? The clear message is that the police – the authority – say that it is acceptable to make judgments about people based on their color.

A more recent example is the behavior of Hillary Clinton during the campaign to determine the Democratic nominee for President in the 2008 election. Behind in delegates, the perception of many people was that Clinton adopted a campaign strategy that suggested a black man could not win the Presidency. As characterized by one party leader, “She is saying, “[H]e’s not one of us.” The fear was expressed that Clinton’s statements “encourage[d] a sense that we are divided as a nation.” Again, this may or may not have been her intent, but is it what was conveyed.

All of these things legitimate uncaring attitudes about the poor, about racial minorities, about criminals. All in various ways involve the law and legal officials not only condoning, but in some sense, fostering an attitude that some people are worth less than others. That some people can be at best ignored and at worst mistreated.

III. How Othering Affects Views of Issues of Law and Public Policy

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87 There are numerous examples over the years of judicial approval (or at least a failure to disapprove) of racial profiling. See, e.g., United States v. Harvey, 16 F.3d 109, 113 (6th Cir. 1994) (finding justification for arrest based on the fact that “there were three young black male occupants in an old vehicle”); Smith v. Swenson, 328 F. Supp. 747, 752 (D. Mo. 1971) (approving of arrest based solely on the fact that “petitioner was a Negro in an all-white neighborhood); State v. Ruiz, 504 P.2d 1307 (Ariz. Ct. App. 1973) (affirming conviction of Hispanic stopped because the area where the arrest too place was “mainly a Negro district” making any Hispanic suspicious).

88 See Theodore M. Shaw, Maintaining Hope in the Struggle Against the Constitutional Tolerance of Racial Discrimination, 39 COLUM. H.R. L. REV. 59, 70 (2007) (discussing “flawed assumption” of racial profiling “that race is a proxy for criminality” and quoting a Justice Department study finding that “disproportionate minority arrests for drug possession and distribution have fueled perceptions by police and others that race is an appropriate factor in the decision to stop or search an individual”). See also Martinez v. Village of Mount Prospect, 92 F. Supp. 2d 780 (N.D. Ill. 2000) (arguing that “racial profiling is a self-fulfilling prophecy” because officers who engage in the practice “will necessarily come into contact with law-breaking members of the minority communities far more frequently than with law-breaking whites and thus will view the actions of minority civilians with a presumption of guilt”).


90 Id.
I think there is very little question that this “othering” of which I speak affects both our perception of many public policy problems and our evaluation of solutions to those problems. Although this is true on any number of issues, this section selects several for purposes of illustration.

The first is criminal law. There is a tendency to view people who break the law and who are jailed for doing so as irrevocably other. Whatever may have been their status before committing their crimes (and, in reality, a significant number were already “other” on racial or economic grounds before they engaged in any act in violation of the law), once convicted and labeled “criminals” they cease to be us. And they cease to matter in the same way they would if they were us.

I earlier made reference to Helen Prejean’s comment about the death penalty – that we allow it only because we don’t believe that those who live on death row are human like us. However, this attitude is not limited to death row inmates and so has impact beyond the death penalty. Ask yourself why there is so little emphasis on and effort put into the reentry into our society of those who have served their time in prison. According to the website of the Office of Justice Programs of the U.S. Department of

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91 In addition to the three examples I discuss in the text, what comes to mind immediately is the NIMBY (not-in-my-backyard) reaction to residents of a particular area when it is proposed that a halfway house or a home for developmentally disabled adults be built in the neighborhood. See, e.g., Sam Verhovek, Neighbors Now more Likely to Oppose Jails and Shelters, N.Y. TIMES, Apr. 23, 1987, available at http://query.nytimes.com/gst/fullpage.html?res=9B0DEFDA1531F930A15757C0A961948260; Shawn Reeves, Facing F.E.A.R., HABITAT WORLD, June 2004, available at http://www.habitat.org/hw/june-july04/feature2.html. Although the term “NIMBY” once referred to opposition to a narrowly defined class of uses that arguably constituted a threat to property value, “in wealthy communities across the New York region, the pitched battles are now over ball fields and libraries, school buildings, churches and housing for the elderly -- projects once seen as pillars of an upright community.” David Herszenhorn, Now It’s ‘Nothing in My Backyard’: Just About any Kind of Project Can Rile Homeowners, N.Y. TIMES, Apr. 16, 2000, available at http://query.nytimes.com/gst/fullpage.html?res=9E06EDF17335F935A25757C0A9669C8B63.

92 In Section II.C.1., I gave examples of how existing laws affect people’s views. Here my focus is on how othering affects our perception of legislative or other public policy proposals.
Justice, approximately 650,000 state and federal prisoners reenter society each year.\footnote{See http://www.reentry.gov/.


\footnote{See Outside the Walls, supra note 94, at 128-30.

\footnote{See id. at 132-62.


\footnote{Doubtless the difficulty of re-integration also plays a role here. It takes a lot of energy and effort to build community with those who have been imprisoned, especially where addictions and mental illness play some role in their criminal behavior.

\footnote{I think this also explains why the United States has such restrictive felon disenfranchisement laws; 35% of ex-felons in this country are permanently disenfranchised. See Uggen, C., Barriers to Democratic Participation, 2002. Washington, D.C.: The Urban Institute.}}}

When they do, they face tremendous obstacles, including difficulty finding housing and employment and health and substance abuse problems.\footnote{See Outside the Walls, supra note 94, at 128-30.}

Without help in handling those problems, they will be (and are) rearrested and reimprisoned, creating a vicious cycle.\footnote{See id. at 132-62.}

To be sure, there are some programs aimed at assisting reentering inmates, but there are far too few,\footnote{The Urban Institute, 2002. Background Paper: The Effect of Incarceration and Reentry on Children, Families, and Communities. Washington, D.C.: The Urban Institute. NCJ 207444.}

meaning, in the words of one Urban Institute report, that “an increasing number of prisoners are returning home, having spent longer terms behind bars, less prepared for life in the outside, with less assistance in their reintegration and, at best, strained connections to their families and communities.”\footnote{Doubtless the difficulty of re-integration also plays a role here. It takes a lot of energy and effort to build community with those who have been imprisoned, especially where addictions and mental illness play some role in their criminal behavior.}

Why are there far too few? Although by no means a complete answer,\footnote{I think this also explains why the United States has such restrictive felon disenfranchisement laws; 35% of ex-felons in this country are permanently disenfranchised. See Uggen, C., Barriers to Democratic Participation, 2002. Washington, D.C.: The Urban Institute.} I think part of the explanation may be that the view of far too many people is that “they,” those who commit crimes, deserve to be punished. It is not uncommon to hear some version of, “Lock them up and throw away the key.” There is very little focus on what happens to prisoners on the back end because they have ceased to be us.\footnote{I think this also explains why the United States has such restrictive felon disenfranchisement laws; 35% of ex-felons in this country are permanently disenfranchised. See Uggen, C., Barriers to Democratic Participation, 2002. Washington, D.C.: The Urban Institute.}

A second example relates to American “othering” of those from other countries. I talked earlier about our reactions to atrocities or poor conditions in other countries. We
think very differently about Americans than we do about non-Americans. This plays out in different ways. As a practical reality, globalization has meant the global spread of unrestrained capitalism. It has translated into larger and more powerful multinational corporations with increasing power to impose their will on a broader range of persons, which almost inevitably means more for the haves and even less for the have nots. Globalization has translated into trade policies by the governments of the industrialized nations that artificially protect their own producers at the expense of those of developing nations.100 Even worse, globalization sometimes also includes U.S. corporations profiting from human rights abuses committed by foreign government entities.101 These aspects of globalization have sometimes been referred to as “economic imperialism.” 102

Our view of this activity is very much dependent on our vision of the human person. If “us” is the community of persons living in the United States and we “other” those in the third world, we feel perfectly justified in protecting American businesses at the expense of those in developing countries. We lack a “global culture of solidarity attentive to the needs of the weakest” 103 and instead think of only parochial interests. 104

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100 See Mary Durran, In World Trade, Cotton Fields Aren’t Level; Global Trade Meeting Fails African Farmers, NATIONAL CATHOLIC REPORTER, Oct. 10, 2003, at 4 (discussing $3 billion in subsidies paid to American cotton farmers, resulting in their ability to flood the world market with inexpensive cotton, preventing “West African farmers from competing even in their own domestic market.”).  
102 Douglas M. Branson, The Social Responsibility of Large Multinational Corporations, 16 TRANSNAT’L LAW 121, 132-33 (2002) (calling “detrimental globalization” an economic imperialism that “uses globalization as a bulldozer to crush resistance for the achievement of (the goals of eradication of all borders so that the same products and services dominate all markets) by the multinational corporations, which are the progenitors of economic imperialism”).  
103 Pope John Paul II, Address of John Paul II to the Members of the Vatican Foundation “Centesimus Annus – Pro Pontifice”, May 9, 1998, ¶ 2.  
104 Some might suggest that it is not necessarily othering that produces this effect, arguing that it may simply be that people find no time or inclination to care about things that happen far away. There are more pressing issues closer to home. First, the issues closer to home are more pressing to us precisely because of othering; the people nearer are more like us. Second, Americans don’t react same way to things far off. There is much greater American reaction to and concern for, problems in Europe than those in Africa or
We see the same effect of this lack of a global culture of solidarity in our discussions about immigration reform. Advocating restrictive immigration policies at the same time that we exploit illegal workers in this country represents the same kind of othering – those trying to get in are not us.\(^{105}\)

A third example relates to our attitudes about the poor, which is manifest in so many different ways. Think of the complete inability of John Edwards to “gain traction in his bid for the Democratic presidential nomination,” a bid that was largely built on his passion for addressing poverty.\(^{106}\) A January 2008 Pew Research Center survey found a decline among both Democratic and Republican voters who view “dealing with the problems of the poor” to be a top priority.\(^{107}\) And when Edwards kicked off the Half in Ten campaign\(^{108}\) with a speech on May 12, 2008,\(^{109}\) only one major newspaper even covered the event.\(^{110}\) In the words of Pope Benedict XVI, “every form of externally imposed poverty has at its root a lack of respect for the transcendent dignity of the human person.”\(^{111}\)

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\(^{105}\) See Kristin E. Heyer, Welcoming the Stranger: What Christian Faith Can Bring to the Immigration Debate, AMERICA, Oct. 13, 2008, at 13, 24 (talking about how immigrants are scapegoats for many social ills and how media and political rhetoric of immigrants “encourage xenophobia or ethno-cultural nationalism; also discussing juxtaposition of demonizing and scapegoating of immigrants even as we “gladly accept the sweat and taxes they provide”).

\(^{106}\) Matthew Bigg, Edwards Bid Shows Poverty Not Big Campaign Theme, REUTERS, Jan. 30, 2008, available at http://www.reuters.com/article/topNews/idUSN3024268420080130. This was the case even before Edwards’ summer 2008 mistress scandal.


\(^{108}\) See the campaign’s website at http://www.halfinten.org/index.html.


\(^{111}\) Howard J. Hubbard, Fighting Poverty to Build Peace, AMERICA, Feb. 9, 2009, at 11, 13 (quoting Pope Benedict XVI).
I alluded already to the issue of lack of access by so many Americans to affordable health care in this country. Our ability to adopt needed reform of the health care system is, I suspect, affected by the fact that a shocking number of people have the attitude Bush expressed: that people without insurance can get the medical care they need from emergency rooms.112 Again, what is most shocking is not that they are wrong, but the underlying judgment about the worth of the poor and lower income population, a judgment that has significant impact on our ability to secure health care reform.

Professor Robert Pecorella has suggested that commutative and contributive justice might entail “defining not just economic ‘floors’ beneath which human beings should not be allowed to fall but economic ‘ceilings’ which define the point when people of ‘good faith’ simply have enough.”113 Leaving aside the complexity of picking an upper limit and things like the need to take into account regional differences,114 the idea that not only does everyone deserve to have enough to flourish as a human person, but that there is a point at the upper end that is enough and beyond which is simply too much, is one worth thinking about. Yet it is not in the cards for us to think about such a solution where we other those who have less than we have.

112 See Missouri Department of Public and Senior Services, Public Deliberation Forums, 2003, available at http://healthpolicy.missouri.edu/publications/mspg/pubdeliberation.pdf (discussing “myth” that people without insurance are able to get the care they need); L. Toni Lewis, Doctors: Emergency Care a “National Disgrace,” Dec. 11, 2008, available at http://www.healthcareunited.org/blog/post/doctors_emergency_care_a_national_disgrace/ (“It sounds appalling, but it’s actually a common belief; many people think emergency rooms act as a safety net for people who can’t afford care.”)

113 Robert F. Pecorella, Property Rights, the Common Good and the State: The Catholic View of Market Economics, 5 J. CATH. SOC. THOUGHT 235, 276 (2008). Professor Pecorella is not arguing that the government ought to define such a ceiling as a legal mandate. Rather, he suggests that the Church ought to include such an idea as an aspect of what “should be expected within the Catholic community.” Id.

114 See id.

The same difficulties arise if we attempt to apply the same suggestion to health care, for example. We could go a long way toward addressing health care costs by some system of rationing care. However, any kind of health care rationing system would be extremely dangerous absent a foundation of solidarity, rather than one of othering.
A final example of how othering affects legal discourse is the discourse of abortion. Whatever one thinks of the privacy rights of a woman with respect to her body, the language of the pro-choice lobby is clearly language of othering. Pro-choice advocates speak of a fetus or an unwanted part of a woman’s body rather than as an unborn child or a living human being.\footnote{For some, the belief that human life beings at conception is a matter of religious faith. From a Judeo-Christian scriptural standpoint, there is no question that the fetus is an object of God’s love and protection. See, e.g., Jeremiah 1:5 (“Before I formed you in the womb, I knew you, and before you were born, I consecrated you.”); Psalm 139:13-15 (“You formed my inmost being; you knit me in my mother’s womb. My very self you knew; my bones were not hidden from you, when I was being made in secret, fashioned as in the depths of the earth.”). This belief that life begins at conception is supported by the fact that “at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving being. A being with a genetic code is man.” John T. Noonan, Jr., \textit{An Almost Absolute Value in History, in Contemporary Issues in Bioethics} 281 (Tom L. Beauchamp & LeRoy Walters ed., 4th ed. 1994). More recent DNA evidence about pre-natal biology supports this view of the fetus as a “living, unique human being.” \textit{A Statement of the Society of Jesus in the United States on Abortion} (Mar. 2003), \textit{in America} 19, 19-20 (May 26-June 2, 2003). A medical view of life beginning at conception is not new. A Boston Medical Surgical Journal editorial in 1864 stated that “[i]t should be taught in every school book of physiology, and every public print should reiterate it, that the child is alive from the moment of conception, and that every interference with its being is as much a sin at one period of its existence as at another.” \textit{Editorial}, 1986 \textit{BOSTON MEDICAL SURGICAL JOURNAL} 66-67, quoted in John Clapper, M.D., \textit{The Sanctity of Human Life and Abortion}, 5 WRS J. 31 (1998). Clapper also quotes a 1938 Obstetrics textbook that terms abortion murder and a 1906 statement of another doctor that “[a]ll physicians, as well as other biologists, must regard the child in the womb as much a human being while still in the womb as after its expulsion.” \textit{Id.}} An entire category of human beings is defined as other, is defined by some as non-human, with the consequences that their interests are ignored entirely in favor of the interests of the mother. The fact that we need to pass legislation called the Infant Born Alive Protection Act\footnote{Born-Alive Infants Protection Act of 2002, PL 107-207, 1 U.S.C. § 8.} to force hospitals to provide medical care to infants who come through the abortion process alive\footnote{The statute defines “born alive” as “the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.” \textit{Id.} at § 8(b).} suggests the extent to which othering operates here.\footnote{In more general terms, the discourse of feminist legal theory provides another example of how othering affects legal discourse. Some feminists have at times expressed concern over approaches to gender discrimination that seek different treatment for women. “Advocates of the ‘equal treatment’ position argue that women should strive for sex-neutral standards that deemphasize differences between the sexes.”}
IV. Combatting Othering

If our discussion of many polarizing issue of public policy is skewed by a view of certain groups as other, then the question is how to change the terms of the discourse – how do we encourage the development of a vision of persons that does not other them? What I want to suggest in this Section is that religion provides us with a set of values that help to combat othering and that there are ways the law can and should implement those values.

A. Religions Values that Promote an Alternative View

In some of my earlier writing I have discussed religion as a force with the potential to promote a sense of communion and interrelatedness of human beings. Religion offers a vision of the human person and the relationship among humans that is at odds with othering and thus the capacity to play an important role in combating the cultural and other forces that promote othering. It is deeply inconsistent with the tenets of most major faith traditions to say that some people are worth more or less than others.

Maxine N. Eichner, Getting Women’s Work that Isn’t Women’s Work, 97 YALE L. J. 1397, 1399 n.8 (1988). See Linda J. Krieger and Patricia N. Cooney, The Miller-Wohl Controversy, in KELLY WEISBERG, FEMINIST LEGAL THEORY: FOUNDATIONS 156 (1993) (discussing differences among feminist theorists about meaning of equality). The concern is that any difference in treatment, even if it favored women (such as for example, imposing different weight and strength requirements for police officers), would ultimately lead to exclusion and subordination. See, e.g., Martha Albertson Fineman, Feminist Legal Theory, 13 AM. U. J. GENDER, SOC. POL’Y & LAW 13, 15-16 (2005) (citing concern of some feminist scholars that “any recognition of difference or argument for "special treatment" would operate to the disadvantage of women”). This may reflect the sense that “[t]he history of gender discrimination in the United States is littered with cases of ‘protective’ legislation and policies that, in reality, served primarily to limit the rights and opportunities of women.” Deborah A. Calloway, Accommodating Pregnancy in the Workplace, 25 STETSON L. REV. 1, 22 (1995). Difference in treatment would make women other and, therefore, ultimately vulnerable to the forces of othering. See, e.g., Susan J. Stabile, Workers in the Vineyard: Catholic Social Thought and the Workplace, 6 J. OF CATHOLIC SOC. THOUGHT 371,410 (2008); Susan J. Stabile, A Catholic Vision of the Corporation, 4 SEATTLE J. FOR SOC. JUS.181 (2005); Susan J. Stabile, Using Religion to Promote Corporate Responsibility, 39 WAKE FOREST L. REV. 839, 847-878 (2004);

This may not be true of some forms of fundamentalist thought, which is sometimes characterized by a lack of willingness to associate with others not of the same religion. See KAREN ARMSTRONG, THE BATTLE
Let me discuss three religious principles or values that help promote a view that is antithetical to the kind of othering I have been describing. I speak from a Catholic perspective, since that is the faith tradition out of which I operate, but similar principles operate in other religions as well. The principles I identify here are rooted in all religious experience.

1. **Dignity of Human Person**

The dignity of the human person is one of the most fundamental principles of Catholic Social Thought. In his first encyclical, *Redemptor Hominis*, Pope John Paul II said that Christianity is an attitude of “deep amazement” at the worth and dignity of the human person.

The conviction of the dignity of the human person that animates Catholic thought does not stem from any particular talent, fortune or ambition of the individual, or from one’s being born to any particular race, religion, ethnicity or gender. It stems, rather, from the fundamental tenet of the Catholic faith is that all humans are created in the

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There is, of course, the danger of “othering” fundamentalists. As with other labels, the label “fundamentalist” is used as a way to distance those labeled from ourselves. It is a term that is almost always used pejoratively, as a way of suggesting people who are dangerous, different, and not quite to be trusted; and a term that is often applied incorrectly to anyone whose views seem too conservative or orthodox.

121 See SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 26 (1965).
123 Id. at ¶ 10 (“In reality, the name for that deep amazement at man’s worth and dignity is the Gospel, that is to say: the Good News. It is also called Christianity.”). That dignity is not created by Christ; rather, Christ’s redemptive act restores “dignity to man and given back meaning to his life in the world, a meaning that was lost to a considerable extent because of sin.” Id.
image and likeness of God.\textsuperscript{124} In \textit{Mulieris Dignitatem},\textsuperscript{125} Pope John Paul II wrote that “the human race, which takes its origin from the calling into existence of man and woman, crowns the whole work of creation; \textit{both man and woman are human beings to an equal degree}, both are created \textit{in God’s image}. This image and likeness of God, which is essential for the human being, is passed on by the man and woman, as spouses and parents, to their descendants: ‘Be fruitful and multiply, and fill the earth and subdue it’… The Creator entrusts dominion over the earth to the human race, to all persons, to all men and women, who derive their dignity and vocation from the common beginning.”\textsuperscript{126}

Our dignity as human persons, then, comes from God. It is rooted in the mystery of creation and the creation of each of us in God’s image implies that we are each sacred and precious and invested with a dignity that requires equality of treatment. Being created “in the image and likeness” of God, all humans partake of a divine nature. In the words of St. Paul, “There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for you are all one.”\textsuperscript{127} God wills each one of us into existence with love and God looks at each one of us and sees that we are good.

Not only are we created in God’s image, but this God who created us in love, dwells within us. St. Ignatius’ \textit{Contemplatio ad amorem} (the Contemplation to Attain Love)\textsuperscript{128} is an invitation to consider “how God dwells in creatures: in the elements, 

\begin{footnotesize}
\begin{enumerate}
\item See CATECHISM OF THE CATHOLIC CHURCH ¶ 1934 (2d ed. 1997) (“Created in the image of the one God and equally endowed with rational souls, all men have the same nature and the same origin. Redeemed by the sacrifice of Christ, all are called to participate in the same divine beatitude: all therefore enjoy an equal dignity.”); PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 105 (2004) (in every person there exists “the living image of God”); Genesis 1:26-27.
\item John Paul II, \textit{Mulieris Dignitatem} (1988).
\item Id. at ¶ 6.
\item Galatians 3:28-29.
\end{enumerate}
\end{footnotesize}
giving them existence; in the plants giving them life; in the animals, conferring upon them sensation, in [humans] bestowing understanding. So He dwells in me and gives me being, life, sensation, intelligence; and makes a temple of me, since I am created in the likeness and image of the Divine Majesty.”

If God dwells in me, then God so dwells in each human being. By this indwelling, “God transforms every ‘human life into that which is sacred.’ Indeed, every human life…is a temple, ‘a dwelling-place of God.’”

Every human life is sacred. Every human being is a temple, a dwelling-place of God. Our eyes may see – black, Asian, Hindu, Moslem, homosexual – but we need to understand that what defines us as human beings is the presence of God dwelling in each of us.

Not surprisingly, given its origins in human creation in the image of God, Judaism has a similar notion of the dignity of the human person. Common in the words of the Old Testament prophets is “the conviction that every human being, simply by virtue of his or her humanity, is a child of God and therefore in possession of rights that even kings must respect.”

Islam has the same recognition of the divine origin of humanity, entitling everyone to respect.

It is easy to see the value of cultivating this kind of attitude. If we fail to see the dignity of the human person, if we cannot recognize the equal moral worth of all human organisms, we will rationalize assigning less worth to some subset of humans – to blacks,
to Muslims, to the poor, to criminals, to homosexuals.  

We will rationalize assigning less worth to some subset of beings in order for us to exert power over them in the name of some other real or imagined good. Such rationalization is impossible if we see the inherent dignity of the human person.

2. Solidarity

David Hollenbach has suggested that “a revival of commitment to the common good and a deeper sense of solidarity are preconditions for significant improvements in the lives of the poor.” He might just as well have said that solidarity is a precondition for significant improvement in the lives of all of those who are marginalized and “othered.”

The principle of solidarity recognizes that a basic element of human existence is interdependence and relationship; living as human means living in community. Solidarity reminds us of our relationship with other members of our human family, i.e., that all are our neighbors, entitled to share in the “banquet of life to which all are equally invited by God.”

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134 See George M. Anderson, Roots of Genocide, AMERICA, Feb. 9, 2009, at 16, 19 (discussing “tendency to demonize others when we fail to recognize that human dignity is universal and carries with it certain inalienable rights”).
135 See Damian P. Fedoryka, The Concept of ‘Gift’ as Hermeneutical Key to the Dignity of the Human Person 11 LOGOS 49, 62 (2008) (“Only to the extent that we see that ontological preciousness and beauty of human beings that are their birthright prior to race, creed, ethnic origin, accident of birth, or accomplishment in life can we receive them and in doing so affirm them.”).
138 Pope John Paul II, Sollicitudo Rei Socialis (On Social Concern) ¶ 39 (Dec. 30, 1987). In the words of Thomas Massaro, “to invoke the virtue of solidarity as a central value of ethical life is to call new attention to the relations among individuals. In order to be truly morally good, these relationships must be characterized by mutual concern for the well-being of others and by a willingness to make necessary sacrifices for the common good of the human community as a whole.” THOMAS MASSARO, S.J. CATHOLIC SOCIAL TEACHING AND UNITED STATES WELFARE REFORM 8-9 (1998), 8-9, describing solidarity as “a regulative norm for judging the working of social institutions”).
fellowship” of persons. As expressed by Pope John Paul II, solidarity “is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all.”

Buddhists do not use the term solidarity. However The Dalai Lama speaks of the interdependence of all beings as a “fundamental law of nature” and Mahayana Buddhism in particular places significant emphasis on overcoming the delusion of a separate self and of developing an attitude of cherishing others over the self. It also encourages development of an attitude of “equal concern, equal regard, for everyone, …[one that sees] that our present discrimination is based on arbitrary, mistaken and very changeable labels.” The same wholehearted giving of the self is present in found in the Islamic faith as well.

Similarly, although the term solidarity may not be used within the Jewish religion as a term of art it is in the Catholic tradition, Judaism shares a belief in the “interconnectedness of all life.” Martin Buber suggested that fulfillment is possible

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140 Pope John Paul II, Sollicitudo Rei Socialis (On Social Concern) ¶ 38 (Dec. 30, 1987). The virtue of solidarity is derived from the recognition of interdependence among individuals and nations. Id. See also Vatican Press Release, Solidarity and Subsidiarity to Overcome Social Exclusion, Feb. 6, 2009, available at http://212.77.1.245/news_services/press/vis/dinamiche/d0_en.htm (quoting Archbishop Celestino Migliore on the “logic of solidarity” as a means of ensuring well being of all persons and social groups).
143 Kathleen McDonald, How to Meditate 93 (1984).
145 See, e.g., Ted falcon, Life at Its Highest, Reform Judaism, Summer 2003, at 11, 13, 15.
only in true community, in the “unity of the human community in the sight of God.”\textsuperscript{146} This translates in various ways into a concern for others and there has been recent emphasis by some progressive Jewish groups on an understanding of the term “kosher” as involving more than merely food preparation and extending to how we treat those who are traditionally “othered.”\textsuperscript{147}

3. \textit{Family as the Paradigm for Human Relationship}

In Catholic thought, the family is indispensable to the promotion of the conditions necessary for the flourishing of the human person.\textsuperscript{148} That is because it is in the family that we get our first revelation of our interconnectedness as humans, learning that we are “not born as isolated, autonomous monads, but rather as a precious part of a social unit.”\textsuperscript{149}

However, the covenantal relationship within which we are born is not one that exists only as family members. Rather than being a unique relationship, the familial relationship is the blueprint for our relation to the broader human community. Through the “complex of interpersonal relationships” formed through marriage and family, “each human person is introduced into the ‘human family’ and into the ‘family of God.’”\textsuperscript{150}

Even in secular terms, it seems clear that it is easier to develop an attitude of cherishing all others if we take as our paradigm our feelings for those with whom we are

\textsuperscript{146} \textsc{Maurice S. Friedman, Martin Buber: The Life of Dialogue 144 (1955)} (quoting Martin Buber, ‘\textit{Der Chaluz und seine Welt} [Auf Einer Redell, in Almanach Des Schoken Verlag Auf Das Jahr 5697, AT 89 (1937)}).

\textsuperscript{147} See the website of the Progressive Jewish Alliance, for discussion of the idea, for example of “kosher clothing.” \url{http://www.pjalliance.org}.

\textsuperscript{148} \textsc{Christopher P. Vogt, The Family as Cornerstone of the Good Life and the Good Society: Family Life in the Compendium of the Social Doctrine of the Church, 27 Rev. of Bus. 13, 13 (2006)}.

\textsuperscript{149} \textit{Id.} at 14-15.

\textsuperscript{150} \textsc{John Paul II, Familiaris Consortio ¶ 15 (1981)}. 
closest. A Mahayana Buddhist meditation suggests meditating first on the love for a
mother as a method for developing a loving attitude toward all human beings.\textsuperscript{151}

Some clearly would doubt whether this type of change in attitude is possible. In
an examination of the Deuteronomic commandment on usery, Benjamin Nelson argues
that “[t]he road from clan comradeship to universal society is beset with hazards,”
specifically a loss or attenuation of clan bonds of love.\textsuperscript{152} He calls it a “tragedy of moral
history that the expansion of the area of the moral community has ordinarily been gained
through the sacrifice of the intensity of the moral bond,” suggesting “that all men have
been becoming brothers by becoming equally others.”\textsuperscript{153} Nonetheless, notwithstanding
his pessimism, he clearly views it preferable to attempt to embody norms that treat all
people equally over “one in which there are privileges for the insiders, temporary
concessions for good neighbors and strangers, and no obligation at all toward distant
‘barbarians.’”\textsuperscript{154}

Extending the covenantal notion of family relationships to all persons does not
mean we can’t prioritize when making decisions, for example, about limited resources
and who we as individuals can help as a practical matter. It may be that we have a
greater obligation to those to whom we are closest with precisely because we flourish in
community. But that is a practical limitation that does not say that those with whom we

\textsuperscript{151} \textit{See}, \textit{e.g.}, DESHUNG RINPOCHE, \textit{THE THREE LEVELS OF SPIRITUAL PERCEPTION} 240 (2d ed. 2003)
(explaining that “most of us have a certain amount of affection or fondness for the people we relate with
through family”).

\textsuperscript{152} BENJAMIN N. NELSON, \textit{THE IDEA OF USERY: FROM TRIBAL BROTHERHOOD TO UNIVERSAL OTHERHOOD}
136 (1949).

\textsuperscript{153} \textit{Id}.

\textsuperscript{154} \textit{Id}. at 137.
are closest in community are more valuable than others.\textsuperscript{155} Acknowledging that we are one family is a key to the advancement of solidarity as a common virtue.

The covenantal notion of family also doesn’t mean we don’t chastise those whose behavior is inconsistent with familial love. Indeed, chastising those who stray is part of familiar responsibility.\textsuperscript{156}

\subsection*{B. Ability of Law to Promote an Alternative View}

Although what is required ultimately is a change in heart, which is not accomplished simply by passage of the law, law plays an important part. Just as the law can promote othering, it has the capacity to express and thus promote values, such as those identified in Section A, that combat othering. To be sure, some of what the law does is to attempt to compel certain behavior. However, equally (if not more) importantly, law (in the broad sense in which I define it earlier) can serve an expressive and pedagogical function in helping to foster cohesion.\textsuperscript{157}

Cathy Kaveny advances a model of the Law as “Moral Teacher,”\textsuperscript{158} a model that recognizes that law “communicates something to its subjects about the ways in which

\begin{footnotes}
\item[Hanna Wolff]Hanna Wolff describes the story of Jesus and the Good Samaritan as describing a movement from particularism “to a universalism that embraces the world and humanity” HANNA WOLFF, JESUS THE THERAPIST 127 (1978).
\item[G. C. Sisk & Charles J. Reid]Cf. Gregory C. Sisk & Charles J. Reid, Jr., Abortion, Bishops, Eucharist and Politicians: A Question of Communion, 43 CATH. LAWYER 255, 267-68 (2004) (observing that “[t]o fully achieve the joy and fellowship of full membership in our Catholic Church, we likewise must accept the responsibilities that accompany that affiliation. In a truly loving home, wayward children are called to account for their behavior and are instructed in how they must behave in order to be restored to full communion with their siblings.”).
\item[Implicit bias]I don’t mean to minimize the value of laws that force behavior, such as antidiscrimination laws that prevent discrimination against certain classes. But we know from our history that the passage of such laws are a necessary but not sufficient condition. I earlier noted the example of school desegregation, which continued to exist for years after the Supreme Court’s decision in \textit{Brown}. See \textit{supra} note 80. Mandating integration of schools or banning forms of discrimination have no effect on implicit bias. \textit{See}, \textit{e.g.}, Christine Jolls & Cass R. Sunstein, \textit{The Law of Implicit Bias}, 94 CAL. L. REV. 969 (2006).
\item[Kaveny, supra]Kaveny, \textit{supra} note 64, at 349-58. Kaveny argues that “some of the most important pieces of legislation enacted in the United States in the second half of the twentieth century” are explained by the conception of law as teacher. \textit{Id.} at 354.
\end{footnotes}
they should and should not go about living their lives.”\textsuperscript{159} In addressing the question of what should be the lessons of the law, she draws on the teachings of Aquinas to conclude that solidarity is one of the virtues that the law needs to teach.\textsuperscript{160} Similarly, John Noonan has written about the power of law “to channel human energies toward cooperative relationships, and to teach the basic values of society.”\textsuperscript{161}

This section frames the discussion in terms of three questions that help us evaluate the law in terms of the goals of which I am speaking. There may be other questions that are helpful, but these three offer a good starting point in an effort to have the law do a better job than it now does\textsuperscript{162} to foster solidarity.

\textit{Question 1: In the case of legislation, does the legislation promote unification and cohesion or division?}

The issue here is the message encoded in legislation. The question here is what message is being conveyed by our legislative enactments about groups that we perceive to be not us?\textsuperscript{163}

I earlier talked about the ways in which the law promotes othering. The death penalty encodes a sense that some people’s lives no longer matter. The emphasis in criminal law on punishment over retribution similarly says some people are simply not

\textsuperscript{159} \textit{Id.} at 350.
\textsuperscript{160} \textit{Id.} at 353. The other virtue she thinks is appropriate for law to promote in the United States is autonomy, in the sense in which Joseph Raz uses the term, that is, in promoting a “vision of the person situated in, and interacting with, a community, in order to develop an identity that draws equally upon his unique talents and motivations and the opportunities provided by the broader society.” \textit{Id.} at 349.
\textsuperscript{162} Implicit in the prior discussion is my view that law and society do not do currently do a very good job in educating on the virtue of solidarity.
\textsuperscript{163} Although I speak here in terms of legislative enactments, the same question can be raised with respect to judicial decisions. As suggested by the discussion at text accompanying notes 65-68, the judicial decisions convey messages about “others” as much as do legislative enactments.
worth the effort. In the same way, protectionist trade legislation can signal a disregard for people in developing nations, a sense that they matter less than do Americans.

Antidiscrimination laws have a very different signaling effect. As limited as they may be in addressing implicit bias, they at least provide a legislative statement that certain groups may not be treated in a manner that adversely impacts their dignity as persons.

The law is always instructive and it always conveys something apart from the substantive provisions it contains. Therefore, part of our attention in considering new legislation and in evaluating existing legislation must be on the question of to what extent the legislation promotes either unification and cohesion or division and a sense of othering.

Thus, for example, we need to ask whether our immigration laws reflect compassion and a desire to help rather than simply the exclusion of undesirables. Does our legislative approach to health care and poverty reflect a sense that poor people matter less?

I want to be clear that I am not here making judgments about what the particular content of the law in a particular area must be. Rather, I am talking about an approach to evaluating the particular – a consideration that has to be part of our evaluation of a particular law. So, for example, so an immigration law need not be one of completely open borders, but it must recognize the dignity of those persons seeking life in the United States. Similarly, avoiding othering does not require that we have national health insurance, but whatever law we do enact must proceed from the premise that is it
unacceptable in our society for some people to lack access to affordable health care and that the government has some role in addressing that lack of access.

I am also not suggesting that laws can never make distinctions among people, which would be an impossible task. That is, to some extent all law discriminates or at least categorizes, at least in the sense that law generally favors one group over another. A system of progressive income taxation means we draw a distinction between higher income and lower income persons in how much taxes we ask them to pay. Anti-discrimination laws permit airlines to refuse to allow a pilot above a certain age to fly a plane. At the other end of the spectrum, the law prohibits those who have not reached a certain age from obtaining a driver’s license or from voting.

However, not all distinctions are dehumanizing; not all distinctions signal that some are other. The problem is not with the law making distinctions; the problem arises only when distinctions made in the law either create or reinforce the sense that some people are valued less than others, distinctions that negate the equal moral worth of all people. There is a vast difference between a law that says blacks must sit at the back of a bus and a law that says that a person under the age of 18 cannot vote.

I acknowledge that deciding which distinctions are dehumanizing and which are not morally questionable will not always be easy. Should the law interfere with a decision by a Christian student group to limit its leadership positions to Christians?

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164 See Deborah Hellman, When Is Discrimination Wrong? (2008) (distinguishing between discrimination that is demeaning and fails to treat other as moral equals, and treating people differently where doing so does not demean). Starting from the premise that “it is often desirable and sometimes necessary to treat people differently, Hellman’s book is an exploration of the question of “when discrimination is morally permissible and when it is not.” Id. at 4.

165 Hellman suggests that “drawing distinctions among people is morally permissible when doing so does not demean any of those affected.” Id. at 169. I wouldn’t phrase it quite that way because I am concerned not only with whether the subject is the discrimination feels demeaned, but also whether it appears to the rest of us that the law is demeaning the subject of discrimination. One would substantial overlap between those two ways of framing it, but the overlap may not be total.
Would the failure to interfere in that case signal something negative about non-Christians or would it simply be an expression of religious freedom? Does acting in a way that promotes equal dignity mean that the law must require Catholic Charities to place children for adoption with same-sex couples? One can imagine instances where the desire to promote the kind of unity of which I am speaking might smack up against other goals of our legal system, such as freedom of association and religious liberty. But the fact that some situations raise difficult questions does not change the fact that the law does provide signals and we need to be cognizant of what is signaled by our laws.

**Question 2: How seriously are our enforcement efforts of laws that promote equality of treatment of all?**

This is a fairly straightforward point. Having a law on the books is one thing. Acting as though we take that law seriously is another matter. Regardless of what the letter of the law says, the failure to enforce certain laws sends a signal to the populace about what is or is not valued by those in power. “Do as I say, not as I do” is never very effective. When officials permit redlining to occur despite the existence of fair lending laws, when the government fails to prosecute civil rights violations, a signal is sent that certain people don’t matter.

People pay attention to what the law does, not just what it says. Indeed, the signaling function of enforcement efforts (or lack thereof) may be even stronger than the signaling function of the laws themselves, at least where there is significant publicity surrounding the action (or failure to act).

I recognize that it requires more effort to ascertain when something is not happening than when it is happening. But we do need to be vigilant to ensure that laws
that protect certain vulnerable populations are not begin ignored by those with authority to enforce them.

**Question 3: Do our elected officials speak in a way that is unifying or divisive?**

This too is a fairly straightforward point. I earlier gave examples of the language of elected officials and the signals conveyed by that language. How we speak about each other has a tremendous effect on the people who hear that speech.166

During this past year, we have witnessed a hard fought presidential campaign. Part of how we evaluate, not only existing government officials, but also candidates for major political positions, ought to be whether they speak in a way that is unifying or divisive. In particular, we need to focus attention on how they speak about marginalized or unpopular groups and how they speak about each other. Does their speech reflect an attitude of a “global culture of solidarity”?167 Or does it tend to divide us along race, gender or other lines? And worse, does it do so in a way that suggests the other is less than we are?

**C. A Cautionary Note**

As the foregoing discussion suggests, we need to be concerned with positive legal enactments, what is done to enforce the laws that do exist and how our elected officials talk about the law. Each has the capacity to promote either othering of those who are not us, or a sense that all persons are possessed of a human dignity that makes them equally valued. What we want in each of these areas is the promotion of a sense of human community, of a global culture of solidarity.

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166 J.B. White is someone who has written much on the power of language. See, e.g., J.B. WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (2006). In the preface of this book, he talks about the way language can “deny the value of ourselves and other people, and the activities of life we share.”

167 See infra note 103 and accompanying text.
However, it is important to be on guard against abuse of the othering concept, the use of it in a way that has the unintended consequence of reinforcing negative images and reducing rather than promoting the dignity of all human persons. Consider the example of affirmative action, a subject which is often hotly debated. One may have various grounds for supporting or promoting affirmative action, but it would be unfortunate if a superficial appeal to othering – the suggestion that affirmative action separates blacks and promotes othering – were permitted to short-circuit meaningful debate.

One can easily see the danger of the same superficial appeal to othering infecting the debate about programs designed to assist the poor. One might imagine, for example, the argument that welfare programs, by singling out lower income people for special treatment, reinforce an image of the poor as others.168

Having raised the welfare example, let me also highlight the danger that my arguments will be viewed as a stalking horse for redistribution. One could attempt to take my arguments in a direction that says there can’t be winners and losers and must therefore promote a policy of redistribution. However, as I suggested earlier, the problem is not the law making distinctions among persons, it is what underlies those distinctions. There will always be people worse off and better off in any society, but we can have that difference without the destructive kinds of attitudes I am concerned with here.

As I said already and as the foregoing clarifies, I am not arguing that othering demands a particular content to the law. However, as the discussion in Section B suggests, I do proceed from the conviction that what the government says and how it acts

168 Both of these examples reflect a different version of the concern of some feminists that I expressed earlier – the worry that any special treatment will ultimately lead to exclusion. See infra note 118.
has consequences and, therefore, that there is some role for the law and for the government here.

**Conclusion**

My ultimate concern is with changing attitudes, with replacing an attitude of othering with one that see all persons as brothers and sisters, as part of the same human family. That is not a change that can be legislated into existence. However, just as the law can promote othering,, it can have a positive effect in promoting a more cohesive view of human relationship. That change in attitude is likely to then effect further changes in the law to promote the dignity of all human persons. The law may not be capable of creating a world populated by people willing to give up their lives for one another, but it can do more than it does now to promote a vision that does not accept othering.

I recognize there is a practical question of how possible it is to achieve what I’d like to see the law achieve in this area. We have a democratic legislative process that does not necessarily take the broad public interest into account. One way of putting it is that often, those who are “other” do not have a place at the table in which decisions are made about what the content of the law will be and or a place in deciding how the law will be enforced. And the rise of interest group politics generally means a narrowing of concerns, a hardening of positions and not one looking broadly at the public/human interest. I say this to acknowledge that I’m speaking normatively about what the law

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169 John 15:13 (“Greater love has no one than this, that one lay down one’s life for his friend.”).
should do and about the direction in which it ought to move. Getting it to do that will not be an easy task.\textsuperscript{170}

\textsuperscript{170} What role, if any, legal education might play in this process is an interesting question, but one that is beyond the scope of this article.