Othering and the Law

Susan J. Stabile
Othering and the Law

Susan J. Stabile∗

Introduction

Although some laws address the needs of citizens of the United States as a whole, many of our laws are designed to address the conditions and needs of one or more discreet subsets of the population. Thus, we debate the merits of laws addressing, for example, illegal immigrants, the poor, or criminals.

Our view of the issues relating to the needs and condition of different groups of persons and, therefore, of legal strategies designed to address those needs and conditions, 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 legal and 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 solidarity, 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.

∗ Robert and Marion Short Distinguished Chair in Law, University of St. Thomas School of Law; Fellow, Holloran Center for Ethical Leadership; Affiliate Senior Fellow, St. John’s University Vincentian Center for Church and Society; Research Fellow, New York University School of Law, Center for Labor and Employment Law; J.D. 1982, New York University School of Law; B.A. 1979, Georgetown University. I first presented my ideas for this Article at a faculty colloquium at the University of Oklahoma College of Law and I am grateful for the helpful comments I received the faculty there. I am also indebted to Frank Feldman, John Freund, C.M., Greg Kalscheur, S.J., Sr. Margaret John Kelly, D.C., Greg Sisk, Amy Uelmen and Rob Vischer for their comments on earlier drafts of the Article, and to Deborah Hackerson, Amber Barnett and James Long for research assistance.
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 and how the law might help move us beyond it. I begin in Section I by articulating a view of the human person and human relations that I believe should be the foundation and ideal for our legal system, a view very much at odds with othering. Section II discusses the prevalence of an attitude that views other people as “other” than the self, as well as the forces that promote an attitude of othering. Section III explores how the attitude infects public policy debates on any number of issues. Finally, Section IV addresses the question how the law might move us from an attitude of othering to one of communion.

I. A Communal Vision of the Human Person and Human Relations

In some of my earlier writing I have discussed religion as a force with the potential\(^1\) to promote a sense of communion and interrelatedness of human beings.\(^2\) Here, I want to focus particularly on the vision of the human person and of human relations articulated by Catholic social thought, although I will suggest this vision is not wholly unique to Catholicism and strands of it appears in other major world religions as well. This Section discusses three principles or values deeply imbedded in Catholic thought that promote a view of the human person and of

\(^{1}\) I speak of “potential” because religion has, in many instances, been a factor contributing to othering, as I will discuss in section II.C., infra.

human relations that I will argue should both be promoted by the law and serve as the basis for our public policy decision, principles that are antithetical to othering.

A. Dignity of Human Person

The dignity of the human person is one of the most fundamental principles of Catholic Social Thought.³ In his first encyclical, Redemptor Hominis,⁴ Pope John Paul II said that Christianity is an attitude of “deep amazement” at the worth and dignity of the human person.⁵

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, that all humans are created in the image and likeness of God.⁶ In Mulieris Dignitatem,⁷ 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; both man and woman are human beings to an equal degree, both are created 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.⁸

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

---

⁵ 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.
⁶ 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.”);
⁸ Id. at ¶ 6.
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.”⁹ God wills each one of us into existence with love and God looks at each one of us and sees that we are good.¹⁰

Not only are we created in God’s image, but this God who created us in love, dwells within us. St. Ignatius’ *Contemplatio ad amorem* (the Contemplation to Attain Love)¹¹ is an invitation to consider “how God dwells in creatures: in the elements, 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.”¹² 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.’”¹³ 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.¹⁴

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

---

¹⁰ Cf. Genesis 1:1-31 (God looks at everything he makes and “finds it very good.”)
¹² SPIRITUAL EXERCISES, supra note 11, at ¶ 235.
¹³ Kalscheur, supra note 11, at 12 (quoting BUCKLEY, supra note 11, at 82).
¹⁴ BUCKLEY, supra note 11, at 82.
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.” \( ^{15} \) Islam has the same recognition of the divine origin of humanity, entitling everyone to respect. \( ^{16} \)

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, it is easier to rationalize assigning less worth to some subset of humans than to others. “[W]hen we fail to recognize that human dignity is universal and carries with it certain inalienable rights,” our tendency is to “demonize others.” \( ^{17} \) 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. \( ^{18} \)

B. 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.” \( ^{19} \) 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. \( ^{20} \) Solidarity reminds us of our relationship with other members of our human family, i.e., that all are our


\( ^{16} \) Id. at 239.

\( ^{17} \) See George M. Anderson, Roots of Genocide, AMERICA, Feb. 9, 2009, at 16, 19.

\( ^{18} \) 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.”).

\( ^{19} \) David Hollenbach, THE COMMON GOOD AND CHRISTIAN ETHICS 173 (2002).

neighbors, entitled to share in the “banquet of life to which all are equally invited by God.”\(^{21}\) In *Pacem in Terris*, Pope John XXIII spoke of a “worldwide fellowship” of persons.\(^{22}\) 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.*”\(^{23}\)

Buddhists do not use the term solidarity. However the Dalai Lama speaks of the interdependence of all beings as a “fundamental law of nature”\(^{24}\) 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.\(^{25}\) 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.”\(^{26}\) The same wholehearted giving of the self is found in the Islamic faith as well.\(^{27}\)

Similarly, although the term solidarity may not be used within the Jewish religion as a term of art is it is in the Catholic tradition, Judaism shares a belief in the “interconnectedness of

---

\(^{21}\) Pope John Paul II, *Encyclical Letter on Social Concern, Sollicitudo Rei Socialis* ¶ 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").


\(^{23}\) *Sollicitudo Rei Socialis*, supra note 21 Error! Bookmark not defined., at ¶ 38. 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).


\(^{26}\) KATHLEEN MCDONALD, HOW TO MEDITATE 93 (1984).

all life.”

Martin Buber suggested that fulfillment is possible only in true community, in the “unity of the human community in the sight of God.”

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.”

C. 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. 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.”

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.’”

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 closest. A

---

29 Maurice S. Friedman, Martin Buber: The Life of Dialogue 144 (1955) (quoting Martin Buber, ‘Der Chaluz und seine Welt’ [Auf Einer Redel], in Almanach des Schoken Verlag auf das Jahr 5697, at 89 (1937)).
30 See the website of the Progressive Jewish Alliance, for discussion of the idea, for example of “kosher clothing.” http://www.pjjalliance.org.
32 Id. at 14-15.
Mahayana Buddhist meditation suggests meditating first on the love for a mother as a method for developing a loving attitude toward all human beings.\(^{34}\)

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.\(^{35}\) 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.”\(^{36}\) 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.’”\(^{37}\)

Extending the covenantal notion of family relationships to all persons does not mean we as individuals 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.\(^{38}\) But that is a practical limitation that does not say that those with whom we are closest in community are more

\(^{34}\) See, e.g., DESHUNG RINPOCHE, 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”).


\(^{36}\) Id.

\(^{37}\) Id. at 137.

\(^{38}\) Some might argue that this greater obligation flows from the principle of subsidiarity, discussed supra.
valuable than others. Acknowledging that we are one family is a key to the advancement of solidarity as a common virtue.

Together, the notions of human dignity and solidarity, along with a sense that family provides a model for all human relations, provide a foundation for a legal system that respects and honors the rights of all persons and a model for how the law might serve as a positive force in countering the othering that I will now address. How the law might do so is taken up in Section IV.

II. Othering and Its Manifestations

A. The Process of Othering

“Othering” refers to a process by which individuals and society view and label people who are different in a way that devalues them. We determine that certain people are “not us” and that determination affects how we view them and their needs.

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.”

39 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).

40 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. 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.”).

41 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. There has been some discussion of this othering 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).

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.\textsuperscript{43}

Othering does not necessarily 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 a part.\textsuperscript{44} 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,\textsuperscript{45} 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.”\textsuperscript{46} 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,”\textsuperscript{47} therefore operating similarly to othering in its effect, for Noonan, it is the fact that there are points “where it is too

\textsuperscript{43} “[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.” \textit{Id}. 44 Stereotyping involves making associations between a particular group and particular traits. \textit{See, e.g.}, Anthony G. Greenwald & Linda Hamilton Krieger, \textit{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 2008 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. \textit{See What a Difference a Shawl Makes, Jan. 4, 2008, available at} http://www.mediacurves.com/Culture/J6652/. 45 \textit{See} Kreigner, \textit{supra} note 42, at 1188 (pointing out that stereotypes “operate beyond the reach of decisionmaker self awareness”). \textit{See also} Melissa Hart, \textit{Subjective Decisionmaking and Unconscious Discrimination}, 56 ALA. L. REV. 741 (2005). Kreiger suggests that stereotype biases “operate absent intent to favor or disfavor members of a particular social group.” Kreiger, \textit{supra} note 42, at 1188. \textit{See also} John F. Dovidio, et al., \textit{Contemporary Racial Bias: When Good People Do Bad Things, in THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL} 141, 144 (Arthur G. Miller ed., 2004) (discussing the fact that racial bias “may occur spontaneously, automatically, and without full awareness”). Ivan Bodensteiner, however, argues that “choos[ing] to make decisions based on stereotypes rather than individual assessments [involves] a conscious decision to disfavor members of group he views negatively.” Ivan E. Bodensteiner, \textit{The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination}, 73 MO. L. REV. 83, 85 (2008). 46 \textit{JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW} 20 (2002). 47 \textit{Id.} at 23.
much [for the legal system] to recognize that a human being exists” that results in the creation of masks.”

The starting point of this process of othering is fairly benign. We all identify ourselves as parts of various groups – ethnic, religious, racial, familial, a process that creates a separation between those in the group and those outside. When I say: I’m a New York City born and bred, white, Catholic, female of Italian-American heritage, to at least some degree I exclude from me, form 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 psychologist Erik Erickson refers to this as “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 religions 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.

Note that Erikson speaks of a development of not only a distinct, but a superior, identity. Quite easily, those who are “not us” come to be seen as not only as different, but as “less than” us. 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

---

48 Id. at 26.
50 Id. See also Tony Smith, Social Violence and Conservative Social Psychology: The Case of Erik Erikson. 13 J. PEACE RES. 1 (1976).
“others” and for tensions to mount so high that one group literally annihilated 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.

What Goodall observed in the chimps is not much different from what we saw in the early 1990s in Bosnia or in 1994 in Rwanda. The partition of Yugoslavia in World War II that followed Nazi Germany’s invasion of that country set the stage for growing conflict between Serbs and Bosnian Muslims. These two groups, “who hated each other so much… were all but indistinguishable in their facial traits. It was only by their names that you could tell them

---

52 REASON FOR HOPE, supra note 51, 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 51, 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).

53 REASON FOR HOPE, supra note 51, at 130. See also ENDURING LIVES, supra note 51, 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”).

54 REASON FOR HOPE, supra note 51, at 129-130.

55 THROUGH A WINDOW, supra note 51, at 210; REASON FOR HOPE, supra note 51, at 130-131 (observing that the Kahama chimps were treated as though “they were thoroughly ‘de-chimpized’”).

apart.” 57 The conflict, which then U.S. Secretary of State Richard Holbrooke called the “largest failure of the West since the 1930s,” 58 resulted in the death of over 200,000 Muslim civilians and ten times that number becoming refugees. 59

In a similar vein, 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. 60 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 Hutus rose up and attempted to annihilate the Tutsis. 61 I’m not suggesting here that there may not have been abuse of the Hutus by the Tutsis at various times. 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” 62 came to view each other in a way that made annihilation of the other seem reasonable.

Yugoslavia and Rwanda are hardly the only examples. We need only take a casual glance through our not too distant history to find many others, including the lynchings of African-Americans, 63 the internment of Japanese Americans during World War II, 64 the

61 Human Rights Watch, supra note 60.
62 BBC News, supra note 60.
64 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. See Bush to Preserve WWII Internment Camps, CBS News, Dec. 23, 2006, available at
systematic attempt by the Nazis to exterminate the Jewish race, and hate crimes based on sexual orientation.

Pseudospeciation results in denigrating others based on the ways they are different from us culturally, behaviorally, or otherwise. Goodall opines that “[o]ur tendency to form select ingroups 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 formation, and judgment” that creates othering. Nonetheless, “othering” comes in many forms and in various degrees. It appears as fascism, racism, misogyny, homophobia, and religious and ethnic hatred. It also appears as discrimination against the aged and against those with physical disabilities and mental and emotional illnesses.

Even when othering doesn’t lead to the commission of horrendous acts against those we label as others, it quite often has the effect of excluding others from our locus of concern.

http://www.cbsnews.com/stories/2006/12/23/national/main2293979.shtml. 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. Civil Liberties Act of 1988, P.L. 100-383 (1988) (declaring that 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”). Five to seven million Jewish people were slaughtered in an attempt by the Nazis to systematically exterminate the Jews. See LUCY S. DAVIDOZICZ, THE HOLOCAUST AND THE HISTORIAN 12-13 (1981); MARTIN GILBERT, THE HOLOCAUST 257 (1985); JUDAH GRIBETZ WITH EDWARD L. GREENSTEIN AND REGINA S. STEIN, THE TIMETABLES OF JEWISH HISTORY: A CHRONOLOGY OF THE MOST IMPORTANT PEOPLE AND EVENTS IN JEWISH HISTORY 479 (1993).


REASON FOR HOPE, supra note 51, 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”).

Greenwald & Kreiger, supra note 44, at 946.

Those in the disability movement have long recognized that social barriers create disability and “that the difficulties of living as a disabled person are due to discrimination and prejudice, rather than impairment.” See Tom Shakespeare, Eugenics, Genetics and Disability Equality, 13 DISABILITY & SOC’T 665, 669 (1998); see also Adrienne Asch, The Human Genome and Disability Rights, DISABILITY RAG AND RES. 12 (January – February
Again, examples abound. Think, for example, of Western reaction to reports of atrocities in places far away. With respect to the genocide in Rwanda, which I already mentioned, 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

---

1994) arguing that the premise of the disability rights movement is that persons with disabilities are disadvantaged far more by negative social attitudes than by their disabilities. Othering 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.

70 *Hotel Rwanda* (MGM 2005).


of children dying around the world because of lack of access to health care or to clean drinking water\textsuperscript{73} or the numbers of young women transported for purposes of sexual trafficking.\textsuperscript{74}

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{75} 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.

Distance may account for some of the lack of concern with the plight of those living in places many Americans cannot even find on a map, but it clearly does not provide a total explanation, since we can find many similar examples that are much more proximate. Consider, for example, 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{76} Not only did this have nothing to do with “us,” but many people said and thought things like – “They


\textsuperscript{75} 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”).

had it coming” or “That’s what they get for their unnatural behavior.” Or, worse, “AIDS is God’s punishment for 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.

We see the same thing in people’s reactions to 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 a few years 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.

B. Factors that Reinforce Our Tendencies to Other People

77 Littlejohn; Spare us the ‘People’s Prostitute’ Thing, MAIL ONLINE, Dec. 18, 2006, available at http://www.dailymail.co.uk/debate/columnists/article-423549/Littlejohn-Spare-Peoples-Prostitute-routine-.html. 78 I don’t mean to suggest that othering operates universally; there clearly are exceptions. The Tsunami, for example, generated a tremendous charitable outpouring among Americans, despite the fact that it happened someplace a significant number of Americans probably couldn’t locate on a map. See Philip Rucker, In U.S., A Multitude of Forces Drains the Spirit of Giving, WASHINGTON POST, May 23, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/22/AR2008052204116_pf.html (noting that Americans donated $207 million in the first five days after the Tsunami hit). 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. See id. (noting that Americans donated $226 million in the five days after Hurricanes Katrina and Rita). It may be that natural disasters don’t so easily give rise to a response of othering: even though 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.
Apart from the natural process by which we identify ourselves by the groups of which we are a part, there are a number of forces that contribute to othering and that contribute to our devaluing of those we label as other. This section addresses three important factors: religion, culture and law.

1. Religion and Othering

In Section I, I outlined a communal vision of the human person derived from Catholic social thought, but also having roots in other major world religions, observing the potential of religious thought to promote a sense of communion and interrelatedness of human beings that is at odds with the othering I have been discussing. Lamentably, religion has not always lived up to the potential its principles invite, instead, often serving to promote an othering that devalues others.

Religion has far too often operated in the world as a means of dividing people. For many, the belief that their religion possesses a monopoly on truth has led to a need to denigrate those possessing different views. As we all know from our history, I am talking about more than merely unexpressed feelings of superiority. Instead, religious adherents have, over the years, zealously sought to advance their religion by violent and atrocious means. The Crusades were undertaken under the battle cry “Deus Vult” (God Wills) to destroy Jews and Moslems in the Holy Land. The Islamic jihads, believing themselves mandated to do so by the Koran, have killed millions over the centuries. In the 1900s, Muslim Turks waged genocide against Christian Armenians. Our more recent history had included years of conflict in Northern Ireland.

---

79 JAMES MORWOOD, A DICTIONARY OF LATIN WORDS AND PHRASES, 46 (1998).
between Protestants and Catholics and ongoing violence between Arabs and Jews in the Middle East. Incredible death and barbaric behavior toward others, all in the name of religion. These are the things that lead people like Christopher Hitchens to claim that religion “has been an enormous multiplier of tribal suspicion and hatred” that “must seek to interfere with the lives of nonbelievers, or heretics, or adherents of other faiths.”

Left unchecked, many people will use religion as an excuse for othering. Even where it does not lead to violence, a fundamentalist approach to religion often leads to a lack of willingness to associate with others not of the same religion. It is reflective of the desire of some religious groups to remain separate that a 1998 documentary of Hasidism in America was titled, A Life Apart.

2. Contribution of Cultural Forces to Othering

Cultural forces can be very powerful in shaping our reactions. Much of our understanding of the meaning of concepts such as justice, truth and freedom, are a function of the culture that steeps our lives. As a result, cultural forces also contribute to “othering. David

---

82 See, e.g., William Borders, Families Shift Homes in an Inflamed Ulster, NEW YORK TIMES, Sept. 30, 1981 at p. 11; James F. Clairity, After Six Killings, the Old Sadness in Ulster: A Raid on a Pub by Protestant Gunmen is Widely Condemned, NEW YORK TIMES, June 20, 1994 at A3; New York Times, A Pregnant Catholic Woman is Shot Dead in Northern Ireland, NEW YORK TIMES, Aug. 8, 1994 at A2.
84 CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISON EVERYTHING 36 (2007).
85 Id. at 17.
86 See KAREN ARMSTRONG, THE BATTLE FOR GOD xi (2000) (“to avoid contamination, [fundamentalists] often withdraw from mainstream society to create a counter-culture”). Intended or not, that conveys the sense that those not of the religion in question are at a minimum other and worse, less valuable as human persons. In the words of one commentator, “Religious fundamentalism is divisive. Instead of uniting societies, it produces isolation and hostility.” Darrell Williams, Religious Fundamentalism Versus Tolerance, AMERICAN CHRONICLE, Oct. 10, 2007, available at http://www.americanchronicle.com/articles/39850.
87 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.
88 A Life Apart: Hasidism in America, see http://www.pbs.org/alifeapart/index.html.
Brooks wrote an op-ed in the New York Times a few years ago entitled *The Segmented Society*.\(^{88}\)

In it, he suggested that we “live in an age in which the technological and commercial momentum drives fragmentation.”\(^{89}\) 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.”\(^{90}\)

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.”\(^{91}\)

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.”\(^{92}\) We see examples of this in the efforts to embrace Ebonics in American classrooms and other educational policies fostering multiculturalism\(^ {93}\) as well as in strategies for integrating immigrants into American life.\(^ {94}\)

Obviously, cultural pluralism is “necessary in an ethnically diversified society”\(^ {95}\) such as the one which exists in the United States today. Multiculturalism does not necessarily entail


\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.


\(^{95}\) SCHLESINGER, supra 92, at 40.
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, it is both valuable and necessary.96

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.”97 Thus, multiculturalism has the potential to foster a separatism that “corrodes all sense of community.”98

3. 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.99 Whatever else it does, the law “imbues a vision of how the members of a particular society should live their lives together.”100

---

97 Mark Tushnet, Thinking about the Constitution at the Cusp, 34 AKRON L. REV. 21, 34 (2000). See also SCHLESINGER, supra 92, 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”).
98 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 Critiques of Multiculturalism, 23 CARDOZO L. REV. 253, 259 (2001) (discussing “external” critique of multiculturalism, citing critics who worry that multiculturalism has the potential to “harden[] cultural identities into political categories”).
By “law” 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 often proceed from an attitude of othering and effectively legitimizes such behavior, expressing to the citizenry that some people can be disregarded.

Several examples illustrate the potential of legislative and judicial law to legitimate “othering.” First, the internment of Japanese-Americans during World War II, which I mentioned earlier, was effected pursuant to congressional legislation. That legislation was upheld by the Supreme Court in *Korematsu v. United States*.\(^{101}\) 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.”\(^{102}\) 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.’”\(^{103}\) 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

---

102 *Id.* at 226 (Roberts, J., dissenting).
103 *Id.* at 236 (Murphy, J., dissenting).
ourselves. The legal behavior constituted, in the words of Justice Murphy, the “legalization of racism.”\textsuperscript{104} 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.\textsuperscript{105}

A second example is provided by Cathleen Kaveny in an article in which she discusses the pedagogical function of the law.\textsuperscript{106} She discusses laws colloquially referred 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{107} 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{108} And the effect of the law extends beyond the actual prohibitions.\textsuperscript{109} “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{110} The law will clearly affect how people relate to persons with disabilities in whatever environment they confront them.

\begin{itemize}
\item \textsuperscript{104} \textit{Id.} at 242 (Murphy, J., dissenting).
\item \textsuperscript{106} See Kaveny, \textit{supra} note 100.
\item \textsuperscript{107} Chicago Municipal Code, § 36034 (repealed 1974).
\item \textsuperscript{108} Kaveny, \textit{supra} note 100, at 340.
\item \textsuperscript{110} \textit{Id.}
\end{itemize}
The language and behavior of government officials also contributes to othering. 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?

If, as I suspect, the answer to that question 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 the poor and about minorities, who have the highest rates of uninsurance – 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

112 Recently a study published in the Archives of Surgery concluded that uninsured Americans have a higher adjusted mortality rate after trauma due to treatment delay, different care, and decreased health literacy. See Heather Rosen, et al., Downwardly Mobile: The Accidental Cost of Being Uninsured, 144 ARCHIVES OF SURGERY 1006, ____ (Nov. 2009); see also Diane M. Birnbaum, MD, Insurance Status and Mortality After Trauma, J. WATCH EMERGENCY MED., ____ (Nov. 2009) (concluding that uninsured adults are almost twice as likely as insured adults to die after blunt or penetrating trauma); Jennifer S. Haas, MD, MSPH, Lee Goldman, MD, MPH, Acutely Injured Patients with Trauma in Massachsets: Differences in Care and Mortality, by Insurance Status, 84 Am. J Pub. Health 1605, 1608 (Oct. 1994) (concluding that “among patients with acute trauma, those who were uninsured were less likely to suffer in-hospital mortality than those with private insurance” possibly due to the use of fewer resources for the uninsured.).
113 See Kim Krisberg, Uninsurance Numbers Show Need for U.S. Health Reform: Poverty Rate Grows, THE NATION’s HEALTH, Oct. 2009, at p. 35 (noting that the “Census Bureau reported a 19.1 percent uninsurance rate in 2008 among blacks, 17.6 percent among Asians, 30.7 percent among Hispanics and 10.8 percent among whites”); Rebecca Vesely, Adding it All Up, 39 MODERN HEALTH CARE 7, 13 (Sept. 14, 2009) (commenting that “Income mattered when it came to health coverage. Last year, nearly a quarter of people with incomes of less than $25,000 annually were uninsured, while 21.4% of people with household incomes between $25,000 and $49,999 were uninsured. Just 8.2% of households with incomes of $75,000 or more were uninsured.”).
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.”

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. 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. George Wallace vowed in his first
inaugural address as Governor 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

\[\text{114 Michael Millenson, Want Universal Health Care? The Operative Word is Care, WASH. POST, June 8, 2008, at B03.}\]
\[\text{115 See 347 U.S. 483 (1954); see also Barbara A. Noah, A Prescription for Racial Equality in Medicine, 40 CONN. L.
REV. 675 n.107 (2008) (acknowledging that de facto segregation of schools continued through the 1980’s and
1990’s).}\]
\[\text{116 Prior to the Civil War and the subsequent enactment of the Thirteenth and Fourteenth Amendments to the U.S.
Constitution, the othering of African-Americans was promoted by the law itself. “To put it bluntly,” in the words of
John Noonan, “law was the medium and lawyers were the agents responsible for turning one class of human beings
into property. See Noonan, supra note 46, at 669, 669-671 (discussing early court decisions addressing the status of
slaves).}\]
\[\text{117 George C. Wallace, Governor of Alabama, 1963 Inaugural Address (Jan. 14, 1963), available at
http://www.archives.state.al.us/govs_list/inauguralspeech.html. Interestingly, almost lost to history is the fact that
Wallace first ran as a pro-integration candidate, a position he discarded after losing the governor’s race. More
significantly, also lost is the fact that while he was governor Wallace invested heavily in education and health care
programs for blacks and established free clinics and vocational schools that helped black and other low-income
residents of his state.}\]
\[\text{118 See George C. Wallace, Governor of Alabama, Statement and Proclamation at the University of Alabama (June
11, 1963), available at http://www.archives.state.al.us/govs_list/schooldoor.html. This speech became widely
known as the “stand in the schoolhouse door” speech.}\]
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.

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 it is 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. Effects of Othering on Issues of Law and Public Policy

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.

---


121 *Id*.

122 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*
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.

Sr. Helen Prejean (famous from her book *Dead Man Walking* and for her efforts to secure a moratorium on the death penalty) has said that 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. 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. However, one frames the justification, the reality is that the criminal to whom the death penalty is given is viewed as not us.

---

123 In Section II.B.3., 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.


125 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”).

126 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 Issues*, 2
Nor is this attitude 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 Justice, approximately 650,000 state and federal prisoners reenter society each year.\textsuperscript{127} When they do, they face tremendous obstacles, including difficulty finding housing and employment and health and substance abuse problems.\textsuperscript{128} Without help in handling those problems, they will be (and are) rearrested and reimprisoned, creating a vicious cycle.\textsuperscript{129}

To be sure, there are some programs aimed at assisting reentering inmates, but there are far too few,\textsuperscript{130} 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 on the outside, with less assistance in their reintegration and, at best, strained connections to their families and communities.”\textsuperscript{131}

Why are there far too few? Although by no means a complete answer,\textsuperscript{132} 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

\textsuperscript{127} See http://www.reentry.gov.


\textsuperscript{129} See Outside the Walls, supra note 128, at 128-30.

\textsuperscript{130} See id. at 132-62.


\textsuperscript{132} 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.
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.\textsuperscript{133}

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.\textsuperscript{134} Even worse, globalization sometimes also includes U.S. corporations profiting from human rights abuses committed by foreign government entities.\textsuperscript{135} These aspects of globalization have sometimes been referred to as “economic imperialism.”\textsuperscript{136}

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

\textsuperscript{133} 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. \textit{See generally} Christopher Uggen, \textit{Barriers to Democratic Participation}, 1-2 (Urban Institute, Working Paper, No. 410801, 2002).

\textsuperscript{134} \textit{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.”)).


\textsuperscript{136} \textit{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”).}
developing countries. We lack a “global culture of solidarity attentive to the needs of the weakest” and instead think of only parochial interests.

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.

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. 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. And when Edwards kicked off the Half in Ten campaign with a speech on May 12, 2008, only one major newspaper even covered the event. Similarly, think of the difficulty

---

137 Pope John Paul II, Address of John Paul II to the Members of the Vatican Foundation “Centesimus Annus – Pro Pontifice”, May 9, 1998, ¶ 2.
138 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 the same way to things far off. There is much greater American reaction to and concern for, problems in Europe than those in Africa or Asia. Why? Because when we look at Europeans we see people that are more like us than are Asians and Africans.
139 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 the juxtaposition of demonizing and scapegoating of immigrants even as we “gladly accept the sweat and taxes they provide”).
140 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.
142 See the campaign’s website at http://www.halfinten.org/index.html.
this country has faced trying to address the lack of access of so many Americans to affordable health care. Our ability to adopt meaningful reform of the health care system is, I suspect, affected by the fact that a shocking number of people share the attitude that people without insurance can get the medical care they need from emergency rooms. 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. 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.”

One can find numerous other examples of how othering affects the discourse over issues of law and public policy including the discourse of feminist legal theory, the discourse of

145 See Missouri Department of Pulcic 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.”).
146 Howard J. Hubbard, Fighting Poverty to Build Peace, AMERICA, Feb. 9, 2009, at 11, 13 (quoting Pope Benedict XVI).
147 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.” 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 KELY 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.
abortion, and NIMBY efforts to use zoning laws and other means to challenge the construction of facilities to house those with mental illnesses.

IV. The Role of Law in Moving From Othering to Communion

If our discussion of many polarizing legal issues 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? Earlier I suggested that religion and law are among the factors that contribute to othering. Here, I want to suggest that the law can be a powerful force in combating othering, and that the principles of Catholic social thought I identified at the outset serve to shape the values the law ought to promote.

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 human dignity and solidarity, which 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 can serve an expressive and pedagogical function in helping to foster cohesion.

148 Although for some, the belief that human life beings at conception is a matter of religious faith, that belief 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., 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.” A Statement of the Society of Jesus in the United States on Abortion (Mar. 2003), in AMERICA 19, 19-20 (Mar. 26-June 2, 2003). Even if one wants to argue that what exists at conception is only the potential for life, the fact that we need to pass legislation called the Infant Born Alive Protection Act to force hospitals to provide medical care to infants who come through the abortion process alive suggests the extent to which othering operates here. Born-Alive Infants Protection Act of 2002, PL 107-207, 1 U.S.C. § 8. 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.” Id. at § 8(b).


150 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
Cathy Kaveny advances a model of the Law as “Moral Teacher,” a model that recognizes that law “communicates something to its subjects about the ways in which they should and should not go about living their lives.” 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. 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.”

In terms of the law’s capacity to promote values that combat othering, we are primarily concerned with the signaling effect of the law. That is, the question is to what extent our legislative and judicial enactments, and the language of government officials, promote human dignity, unification, and cohesion, rather than a division and a sense of othering? As the following discussion suggests, there are both easy answers and hard questions.

A. Easy Answers (Direct and Subtle)

Some things are easy and fairly direct. Antidiscrimination laws and laws punishing hate crimes send important signals. As limited as they may be in addressing implicit bias, they provide strong statements that certain groups may not be treated in a manner that adversely impacts their dignity as persons.

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 *Brown*. See *supra* note 115. Mandating integration of schools or banning forms of discrimination have no effect on implicit bias. See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

151 Kaveny, *supra* note 100, 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. *Id.* at 354.

152 *Id.* at 350.

153 *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.” *Id.* at 349.

It is not, of course, enough merely to have such laws on the books. Self-evidently, for the law to have the appropriate signaling effect, the legal system must behave as though we take such laws seriously. 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. 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).

Other ways the law can promote values that counter tendencies to other are more subtle. The law and the way we talk about the law conveys a message apart from the substantive provisions it contains.

I’m talking in part here about the message conveyed by the laws themselves. 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 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, 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 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.
In part, I’m also talking about how government officials speak, recognizing that how we speak about each other has a tremendous effect on the people who hear that speech. In 2008, we 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”? 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?

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.” Leaving aside the complexity of picking an upper limit and things like the need to take into account regional differences, 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. It is worth asking what kind of effect there might be if our government officials started preaching what one

\[^{155}\text{J.B. White is someone who has written much on the power of language. See, e.g., J.B. WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (2006). In the preface of this book, he talks about the way language can “deny the value of our selves and other people, and the activities of life we share.”}\]

\[^{156}\text{See supra note 137 and accompanying text.}\]

\[^{157}\text{Professor Pecorella is not arguing that the government ought to define such a ceiling as a legal mandate. Rather, he suggests that the Church ought to include such an idea on an aspect of what “should be expected within the Catholic community.” Id.}\]

\[^{158}\text{See id.}\]

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.
conference called a “Virtue of Enough,”¹⁵⁹ that might encourage a sense of obligation to use one’s surplus to meet the needs of those without.

**B. Harder Questions**

To some extent, all laws make distinctions among people. They discriminate or categorize, at least in the sense that the 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 devaluing; not all distinctions signal that some are other.¹⁶⁰ 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.¹⁶¹ 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 eighteen cannot vote.

¹⁶⁰ See DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008) (distinguishing between discrimination that is demeaning and fails to treat others as moral equals, and treating people differently where doing so is not demeaning). 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.
¹⁶¹ 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 of 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 expect to see substantial overlap between those two ways of framing it, but the overlap may not be total.
The difficult task, of course, is deciding which distinctions devalue others and which are not morally questionable, a task that is complicated by the fact that there other important values may be at stake that might justify othering.

In some cases, our desire to treat people differently stems precisely from a desire to promote their dignity and to allow them the means to flourish in community. 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 about a measure designed to address the historical effects of a dehumanizing othering. The same is true of programs designed to aid the poor. Such programs clearly make distinctions – they single out the poor for distinctive treatment. But they do so for purposes that advance human dignity, not denigrate it. 162

The short resolution is to suggest that distinctions that are motivated by a desire to address particular needs of subsets of the population do not promote the kind of othering with which I am concerned here. Where differential treatment by the law aims to rectify that which prevents the flourishing of the human person, where it doesn’t devalue, that differential treatment is justified.

In other cases, the desire for the law to promote the kind of unity of which I am speaking might run up against the values of freedom of association and religious liberty. For example,

162 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.
what of a law that interferes with a decision by a Christian student group to limit its leadership positions to Christians? Or, what of a law that requires Catholic Charities to place children for adoption with same-sex couples? Are such laws justified as efforts to promote dignity and equality of treatment and to combat an attitude of othering notwithstanding their impact on the freedom of association and religion of the Christian student groups in the first instance and the religious freedom of Catholic Charities in the second? Or are the values of freedom of association and of religion sufficiently strong that the should be respected notwithstanding their impact on the “othered” groups?

The resolution of these tensions is far more difficult. 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.

**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.

---

163 The Supreme Court has granted certiorari to decide whether a public university can refuse to recognize a religious student group because the group requires its leaders to share its religious beliefs. Christian Legal Society v. Martinez, 319 Fed.Appx. 645 (9th Cir. 2009), *cert granted*, 2009 U.S. LEXIS 8842 (Dec. 7, 2009).

164 In 2006, Catholic Charities of Boston determined it had no choice but to cease its adoption services because of a Massachusetts law that would require it to place children for adoption with homosexual couples. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, March 11, 2006, at A1.

165 *John 15:13* (“Greater love has no one than this, that one lay down one’s life for his friend.”).
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 should do and about the direction in which it ought to move. Getting it to do that will not be an easy task.\textsuperscript{166}

\textsuperscript{166} 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.