The Cresset (archived issues)

12-1998

The Cresset (Vol. LXII, No. 2 & 3, Christmas/Epiphany)

Valparaiso University

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Contents

3 The Editor / in luce tua: longer than this round earth rolls
4 Tim Gustafson / when Quirinius was governor of Syria (verse)
5 Rosalie Berger Levinson / the dark side of federalism in the 90's
13 Bruce G. Berner / philosophy or crime control?
19 Ivan E. Bodensteiner / who polices the states?: civil rights in a new key
27 Jennifer Voigt / film: in the dark about religion
31 Walt McDonald / the season our son left home (verse)
32 Maureen Jais-Mick / music: sharing and stealing: cultures and commerce
35 Thomas C. Willadsen / letters from the front: hearing about racism
37 book reviews / Rubel on Conway (Memory), Howard on Rorty (Leftist Thought)
39 George Slanger / Meister Eckert's sermon 6 (verse)
42 notes on poets, reviewers
43 Jeanne Nuechterlein / elegy (verse)

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Postmaster send address changes to The Cresset, #10 Huegli Hall, Valparaiso University, 651 S. College Ave., Valparaiso, IN 46383
Covers can get to be an exciting part of the editing business. Being a wordy type myself, I deal easily with pages of words. Articles come in, you read them, you fuss with their authors about their words, you change some, you get them squared up—it's all pretty manageable. Dealing with words and type can become routine; the familiarity of words themselves, and the ease with which we all use them, sometimes hides the surprises they mean to convey.

But pictures, and the people who make them? As we say today, "a whole nother story." Pictures get in amongst you. They say things you can't change by altering a phrase here, adjusting a modifier there. It may be an editorial failing to get into the habit of saying about someone's prose, "Ah ha! I can use this!" But dealing with pictures is different; you don't use them. With considerable effort (and sometimes with more money and trouble than you'd like to admit) you can get pictures to come briefly under your control. Like wrastling alligators, maybe. When Bob Potter sent me these choices for this issue's covers, it was as if they started a conversation in my head, but it is a conversation where it is hard to get a word in edgewise.

First, there was the round thing. It captured me, in part because I was curious. The ball, so solid and bright, so very blue. You want to touch it, though it seems to be both still and moving at the same time. Those crisp ridges are nicely marked out, holding everything tightly together, yet crossed by that slash of whooshing green. I turned the picture around so that the little blobby feet things were on the top, but they insisted on coming down to be a resting place at the bottom, there in the dark, dark blueblack. The light part of the ball teases your eye—it must be moving but how? The ball is suspended, but circled too. I wanted to play with it, to feel those lines and blobs and turning brightnesses. "What is it?" I asked Bob.

"It's the earth," he answered, politely surpressing the inevitable "duh!"

Then I knew why I had felt about it that combination of desire, admiration, wonder and curiosity. It's a picture of how God might see the earth, or of what he might have had in mind when he separated it out from the waters, or tohu vebohu—the everything else. There it is—perfect, charming, light and blue and clear, an ornament for the great expanse of space. Something to love and play with, to toss up and catch and rub against your divine cheek.

"It's wonderful," I said to Bob. "Now, what have you got for the back cover?"

So we talked for a bit about what I had intended for this issue, back in July when I had hopes of an issue about race. The articles I had thought of had not materialized, but I had others to be excited about. Three law professors writing about the current state of the Supreme Court and its present notions that people could look after themselves without the curse of Big Government protecting their rights. This is, I could convince myself, not so very far from issues of race in America. And columnists had rallied and written about race. But what about a picture?

"Well, let's see. I've got buses and camels and boxes and trees and dogs and actors—no, hey, wait a minute. I've got some vets demonstrating about the flag desecration, how about that?"

So in a day or two, they arrived, these demonstrating American veterans, flags flapping in the chilly breeze of a dull day on Michigan Avenue. And the picture won't stop talking. It's insisting on the drama of human life, which might seem too grandiose a term for the big guy in the flannel shirt,
or the little guy just peering over his shoulder in the grey windbreaker. But drama is, somehow, what human beings started to do as soon as we were set up on our clayey legs. Just a breath from God, and bam! Dialogues with snakes, temptations, lies, blame, excitement, fashion, travel, sex, childbirth, religion and murder—and that’s all before Genesis 5.

The picture has quite a bit of that, at least potentially. Skyscrapers, flags, uniforms, crowds seem to be the results of civilization, as though human beings will inevitably evolve into this picture, somehow or other. It’s not violent, there’s nothing here to show the shocking or the brutal in human nature, yet it seems also to speak somehow of the state of defensive hostility and distrust that accompanies being human. “Corps” says the red flag overhead. Indeed, just being a body involves the person in such a posture, over and over again. Wary, critical, and alert, carrying the markers of a perceived and perhaps precarious unity, this body of men makes known that they oppose the art museum’s treating their symbol of unity as a mere work of art. The picture speaks both of their determination and the fragmentary nature of their united front.

So, I thought, finding a little space for thinking within the insistent conversation provoked by the two pictures, “Are both pictures God’s view of us?” The earth so clear and beautiful as an abstraction, looking like an idea waiting to be made, a plan for a world. The human world so contentious and angry, cautious and defensive at the same time.

Part of the trouble with pictures is that they monopolize the conversation. There are other conversations. God’s desire to bring us into a really good one made him try again, this time in that “shining stable in the night.” May we meet Him there.

Peace,

GME

WHEN QUIRINIUS WAS GOVERNOR OF SYRIA

The word came down from Rome: “Take a census
That Caesar, imperial lord, may tax
His realm, Caesar divine, who gives the pax
To all the world. An empire’s expenses
Are great: the roads, weapons, ships, defenses
Required to keep the peace burden the backs
Of peasant and soldier both. But to relax
Is no option, lest any rise against us.”

Along roads up to royal David’s home
A couple bore their burden, pilgrims of
Divinity’s desire. Some shepherds heard
The noise of birth, of small account in Rome:
Cries of a child, cries of a mother’s love
Graced with a gift of peace come down, the Word.

Tim Gustafson
The Dark Side of Federalism in
the 90's

restricting rights of religious minorities

Rosalie Berger Levinson

The most dominant theme of the Rehnquist Court's jurisprudence is federalism. Although this term refers to maintaining a proper balance between state and federal power, to the Rehnquist Court it has meant restoring power to the states. It has invoked federalism to limit congressional power to enact laws on behalf of the people, even when such laws expand individual liberty. Further, it has invoked federalism as a basis for denying a broad interpretation of constitutional guarantees. This essay will explore generally the growth of federalism as an obstacle to enforcing federal rights and then more specifically the Court's use of federalism to deny the rights of religious minorities.

the expanded use of federalism by the Rehnquist Court

The framers of the Constitution struggled with the question of how best to distribute power between the states and the federal government. The Constitution which emerged mandates that Congress may enact legislation only pursuant to powers specifically enumerated in that document. Among those powers, the Commerce Clause has probably been the one most utilized. Over the years Congress has invoked and perhaps stretched its stated power "to regulate commerce among the states" to pass literally hundreds of laws, including significant civil rights laws in the 1960s and 1970s, based on a theory that discrimination affects interstate commerce. It has passed environmental laws, labor laws, and criminal laws, and the Supreme Court has acquiesced and has in fact given its stamp of approval to such enactments. It is this line of decisions that is one of the primary targets of the Rehnquist Court.

In Printz v. United States the Court held in 1997 that Congress exceeded its power in passing the Brady Handgun Act, which commanded the state's Chief Law Enforcement Officers to search records to ascertain whether a person could lawfully purchase a handgun. Despite its previously broadly construed commerce clause source, the Court reasoned that the history and structure of the Constitution prohibits Congress from conscripting state executive officers to enforce a federal regulatory program. Earlier, in New York v. U.S. the Court invalidated an environmental law, the Low-Level Radioactive Waste Disposal Act, that required states to either enact measures to deal with the problem of low radioactive waste generated within its border by 1996 or else to take title to the waste. The Court ruled that Congress may not "commandeer" state officials to exercise legislative power to assist the federal government. This was only the second time since 1936 that a federal law was invalidated on Tenth Amendment grounds and the other decision was overturned in 1985.

Finally, in United States v. Lopez, the Court ruled in 1995 that Congress exceeded its Commerce Clause power in passing a federal criminal statute, the Gun-Free School Zone Act, which prohibited the possession of a firearm within 1000 feet of a school. Congress failed to demonstrate that the regulated activity substantially affected interstate commerce. Further, the criminal statute had nothing to do with commerce, nor was possession of firearms in any way connected with a commercial transaction. The Court invoked federalism, stressing that the statute governed areas historically left to states, namely criminal law enforcement and education. This was the first time since 1936 that a federal law not directly aimed at states was declared unconstitutional because it
purportedly exceeded the scope of Congress’ Commerce Clause authority.

The Rehnquist Court’s concern for states’ rights is also apparent in a series of recent decisions that protect state agencies and state officials from being hauled into federal court. The Eleventh Amendment to the Constitution was enacted to restore state sovereignty by protecting states from suit in a federal forum. However, the Supreme Court long ago recognized two principles that restrict this immunity. First, the states, through their representatives in Congress, may waive state immunity from suit. Second, the Eleventh Amendment does not preclude a federal court from enjoining a state official where there is an ongoing violation of federal law, even though the state itself may be immune.

In a 1996 landmark ruling the Court in Seminole Tribe of Florida v. Florida attacked both of these well-established limitations on the Eleventh Amendment. It held that Congress lacks the power to abrogate the Eleventh Amendment when it acts under the Commerce Clause, or any Article I power, and thus the State of Florida could not be subjected to suit in federal court. It further held that even suits seeking injunctive relief against state officials, rather than the state itself, are barred when Congress has prescribed a detailed remedial scheme for enforcing a statutorily created right against a state. As to the first holding, the Seminole case places in jeopardy numerous federal statutes including environmental laws, labor laws, and even some civil rights laws that expressly authorize suit in federal court against state government, but that were enacted under the Commerce Clause. For example, several appellate courts have recently held that the Eleventh Amendment bars suit against a state employer in federal court under the Fair Labor Standards Act, which guarantees minimum wage and overtime for employees, because this law was enacted under Congress’ power to regulate interstate commerce. Further, two appellate courts have ruled that state employers may not be sued in federal court for discriminating against their employees on the basis of age because Congress lacked authority under the Commerce Clause to deprive the states of their immunity from suit. As to the Court’s second ruling in Seminole Tribe, it represents the first time in almost 100 years that the Supreme Court has disallowed suit against a state official in federal court. This seriously threatens the well-established principle that state government action that violates federal rights may be enjoined by naming the responsible officials as defendants in the federal court action.

One year later, in Idaho v. Coeur d'Alene Tribe of Idaho, the Court again held that a federal court may not hear an action against state officers for injunctive and declaratory relief. The Court reasoned that the Indian Tribe in essence sought adjudication of Idaho’s title to land and an injunction against the Governor would deprive the state of all practical benefits of ownership of the disputed waters and submerged lands. This was too direct an affront to state sovereignty, even if the state itself was not named as a defendant. Four Justices, dissenting to both Seminole and Coeur d’Alene, argued that there was nothing unique in either of these cases to abandon the “general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began.”

These recent decisions expand state immunity and the price is loss of state accountability for federal law violations. Our lectures this afternoon will focus more specifically on the use of federalism to justify the Court’s refusal to recognize and protect individual rights from government tyranny. Although the framers did express concern that a national system not invade and swallow up state sovereignty, they also envisioned a system whereby individual rights would enjoy double protection—both under state and under federal constitutions; both in state and in federal courts. James Madison wrote that federal courts were necessary to ensure the protection of individual liberties, and Justice Marshall in the 1803 Marbury v. Madison decision established the important principle of constitutional judicial review. As the Supreme Court wrote in Cooper v. Aaron: “[Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle ever since has been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”

The Rehnquist Court has turned federalism on its head and has abdicated its role as guardian of the rights of the people. It has narrowed federal court jurisdiction based on its express declara-
tion that state courts are equally trustworthy in deciding constitutional claims, and thus federal
courts should take a "passive" role in enforcing constitutional values. Professor Burt Neuborne has
explained that this concept of parity may be a "pretext for funneling federal constitutional decision-
making into state courts precisely because they are less likely to be receptive to vigorous enforce-
ment of federal constitutional doctrine." Professor Neuborne's cynicism may be well-founded. An
overview of recent decisions suggest that while abdicating its duty to protect the rights of the politi-
cally powerless in our society, the Court has in actuality not relinquished its role as final arbiter of
the meaning of the Constitution and indeed has taken an "activist" stance when this would advance
a political agenda that favors the interests of the majority.

For example, the Supreme Court has interpreted the First Amendment Free Speech Clause to
prohibit state and local government from enacting hate speech statutes. As Justice White wrote in
*RAV v. City of St. Paul, Minn.* "the majority legitimates hate speech as a form of public discourse." The
Court has also invoked the free speech guarantee to expand the rights of big business by affor-
ding significant protection for commercial speech, holding, for example, that big business should
be able to advertise its wares free from state interference.

Another example is provided by the Court's decisions interpreting the due process clause. The
Supreme Court has held that the due process clause protects against abuses of government power,
but only where such is sufficiently egregious so as to "shock the judicial conscience." Last summer in
*County of Sacramento v. Lewis,* the Court ruled that it does not shock the judicial conscience for
a police officer to conduct a high speed chase of up to 100 mph through a residential area to pursue
a juvenile on a motorcycle whose only crime was refusing another officer's command to stop. The
chase ended 75 seconds after it began when the motorcycle overturned and the deputy skidded into
and killed the 16-year old. Nonetheless, the Court ruled its conscience was not shocked because the
evidence did not show the deputy acted "with intent to harm"—a police officer does not violate
substantive due process merely by causing death through deliberate or reckless indifference to life.
On the other hand, this same Court ruled in *BMW of North America, Inc. v. Gore* that its judicial
conscience is shocked by juries that impose excessive punitive damage awards on major companies
like BMW and it has invoked substantive due process to overturn such awards.

Further, the Rehnquist Court has "actively" invoked the Equal Protection Clause to invalidate
state and municipal affirmative action plans based on the disingenuous rationale that racism and
sexism no longer warrant any type of preferential treatment. My colleagues will elaborate on these
cases and provide other examples of this form of judicial activism. My focus will be on the rights of
religious minorities.

**restricting rights of religious minorities in the name of federalism**

The Rehnquist Court's approach to the First Amendment religion clauses clearly demonstrates
both its willingness to protect majority interests and its unjustified use of federalism to invalidate
laws that would protect the rights of those who lack political power. There are two clauses in the
First Amendment—one prohibits government from establishing religion and the other guarantees
the free exercise of religion. As to the Establishment Clause, the Court has clearly moved from a
strict wall of separation between church and state to an approach which seeks to accommodate reli-
gion. At least three members of the Court, Chief Justice Rehnquist and Justices Scalia and Thomas,
would permit virtually all forms of government assistance to religion provided there is no coercion
involved and the government is not favoring any particular faith. Justice Kennedy will vote with
these accommodationists against a separatist approach, unless he perceives some form of coercion,
actual or subtle. And Justice O'Connor will provide a fifth vote to sustain government involvement
with religion provided such appears neutral and arises out of a general scheme that only incidentally
benefits religion.

At first blush this may be seen as a movement towards greater protection of religious liberty. Indeed in 1952, Justice Douglas, a jurist whose philosophy was more "liberal" than that espoused by any currently sitting Justice, wrote in *Zorach v. Clauson* that "When the state encourages reli-
gious instruction or cooperates with religious authorities ... it follows the best of our traditions.
For it then respects the religious nature of our people and accommodates the public service to their
spiritual needs." However, the wall of separation erected by the Warren Court is viewed by mem-
bers of religious minorities as a safeguard against practices which tend to favor those majority reli-
gious faiths that have the political power to enact laws for their own benefit. When government of-
ficials decide to display religious symbols, to offer prayers at public functions, or to institutionalize
prayer in public schools, you can be assured that neither Buddhist nor Islamic prayers or symbols
will be selected. Yet the Court has rejected Establishment Clause challenges and has upheld public
displays of religious symbols provided they are sanitized by a secular context, such as a creche sur-
rounded by reindeer and Santa.

Let me point out that I am not necessarily opposed to the Court’s movement towards a more
accommodationist approach. Indeed I agree with its most recent accommodationist decision, Agos-
tini v. Felton. The Court in 1997 overturned a 1985 Supreme Court ruling, Aguilar v. Felton, which
had denied Title I funds for remedial educational and counseling services for needy children on
parochial school grounds. The Court in Aguilar assumed that having public salaried teachers set
foot on parochial school premises would end up impermissibly advancing religion and causing ex-
cessive entanglement between church and state, and thus the program violated the Establishment
Clause. Because, however, the Court did allow such services to be provided off parochial school
property, i.e., at neutral sites and in mobile instructional units parked outside the parochial schools,
Aguilar in essence meant that millions of dollars had to be spent on leases of mobile units and trans-
portation rather than for remedial education. At the time of the decision some 183,000 students na-
tionwide benefitted from the program. The Court’s ruling meant 35 percent fewer students would
be served. The New York School Board alone reported that as a result of the 1985 ruling it spent
$100 million to lease off-site instructional units and transport parochial students to those sites.

It should be noted that the Title I program, enacted as part of the 1965 Elementary and Sec-
ondary Education Act, specifically mandated that parochial school classrooms used by public
teachers to provide remedial services were to be expunged of all religious paraphernalia. In addi-
tion, only preapproved secular materials could be used, and remedial instructors were cautioned
not to inculcate religion into their instruction. Thus, the only notable difference between on-campus
and off-campus instruction was the fact that the former took place on the property of the parochial
school whereas the latter was administered in mobile units oftentimes parked on the curb of the
parochial school campus! Although some have heralded Agostini as portending a significant and
welcome shift in Establishment Clause jurisprudence, perhaps foreshadowing a further crumbling
of the wall of separation, I applaud the decision on much more narrow grounds—namely, it means
that the special education needs of the impoverished of our society will be better served, regardle-
of whether those children happen to attend public or parochial school.

On one level, Agostini might be interpreted as a decision providing greater protection for reli-
gious liberty, since it recognizes the right of parents to select religious over public education. Since,
however, the vast majority of parochial schools are operated by mainstream religions, i.e., over 80
percent are affiliated with the Catholic Church, the Court’s eagerness to allow aid to parochial
schools does not really reflect a concern for minority religious interests. Indeed the Court’s willing-
ness to accommodate mainstream religion under the Establishment Clause stands in sharp contrast
to its jurisprudence under the free exercise guarantee—a clause intended to protect minority reli-
gious interests from the will of the majority. Here the Court has really subjected minority rights to a
double whammo—both narrowly construing the Free Exercise Clause and then vitiating Congress’
attempt to broaden religious rights by legislation. Ironically, many of the Justices who have argued
for an accommodationist approach under the Establishment Clause have flatly rejected the need to
accommodate the religious practices of minority faiths under the Free Exercise Clause.

In 1990 in Employment Division v. Smith the Court held that the free exercise clause grants
no special exemption from generally applicable laws that appear neutral and that do not single out
religious groups for adverse treatment. No matter how much such laws burden religious practices,
they will be upheld provided they are rational. In *Smith* the Court rejected a claim by members of
the Native American Church that their free exercise right was unconstitutionally burdened by an
Oregon statute that criminalized the use of the drug peyote. Black and Smith were terminated from
their jobs and then denied unemployment compensation by the state for engaging in their religious
practice of ingesting peyote sacramentally.

Prior to *Smith*, laws which substantially burdened religious freedom were subjected to a much
stricter analysis: states had to show an overriding interest that would be significantly impaired by
granting a religious exemption. In other words, states would have to *accommodate* religion by
granting an exemption unless this strict standard could be met. Under *Smith*, a law will be sustained
so long as it does not single out religious behavior for punishment. Since Oregon's drug law applied
equally to all and it was rational, Smith and Black could lose their claim to unemployment compensa­
tion and even be imprisoned despite the fact that ingesting peyote is central to their religious be­
liefs, and Native American Indians have been using it in their ceremonies for centuries without
causing societal problems.

Justice Scalia acknowledged in *Smith* that his rational basis test would place religious minori­
ties at the mercy of the political process, but he blithely concluded that discriminatory treatment
was an "unavoidable consequence of democratic government." The problem is that democratic
government generally will be sensitive to the religious needs of the majority—i.e., during Prohi­
ption an exemption was made for the use of wine during Holy Communion—but it is apt, as was the
case in Oregon, to ignore the concerns of religious minorities. Since the whole purpose of the Bill of
Rights was to withdraw certain subjects, such as religious liberty, from the will of the majority—to
establish certain fundamental values that the courts are to protect—Justice Scalia's comments are
deeply troublesome. Indeed, *Smith* triggered an immediate reaction nationwide and a massive coali­
tion of mainstream and minority religious leaders turned to Congress for help, and Congress lis­
tened.

To restore greater protection for religious liberty, Congress, by an overwhelming majority, en­
acted the Religious Freedom Restoration Act (RFRA). This law prohibits government from substan­
tially burdening a person's exercise of religion, even if the burden results from a rule of general app­
llicability, unless the government demonstrates that its enactment furthers a compelling interest
and is the least restrictive means of furthering that interest. The victory for religious liberty was un­
fortunately short-lived. The Supreme Court in *City of Boerne v. Flores*, ruled that RFRA was an un­
constitutional exercise of congressional power, even though its source was the Fourteenth Amend­
ment, which protects us from state deprivation of our liberty.

The Court in *Flores* acknowledged that §5 of the Fourteenth Amendment gives Congress the
power "to enforce by appropriate legislation, the provisions of this Article," including the free exer­
cise guarantee. It concluded nonetheless that this enactment "alters the meaning of the Free Exer­
cise Clause" and "cannot be said to be enforcing the Clause." The Court drew a distinction between
Congress' legitimate power to enforce constitutional rights, i.e., to act in a remedial fashion, and
the illegitimate use of power to determine what constitutes a constitutional violation. It determined
that RFRA was not a proper exercise of Congress' remedial or preventive power, despite 800 pages
in the Congressional Record setting forth the difficulty that minority religions have had in getting
exemption from facially neutral laws. The Court stated that RFRA was so out of proportion to a
supposed remedial or preventive objective that it could not be understood as merely responsive to
any unconstitutional behavior. RFRA required state and local legislation that substantially burdens
religious liberty to meet a compelling interest/least restrictive means test. Justice Kennedy, writing
for the majority, determined this violated federalism principles because Congress intruded "into the
States' traditional prerogatives and general authority to regulate for the health and welfare of their
citizens."

The Court's conclusion that RFRA was an unwarranted expansion of Congress' power be­
cause it attempted to make a substantive change in constitutional protections and thus intruded on
the Court's bailiwick appears misdirected. Congress was not declaring that an individual has a con­
stitutional right of free exercise greater than that announced in *Smith*, but was merely adding a *federal legislative right*, one that on its face is not inconsistent with or prohibited by *Smith*. RFRA addressed the concern that the rights of religious minorities cannot be protected in the majoritarian legislatures and that even where laws are facially neutral, by reason of indifference, if not hostility, religious minorities may find themselves at a disadvantage.

At the beginning of my remarks I addressed the Court’s recent decisions restricting Congress’ power under the Commerce Clause on the theory that such laws intruded on state sovereignty. The *Printz* case, invalidating aspects of the Brady Act, was indeed handed down two days after *Flores*. The difference, however, is that RFRA was passed not under the Commerce Clause, but under § 5 of the Fourteenth Amendment. The Supreme Court ruled in the 1960s that § 5 is “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” Indeed Chief Justice Rehnquist himself wrote in a 1976 decision, *Fitzpatrick v. Bitzer*, that the principle of state sovereignty is “necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment... When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.” Justice Rehnquist cited the Fourteenth Amendment and observed that it “quite clearly contemplates limitations on [state] authority” and represents a “shift in the federal-state balance.”

On several occasions in the past when the Supreme Court has given a fairly narrow construction to a constitutional right, Congress has responded by invoking §5 of the Fourteenth Amendment to create a more expansive federal statutory right. For example, the Supreme Court ruled in *Katzenbach v. Morgan* that Congress acted well within its authority under § 5 of the Fourteenth Amendment in concluding that the needs of the Puerto Rican minority in New York warranted federal intrusion upon any state interests served by English literacy requirements because such impaired the ability of this group to vote. Even though the Supreme Court had earlier sustained the use of literacy tests by states against a constitutional challenge, Congress was free to reevaluate the situation and determine that in certain contexts a federal statutory right to be free of restrictive literacy tests was warranted.

Similarly, after an all-male Supreme Court held in *Geduldig v. Aiello* that discrimination based on pregnancy was not necessarily sex discrimination, Congress passed the Pregnancy Discrimination Amendment, which defines discrimination based on pregnancy as a form of gender discrimination. Congress created a federal statutory right on behalf of women employees to be free from discrimination based on pregnancy even where that discrimination would not be deemed to violate the equal protection guarantee of the Fourteenth Amendment. More analogous are the congressional enactments of the 1960s—Title VII and the Voting Rights Act—which dispense with proof of overt discrimination and allow a remedy for conduct that has a discriminatory impact even though the Equal Protection Clause itself has been interpreted by the Court as reaching only intentionally discriminatory conduct. The Court in *Washington v. Davis* held that only overt discrimination in employment is prohibited by the Equal Protection guarantee, but Title VII requires employers to justify practices that have a disparate impact on protected groups by showing job-relatedness or business necessity. Further, the Voting Rights Act imposes a “results” test despite the Supreme Court’s holding in *City of Mobile v. Bolden* that the Fourteenth Amendment itself forbids only purposeful vote dilution. In short, it is well established that Congress, as well as state government, may confer more rights than the Court finds in the Constitution.

In finding that RFRA cannot be viewed as necessary remedial legislation, the Court has subjected this act of Congress to an even more stringent test than that imposed with regard to laws passed under the Commerce Clause. This again turns federalism on its head. The Fourteenth Amendment was specifically aimed at states and designed to limit their power following the Civil War. Historically it makes no sense to interpret § 5 as imposing more rigorous federalism constraints on Congress than that imposed by the Commerce Clause. The latter arguably was limited by
the subsequently enacted Tenth Amendment that carved out a sphere of power reserved exclusively to the states, and the Eleventh Amendment that was adopted to protect states from federal court judges.

*Flores* is troublesome not just because it leaves religious liberty without effective federal protection, but also because it casts doubt on Congress' power to address other pressing national problems under §5 of the Fourteenth Amendment. The Court's new proportionality requirement—that congressional enactments be reasonably well-suited to their end—is vague. As Douglas Laycock, the attorney who argued and lost the RFRA battle before the Supreme Court, opined, "*Flores* significantly limits Congress' independent power to protect the civil liberties of the American people. How significantly remains to be seen, because the opinion announced a vague standard of uncertain scope."

It is difficult to understand how federalism mandates this result. The purpose of federalism is to ensure against federal tyranny by dividing power between state and federal governments. However, if Congress is expanding rights, there is no reason to fear tyranny. Further, federalism is promoted because it purportedly infuses power into state and local government which is closer to the people and thus more likely to be responsive to their needs and concerns. The whole point of RFRA, however, is to acknowledge that the majoritarian processes, whether at a state, local or federal level, often ignore the needs of minority faiths. The Court's reliance on federalism in this context thus appears suspect.

The most obvious effect of *Flores* is to reduce protection of free exercise of religion by returning the law to the test articulated in *Smith*, i.e., that a neutral law of general applicability will never be found to violate the Free Exercise Clause provided government can muster any rational basis for its enactment. *Flores* means that people in the United States, primarily those who lack political power, will have far less protection for their religious practices. It certainly means that many claims of free exercise of religion that previously would have prevailed under RFRA now certainly will lose. Thus, in less than a decade the Rehnquist Court has restricted one of the most revered principles in the Bill of Rights by invoking judicial passivism to deny any meaningful protection to religious liberty under the Constitution and then by offering a novel, unprincipled and certainly "judicially active" interpretation of federalism to vitiate Congress' attempt to correct the Court's error.
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Cooper v. Aaron, 358 U.S. 1, 18 (1958).
Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).
At first glance, the current Court’s decisions in criminal cases may appear to be examples of “judicial passivism,” casting many issues out of its own view and committing them to the discretion of other actors in the criminal justice system. A closer examination, however, begins to unveil a more result-oriented agenda since the only issues banished from view are ones historically of service to accused persons; and this abdication of the Court’s role is engaged in only when the Court can be confident that those other actors (police, states, lower federal courts) will “get it right,” will convict defendants. Indeed, this so-called “passive” Court has generated new, suspiciously activist theories pressing heretofore irrelevant facts into the service of diminishing the constitutional guarantees of persons accused of crime. In short, the Court’s jurisprudence in the criminal area may have much less to do with its philosophy of judging than with its politics of crime control.

To demonstrate my thesis, I offer three pieces of evidence: (1) a comparison between the “good faith exception” to the exclusionary rule and a 1996 decision on pretext arrests; (2) recent Court decisions on when a “seizure” occurs including a spectacular 1998 case which reaches a conclusion you will find fantastic (in the original sense of that word); and (3) this Court’s basic jurisprudential tool for deciding difficult crime-connected constitutional questions—the “totality of the circumstances” test.

One more introductory note is important. Our complex of interests in enforcing the criminal law firmly (our “crime control” interest) is in constant, creative tension with the constellation of interests in treating accused persons fairly (the “due process” interest.) The polestar work in understanding the criminal process as an admixture of two models—the “crime control” model and the “due process” model—is Herbert Packer’s Two Models of the Criminal Process. It is not as if we have to choose up sides here, though the press often likes to play it that way; instead, we each want, in varying degrees, both interests served and thus the politics of “crime control” versus “due process” ebbs and flows with public opinion and may even ebb and flow within ourselves. But as an institution, the Supreme Court is not just a mediator of that tension, for it has been made the special guardian of those fundamental rights which together make up the “due-process” interest. When we find the Court pulling too strongly toward the crime-control side, we need to understand that it not only tips its hand as to its political sentiment but abandons one of its principal reasons for existence.

“good faith” and “pretext”

In 1961, the Warren Court, generally reckoned to be among history’s most activist courts, held in Mapp v. Ohio that henceforth state courts could not accept in criminal prosecutions any evidence obtained in violation of the fourth amendment, that is, through an illegal search or seizure (and keep in mind that a seizure might be a seizure of goods or a seizure of a person—an arrest). This “exclusionary rule” of Mapp together with Miranda v. Arizona on custodial interrogation techniques and Gideon v. Wainwright on indigents’ right to counsel, formed the centerpiece of what is often called “the Warren Court revolution.”

In 1984, in the companion cases, United States v. Leon and Massachusetts v. Sheppard, the Court (now, of course, the Burger Court and on the brink of becoming the Rehnquist Court) created a new exception to the exclusion of evidence obtained illegally when the police can be shown to have operated in “good faith.” Bear in mind that in each of these two cases, the arrest or search in
question was, the Court found, illegal. (In *Leon* the arrest was made without probable cause and in *Sheppard* the search was conducted pursuant to a warrant which did not sufficiently particularize the items to be seized.) Yet, in both cases, the Court stated that, the constitutional violation notwithstanding, excluding the evidence would be inappropriate because the police had acted reasonably—the mistakes were made by judges, not the police themselves. In 1995, this “good faith” exception was utilized to save an arrest made in reliance on computerized information inaccurately maintained by the court clerk’s office. The Court noted that had the police been responsible for maintaining the computer records, the seizure would have led to inadmissible evidence. (Only two current justices voted against the outcome in this case so the “good-faith exception” can be fairly characterized as the strong stance of the current Court.) What drives this good-faith doctrine is a belief that the state of the police officer’s mind is relevant in determining how constitutional rights are protected. Even though there is an admitted constitutional violation, the individual policeman’s “good faith” eliminates the principal remedy for a fourth-amendment violation. The matter really begins to get zany when one tries to determine exactly what remedy would be available to the defendant. A tort or § 1983 action is a bad candidate given that the only available candidates for defendant are the police officer and the judge. The police officer is, by hypothesis, acting in good faith, so he or she has a defense. And the judge has complete immunity for this kind of judicial action. The victim of the constitutional violation has a right, but no remedy, whatever that means.

Now this has never made total sense to me. The police officer’s personal intention—his *mens rea*, if you will—would surely be important if we were punishing him, but why should it matter in the defendant’s criminal prosecution when it can be shown that someone else in government has engaged in behavior which violated defendant’s constitutionally protected right? As a matter of fact, a systemic remedy like exclusion is the ideal remedy for violations by persons so embedded in the system that immunities designed for the system’s protection covers them. But, never mind. Let’s take the Court at its word here—the police officer’s personal “good faith” matters.

Enter *Whren v. United States* in 1996. For many years, arrests and searches had been invalidated when defendants could show that an actual, if technical, violation of law was used to effect an arrest which was, in reality, a pretext to search for evidence of some other crime. Indeed earlier decisions had routinely invalidated police procedures that were avowed to be for a legitimate purpose when it could be shown that they were being conducted purely for an illegitimate one. For example, police can inventory impounded vehicles for safety and administrative reasons, principally to safeguard valuables contained in the vehicle. But if a given police department inventories only those impounded cars they suspect may contain drugs, it betrays that the “real” reason for the search is not safeguarding but crime detection; the Court does not accept the fruits of these searches. Or, in the common pretextual arrest pattern, police, desiring to get a look into X’s car in transit because they have a suspicion of contraband in the car (but not enough suspicion to justify stopping the car), might experience a sudden intense interest in enforcing a statutory policy that all cars have working license-plate lights.

In the *Whren* case, plainclothes vice officers in an unmarked car were patrolling a “high drug area” of Washington, D.C., and their suspicions were aroused by a dark Pathfinder truck with temporary plates, a vehicle being driven and occupied by young black males. Desiring any excuse to look inside the vehicle, they paid close attention to it. They noted that the driver stopped for an inordinate time at a stop sign, looked down at the lap of one of the occupants and then, upon seeing the officers, turned left . . . [here insert dramatic, sinister music] . . . *without signalling*. The officers pursued and pulled the truck over. Now it’s a good bet that these officers had not made an honest-to-goodness traffic arrest since they shed their uniforms. Indeed, D.C. Municipal Police regulations prohibited plainclothes officers in unmarked cars from making any traffic stops except in the case of a “violation that is so grave as to pose an immediate threat to the safety of others.” As the officers approached the truck, one immediately saw two large plastic bags of what appeared to be crack cocaine. The occupants were arrested and a search of the car turned up more illegal drugs. The case is the paradigm of a pretextual arrest—we know that the police would not have made the
stop but for their interest in searching for drugs (for which they admittedly had no probable cause). In a 7–2 ruling, the Court upheld the search. The logical path of the holding is simple: (1) the driver violated a traffic law and was subject to valid arrest; and (2) during the course of a valid arrest, police found contraband in “plain view.” But what about the pretextual nature of the arrest? Justice Scalia’s opinion for the court includes this language:

“We think [prior cases] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved... Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Well, they sure play a role when they are in “good faith!” It is only the “bad faith” motivations which are pressed out of view.

To be fair, I must stress that I do not claim that the good-faith cases and the pretext case are inconsistent with each other. They fit under different paths of analysis (one is a substantive rule, one a rule about a remedial response) and have distinctly different lineages. The law is full of instances where you can pull one case each out of two totally different conceptual paths and make them look silly by comparing them in isolation. But such a burlesque is not my intention. My claim is only that these cases should cause us to hesitate before denouncing this Court “activist” or “passivist.” A passivist Court would not embark on a new sojourn questing for “good faith.” An activist court would not sweep “bad faith” under the rug. But a Court firmly committed to crime control could consistently develop both the “good-faith” line and the “pretext” line of cases, as this Court has done.

the “seizure” cases

Two recent decisions on when a “seizure” of a person occurs demonstrate this Court’s tendency to press critical constitutional issues out of judicial view entirely thereby committing the decision to the police not only in the first instance but permanently and exclusively. In the 1991 decision California v. Hodari D., police pulled up and got out of their prowler near a group of young black males. Many of them, including Hodari D., broke and ran. Officer Pertoso gave chase to arrest Hodari though the State admits there was no legal basis for any imposition of custody, be it a full-blown arrest or an investigative “stop.” During the chase, Hodari jettisoned something. After Pertoso physically tackled Hodari, he walked back and determined that Hodari had dropped crack cocaine for which he is now prosecuted. The Court understands that if Hodari’s actions of exposing the crack were produced by an unlawful seizure, its use as evidence would be disallowed under the “fruit of the poisonous tree” doctrine, an offshoot of the exclusionary rule. But, the Court holds 7–2, the exposure of criminal evidence happened before the seizure, a seizure which the Court dates from the physical capture, not earlier when Pertoso gave chase. As the dissent points out, all of Hodari’s actions (and regardless of what you think of them, put yourself in the position of a black teenager in Los Angeles for whom the arrival of white policeman seldom augers free ice cream or even pleasant inquiries) are reactions to an attempted seizure. The State admits as much. Why then doesn’t the Fourth Amendment mean that the police may not attempt an illegal seizure? When someone attempts bank robbery, we don’t excuse their actions entirely simply because they are unsuccessful. We convict them of attempt and, as a matter of fact, today the penalty for attempted robbery is in most states roughly the same as for robbery. The police can, under the Court’s rule, prompt all sorts of reactions from citizens by scaring them and then engaging in what the dissent calls a “sufficiently slow chase.” To have a seizure, holds the Court, there must either be the application of physical force which sticks (that is, the suspect doesn’t break free and run) or there must be a governmental show of authority to which the suspect submits. Interestingly enough, if the suspect does submit, this opens the way for an argument that the suspect is consenting to the confrontation and is not really “seized” but is voluntarily complying with a police request. If you or I, for example, stop to have a friendly conversation with a policeman, we are not “seized” under the fourth amendment.

The irony of that “sufficiently slow chase” prediction comes to full flower this past term in County of Sacramento v. Lewis. Officers Smith and partner hailed a motorcycle driver to pull over
as he had been speeding. The driver (Willard) who carried a passenger (Lewis), maneuvered away from police and took off at high speed with Officer Smith now in high-speed pursuit. The chase consumed 75 seconds, 1.3 miles, and achieved speeds in excess of 100 mph whereupon the motorcycle tipped over and deposited Lewis on the roadway where Officer Smith (accidentally) ran over him and killed him. Lewis' heirs bring an action against the County under §1983 claiming, *inter alia*, that the death was caused during an unreasonable arrest—an unreasonable “seizure.” The theory of plaintiff's fourth-amendment case here is not that the police had no right to arrest Willard—he had been speeding—but that effectuating the arrest of a minor traffic violator by engaging him in a 100–mph chase is unreasonable. It doesn’t really matter how you, I, or the Court would come out on this question because, as you see from *Hodari*, the Court isn’t about to get it. No seizure had as yet taken place while the chase was on, only an attempted seizure. Well, when they slammed into Lewis, surely *that* was a seizure, right? “No,” says the Court. The chase was only an attempted seizure and the physical slamming into him was *unintentional*. To have a “seizure,” there must be physical force “intentionally applied.” So the police had slammed into Lewis at 100 mph and killed him, but they hadn’t “seized” him. Lewis died a free man.

Now what is the effect of taking the early phase of police-suspect confrontation out of the fourth-amendment's view? For one thing, it means the Court cannot reach important social/legal questions such as what the limits of high-speed police chases should be. That debate is controversial, to be sure, but it is a debate worth having. (Perhaps it can be argued that the debate should go on in forums other than a constitutional court. Perhaps the legislatures should take this question up and prescribe limits. Legislatures, if they function properly, will probably resolve this question consonant with majoritarian impulses. But why isn't this precisely the kind of question that the framers had in mind for the countermajoritarian branch when they committed the question of “unreasonable seizures” to it under the Fourth Amendment?)

The second effect of the *Hodari–Lewis* doctrine, of course, is to leave the issue in the hands of the police. Does the Court do that with any mystery whatsoever as to how the police will resolve close questions? Is it really judicial passivism or is it really judicial activism with a dodge? If I am asked to arbitrate a dispute between x and y and my decision is: “I choose to be passive and to accept the decision that x will announce,” I have in fact decided the case, haven’t I? And the special bonus I receive is that I don’t have to appear to have a position on the merits of a very touchy dispute. I can still claim to have the “passive virtues.”

The earliest stages of police-suspect confrontation are the most important. If there is one eternal reality we learn from defense counsel it is that a criminal case is often lost well before the lawyer gets involved. Yale Kamisar many years ago wrote an influential article about the “gatehouse” of the criminal justice system and the “mansionhouse.” The gatehouse was the police station where suspects were coerced, tricked, and sometimes even brutalized into confessing. Then the trial was conducted in the mansionhouse and had all the trappings of fairness, formality, equality, and even elegance, except that the star witness in this courtly event was the confession extracted back at the gatehouse. Indeed, this reality led the Warren Court to pronounce the *Miranda* rule to bring a modicum of control over the gatehouse. The more the Court takes its eye off the initial stages of police-suspect confrontation, the less likely any renovations to the mansionhouse will make any real difference. And the Court that takes its eye off is not passive—it is driving outcomes.

the “totality of the circumstances” test

Students in Criminal Procedure learn quickly that while the term “totality of the circumstances” is a product of an earlier court, the current Court has turned it into an art form. Often the Court is confronted with important questions such as these: (1) When does police coercion reach the point where it produces “involuntary” confessions? (2) When does a delay in bringing a defendant to trial violate his right to a “speedy trial?” (3) When does police conduct become over-reaching so as to vitiate a person’s “consent” to search? (4) When does the method of conducting a police line-up reach the point when it produces not an accurate identification from a witness but a
mere ratification by the witness of the police's predetermined result?; and many, many others like these. The Warren Court's approach was to take firm control over questions like these by pronouncing single-factor, prophylactic rules such as Miranda. You want to interrogate a suspect?—first give him these warnings. No exceptions. “But,” a prosecutor might say in a subsequent case before the Court, “in this particular case, your Honors, the suspect had authored a five-volume treatise on the fifth amendment, so we feel that giving the warnings would have been silly and redundant.” The Warren Court simply said, “Sorry, the rule admits of no exceptions. Not up to you, not up to the trial court, not up to the police, not up to the states or lower federal courts; up to us.” The Rehnquist Court, on the other hand, has answered all of the critical questions recited above and many others like them by saying that the answer “depends.” It depends, specifically, on an analysis of a “totality of the circumstances.”

Initially, of course, this sounds quite sensible. None of us when confronted with an important life choice would want to resolve it with reference to, say, “65 percent of the circumstances.” Yet, when Supreme Court Justices propound a multi-factor balancing test, they are in reality paving the way for a commitment of the question's answer to someone else. When this Court propounds balancing tests, it never tells us what anything weighs! That is left to someone else. And so the critical decisions now rest in the sound discretion of whom? Not the highest court in the land, but, initially in the police, then in the lowest courts. Every day, trial judges, both state and federal, make these determinations which are often invulnerable to appeal because of cost and delay, because of the “harmless error” doctrine, and because decisions made under an underdefined balancing test are almost always impossible to prove wrong.

Is this judicial passivism? Is this the product of a liberal, democratic ideal which wants to spread the discretion around? Of course, it could be, but one suspects that the Court knows very well how trial judges will usually resolve these questions. Most of those judges are in state courts with a watchful local audience; many of them are elected for relatively short terms by a population sold on both the fact and fear of crime; all of them are confronted by “repeat players” from the prosecutor's office; and many feel great pressure to avoid alienating the local police. Some trial-court judges view themselves as guardians of local police morale. And, in their defense, these trial judges know one more thing that often gets overlooked. When an error is made to a criminal defendant's disadvantage, there is at least theoretically a cure for it through appeal. When an error is made to the prosecutor's disadvantage, the double-jeopardy clause renders it permanent. Most of us prefer to make the least dangerous mistake. It is particularly cruel that these volatile questions are forced upon local trial judges by a Court itself ingenuously and carefully insulated from public clamor through life tenure and through residence in a place and milieu about as accessible to most Americans as Neptune.

conclusion

The net effect, if not the motivation, of all of the Court’s recent actions which I have presented today is to add bricks on the crime control side of the scale (or to take bricks away from the due-process side, if you want—it amounts to the same thing.) Many would applaud this result. We are, admittedly, all concerned with the havoc wrought by crime. Many crave greater crime enforcement. And if an initiative for tougher crime enforcement came from the executive or legislative branches, although we might personally think it a wise or unwise initiative, we would all understand that the political branches were designed to consider all like suggestions and to act in what they discerned was the majority's best interest. When the majority doesn't like what the political branches do or don't do, they can, after all, “kick the rascals out.” When the majority does like what they do, APPLAUSE, APPLAUSE!

But when results applauded by the majority because they elevate crime control over interests underlying constitutional guarantees are traceable not to a political branch but to the one institution designed to be countermajoritarian, to the one institution designed to defend enduring ideas from the transient opinion of the day, to the one institution designed to stand with the accused and
often despised individual against the awesome power of the state and its clamorous people, we had better hope that the applause does not become an ovation.

**a postscript**

The paper I've just read seemed to me when I finished it one better read on the last day of last term, for it constitutes a looking back. And not a particularly happy look either. But today we look ahead as well. First Monday is to courtwatchers as Spring Training is to Cub fans, except that, perhaps unfortunately, the Court doesn’t decide any “exhibition cases” that don’t count in the standings. And just as Cub fans are ennobled by their ability to discount all the tragicomedies of the past and shaky prospects for the future and imagine unimaginable ecstasy in the coming year, we too would do well to remember that on any given day, the Court can (and still sometimes does) make us proud of the Constitution, proud of the team. Cub fans can trace their indomitable spirit at least as far back as the beloved Ernie Banks. And while none of us saw him play, all Americans can trace their constitutional lineage back to that great little scrapper, Jimmy Madison.

**cases and works cited**

Who Polices the States?
civil rights in a new key

Ivan E. Bodensteiner

The fourteenth amendment to the U.S. Constitution, adopted in 1868, clearly limits the power of state and local government. In 1871, Congress passed a statute providing a cause of action and remedies for persons whose fourteenth amendment rights, as well as other federal rights, are violated. In federalism terms, these provisions expand federal power and reduce state power. Two relatively recent Supreme Court decisions, —Brown in 1954 and Monroe in 1961—gave reason for optimism that such provisions could live up to their promise and provide meaningful protection for civil rights. However, the Court has gradually eroded the provisions to the point where much of their promise now has a hollow ring for many victims of official lawlessness. Again in federalism terms, by making it more difficult to obtain relief under the fourteenth amendment and § 1983, the Court is effectively shifting power from the federal government to the states.

Many examples and decisions could be cited to support this premise. I will address here just two aspects of the issue: the Court’s modification of § 1983, particularly by creating defenses, and its interpretation of the equal protection clause.

fourth amendment rights in the real world

Using a fourth amendment claim, I will attempt to place the §1983 issues in context. Assume the following facts: Ms. Sosa was arrested by a state police officer for shoplifting and brought to the Valparaiso Police Department where she was subjected to a strip-search by the arresting officer and a city police officer, both males. Ms. Sosa files a lawsuit in federal court alleging the strip-search violates the fourth amendment, which prohibits “unreasonable searches and seizures.” In some circumstances a strip-search, which often includes a search of body cavities, is justified by the demands of institutional security and a belief that the person arrested is concealing a weapon or contraband. Such searches are very demeaning and embarrassing, particularly when conducted by a member of the opposite sex, and they are often used as a means of harassment. Reasonableness will depend on the circumstances. A federal statute states the following:

Every person who, under color of [state law] subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress (42 U.S.C. § 1983).

In our hypothetical case, the defendants are the Indiana State Police Department (in effect, the state), the state police officer, the City of Valparaiso, and the city police officer. Ms. Sosa seeks damages, compensatory and punitive, as well as an order enjoining such conduct in the future. Here are some of the hurdles Ms. Sosa will face:

- Indiana State Police Department: Because of the Supreme Court’s interpretation of the eleventh amendment, the State cannot be sued for damages in federal court; also, the Court has determined the State, as well as its agencies and officials in their official capacity, is not a “person” and thus not subject to suit under § 1983.
- State police officer: Can be sued in federal court in his official capacity for an injunction and in his individual capacity for damages; but,
  —Sosa is not entitled to an injunction unless she shows a likelihood of encountering this
again; and
—Sosa is not entitled to damages unless the fourth amendment right she asserts was "clearly established" at the time of the incident (referred to as "qualified immunity").

• City of Valparaiso: While a city is a "person" subject to suit under § 1983, is not protected by the eleventh amendment, and does not enjoy a qualified immunity from damages, it is liable for the action of the city police officer only if the officer acted pursuant to city policy, and its liability is generally limited to compensatory, not punitive, damages.

• City police officer: Same conditions as state police officer.

Therefore, Ms. Sosa could prove a violation of the fourth amendment, but be denied any relief in her federal court action. I will discuss each of these hurdles or Court-imposed restrictions in the following paragraphs.

1. The eleventh amendment (1798) to the U.S. Constitution limits the Article III power of the federal courts in these words:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, . . . .

It is generally agreed that this amendment was passed to overrule Chisholm in 1793, a decision in which the Court allowed a South Carolina plaintiff to sue the State of Georgia in federal court based on diversity jurisdiction, for breach of a contract. However, in 1890 the Court, in one of its more active moments, effectively amended the eleventh amendment to exclude from the federal courts suits against a state brought by its own citizens (Hans, 1890).

In Ex parte Young (1908), a case arising out of a shareholders’ derivative suit to enjoin enforcement of a Minnesota statute establishing maximum railroad rates on the grounds that it violated the fourteenth amendment, the Court created an exception for suits in federal court seeking prospective equitable relief against a state official to prohibit the state official from enforcing an unconstitutional state law. This exception was recently limited when an Indian tribe sought to require the State of Florida to comply with the Indian Gaming Regulatory Act (IGRA), that is, to engage in good faith negotiations for the purpose of entering into a compact (Seminole, 1996). One issue was whether, based on Ex parte Young, the Tribe could obtain an injunction against the Governor. The Court decided the exception did not apply because Congress had provided a specific remedial scheme for enforcement of the IGRA, a scheme that the court found unconstitutional as beyond the power of Congress!

As a federalism matter, the eleventh amendment itself protects state sovereignty, and the Court's interpretation of it provides even greater protection than intended by the amendment. It is indeed ironic that the fourteenth amendment, which clearly represents a constitutional limit on the states, cannot be fully enforced in the federal courts.

2. In 1978 the Court held in Monell v. Department of Social Services that a municipal entity is a "person," but eleven years later, in Will v. Michigan State Police Department, it held that a state is not a "person" for § 1983 purposes. The Court in Will relied heavily on eleventh amendment principles. As stated by Justice Brennan in his dissent, the eleventh amendment "lurks everywhere in today's decision and, in truth, determines its outcome." This decision is important because it eliminates (i) § 1983 actions against states even in state courts, and (ii) § 1983 actions against states in federal courts even where Congress has abrogated their eleventh amendment protection or a state has waived it. However, the Ex parte Young exception survives Will.

As a result of Will, a local governmental entity is a "person" for § 1983 purposes, but a state is not. This is ironic in light of the fact that § 1983 was passed, at least in part, because Congress did not trust the states to enforce either state or federal rights of minority individuals.

In our hypothetical case then, the eleventh amendment and Will, taken together, will prevent any relief against the state of Indiana, even if the state police officer acted unconstitutionally.
3. Injunctions against police abuse, absent a specific policy authorizing abuse, are not favored by the Court because it is unwilling to accept the fact that at least certain segments of our society, whether or not they have done anything illegal, are routinely abused by the police. In City of Los Angeles v. Lyons (1983), a case challenging the routine use of a deadly "chokehold" by the Los Angeles police department, particularly when dealing with African Americans, the Court used the standing doctrine to preclude injunctive relief. According to the majority, the plaintiff did not have standing because it was "no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury." A majority of the justices obviously have a much different view of the Los Angeles police than either the black residents of many neighborhoods in Los Angeles or Justice Marshall who wrote a compelling dissent explaining how the chokehold was actually used in the black community. Thus, the effect of Lyons is to preclude injunctive relief for Sosa.

4. The most effective barrier to relief under § 1983 is the "qualified immunity" affirmative defense created by the Court. In short, this defense enables government officials to avoid individual liability for damages, even where they violated the constitution or a federal statute, unless the plaintiff can show that the right asserted was "clearly established" at the time of the challenged conduct (Crawford, 1998). It is not enough to show it was "clearly established" that strip searches must be reasonable to satisfy the fourth amendment; rather, here Sosa must show it was "clearly established" that the search of her violated the fourth amendment (Anderson, 1987). Because the state is protected for reasons discussed above, if the state police officer escapes individual liability for damages, there will be no monetary relief based on the actions of this officer.

Going back to the language of § 1983, there is nothing in the statute itself to suggest such a limitation on damages. To justify this judicially-created defense then, the Court pointed to the "social costs" of litigation against government and public officials, including

- the expenses of litigation;
- the diversion of official energy from pressing public issues;
- the deterrence of able citizens from acceptance of public office; and
- a danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties (Harlow, 1982).

While rejecting an absolute immunity from liability, because some cases against public officials have merit, the Court arrived at what the majority feels is the appropriate balance. In short, public officials are immune from personal liability if they acted in "good faith," i.e., they did not violate any "clearly established" right of the plaintiff. To fully serve its purpose, the Court says the qualified immunity must be viewed as an immunity from suit, rather than merely a defense to liability. Accordingly, the availability of the immunity should be determined at an early stage in the litigation, usually in response to a motion for summary judgment, and if immunity is rejected, the ruling is usually appealable immediately (Mitchell, 1985).

Clearly Congress, when it passed § 1983, was not as concerned with these social costs as is the Court, because it said nothing about an immunity defense. There may be several reasons why Congress did not include the immunity defense in the "plain language" of the statute. Even if these social costs exist, Congress might have determined that they represent the price we must pay for vindication of important federal rights. Or, Congress might have concluded that these costs are not as great as the Court suggests. It should be noted that the Court did not present empirical data to support its assertions about social costs.

Here, for example, are several questions not addressed by the Court:

- what are the actual expenses of defending civil rights litigation?
- who pays these expenses, government or the individual officials?
• what portion of the total expenses of defending civil rights litigation is avoided by the immunity defense, since successful assertion of the defense avoids only individual damage liability and frequently does not end the litigation?
• how much more does the damage claim divert the energy and attention of government officials, keeping in mind that the litigation may proceed even if the defense is successful and the fact that attorneys provide most of the energy and attention necessary to defend litigation?
• do “able citizens” really avoid government jobs because of the threat of civil rights liability, or do they avoid such jobs because of the bureaucracy, low salary, etc.?
• what evidence is there that the threat of damage liability actually “dampen[s] the ardor” of government officials?

My point is simply that the Court makes assumptions about matters, for the purpose of justifying its creation of the immunity defense, that are best left to Congressional fact finding and deliberation.

To the extent that the Court is really concerned about the prompt termination of insubstantial lawsuits, this concern is not unique to civil rights cases. We have not addressed such concern in other areas by creating a doctrine that frequently absolves wrongdoers of all liability. If we are really concerned about imposing individual liability for damages on the police officer who makes a good faith judgment in the course of making an arrest, but it is later determined his judgment violated the fourth amendment, there is a simple solution. States and municipalities can simply adopt laws agreeing to pay such judgments. In this way the community would bear the cost of unconstitutional action, rather than the victim.

Thus, the effect of qualified immunity is that the state police officer is immune from individual damage liability unless Sosa establishes that her fourth amendment right was “clearly established.”

5. After holding in Monroe that “person” does not include governmental entities, such as states, counties and cities, the Court reversed itself in Monell (1978). While Monell opens the door to municipal liability, based on the illegal actions of the agents and employees of the municipality, the opening is quite narrow because the plaintiff must establish that the agent or employee who inflicted the harm was acting pursuant to municipal “policy.” This can be done by showing (a) an explicit policy adopted by the policymaking body of the municipality, (b) the agent or employee inflicting the harm is a policymaker to whom state or local law delegates authority to make the challenged decision, or (c) an implied policy, based on the municipality’s failure to properly train or supervise its agents and employees, that constitutes deliberate indifference to the rights of the victim and caused the injury.

Respondeat superior liability, that is, a responsibility for the actions of one’s employees and agents, is common in tort law and there are no policy reasons that compel a different result for municipalities under § 1983. Full compensation of the victims of official lawlessness should be the goal of § 1983, particularly in light of the fact that only the municipality is in a position either to prevent the injury or spread the loss it occasions among all members of the community.

Under Monell, it is very difficult to hold a municipality liable for the illegal conduct of its non-policymaking employees or agents. This is true because most entities do not adopt explicit policies authorizing violations of federally protected rights. Cases holding that municipalities are responsible for the acts of their policymakers are often of no help because it is the lower level employees who have the most contact with the public, as in the strip search example.

Municipal liability for the misconduct of nonpolicymakers, like the police officers in the strip search example, will normally have to be based on a failure to train, supervise or discipline. The Court held in Harris, for example, that failure to train police officers amounts to “policy or custom” only where the failure “amounts to deliberate indifference to the rights of persons with whom the police come into contact.” In addition to showing that the failure to train amounts to deliberate indifference, the victim must show a causal connection between the failure to train and the injury suf-
fered. Needless to say, this can be a difficult standard for the victim to meet.

In addition to improving the victim’s chances of receiving full compensation for injuries suffered as a result of official lawlessness, municipal liability based on the respondeat superior theory should help to deter such lawless conduct. The municipality has the ability to discharge or otherwise discipline the responsible employee(s). Liability will provide an incentive for municipalities to police their employees. Voters who oppose the use of tax dollars to compensate the victims of official misconduct can express their disapproval on election day. There is every reason why official misconduct and abuse of power should be issues on election day.

The effect of Monell is to make it difficult for Sosa to establish a municipal “policy,” so the City will not be liable even if its officer is shown to have acted unconstitutionally.

6. Municipal liability for punitive damages is less crucial than liability for compensatory damages, but it is still important as a deterrent. Because the victims of civil rights violations often suffer little out-of-pocket loss but substantial intangible harm, such as emotional and mental distress, humiliation and embarrassment, compensatory damage awards are often quite small. Without broken bones, blood, physical injuries and medical bills, judges and juries seem reluctant to provide substantial compensation, even where the violation of rights is outrageous. Therefore, the deterrent role of punitive damages is far greater than in cases where substantial compensatory damages are awarded. Unfortunately, too few municipalities are willing to take corrective action against employees who violate the civil rights of citizens. The more likely response of municipalities is blindly to take the side of the responsible employees and agents. This may take the form of a cursory investigation with a predetermined outcome and prompt exoneration. Awards of punitive damages would cause elected officials to take civil rights violations seriously, even without large awards of compensatory damages.

While recognizing that a “major objective” of punitive damages is to prevent future misconduct and that an “important purpose” of § 1983 is to deter future abuses of power, the Court in City of Newport v. Fact Concerts, Inc. held that a municipality is immune from punitive damages under § 1983. The reasons advanced by the Court are not compelling and are based on unsupported assumptions. They include assertions about (1) the ineffectiveness of punitive damages as a deterrent if they are assessed against the municipality rather than the individual, (2) the corrective action by the municipality being just as likely without punitive damages, (3) personal liability for punitive damages being more effective, and (4) concern for the fiscal integrity of municipalities. One could just as reasonably conclude that the threat of punitive damages, to be paid by the entity, will cause government employees and agents to act more responsibly because this threat will encourage elected officials and their high-level appointees to make compliance with the federal constitution and laws a priority. Further, awards of punitive damages are a serious risk to the financial integrity of municipal government only if government employees and agents regularly engage in serious violations of civil rights. Why shouldn’t there be a serious risk to the financial integrity of a municipal entity that tolerates and/or encourages official lawlessness? Keep in mind that punitive damages are awarded only where there is proof of malice or reckless disregard for the federally protected rights of the victim.

This reading has the effect of insuring that generally there is no award of punitive damages against the City.

does equal protection work?

The equal protection clause provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” At first glance, one would have reason to believe this clause, adopted in 1868, would establish equality as a guiding principle in our society. However, it has a checkered history.

When we think of low points in the history of the Court, the Dred Scott decision in 1856, which held that black slaves were not citizens of the United States and that the Missouri Compro-
mise was invalid because it deprived slave owners of their "property" rights without due process, obviously comes to mind. Two other equal protection clause cases are not far behind: (i) *Plessy* (1986), holding that a Louisiana law mandating "separate but equal" railway passenger cars did not violate equal protection, and (ii) *Korematsu* (1944), holding that the exclusion of American citizens of Japanese descent from certain areas, because this country was at war against Japan, did not violate equal protection (being Japanese was a proxy for disloyalty).

However, with the decision in *Brown* in 1954, concluding that in the field of public education the doctrine of "separate but equal" has no place and such separate educational facilities violate equal protection, there was cause for optimism. There was finally, many years after its passage in 1868, reason to believe the equal protection clause might fulfill its promise of equality. Unfortunately, the optimism was short-lived. I will address now two lines of decisions that severely restrict the ability of the equal protection clause to accomplish the goal of equality.

1. The first concerns limitations on the type of discrimination which can be reached by the equal protection clause: does it for instance, prohibit only *intentional* discrimination, or does it also prohibit neutral laws and practices that have a discriminatory impact? This is important because so much discrimination today falls in the latter category. When faced with this issue in 1976, the Court limited the reach of the equal protection clause to intentional discrimination, and held that the disparate impact of an employment test (black applicants failed at a rate four times greater than white applicants) alone does not prove intentional discrimination (*Washington*, 1976). Or, as the Court said a few years later, the plaintiff must show that a preference for veterans in government employment in Massachusetts was adopted at least in part "because of, not merely in spite of," its adverse effects on females (*Feeney*, 1979).

It is not readily apparent why the adoption of a law or practice, knowing it will discriminate against racial minorities or women while seeming to be neutral, does not violate the equal protection clause. Certainly the "veterans' preference" was nearly as successful in eliminating women from government employment as a flat ban on hiring women would have been. Similarly, in many communities, the neighborhood school concept is just as effective as the Kansas law at issue in *Brown* in assuring segregated schools. Nevertheless, segregation resulting from neighborhood schools does not violate equal protection, assuming that a school system has eradicated all traces of past intentional discrimination.

As a result of its decision in *Washington*, the Court's message to government is quite clear: if you want to discriminate on the basis of race or gender, look for a neutral proxy, express a neutral purpose, and make it difficult for anyone to prove your real purpose. The Court could have sent a far different message: if your neutral actions have a discriminatory effect, you must determine whether there is a less discriminatory means of accomplishing your compelling/important goal. This message would be much more consistent with the goal of equality.

2. Second, by labeling certain attempts to eliminate race discrimination as "affirmative action" or "reverse discrimination," and assuming that such benign attempts are as bad as invidious discrimination, the Court has justified the use of "strict scrutiny." That is, government needs a compelling justification and must use means narrowly tailored to accomplishing its purpose, when determining the legality of such attempts. Use of the "strict scrutiny" standard is another way of saying certain government action carries a strong presumption of illegality, with the burden on government to overcome that presumption. Or, more cynically, it is a way of justifying the conclusion the Court wants to reach.

Such a strong presumption of illegality makes sense when government acts for the purpose of hurting people because of their race, at least in part because it is rare that such a purpose can be justified. On the other hand, does such a presumption make sense when government acts for the purpose of generally leveling the playing field of education or employment? In other words, when the government's ultimate goal is equality, it is not so clear we should engage in a presumption of ille-
gality. One could say, as the Court does when it wants to reject a first amendment challenge to a content-based regulation of speech, that the predominant concern of government was the secondary effects of the speech, not the content (Renton, 1986). Here, the predominant concern of government is equal opportunity (a level playing field) and a short-term secondary effect might be that someone who wanted a job or a seat in law school did not get it, at least not immediately. Of course, given the current balance of power in this country, a system that excludes white males is more likely to be changed to accommodate everyone than a system that excludes African-American females.

The point is simply this: at least since the Richmond v. J.A. Croson decision in 1989, the U.S. Supreme Court has made the equal protection clause one of the greatest barriers to true racial and gender equality in this country! How ironic. As a result, state and local governments that want to promote equality by taking affirmative steps to end discrimination are told that the equal protection clause will not allow it. This must be standing federalism on its head; the Court is saying that implicit in federalism is the notion that states will not do anything to protect the rights of individuals and, when they do, federalism will be ignored.

The Court completed its agenda in 1995 when it determined that Congress, which is explicitly given the power in §5 of the fourteenth amendment to pass laws enforcing the equal protection clause, cannot take affirmative steps to end race discrimination unless it satisfies the strict scrutiny standard described above (Adarand Constructors, Inc, 1995). While Marbury may give the Court this power, it is one thing for the Court to tell Congress that, in passing a law pursuant to its commerce clause power, it violated another constitutional provision, such as the first amendment. It is another thing for the Court to tell Congress that it, in passing a law pursuant to its §5 power to enforce the fourteenth amendment, exceeded its §5 power. The latter situation is more like telling Congress it exceeded its commerce clause power in passing a law pursuant to the commerce clause. Here, at least until U.S. v. Lopez, the Court restrained itself in the exercise of its self-awarded Marbury power and gave great deference to the judgment of Congress.

Adarand is like the Religious Freedom Restoration Act case (City of Boerne, 1997), but worse because the fourteenth amendment is more obviously about racial equality than religious freedom. However, Adarand was necessary for the Court to accomplish its anti-equality agenda. Indeed, this is a sad state of affairs. One can understand why the two elected branches react to the political winds and opinion polls, but what should we say is the Court's excuse?

It is not clear that federalism concerns are driving the Court's narrow interpretation of §1983 and the equal protection clause. However, the result is clear: except in their efforts to eliminate race discrimination through affirmative programs, states have reclaimed power at the same time that the federal protection of individuals shrinks alarmingly.
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Jennifer Voigt

In her book, *Seeing and Believing: Religion and Values in the Movies*, Margaret R. Miles calls for contemporary filmmakers to invent conventions that describe cinematically the experiences of religious people today. She complains: "...contemporary Hollywood films have not developed conventions to signal religious motivation and commitment," in order that we may look to film when we ask, "How should we live?" This is necessary, she later argues, because "what film does best...is to articulate the anxieties of a changing society." She has a valid complaint. There are many films today that feature religion—they have characters that are Christ figures or go to church, synagogue, or mosque, or have stories based on the life of Buddha or the Dalai Lama—but rarely is their subject religious commitment. In my experience writing about religion and film for the *Cresset*, religion is often an incidental part of the movies about which I write. Often I read them from the perspective of a religious person, asking, "What in this movie applies to my understanding of the Christian mission?" or "What in this film expands my understanding of what religion is?" I don't ask the question "How should we live?" directly, because the films themselves rarely view their subjects from a religious point of view. (The religious components of *Dead Man Walking*, *The Last Supper*, and *The Shawshank Redemption* were all secondary to the exploration of political agendas, for example.)

But I differ with Miles when she states that to properly answer the question "How should we live?" a film must advocate religious experience. Why can't a film simply evoke it? Two recent films, *What Dreams May Come* and *Beloved* themselves ask the question "How should we live?" though their answers couldn't be more different.

A possible answer to Miles' complaint about the absence of cinematic conventions to explore religious matters may be to resurrect the medieval literary genre of Dream Vision for the screen. The cinema may be uniquely suited to the very visual use of allegory and fantastic and transformative events that belong to the genre. In addition, to use it today would be to draw a parallel between our era and an earlier period of history equally obsessed with The End. But except for some of Terry Gilliam's films (you could make a good argument that Gilliam's *Fear and Loathing in Las Vegas* brings Dream Vision to film), its conventions are largely alien to cinema. *What Dreams May Come* may be an example of Dream Vision. The elements are there: the searching protagonist, his object of devotion, his guide. Like some medieval dream visions its subject is the human soul. But this isn't what Miles has in mind. This film stumbles as it attempts to answer fundamentally spiritual questions in a secular way.

*What Dreams May Come* is about Christy, a pediatrician who dies and goes to the afterlife where he meets a spirit guide and mourns the loss of his wife, Annie, who survives him. She takes her own life shortly afterward and goes to spend eternity in Hell. Christy convinces himself that he cannot spend eternity without Annie and elects to find her in Hell and get her out.

Both the Heaven to which Christy goes and the death he experiences are manufactured to appeal to secular audiences at once frightened by the prospect of what dreams may accompany death, and unwilling to give up material security to find out. This is an audience wholly unlike

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Truman, the questing character in *The Truman Show*. Where Truman leaves a secure but empty life to sail to the end of the world and meet his Maker, *What Dreams May Come* keeps us secure, but answers none of our questions.

What is it like to die? The movie describes death much the way an “X-Files” episode might: we see Christy’s soul hovering over his body; Christy watching his funeral; Christy walking through a dark tunnel toward a bright, white light. But is what we have come to recognize as near-death experience an adequate way to describe the physical failings of the body or our separation from our loved ones? The events that cause Christy’s death look gruesome and bloody, but the death itself is surgical, familiar, painless. What about suicide? We don’t get to see Annie’s death.

What will it be like to meet God? It appears, according to *What Dreams May Come*, that God isn’t in His heaven after all. When Christy asks, “Where is God?” his guide dismisses his question as if it were merely rhetorical. God is there “somewhere,” the guide says, pointing to the sky.

Will I be with my loved ones in Heaven? Again, the guide answers unsatisfactorily: “Here’ is big enough for them to have their own private universe.” In fact, in this film’s afterlife, Heaven is what you and everybody else always imagined it to be.

The relativism suggested by the answers that the film gives us obviously appeals to the sense of secularism prominent in America today. We value personal freedoms, so we refuse to “impose” our idea of Heaven or God on anyone else. We are secure in our beliefs, we say, so we don’t have to. Like Christy and the other inhabitants of the heavens in *What Dreams May Come*, we live isolated spiritual lives. We are more comfortable talking to our neighbors about our plastic surgeries and our sex lives than about our experience of God. *What Dreams May Come* fails to satisfy our need for spiritual communion, partly because it has no context within which to frame even these most cursory questions. The best it can do is the popular culture (near-death experience has its origin in television, popular literature, and the movies, not in any moral or religious tradition), a house whose foundation lies in sand.

*What Dreams May Come* could also be called *The Consolation of Psychology* or begin with the phrase “The Kingdom of Heaven is like a psychiatrist’s couch.” The movie substitutes psychoanalysis (or rather, a pared-down, generic, trivialized version of the process—contemporary Americans want their problems solved fast) for religion and the self-discovery that accompanies analysis for spirituality. The result confuses that which helps us in life with that which gives us a framework and a purpose for our lives. The film mistakes the hammer for the house. Emotional awareness becomes the criterion for being. At one point a character actually utters the words “I am aware, therefore I am.” The search on which Christy embarks leads him progressively inward to the point where his guide through Hell reveals himself as having been a psychiatrist in life. The absence of God dilutes the possibilities for a moral universe, so should we really be surprised when Christy learns that the populace of Hell are not prisoners of sin but regular folks who just couldn’t manage their lives? “The real Hell,” according to Christy’s guide, “is your life gone wrong.” This statement assumes a couple of things, neither of them good for psychoanalysis, not to mention human psyches and human souls. First, it assumes that therapy ultimately results in happiness, and secondly that happiness and salvation are equivalent.

It’s easy to see the feeling of security this film’s audience can take from these assumptions. Therapy becomes salvific while the patient is accountable only to himself. In therapy the therapist makes no judgments and encourages the patient to make choices. This model therefore replaces God with an interlocutor. In the film, souls may choose to be reincarnated. It isn’t a decision that a higher power makes for you, or even the way of the universe. “As long as we don’t allow our lives to go wrong, we human beings can have complete control over eternity.” Very comforting for an audience that knows it doesn’t have any control over what happens in life. The Dow-Jones may tumble, the millennium bug may wreak havoc with our credit cards, our children may run with the wrong crowd, but in death we will find peace in our choice to ignore all of this in our own private universe.

The message of the film aside, the director
of What Dreams May Come commits the greatest sin in filmmaking today by failing to connect what’s happening visually on screen to the narrative. The film’s art director gives him so much to work with, too! Allusions to everything from impressionism and post-impressionism to Romantic painting to the Doré illustration of The Divine Comedy to Michaelangelo’s Last Judgement appear on screen before us but the director doesn’t notice. His lack of insight fails the film, for Christy is supposed to be an art connoisseur and Annie an artist. Even if he were sadly undereducated about fine art, you’d think he’d be able to play around within his own artistic tradition. When you have Max von Sydow dressed as a medieval cleric preparing to take your protagonist into Hell, how could you resist a well positioned chess piece, a prop in the shape of a sickle—anything?

Absence of allusion causes Jonathan Demme’s film, Beloved, to suffer, as well. It’s a pity, too, because Toni Morrison’s novel, the text of which the film follows almost exactly, is richly allusive. Reading the novel, with its nods to Homer and Hawthorne, Faulkner, Harriet Beecher Stowe, and the Bible, you get the feeling that it is a culmination of American literature and all of its influences. To paraphrase marketing departments at publishing houses everywhere, Beloved belongs on the shelf next to the works of other “great” American authors. But in Beloved, Morrison also brings the genre of American slave narrative not simply to sit next to Faulkner, but to intermingle with it. Indeed, the novel Beloved makes a good case that the story of slavery is central to the American experience, that without it we would have no framework to tell any of our other stories. The only thing that Demme’s Beloved alludes to is the peasoup scene in the Exorcist. Demme, who has a special sense for the creepy, gets caught up in the innate creepiness of the story, so while you won’t see Hannibal Lector walking down Bluestone Road, you do feel that the ghost story has taken over some of the movie’s other stories.

The big clue, of course, is Beloved herself. Played by Thandie Newton, Beloved snorts and snores like the Beast itself, and when she first opens her mouth to speak the ghost of Linda Blair emerges from between her lips to hover over the production. While Newton’s choices as an actor bring definition to what is a shadowy character, Demme should have reined her in and let Beloved remain a mystery—at least for little while longer. From the time Beloved first speaks the mystery of her incarnation disappears and too early in the story we know what must happen at the end. In fact, we know before the rest of the film’s characters know, and for a director to achieve that without foreshadowing must be embarrassing.

Beloved needs to be more literate. Morrison didn’t win the Nobel Prize for lack of skill, and any film interpretation of her work should be in part an homage to her understanding of her own place in America’s literary tradition. In the novel, there is a moment when Sethe is led from the toolshed to the sheriff’s wagon, carrying one daughter in her arms and covered with the blood of another. Her resemblance to Hester Prynne leaving the jailhouse for the scaffold in that passage could not be more clear. The power of allusion—and even evocation—is that when it surfaces the texts involved at that moment enter into a kind of dialogue and begin to illuminate each other. When Sethe and Hester stand side by side, the questions about sin and forgiveness in both their stories multiply. But in the film of Beloved there is no such scene.

Though we could wish for Demme or the screenwriters to have read more books before they sat down to work on Beloved, it would be shortsighted to condemn the film on this ground alone. Demme’s decision to bring elements of the horror genre into Beloved is bold though not ineffective. In part, horror’s conventions give the cinema language to use to describe evil. Furthermore, Beloved remains a ghost story, and therefore genres which perhaps speak of evil more subtly—noir, for example—have no words to communicate what Beloved needs to communicate. Needless to say, Demme walks an unfamiliar path with this movie, for Beloved is also a story of salvation—one could say the Christian story of salvation—and how often does that appear, from beginning to end, in American cinema today?

Not just one character’s story, the film Beloved follows a family of former slaves from slavery into freedom. The story revolves around Sethe, her daughter Denver, and her friend Paul D. Haunted both by memories and by a real
spirit capable of causing the house to quake and brutalizing the family dog, they are joined by a young woman named Beloved.

If What Dreams May Come imagines freedom where in reality spiritual isolation lies, Beloved explores the relationship between spiritual isolation and freedom. Beloved identifies the separation of families as being one of the crueler aspects of slavery. The film is full of separation: Sethe from her mother, her children, her husband; Sethe and Denver from the community. When Sethe tells Paul D that her sons have run away, he imagines a life separated from loved ones as a preventative of slavery. It’s best that they wander, he says. If they stay in one place for too long, some one will find a way to put them in chains. But it’s clear from Paul D’s actions that he prefers a life of connectedness to the life of a wanderer. He talks to his friends about wanting to have children and know them. He appears on Sethe’s doorstep and demands her company. He entices Sethe and Denver to walk out beyond their front gate. His presence in the film sets the narrative running. He banishes the ghost, he challenges the strange visitor. Paul D’s ability to do these things grows from his understanding of himself as a free man. When he talks to his friends about wanting to have children and know them, he mentions that he has been bought and sold five times in his life. His need to foster connection by fathering children comes from his experience of having this simple, basic joy denied him when he lived as a slave, unable to govern his own comings and goings. He may draw a parallel between slavery and staying put, but after 20 years of running, he decides to remain in one place, connected to it not with iron, but by a choice to belong.

Sethe’s determination to isolate herself grows from the same desire to have children and to know them. She articulates her wish to keep her children out of slavery by explaining that she wants to keep the family together. She explains her actions in the woodshed as a plan for her family. She was trying to get the whole family “to the other side,” she tells Beloved. The difference between Paul D and Sethe is that he is able to embrace freedom, while Sethe escapes from literal slavery into a life as a slave of her memories. Late in the film when Sethe, jobless and friendless, comes to believe that Beloved is her daughter come back from the grave, she curses Paul D for “distracting” her from the truth.

Demme’s decision to make Beloved evil incarnate is particularly powerful considering Sethe’s retreat into shame. The decision makes clear that by refusing to seek forgiveness for killing one child and trying to kill the rest, Sethe invites evil to dwell with her.

Beloved’s most satisfying conclusion is that when forgiveness isn’t asked for it still can be given. Faced with a mother gone insane with guilt and the devil lying in her bed, Denver seeks to restore a relationship between her mother and the community. Unfortunately for the film, Demme is better at the gruesome than the holy, because the scene in which the women of the community come to Sethe’s house to drive Beloved out should slap us in the face with as much force as the opening scene or the scene in which Sethe takes the saw to her children’s throats. Demme is much too serene. He films the scene as if he were five years old, in church and some adult told him to sit quietly and to look straight ahead. The devil doesn’t disappear from your life that easily. Still, it is an admirable scene because it is something that would never happen to Christy or Annie. In this scene, neighbors make Sethe’s soul their business.

What Dreams May Come answers the question “How should we live?” by telling us to move inward, inviting isolation. Beloved answers the question “How should we live?” because it has a sense of what brings us joy and a sense of what separates us from that which brings us joy. It envisions the individual as a part of a community, and the community as being responsible for the well-being of the individuals within it. The most effective part of the movie, when Demme’s direction is at its best, is when the character Baby Suggs preaches. Inserted into the narrative in a manner that looks like flashback but suggests something else, the scenes appear to transcend memory, to take place outside of time. “Love your flesh,” the preacher tells the people who were once slaves. “They do not love your flesh.” Resurrected bodies laugh, dance, and cry to Baby Suggs’s direction. The Kingdom of Heaven is like a woman who was once a slave and who is now free.
THE SEASON OUR SON LEFT HOME

Check the belts, I said, the radiator, check the gas, the tires. I acted wise and foolish and stood aside—old enough to go, and he was going. After gold mines,

after the land grab, after hopes and dreams for this boy, there I was, buffing off dust, rubbing the taillight. What were the odds of striking it rich in Colorado,

knee-deep in streams cold enough to freeze his teeth, a guide for bankers lusting for cut-throats, rainbows, gold-eyed Dolly Vardens. No college for this boy,

no more roundups on the ranch, no heat or sandstorms on the plains. We would see him leave for twenty miles. My fault, raising him brash in a saddle, teaching him to ride,

to flip a hook, to tie dry flies so light you whip the line and let it carry, trusting the trout and the brook. And now he was off, leaving us choking on dust,

stunned so much was over and so soon. Since I was ten, I never believed in magic shows, not even Santa Claus. Christmas in World War Two was a fraud with treats and lights on the tree. Gifts I’d dreamed about were ripped and tossed aside, the season gone in a wink—not magic, but toys from catalogs, all of us caught

in dangerous times rushing past, my mother scouring pans and pots in the kitchen, my father sober on the porch after Pearl Harbor, smoking, reading war news

about attacks, the year my brother—the same age our son was, now—announced he had joined the Marines and was leaving, and never, never came back.

Walt McDonald
sharing and stealing: cultures and commerce

Maureen Jais-Mick

Cultures are both frozen in time and in flux. We celebrate our immigrant traditions while they keep on changing. Scots enjoy their historic Scottish Games, while their musicians have crossed over into the musics of other ethnic groups. Tartans and plaids cover the bodies of those of us with nae Scots blood. The Internet spreads haggis jokes. Scots is a global culture.

Sharing cultures is a wonderful thing. There is also the stealing of cultures, which has gone on for millennia. Melt the gold off Russian icons and trash the rest. Strip the heads off Cambodian temple gods and sell them to museums. Stripped of religious content, gospel music sells fast food, trendy clothing and whatever is hip. When I hear the sweet sounds of an English boys' choir coming from my television I know someone is hawking diamonds or luxury cars. A neighborhood restaurant shows Indian music videos. They're a cross between Saturday Night Fever and temple dancing—lots of hormone-fueled energy combined with classical arm movements (but as yet no physical embraces). U.S. culture is a hot commodity. Wall Street should get down on its knees and thank the diverse groups that make up the U.S. of A. Because of them we have something to sell as our manufacturing declines. “Intellectual property” embraces culture as well as technology.

Cultures aren’t static. Languages change. Cuisines change. Fashions change. Politics change. Horizons broaden. The question was asked years ago: “How you gonna keep ’em down on the farm after they’ve seen Paree?” The battle is somewhere between the extremes—those sworn to preserve culture in its purest forms and those with no appreciation of what has fallen into their hands—the barbarians.

At this point I ought to say wise and derogatory things about the barbarians—those whose only interest in cultures is their commercial value. As international philanthropist and financier George Soros has pointed out, having a market economy is good, but none of us wants to exist in a market society, a place where the value of everyone and everything is only what someone else is willing to pay for them. (Soros).

But commerce—the market economy—provides opportunities for sharing. The many ethnic merchants here in Washington, D.C. don't discriminate based on the color of my skin. They’re only interested in the color green—the money in my wallet. The owner of the Salvadoran restaurant by my office is happy to see me at lunchtime. The Ghanaian clothing store owner assures me that my wardrobe needs a kente cloth shawl. The street vendor promises that my life will be sweeter with some of her incense in my home.

Commerce does every day what sermons about our equality in the Body of Christ do not. Based on my own self-interest (the strongest influence under which humans operate) commerce opens me to other cultures and they to me. I bought the kente shawl, not out of Christian charity, but because it’s chic and the colors complement my wardrobe. Thanks to the market economy I am now connected to the people who created such an outstanding piece of textile art. And they got paid for their labor.

Art is inevitable. People everywhere need to express their stories through music, carving, cooking, painting, dancing, story telling, decorating and other kinds of creation. We use what’s at hand—spices for cooking, bones for carving, vegetable dyes for painting and local trees for instruments. We’re also influenced by the commercial traders, mercenaries, invaders and missionaries who pass through or whom we meet as we pass through. Thanks to printing, airplanes, maps and the Internet we are all Marco Polo. I can travel anywhere, buy any spice, learn any language, eat any cuisine, meet people from all over the world and buy recordings of any folk-
loric music. In my town, if you want to be culturally isolated you have to work at it. I recall musicologist Eileen Southern, author of *The Music of Black Americans*, commenting back in the 1970s that some folks didn’t know quite what to do about musicians who create outside the stereotypes. Composers like George Walker who write in classical forms not inspired by jazz, gospel music or spirituals present a labeling problem. Is his music African American? Why or why not?

Music is portable, at least in its folkloric forms. Carvings and paintings can be heavy. But their advantage is that once they’re completed they don’t change. You can look at a piece of sculpture one day and know that it will look the same the next day. Music is more fluid. Thanks to technology, some of us have become obsessed with the “definitive” performance of musical works. While waiting in line at my local Barnes and Noble recently, the customer in front of me asked for “the original cast recording of Messiah.”

Technology has always been a partner to the arts. Before the development of tools one couldn’t carve ivory, wood or stone or turn animal hide into drum heads. Oral history is an art form, while written history is not. Technology both records culture and freezes it in time. Translation and composition of Christian hymns in the aboriginal languages of Canada began at least by 1634, but we know little from the earliest period because the Jesuit Fathers “had neither means nor motive to commit to print the hymns they produced” (McKellar 9). World Music would never have been born without recording studios and ease of travel. Paul Simon’s *Graceland* was mixed thousands of miles from its performers and weeks after its live performance. Technology offers new possibilities for sharing while separating us from the immediacy of creation.

Some worry that cultural sharing means the end of art forms that belong to each group. Could sharing lead to one bland world music that belongs to no culture? Sharing is not the same as forced assimilation. Sharing leads to renewed interest in one’s own culture. And history has shown us that cultures are tough. Before he died in 1895, James Constantine Pilling, on behalf of the Smithsonian Institution, was compiling monumental bibliographies of all materials written or printed in North America’s aboriginal languages. “Its [The Smithsonian’s] officials were anxious for Pilling, to finish his work before all Indians and Eskimos either assimilated or died out; they made no plans for revising or updating it, because they saw it as the final literary record of an entire race, and expected no further additions” (McKellar 24). Pilling would have been stunned that two Ojibway hymnals were produced in 1972 and 1977 by the tribes themselves smack in the middle of Canada’s high tech petrochemical industry. As Hugh D. McKellar wrote, “What once had to be done for them, Indians now do for themselves; and clearly the end is not yet” (McKellar 30).

McKellar also commented on multicultural worship and why it is more likely to occur than multicultural day-to-day life. As the English and the French of Canada each grew more intransigent about using the other’s language, the federal government undertook to shame them both with a policy of “multiculturalism,” encouraging all Canadians to value and preserve their diverse ethnic heritages, although it remained observable that a Canadian competent in English was apt to be better off then one who was not. *Since there was no money to be made at church, people whose English was fluent began to think it not only permissible but praiseworthy to worship in their ancestral language when they could* [my emphasis]. “Indians shared with many immigrant groups in this trend; the more able they were to worship in English, the more reluctant they became. Eskimos, even after satellite television reached them, were still anxious for a new translation of the Bible into their language” (McKellar 26-27).

*Since there was no money to be made at church...* A refreshing thought. After an alternatively impressive and embarrassing history of political and economic power, the church has lost its commercial influence. Worship services are now planned so as not to interfere with pro sports. Denominations must send lobbyists to Congress alongside tobacco companies, unions and rural electrical cooperatives. Lutherans, Presbyterians, Methodists, Catholics and Episcopalians, take note: Gospel music is the most influential sacred musical form in our time and it arose from a minority culture. Perhaps leading composers in the majority culture just aren’t “anointed,” to use a colleague’s description of a true gospel musicians. As Lewis Foreman wrote of Hubert Parry’s anthems and oratorios, “In fact, he [Parry] was starting a long-lasting tradition of ambivalent agnostics setting biblical words which has come down to our own day, through the music of Vaughan Williams, Britten...
and others.” (Foreman). Crossing from secular to sacred, former Beatle, Sir Paul McCarthy, penned the only oratorio to draw world attention in recent memory.

While the church no longer leads in the arts and culture, it does engage groups of people in the performance of song and provides a record of where we were and where we thought we were headed when each hymnal was put to press. In 1978 when *Lutheran Book of Worship* was released most Lutherans didn't see a multicultural church on their horizon. But thanks to technology's most significant invention—the photocopier—congregations are free to be ahead of or behind their denominations at will. Bulletin inserts fill the gaps in official worship books.

In their preface to *World Praise* (Peacock and Weaver), a collection of worship materials from around the world, editors David Peacock and Geoff Weaver wrote that "In recent years, Christians in the West have begun to see mission as more of a partnership—a giving and receiving between different parts of the Body of Christ. \[\textit{works cited}\]


We started by describing the first time we could remember being affected by race. That was an easy one. It was July 1970. My family had taken the train to Chicago for a few days to celebrate my brother’s tenth birthday. We stayed at the hotel where visiting baseball teams stay. We rode the el. We went to the top of the John Hancock building. We visited the Museum of Science and Industry. Of course, on my brother’s birthday we saw the Cubs top the Reds. When it was time to catch the train for home, there was rioting in Peoria. We didn’t know about the rioting. When we watched the news that night we learned that the police department had issued a warning against traveling in certain parts of the city. Gasoline sales of over five gallons were suspended. I was really, really scared. They only issued warnings for big things like tornados, my number one fear. I remember thinking, “Sometimes they make warnings because of tornados, sometimes it’s because of riots.” Riots must be as bad as tornados.

I was six years old then. That’s the story I told on the first evening of an Interfaith for Racial Justice study circle.

The passion that we brought made for some angry words, tears and frustration. One woman I befriended the first night could have filled the whole two hours every week with how she had been affected by racism. One night, frustrated that she couldn’t finish her thought because others needed to have a turn, she nearly stormed out. The facilitators calmed her down enough for the circle to resume, and the next week when we talked about that exchange I spoke in my friend’s defense. “She has so much to share” I said, “she feels confined and hemmed in by the facilitators and the schedule.” Her smile reassured me that I had guessed right.

But next week when we processed this processing, someone pointed out to me that my saying what I had in Thelma’s defense probably reflected a deep, unstated even to myself, desire to confine ALL black people somewhere, like maybe jail.

That thought silenced me. Could that be right? But I had tried to speak to Thelma’s frustration. I wrote a note to myself that night. “It hurts to be misunderstood.”

My left ear is a little misshapen from the first time I was mugged. I had graduated from the Divinity School of the University of Chicago three days before and moved to the northside until I found a Presbyterian church willing to call me as their pastor. That Monday morning I was riding the el down to Hyde Park around 7:30 to work. I was working on the Sunday crossword puzzle when two, maybe three, men asked me for $10. Then one of them said, “God told me to ask you for $10.” I told him no. He hit me across the face, then again on the ear. I stood up, gave him my wallet as the train was stopping. After taking out the cash he tossed it back to me. One man tried a sloppy kung fu kick to my head, but I blocked it. Another grabbed my watch off my wrist, breaking the band. He looked at it while leaning against the doors of the train to keep it from moving. “Cheap-ass Timex,” he sneered and threw it back.

I arrived at work in a daze, bleeding slightly from my ear. I left early so I could get new glasses. I took the Illinois Central train, not the el, home, after borrowing trainfare from my employer.

For the next week I could not read a sentence from start to finish. The mugging kept replaying in my mind over and over. I could not
control it. The shame I felt from having been hit in the face was overwhelming. As was the shame of not being able to defend myself. More than anything, I later realized, I lost my sense of invulnerability. I had thought that it was a kind of witness for a white person to ride public transportation on the southside of Chicago. I'd been an Urban Studies major; nothing could happen to me! The mugging changed all that.

A trusted friend asked me what would Jesus say about my mugging. I was all ready to compare suffering, when he said, “Think about it for a while, go deeper.”

So I did. I talked through the mugging with my therapist. I envisioned making different responses at different points and found I’d handled it well. I stopped riding in subway cars all alone.

The next time I was mugged made me angrier. It was noon. I was waiting for the 55th Street bus to take me to Hyde Park. Lots of other people were waiting. The grocery to the west of the bus stop and the liquor store to the east were doing a brisk business. There was a maintenance crew from the CTA in the station, 20 feet away. Someone asked me a question softly; I leaned over to hear better as a tall man put his arm around my neck and pulled me off the ground. My questioner went through my pockets, took my cash and keys and asked whether I had a CTA pass.

“I use tokens.”

There were at least 30 people around seeing this. Someone from the CTA crew came out and led me to the pay phone in the station. The smaller one came back and returned my keys. (What’s the etiquette here? Should I thank him? I probably did.) My CTA man said I should carry a knife. One of his associates handed me the pay phone after having dialed 911. I was in a daze again. But this time I was stunned that no one had seen fit to do anything in this situation until the muggers had fled.

A few months later I moved to Minnesota. Chicago, the city I’d lived in for seven years, where I’d gone to college and seminary, home of my beloved Cubs and the best pizza on earth became “the place where I was mugged.” Nothing more, nothing less. I struggled when I passed a black man, asking myself, “Was he the one?” For years I struggled with that question.

I shared all this with my study circle. Having been through this, I found it hard to believe that “black people” have no power in our society. Hadn’t I been subjected to a kind of power exercised by black men?

Then one of the women in the group spoke up, “I’ve been beaten by black men, but I don’t feel that way.” Others joined her.

At first I was very disappointed in the group’s response. I’d shared things that I’d never shared with my own family and they ignored the struggle and minimized my pain. It hurts being misunderstood.

That’s when I heard it, in my own voice: “I’ve not been heard; my pain doesn’t count.”

And I learned something, at last, about racism.

This slim yet helpful study provides a thoughtful entry into the burgeoning genre of recent autobiography. Ms. Conway, an autobiographer, essayist, editor, and former president of Smith College, serves as a wise and sensitive guide through the topic. Because we all carry on “inner conversations with ourselves about the meaning of our experience,” we are all autobiographers, claims Conway. And even though only a handful set about writing down and publishing their results for others to read, that handful has grown immensely in recent years. Why this phenomenal growth? There are a number of reasons, the most important perhaps the continued search for meaning in our lives, even though we are conscious of the loss of a stable center, an authoritative controlling tradition. Also, the specialized languages of history, psychology, philosophy, or literary criticism have made autobiography almost the only kind of writing which attends to “humanistic discourse” in language a nonspecialist can read with ease. Perhaps, too, our reading and writing about personal lives has most to do with cultural history and with the all-too-often tacit dimensions of our “largely unexamined cultural assumptions.” Enter Ms. Conway’s examination of some of these cultural assumptions which aid our understanding of autobiography in the postmodern world.

Although she does not offer an extended definition of what “postmodern” might mean (for which many a reader may be thankful), her summary reflections and analysis describe the predicament through her charting a pattern or typology in some fifty autobiographies, which Conway also places in historical perspective. Beginning with Jean Jacques Rousseau’s *Confessions* (1770) and ending with Jean Dominique Bauby’s *The Diving Bell and the Butterfly* (1997), Conway illustrates the several transitions from the “Secular Hero” through the “Romantic Heroine” to “Grim Tales.”

Conway’s introductory norm is the “Secular Hero,” initially male, mostly embodying Sigmund Freud’s conflicts between love and work, with work taking the ascendency until the mid-twentieth century. Benjamin Franklin, Henry Ford, Lee Iacocca, and James D. Watson are some of the white exemplars; Frederick Douglas and W.E.B. DuBois the black. In these stories of the self, the male character sees himself primarily as an agent, a doer, more acting than acted upon, himself becoming a “cause” for change, success, and understandable public acclaim.

But Conway’s major contribution in this study is her focus on feminine self-understanding. Beginning with the romantic heroine, the author pictures the way the romantic female’s “sexuality existed to be subsumed within that of the male partner”—a view she sees promoted by writers like Rousseau and Samuel T. Coleridge. Yet these romantic heroines, in captive narratives like those of Mary Rowlandson, Mary Cavendish or Rachel Plummer, and later in the writings of Anna Cora Mowatt or Harriet Jacobs, show the narrators as capable of decisive action at the same time that they may mask the shaping of their lives in terms of forces acting on them. Two of the more popular narratives are Jane Addams’ *Twenty Years at Hull House* (1910) and Margaret Sanger: *An Autobiography* (1938). According to Conway, Addams conceals her own role as gifted executive, skillful enabler, and she disguises her own strong ego “so brilliantly in her narrative that the reader is barely conscious of the I behind the gentle narrative voice.” “By seeming all emotion and spontaneity,” Conway adds, Addams offers us a key feature about women’s autobiography: “We can be sure that whenever women autobiographers are hiding behind the passive voice and the conditional tense, they are depicting events in which they acted forthrightly upon a preconceived rational plan.” Sanger, recently featured on public television for her radical contributions to birth control issues, presents herself
in her autobiography in a similar way. The myth of the romantic heroine evaporates in the 1960s, however. Gloria Steinem, Vivian Gornick and others deflate the romantic heroine notion even as the major conflicts alter to struggles between children and parents and eventually, as divorce rates increased, to survival in inadequate families.

Conway then continues her charting of key transitions by taking us through “Imperial Stories,” personal narratives of adventure and cultural exploration. After touching on the accounts of David Livingstone and Henry Morton Stanley, the author takes up an English woman like Mary Kingsley and ends with Winnie Smith’s Vietnam experiences in American Daughter Gone to War (1992), on the way comparing and contrasting male and female adventure and war stories, concluding with the ways in which the experience of total war eliminates differences between men and women in self-presentation.

Subsequently the author elaborates on “Feminist Plots”: Harriet Martineau, Elizabeth Cady Stanton’s Eighty Years and More are selected examples. And then Conway attends to “Assertive Women,” including Virginia Woolf’s Moments of Being (1976) and others. In her summary of Virginia Woolf, Conway registers one of her choice if rare value judgments, suggesting that Virginia Woolf would have found repugnant the compulsive style of victimhood prevalent in the late twentieth century confessional autobiographies. Woolf, Conway contends, would insist that human affairs are more complex.

Conway’s later chapters develop the ways in which recent autobiography, like a verbal mushroom cloud, has expanded and become more diffuse, the consequence of cultural change. The coming out of homosexuals like the distinguished poet James Merrill in A Different Person (1993) and of lesbians like Andre Lorde in Zami, A New Spelling of My Name (1982), and the disputes between gay and straight women, the occasional sex-change personal story mirror the changes. And although these stories have many connections with earlier autobiographical traditions, their focus on erotic experience as “the experience which gives meaning to life” (even though individual relationships often end in mutual disillusionment and loneliness) makes them distinctive in their calling attention to human androgyne.

To finish her inquiry, Conway takes up what she calls “Grim Tales,” personal stories that reflect postmodern predicaments falling outside “the central narratives of worldly success, or of moral and spiritual growth, or of power and its exercise.” In other words, anyone’s story may be as good for the reading as it is in the telling. Including Kathryn Harrison’s The Kiss (1997), Mary Gordon’s The Shadow Man (1996), Frank McCourt’s Angela’s Ashes (1997), and others, Conway sees in these stories, often bleak narratives driven by primal feelings, something of the fairy tale. Yet these stories shore up Conway’s central contention: “The intersection point between culture and the stored traces of past experience is the most revelatory point for understanding the tension between individual and society.” That is what autobiography is all about.

Conway draws a general verbal map for the reader’s further exploration, a map including her own sensitive clusterings, her own guiding discriminations, and a brief bibliographical supplement. Hardly had I finished reading her study when I hurried to read Jean Dominique Bauby’s The Diving Bell and the Butterfly (1997) as testament to some of Conway’s recommendations for reading those authors who, like Bauby—dictating his coding of the French alphabet by blinking his left eye after suffering a massive stroke that enclosed his mind in a helpless body—have the power of speaking for oneself. What we do need, nevertheless, is the philosopher or theologian or cultural critic, alas, the specialist, to give us a better grasp of what social and individual values are at stake in the multitude of personal stories.

Warren Rubel


As a graduate student in history at the University of Virginia, I found the early 1990s heady times. The Cold War had just ended with the Eastern-bloc and Soviet revolutions. The Gulf War unfolded in ’91, Clinton beat Bush in ’92, and Republicans swept congress in ’94. Marxism-Leninism was waning, democratic capitalism rising. When Gorbachev spoke on campus in ’93, I had just read Francis Fukuyama’s declaration that the “end of history” was at hand.

But not everyone was sanguine. James Hunter in Virginia’s sociology department argued in ’92 that America’s “culture wars” were just heating up. In the English department (where else?), internecine battles of cultural politics acrimoniously raged: Lacanians against Derridians, Deconstructionists against New Historicialists, et cetera. Across the humanities, though, most profs agreed that 1989 portended more “globalization” and “consumerism”; these were clear-cut blights on the human spirit and America was mostly to blame. De-
spite swelling TIAA-CREF accounts and tenure securities, my learned betters frowned.

And then there was Richard Rorty, the gem of Mr. Jefferson's University, the affable anti-philosopher, a hybrid of American pragmatism and de rigueur postmodernism, Ben Franklin and Nietzsche in one person. Perched fortuitously at the end of history and, as he told us, at the end of Western metaphysics too, Rorty pronounced his judgments on man, society, and the general state of things. "Liberal irony" is the way forward from here, he explained: liberalism and democracy are not true in any essential, deep-down sense but believe in them anyway and do good. He had argued as much in Contingency, Irony, and Solidarity (1989). Awed, curious, and perplexed, I came to class and took notes.

Harvard has published some of Rorty's more recent political musings, first given in 1997 as the William E. Massey Sr. Lectures in the History of American Civilization. Reading them calls to mind many of Rorty's classroom observations at Virginia, though in this volume "irony" and "contingency" take an emphatic back-seat to "solidarity," or to what Rorty calls forging a "moral identity" for our nation.

Drawing inspiration from his familiar heros—Walt Whitman, John Dewey, Herbert Croly, movers and shakers in the Progressive Movement and New Deal—Rorty seeks to articulate a leftist politics which reconciles concerns for social justice with pride in America's identity and future. He criticizes fellow leftists for resting content with the right's monopoly on national pride. Such leftist pride in America, he believes, coexisted with concerns for social justice until the late 1960s, at which time, mainly because of the Vietnam war, they split ways. Ever since, Rorty feels the Left has been mired in what Jonathan Yardley once called the "America Sucks Sweepstakes," a one-upmanship game of creatively deploring the United States. Refusing his turn at bat, Rorty criticizes two of the game's most enthusiastic players: obdurate post-1989 Marxists and those he calls the "Foucauldian" or New Cultural Left, i.e. those (especially of my generation) beholden to recent Continental and especially French theory to make sense of present-day American realities.

Rorty's attack on Marxism derives its force from doubts about his own "Trotskyite" upbringing (Rorty 31-50). Interestingly, Rorty's words parallel many neo-conservative critiques, such as those of Irving Kristol, who, incidentally, also started out a Trotskyite. Validating the insights of Paul Tillich and "others," Rorty admits that Marxism was, after all, a religion and "like all fundamentalist sects, it emphasized purity." If you strayed from the "Truth," you were cut off from the fold: if you whole-

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MEISTER ECKERT'S SERMON 6

The soul is made of God's own stuff
And turns to him in utter love.
When like to like calls loud enough,
God will answer, like the dove.

God will go where there is room.
There within the empty tomb,
Less is more and more is less.
He needs space and emptiness.

Grant me grace to cast aside
All things heavy, even pride.
Help me let them go, like stone,
And rest with God, in God, alone.

George Slanger
heartedly supported the West in the Cold War (like Rorty did), you were marked a bourgeois ideologist (like Rorty was and is). With Kristol, Rorty finds it revealing that the best Marxist thought of our century originated in the West and not in socialist countries. He further wonders what history-wizened Eastern Europeans and Chinese must think today about the sentimental socialist countries. He further concludes, was a “catastrophe” for the political Left, both for countries where Marxism took hold and those where it did not. “The ideals of social democracy and economic justice . . . long antedated Marxism, and [we] would have made much more headway had ‘Marxism-Leninism’ never been invented.”

Rorty reserves an even sharper invective for the “Foucauldian Left,” the “most prominent and vocal” Left on American campuses today. This group, he contends, has given up hope in reformist politics and is content to engage in rarefied theoretical analyses which produce “cultural politics” but not “real politics.” They sneer at American institutions and liberal hopes, content to “theorize” everything as manifestations of “power.” They are “a spectatorial, disgusted, mocking Left,” which “exaggerates the importance of philosophy for politics, and wastes its energy on sophisticated and theoretical analyses of the significance of current events.” This Left is even “more useless” than Marxists, Rorty contends, because at least the latter had an “eschatological” vision. For the Cultural Left, futurist hope and political action are silenced by principled jaundice and “theory.” In Rorty’s words:

The contemporary academic Left seems to think that the higher your level of abstraction, the more subversive of the established order you can be. The more sweeping and novel your conceptual apparatus, the more radical your critique. . . . When today’s academic leftist says that some topic has been “inadequately theorized,” you can be pretty certain that he or she is going to drag in either philosophy of language, or Lacanian psychoanalysis . . . . Theorists of the Left think that dissolving political agents into plays of differential subjectivity, or political initiatives into pursuits of Lacan’s impossible object of desire, helps to subvert the established order. Such subversion, they say, is accomplished by “problematizing familiar concepts.”

Rorty acknowledges that theory in this vein has produced a few interesting books, but it also has given rise to “scholastic philosophizing at its worst.” Furthermore, it is often impossible to “clamber down” from such sophistication to discuss practical, humane politics.

Rorty concedes, however, that at least some recent theory—especially among blacks, gays, and feminists—has given rise to a laudable concern for “the Other.” This concern has manifested itself institutionally in the emergence of gay, black, and women’s studies programs on many American campuses. Rorty applauds this development for helping combat the marginalization of minority groups. Yet he quickly qualifies his praise by noting that these initiatives are more concerned with overcoming “stigma” than “poverty.” “Nobody is setting up a program,” he opines, “in unemployed studies, homeless studies, or trailer park studies, because the unemployed, the homeless, and residents of trailer parks are not ‘other’ in the relevant sense.” Of course, the stigmatized might often also be the impoverished, but not always, and Rorty thus finds it troubling that the former has eclipsed the latter in the Left’s political imagination. Despite grave doubts about his political brethren, Rorty is a committed man of the Left. He wants to steer the Left back to a period before the 1960s when, in his view, poverty was the enemy, social justice the goal, and a bright American future the consequence. These are all laudable objectives and ones with which most Americans (left, right, and in-between) would heartily agree. Rorty’s chief problem, however, is that despite his trenchant words against Marxists and “Foucauldians,” he is much more implicated in their political diagnoses and remedies (or lack thereof) than he is willing to admit. His “alternative,” therefore, is not terribly convincing.

For all his diatribes against Marxism, for instance, Rorty thinks, economically, in highly redistributionist and relative terms (how much do the poor have when compared to the rich?) instead of absolute terms (what policies best improve the conditions of the poor—irrespective of the rich?) (Sherman 3,5,35-36). While condescending to tolerate capitalism, he implies that he’s on the lookout for “alternatives to a market economy” and still wonders “how to combine political freedom with centralized economic decision-making.” Despite his desire to “achieve” America, he is ultimately skeptical of the nation-state, and holds out the bombastic hope that “America will some day yield sovereignty to what Tennyson called ‘the Parliament of Man, the Federation of the World.’” Instead of regarding the global market economy in ambivalent or critical terms, Rorty waxes alarmist, even apocalyptic, fearing that we are hastening an “Orwellian” world where the “Inner party,” an “international, cosmopolitan super-rich,” will dominate an “Outer party” of immiserated workers. Without the Left of Rorty’s envisioning, these workers might seek out a “strong man” and
swing America from international plutocracy to a nationalist fascist state. In suggesting such scenarios, Rorty appears quite serious.

Despite Rorty’s denunciation of the New Cultural Left, one cannot help but conclude, when considering his earlier books, that he himself played no small role in nurturing this Left to intellectual maturity. In fact, if you asked many of the “Foucauldian” students (my classmates) whom he lampoons which books have influenced them the most, his Philosophy and the Mirror of Nature (1981) and Contingency, Irony, and Solidarity (1989) would probably rank pretty high on their lists. Aware, however, that his infamous severance of philosophy from political deliberation is often a difficult pill to swallow, Rorty awkwardly assures his readers that leftist liberalism is fully compatible with seeing “everything around us and within us as one more replaceable social construction.” To achieve this fit between liberalism and historicism though, everyone must, following him, relegate “antimetaphysical, anti-Cartesian” ideas to an “individual quest for private perfection”; they should “not be taken as guides to political deliberation.” In other words, radical historicism, like religion, is bad for the body politic; practice it privately or not at all.

Plumbing the heart of a seasoned ironist is no easy task. I myself have spent more than a few evenings at Virginia discussing with peers whether Rorty really believes that he has adequately defended liberal political commitment. If he does believe, his solution—persuading others to become private ironists and public liberals like himself—appears perhaps only slightly less misguided than the Marxist goal of a classless society. On the other hand, if he doesn’t believe, then it would seem that he is engaged in the same rarefied, politically useless theorizing that he other­wise laments. One would wonder, moreover, what Eastern Europeans would think of the suggestion that philosophy’s primary relevance is private, not public. What is politics, Vaclav Havel (whom Rorty admires) once asked, without “the force of truth” and “metaphysical grounding” (Havel 1-20)? To my knowledge, there’s no demand for Rorty translations today among Chinese dissidents.

Given the neoconservative drift of Rorty’s musings, it is unfortunate that he does not seriously engage any “neocons,” many of whom, as indicated, started out as committed socialists (Kristol 3-40). Rorty’s impression of the Right—paleocon and neocon alike—remains conveniently one of caricature and generalization. Conservative views—or those from “the sterile vacuum called the ‘center’”—reflect simply the interests of the “rich and greedy,” “male rightists in the country clubs,” or “suburbanites” who lack “a sense of community.” The neocon (and now bipartisan) argument that the welfare state has been one of recent history’s most proficient engines of human immiseration is not a view Rorty takes time to rebut. Furthermore, Mr. Rorty says practically nothing about the widely discussed role of “mediating structures”—families, neighborhoods, schools, voluntary associations, and churches—in sustaining civil society and democracy. In Rorty’s world, there are finally only two actors—the individual and the state, and he does not condescend to address the view that statist policies have often eroded the community and identity-forming functions of mediating structures. On religion and churches, Rorty has little to say, except to make a characteristic appeal for a “thoroughly secular” America. The millenia-old religious impulse to help the needy and the work of America’s bountiful church-affiliated charitable institu­tions are not deemed worthy of commentary.

Because of Rorty’s stature, this book will certainly be of enduring historical value. For students of the history of philosophy, I would suggest it will represent another of Rorty’s persistent but persistently unconvincing attempts to pull the rabbit of political solidarity from the hat of contingency and irony. For future students of American politics and history, it will undoubtedly help explain the fractious and increasingly deserted house of leftist thought at century’s end (Rorty 10ff). Moreover, the very fact that Rorty felt primarily obliged to dialogue with Marxists and “Foucauldians”—despite the centrist turn of mainstream, fin-de­siecle liberalism—might, in the hands of some enterprising student, shed further light on the identity of our elite universities as the over­weening repositories of a bygone radicalism.

Thomas Albert Howard

works cited


on poets—

Tim Gustafson
lives in Minneapolis and teaches writing at the University of Minnesota.

Walt McDonald
directs the program of creative writing at Texas Tech University. His newest book, Blessings the Body Gave, recently received the Ohio State University Press/The Journal Award and will be published in the coming year by Ohio State.

Jeanne Nuechterlein
is the mother of three and grandmother of five, writes (almost) every morning, and is active in a community food bank project. She has been published in Daughters of Sarah, Broken Streets and Christian Life, as well as The Cresset.

George Slanger
lives and teaches in North Dakota, not far from the Canadian border. He and his wife cross-country ski in the winter and canoe in the summer—when there is a summer. His poetry and prose have appeared in Winterset, Plains Poetry Journal and North Dakota Quarterly.

on reviewers—

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The Cresset thanks the following for their contributions to mailing costs: Augsburg College, Carthage College, Dr. Martin Luther College, Luther College, Midland Lutheran College, St. Olaf College, Texas Lutheran University and Thiel College.
ELEGY

The deer was sprawled on its side, right foreleg twisted, wrenched the wrong way—broken.

A perforation the size of a penny punctured its neck, dried blood circled the round unnatural opening.

Had the doe come to the river to drink, slipped, fallen, broken a leg? Was a park attendant forced to shoot her?

Or was she killed first and staggering to safety, her leg buckled, splintering as she stumbled and fell?

I grieve the deer’s death, dreading the next violent interruption—the gas in the subway, the bomb on the bus, the killer in the kindergarten.

(Who will deliver us from violent men, from those who plan evil, who plant terror in our hearts?)

Ever enterprising, evolution hatches fiends and gods as this crazed age wrings our hearts dry.

Jeanne Nuechterlein