Inclusive and Exclusive Virtues: Approaches to Identity, Merit, and Responsibility in Recent Legal Thought

Peter Margulies
ARTICLE

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APPROACHES TO IDENTITY, MERIT, AND
RESPONSIBILITY IN RECENT LEGAL
THOUGHT

Peter Margulies*

When I thus bluntly reveal the personal background of my reflections, it may easily sound to those who know the fate of the Jews only from hearsay as if I am talking out of school, a school they have not attended and whose lessons do not concern them.

One of the most important results of reconceptualizing from “objective truth” to rhetorical event will be a more nuanced sense of legal and social responsibility. This will be so because much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities and unexamined claims that make property of others beyond the self, all the while denying such connections.

Conceptions of virtue can be inclusive or exclusive. Civic republicanism, which the historian of political thought J.G.A. Pocock calls civic humanism, finds virtue in voice—human beings’ ability to realize their

* Associate Professor and Director, Immigration Clinic, St. Thomas University School of Law. B.A. 1978, Colgate University; J.D. 1981, Columbia Law School. I thank Meg Nocero for her research assistance, and Dan Farber, Howard Lesnick, Susan Sturm, and participants at a workshop at St. Thomas University for their comments on a previous draft.


freedom together through participation in the development of just institutions which allow both the revelation of self and connection with others. This vision celebrates the diversity of human beings, and the virtue of continually reinterpreting received wisdom. Civic humanists understand that the aesthetic always precedes the empirical—that people are always interpreting information and selecting the stories they wish to tell.


Recently, outsider scholars in the legal academy have advanced a rich and varied project that extends this conception of virtue by traversing

6. For purposes of this Article, the term "outsider" refers to members of a subordinated group in any society. In the United States, outsiders have included people of color, women, gays and lesbians, and people with disabilities. In Europe, at least through the generation that experienced World War II, Jews were in many ways the paradigmatic outsiders. See infra note 12 (citing the work of Hannah Arendt).


the complex terrain of identity. In a project that this Article views as multicultural humanism, the outsider scholars have argued that experiences of subordination lend outsiders a special voice that demands inclusion in the design and conduct of institutions, public or private. To articulate this voice, outsiders have resorted to narrative,\(^8\) sought connections between the political and the personal, and critiqued an unthinking allegiance to supposedly neutral principles that uphold the status quo.\(^9\) One attribute of virtue is that it is never without risk. In response to the challenge of multicultural humanism, scholars laying a more explicit claim to the mantle of virtue argue that the focus on identity threatens American civic solidarity and the integrity of American law and legal scholarship. The two most persistent critics of identity, Daniel Farber and Suzanna Sherry, have invoked the vocabulary of civic republicanism to warn of the baleful effects of identity on conceptions of merit, reason, and responsibility.\(^10\)

Farber and Sherry argue, in contrast to the acknowledgment of identity’s importance in this Article’s epigraph from Hannah Arendt, that outsider scholars are “telling stories out of school.”\(^11\) For Farber and

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L. REV. 1581, 1583 (1993). I largely agree with those criticisms, which is why I regard the outsider scholars as developing approaches that materially enhance the relevance of the civic republican tradition.


11. Farber & Sherry, Telling Stories, supra note 10, at 42-52. Farber and Sherry’s work is part of a debate about legal scholarship and method in which scholars focused on doctrine and empiricism critique the reliance on identity and narrative in outsider schol-
Sherry, narratives stressing the many facets of identity trigger emotional reactions that compromise the commitment to reason in legal scholarship. In addition, Farber and Sherry argue that the assertion of identity emphasizes the group over the individual in a manner that undermines choice and responsibility. To promote choice and responsibility, Farber and Sherry turn to ostensibly neutral indicia of truth and merit like empirical verifiability and marketplace success. Here, too, they confront outsider scholars who, as in the Article's epigraph from Patricia Williams, interpret the "hidden subjectivities" of ostensibly neutral discourse. For Farber and Sherry, the outsider scholars' suspicion of established verities paves the way for religious fanaticism, anti-Semitism, Holocaust revisionism, and—if that parade of horribles were not sufficient—the erosion of law school promotion and tenure standards.

This Article argues that although Farber and Sherry speak the language of virtue, they fundamentally misunderstand the civic republican tradition. In considering three issues—school reform in Part I, legal storytelling and scholarship in Part II, and hate speech on campus in Part III—the Article demonstrates that Farber and Sherry have strayed from the civic humanist commitment to voice and interpretation, represented

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in the work of thinkers like Hannah Arendt and Niccolo Machiavelli. In much of their recent work, Farber and Sherry actually are positivists in humanist packaging, deploying unitary conceptions of merit, truth, reason, and responsibility to create a closed system, and then employing


14. Farber and Sherry's positivism conflicts with some of the commitments of their prior work. See Daniel A. Farber, The Case Against Brilliance, 70 Minn. L. Rev. 917, 918-24 (1986) (critiquing positivism in law and economics). My criticism of positivism here should not be taken as a denial that positivism as a form of argument can sometimes be exceptionally useful in a variety of contexts, including articulating the wrongs done to subordinated groups. Cf. Peter Margulies, The Violence of Law and Violence Against Women, 8 Cardozo Stud. L. & Literature 179, 188-93 (1996) (noting uses of positivism, including arguments invoking public health rationales, in remedying practices such as female genital surgery). This use of positivism, however, is more situated, strategic, and self-aware than the system-building kind connoted by unitary conceptions of truth
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those conceptions selectively to promote the status quo and obscure alternative perspectives. In contrast, the multicultural humanism of the outsider scholars embodies inclusive virtues of voice, interpretation, and connection. These virtues deepen and extend the commitment to identity that has always been a part of the civic humanist tradition.

I. EDUCATION REFORM

Nowhere is Sherry's departure from the civic humanism principle clearer than in her approach to school reform. As Sherry recognizes, elementary and secondary education have long been central to the American conception of democratic citizenship. Along with a wide range of scholars, Sherry argues that our public school system no longer meets the goal of developing democratic citizens. It is Sherry's policy positions that set her apart from civic republican traditions—particularly her advocacy of vouchers and public-private school "choice" systems as a recipe for school improvement. This position and Sherry's summary rejection of Afrocentric curricular perspectives are at odds with the commitments to voice and equality at the heart of civic republicanism.

A. Choice Versus Voice in School Reform

Sherry's recommendation of a voucher system for primary and secondary schools is both a central element of her program of "responsible republican" education, and a striking example of her flight from civic re-

15. Positivists label alternative methods such as narrative as forms of "pseudo-knowledge." See RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 48 (1983); cf. J.M. Balkin, A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason, in LAW'S STORIES, supra note 8, at 211 (discussing use of categories in legal reasoning as a form of rhetoric). Richard Posner, a frequent ally of Farber and Sherry, recognizes that this selectivity in applying supposedly unitary conceptions is a favorite gambit of legal positivists. See POSNER, supra note 11, at 155. While Posner is most famous as a positivist law and economics theorist, one of the best kept secrets of the Left and Right in legal thought is that in his judicial duties he occasionally relinquishes the positivist stance to reveal emotion and empathy for victims of discrimination. See infra note 103 and accompanying text; cf. Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 HARV. L. REV. 1393 (1996) (arguing for synthesis of outsider legal scholarship and positivist political theory).


17. See infra notes 52-58 and accompanying text (discussing Sherry's view on the effect of multiculturalism on education).

18. Sherry, Responsible Republicanism, supra note 3. Sherry, who readily acknowledges the contributions of other scholars to the literature on school choice, has in mind a regime that would distribute vouchers to parents to fund education in either public or private schools. See id. at 200. The critique of Sherry's position offered in this essay does
publican principle. For civic republicans, voice—defined as participation in discussion, debate, and struggle about the future of public institutions—is the quintessential occasion for the exercise of virtue. The republican definition of voice suggests, however, that voice is not infinitely portable, like a wristwatch television. There is one condition for the realization of each person's voice: the presence of others. As Arendt notes, the "revelatory quality of speech and action comes to the fore where people are with others . . . that is, in sheer human togetherness." In concert with others, people have the opportunity to excel in wisdom, loyalty, and audacity. In contrast, "individuals" in Sherry's vocabulary—that is, persons making choices without dialogue with others—arise in republican terms only when human institutions fail, leaving atomized beings behind in the wreckage.

Such uprooted people in this distinctive republican view are at best incomplete selves, because they exist only in the collapse of the togetherness which makes selfhood possible. Individuals in the aggregate, like those produced en masse as capitalism overwhelmed more traditional institutions of governance, are the raw material for oppressive ideologies. Lacking loyalty, they enroll in any world view, such as fascism or racism, offering the illusion of control and the conviction that they are better than other people.

One consequence of rejecting this corruption of voice is an acknowledgment of normative and descriptive constraints on choice. Descriptive constraints stem from the understanding that no choice is completely

not apply as clearly to choice plans limited to public schools, which are not as potentially destructive of public education.

19. ARENDT, THE HUMAN CONDITION, supra note 12, at 180. A commentator on the republican revival articulates this view eloquently:

[Human good] cannot be attained 'on one's own' . . . in isolation from other people . . . [or] purely through one's own civic virtue regardless of the virtue of other citizens. Thus, for republicans, the individual neither determines what the good is nor can the individual rely only on herself for attainment of the given good. Gardbaum, supra note 4, at 725.

20. These are all virtues praised by Machiavelli. See generally MACHIAVELLI, THE PRINCE AND THE DISCOURSES, supra note 13.

21. Sherry argues that the virtue of individual citizens stems not from interaction with others, but from an "internal state of mind." Cf. Sherry, Hate Speech, supra note 10, at 934. Persons under a republican view also have negative freedoms, which preclude oppression by the group. These generally include freedom of speech, which makes voice possible. See ARENDT, ON REVOLUTION, supra note 12. Yet, as we shall see, certain kinds of speech, including hate speech, can also involve attempts by some members of the group to oppress others and distort or silence their voices. For this reason, freedom of speech is not absolute.

22. See generally ARENDT, ORIGINS OF TOTALITARIANISM, supra note 12.
free. We are all part of a "web" of human relationships, including attachments to family, friends, neighbors, and colleagues, that influence our decisions. In addition, our choices reflect an immersion in the images, narratives, and ideology of the larger culture. This diffuse cultural context yields positive examples, like the commitment and sacrifice of Dr. Martin Luther King and the civil rights movement, and more ominous inheritances, such as the myth of white supremacy underlying racism and imperialism.

Because our choices as a descriptive matter reflect the influence of so many factors, including the stereotypes that fuel racism and other invidious biases, some constraints on choice are also normatively justified under a civic republican model. Indeed, restraints on alienation are a

25. Cf. ARENDT, CRISES OF THE REPUBLIC, supra note 12, at 64 (discussing the differing civil rights beliefs of Dr. Martin Luther King and Governor Ross Barnett).
27. See Cass R. Sunstein, Preferences and Politics, 20 PHIL. & PUB. AFF. 3, 6-14 (1991) (arguing that certain categories of personal consumption choices in a democracy should be overridden by government).
significant feature of our legal landscape. Inalienability rules constrain decisions in order to safeguard rights, values, and institutions, and discourage decisions stemming from coercion, caprice, or invidious bias. For civic republicans and for outsider legal scholars, inalienability is important in two contexts. First, restraints on alienability curb the brutal calculus of the market—the "machine whose tremendous power of processing first standardizes and then devalues all things into consumer goods." Second, the idea of a constitution is itself a paradigmatic in-


32. ARENDT, THE HUMAN CONDITION, supra note 12, at 163. Critiques of the market were commonplace in the turbulent English political climate of the 1700s which shaped the American civic republican tradition. See ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 119-22 (1977) (discussing the views of Adam Ferguson); Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 434-76 (1996) (describing the responses to economic analysis in the law by environmental ethics, civic republicanist, and commodification scholars); J.G.A. Pocock, *The Mobility of Property and the Rise of Eighteenth-Century Sociology*, in VIRTUE, COMMERCE, AND HISTORY 103, 104 (1985) ("In every phase of Western tradition, there is a conception of virtue—Aristotelian, Thomist, neo-Machiavellian or Marxist—to which the spread of exchange relations is seen as presenting a threat."). Outsider legal scholars like Patricia Williams have criticized market ideology in areas such as adoption for reducing human beings in a similar fashion. Speaking of Posner's scheme for a market in babies, and the subtle marketplace influences on current adoption regimes, Williams asks,

How will my son's 'price' at birth relate to what value doctors put on his various parts if he ever stubs his toe and shows up at a hospital? Will he be valued more as a series of parts in the marketplace of bodies or more as a whole, as a precious social being with not just a body or a will but a soul?

WILLIAMS, THE ROOSTER'S EGG, supra note 6, at 224. Yet, while civic republicans and outsider scholars are wary of the market's excesses, they also regard it as an important attribute of a democratic society. See ARENDT, THE HUMAN CONDITION, supra note 12, at 220 (cautioning that in societies like the former Soviet Union, "where even the exchange market is being abolished, the withering of the public realm, so conspicuous throughout the modern age, may well find its consummation"); Regina Austin, "A Nation of Thieves": Consumption, Commerce, and the Black Public Sphere (adapted from Regina Austin, A Nation of Thieves: Securing Black People's Right to Shop and to Sell in White
stance of inalienability. A constitution is a collective promise\textsuperscript{33} to preserve fundamental rights and institutions against the caprices of the moment. Constitutions contemplate a special sort of loyalty to underlying commitments and first principles, and oblige people to return to those first principles in times of trouble.

Through creation of an aware and watchful citizenry, democratic institutions like public education help engender this loyalty and should receive loyalty in return. Arendt acknowledges the special place of education in America, noting that in America "a right to education is one of the inalienable civic rights.\textsuperscript{34} Virtues developed in the educational system include a commitment to equality, diversity, and critical thought, manifested by an active desire to hear many voices without making facile judgments.\textsuperscript{35} In sum, Arendt notes, the egalitarian strain in American culture represented by the public school system has "great advantages, not simply of a human kind but educationally speaking as well."\textsuperscript{36}

An educational system which nurtures voice should accord voice pride of place in any reform plan. Thus, a civic republican school reform plan

\textit{America, 1994 Utah L. Rev. 147}, reprinted in \textit{The Black Public Sphere: A Public Culture Book} 229, 250 (Black Public Sphere Collective eds., 1995) (noting that "for-profit enterprises are an inescapable feature of a viable black public sphere").

\textsuperscript{33} \textit{See Arendt, The Human Condition, supra} note 12, at 244-45.

\textsuperscript{34} \textit{Arendt, Between Past and Future, supra} note 12, at 179. Arendt's views on the public nature of primary and secondary education evolved over time. For example, Arendt was reluctant to choose public education as the ideal vehicle for resolving political issues. For this reason, Arendt initially disagreed with the NAACP's focus on desegregation in public schools, arguing in a highly controversial piece that the desegregation effort should instead target anti-miscegenation laws and discrimination in public accommodations and transportation. \textit{See Hannah Arendt, Reflections on Little Rock, Dissent}, Winter 1959, at 45, 46-48. Arendt revised her stance after correspondence with Ralph Ellison, the author of \textit{Invisible Man}. Ellison described the role of school children in the desegregation struggle as part of an African-American tradition of "sacrifice" and as a "rite of initiation" into the experience of racism. In a letter to Ellison, Arendt acknowledged that she had failed to appreciate both the African-American civic tradition and the pervasiveness of the white hatred which African-American children routinely encountered even absent participation in the desegregation campaign. \textit{See Elisabeth Young-Bruehl, Hannah Arendt: For Love of the World} 316 (1982).

\textsuperscript{35} \textit{Arendt, Between Past and Future, supra} note 12, at 180. Sherry echoes this view. \textit{See Sherry, Responsible Republicanism, supra} note 3, at 166 ("[M]ulticulturalism ... is not only compatible with a responsible republican education, it is also necessary if republicanism is to survive in an ethnically diverse and democratic society."). In contrast, other countries employ narrower views. Arendt describes the "dreaded examination" in England which excludes the majority of students from higher education. \textit{Arendt, Between Past and Future, supra} note 12, at 180. She associates this system squarely with the tradition of "oligarchy" in the United Kingdom, vastly different from American ideals of equality. \textit{See id.}

\textsuperscript{36} \textit{Arendt, Between Past and Future, supra} note 12, at 180.
would emphasize greater participation by parents and teachers, including curricular matters.\textsuperscript{37} It might employ a limited choice regime, perhaps limited to public schools, to strengthen voice. Under such a regime, if parents complained to a school principal about, for example, the lack of homework for their children, the principal would know that parents had an alternative to merely accepting the status quo. Parents and teachers in sufficiently critical mass also would have the ability to remove a principal who resisted change too dogmatically, and to select a replacement.\textsuperscript{38}

Sherry’s “responsible republicanism” school reform plan, in contrast, turns civic republicanism on its head, operating as a “sorting machine”\textsuperscript{39} instead of a source of voice. Her plan uses total school choice as virtually the sole means of education reform. Voice—parents acting and speaking in concert to improve public institutions such as schools—lacks even a cameo role in her account. Instead, parents appear as individual consumers in an educational convenience store, making choices among school products shipped to the grocer’s shelves.

Education as a shopping metaphor makes parents appear at best quixotic and at worst irresponsible if they opt for loyalty toward admittedly imperfect schools, deploying voice to make the schools better over time. After all, one would not expect to see shoppers decide what detergent to buy by saying as a group: “We know this cleanser has problems, but if we can just get together and start a letter-writing campaign, we're sure that the Luxo-Soap Corporation will find a better way to get out that chocolate stain!”\textsuperscript{40} Rather than display loyalty and voice, we expect consumers to exit or, in this case, switch to another detergent.\textsuperscript{41} Yet exit without voice, while it may be an appropriate strategy in the market, effectively sabotages civic republican commitments. Because Sherry focuses only on individual responsibility, she does not even notice the tension between civic republican precepts and her proposal. Indeed, Sherry’s rec-

\textsuperscript{38} This kind of voice has been maximized in the Chicago school reform plan. See \textsc{generally} Michael B. Katz, \textit{Chicago School Reform as History}, 94 TCHRS. C. REC. 56 (1992).
\textsuperscript{39} See Liebman, \textit{supra} note 37, at 293.
\textsuperscript{40} I thank my three year old daughter, Sarah, for influencing my discussion in this section.
\textsuperscript{41} See \textsc{Hirschman}, \textit{supra} note 37, at 21-25.
ommendation amounts to a contradiction in terms: not civic republicanism, but civic privatism.

Sherry's proposal discounts the voice and loyalty necessary to maintain democratic institutions like the public schools. Because vouchers make exit so easy, voice seems like a waste of effort, and loyalty a luxury beleaguered parents cannot afford. Unfortunately, in this context, the eclipse of voice does not mean merely that one detergent sells more than another. The result is far more dire: a vital public institution, the public school system, is increasingly denuded of the concerned parents that it needs to remain viable. While markets do not mourn this sort of nonpecuniary loss, a democratic society should.

Sherry's discounting of voice is all the more striking in light of her relegating to a footnote issues of race, religion, and disability discrimination. More extended treatment of these issues might have been appropriate, given that civil rights lawyers, who have been confronted with choice plans for decades, historically have viewed that option as animated largely by racism, as white parents seek to exit from integration. Indeed, Sherry, in her analysis of "irresponsible" choices, unintentionally demonstrates how focusing on choice to the neglect of voice replicates practices of subordination.

Sherry is harsh in dealing with the "choices" of parents who do not "make the effort necessary to obtain a better education for their children." According to Sherry:

A parent who refuses to exercise her responsibility to provide her children with an adequate education—when the state, through vouchers, is offering her the means to do so—is . . . neglecting a basic task of parenthood. And perhaps her children will be better off with the state as surrogate parent.

42. See id. Arendt makes a somewhat similar point in arguing that the political potential of the labor movement largely ended when the movement became powerful enough to shed its marginal status and exit into the ranks of "players" in the larger society. See ARENDT, THE HUMAN CONDITION, supra note 12, at 218-19.

43. See Sherry, Responsible Republicanism, supra note 3, at 206 n.318. Sherry also discusses whether choice plans would increase segregation, and concludes they would not. See id. at 202-03. For a discussion of the intersection of race and disability in public education, see Theresa Glennon, Race, Education, and the Construction of a Disabled Class, 1995 WIS. L. REV. 1237 (1995).


45. Sherry, Responsible Republicanism, supra note 3, at 203.

46. Id. at 204; cf. Peter Margulies, The Lawyer as Caregiver: Child Client's Competence in Context, 64 FORDHAM L. REV. 1473 (1996) (discussing the role of lawyer for a
Sherry also is harsh in dealing with unmarried teachers who become pregnant, whom she also believes have acted irresponsibly and are poor role models for their students.\(^7\) She is not wrong to focus on the importance of parental involvement in education, or on the diminished life chances that often accompany teenage parenthood. Yet analyzing these issues solely in terms of individual choice and irresponsibility mischaracterizes both the problem and potential solutions.\(^4\)

Consider the issue of parental involvement in education. A nuanced view would not contest the sad reality that some parents are indifferent, or worse, in the face of their children’s needs. Sherry, however, ignores the challenges faced by parents, disproportionately poor and working-class women, who may be working two or more jobs just to get by, and sometimes can’t make it to school for a tête-à-tête with a teacher.\(^4\) Listening to the voices of parents living in poverty\(^5\) might have enriched child in custody and child welfare disputes). Sherry goes on to suggest a “proxy shopping” system which will alleviate the harshness of this approach. Sherry, Responsible Republicanism, supra note 3, at 204-05. Nonetheless the starkness of Sherry’s attribution of irresponsibility lingers.\(^47\)

47. *See* Sherry, Responsible Republicanism, *supra* note 3, at 178-79.

48. This is not to argue that it is impossible to make considered judgments about character and virtue in particular situations. All human beings, including people living in poverty, make judgments constantly. Sherry is correct that for some on the Left, a focus on materialist analysis and distributive justice has obscured links between public policy and ostensibly “private” issues of character. One extension of the feminist deconstruction of the public/private distinction is a willingness to make connections between policy and character in some contexts. *See* Joan Meier, Domestic Violence, Character, and Social Change in the Welfare Reform Debate 3 (June 8, 1996) (unpublished manuscript, on file with the Catholic University Law Review). Yet those making connections between policy and character should not neglect the demagoguery practiced by politicians and others who use poverty and education issues to make coded statements about race. This is the sub-text that has animated critiques of welfare reform proposals. *See* Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare “Reform,”* 26 U. Mich. J.L. Reform 741 (1993); Beverly Horsburgh, Schrödinger’s Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color, 17 CarDOZO L. REV. 531 (1996); Lucie E. White, *On the “Consensus” to End Welfare: Where are the Women’s Voices?*, 26 Conn. L. REV. 843 (1994); Lucy A. Williams, The Ideology of Division: Behavior Modification Welfare Reform Proposals, 102 Yale L.J. 719 (1992).


50. *See* White, *supra* note 48. A substantial body of literature employing narrative has developed on the importance of poverty lawyers listening to their clients. *See generally* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107 (1991); Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475 (1993); Clark D. Cunningham, A Tale of Two Clients: Thinking About Law as Lan-
Sherry's analysis. Valuing such voices also would lead to a richer array of strategies for encouraging parental involvement. It would suggest, for example, that programs like Head Start, which organize parents living in poverty and offer a forum for their voices, can complement, if not replace, the market mechanisms Sherry favors.\textsuperscript{51}

B. Voice and the Multicultural Curriculum

Sherry's advocacy of a choice regime is linked with her distrust for voice in education, particularly in curricular matters. Here, as elsewhere, Sherry condemns what she views as the corrupting effect of identity on truth. Sherry's principal target is what she calls "particularistic multiculturalism," exemplified by curricula with an Afrocentric perspective.\textsuperscript{52} Sherry's concern is that curricula which stress the achievements of particular ethnic groups will balkanize education by breaking up historical truth into a "futile cacophony of conflicting claims."\textsuperscript{53}

Unfortunately, here as elsewhere, Sherry herself plays identity politics under cover of accusing others. In her discussion of Afrocentric curricula, she raises only two specific points. The first is the assertion by some scholars that much of Western civilization initially came from Africa, not Greece and Rome.\textsuperscript{54} This point Sherry dismisses out of hand, as too preposterous to entertain. The second point is the by-now obligatory mention of Professor Leonard Jeffries\textsuperscript{55} of the City University of New York, whose effusions have made him the perverse poster child of opponents of Afrocentric programs.\textsuperscript{56} For Sherry, the merest mention of the "Black Athena" thesis or of Leonard Jeffries apparently functions in lieu of any...


\textsuperscript{52} Sherry, Responsible Republicanism, supra note 3, at 167. Sherry supports some visions of multiculturalism, and recognizes that standards of cultural literacy require revision to reflect multicultural concerns. See id. at 166-67.

\textsuperscript{53} See id.; Sherry, Sleep of Reason, supra note 10, at 482-83.

\textsuperscript{54} Sherry, Responsible Republicanism, supra note 3, at 167.

\textsuperscript{55} See Sherry, Sleep of Reason, supra note 10, at 482 (citing, inter alia, MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION (1987)).

\textsuperscript{56} See Sherry, Responsible Republicanism, supra note 3, at 167 n.157.

\textsuperscript{57} See WILLIAMS, THE ROOSTER'S EGG, supra note 6, at 55-56, 144-45.
analysis of Afrocentric theory or practice. Yet, the attempt to demonize a whole group because of the judgments of a few is, ironically, what Sherry believes is wrong with the approach of outsider scholars to the dominant culture.\textsuperscript{58}

Supplying another example of an Afrocentric approach helps demonstrate both that Sherry's claims about the alleged evils of Afrocentric curricula reflect rhetoric more than reality, and that some Afrocentric methods \textit{can} be consistent with a civic republican approach to the interpretation of history. A useful example for these propositions is the case of Lincoln and the slaves. One of the great American articles of faith is the belief in Lincoln, frequently viewed as our greatest President, as "the Great Emancipator," a personification of the struggle against bigotry, racism, and systems of oppression.\textsuperscript{59} An Afrocentric perspective would add some other colors to this portrait.

An Afrocentric perspective on Lincoln would note that many slaves freed themselves by heading toward Union lines upon the outbreak of the Civil War, to some degree making emancipation a fait accompli at the time Lincoln issued the Emancipation Proclamation.\textsuperscript{60} This perspective also would stress the role such self-freed slaves played in the defeat of the South through their roles as Union soldiers and workers.\textsuperscript{61} In addition to emphasizing the agency of African-Americans in the struggle for freedom, an Afrocentric view of Lincoln would note the anomalies in Lincoln's views and actions. Such a view would focus not only on his efforts to end slavery but also on the failure of the Emancipation Proclamation to cover border states,\textsuperscript{62} and on Lincoln's persistent support of government-sponsored African-American resettlement in Liberia and

\textsuperscript{58} See Sherry, \textit{Responsible Republicanism, supra} note 3, at 165 & n.146.

\textsuperscript{59} A sense of this view, which was the received wisdom for American school children, can be had in considering Justice William O. Douglas's reference to "the Lincoln tradition . . . [where] the individual is important, not his race, his creed, or his color." \textit{Wright v. Rockefeller}, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting). For a more nuanced, but still generally favorable portrait of Lincoln, see \textit{LAWANDA COX, LINCOLN AND BLACK FREEDOM: A STUDY IN PRESIDENTIAL LEADERSHIP} (1994).


\textsuperscript{61} See James M. McPherson, \textit{Foreword} to \textit{COX, supra} note 59, at xi.

\textsuperscript{62} See Brown, \textit{supra} note 60, at 855; cf. \textit{BELL, FACES AT THE BOTTOM OF THE WELL, supra} note 6, at 24 (arguing that the Emancipation Proclamation was "a potent symbol for the slaves, many of whom simply took off when they learned that Lincoln had issued a freedom order").
Finally, an Afrocentric perspective would award the last word on such resettlement schemes to Frederick Douglass: "We deem it a settled point that the destiny of the colored man is bound up with that of the white people of this country . . . . We are here, and here we are likely to be."

What is striking about considering the case of Lincoln and the slaves from the standpoint of a civic republican theorist like Arendt is that she paints a portrait of Lincoln remarkably similar to one rendered from an Afrocentric perspective. While Arendt recognizes the force of Lincoln's pragmatic approach in a time of the gravest national crisis, she takes a hard look at Lincoln's policies on African-Americans. For example, she describes Lincoln's resettlement idea as a plan for the "deportation" of blacks. She also argues that the Fourteenth and Fifteenth Amendments could not remedy the "original crime" of the exclusion of African-Americans from membership in the American republic. As a more fitting measure, she urges passage of a constitutional amendment that would replace the general language of the Civil War amendments with language "addressed specifically to the Negro people of America."

We can see in Arendt's and outsider scholars' views of Lincoln and the slaves the same commitment to re-interpretation. Arendt and the outsider scholars decline to accept the standard account of Lincoln. Instead, they tell a different story, a counter-story, which enhances unheard voices. This counter-story triggers not dutiful encomiums to Lincoln or wholesale alienation but, instead, a richer appreciation of the fundamental connection between white and black Americans outlined by Frederick Douglass.

II. LEGAL STORYTELLING

Farber and Sherry's treatment of outsider legal scholarship displays the same distrust for voice and interpretation as Sherry's substantive discussion of education. Here, too, civic republican theorists like Machiavelli and Arendt offer little support for Farber and Sherry's views. Con-

64. Id. at 40 (omission in original) (quoting Frederick Douglass in an 1858 issue of his newspaper, North Star).
66. ARENDT, CRISES OF THE REPUBLIC, supra note 12, at 90.
67. See id. at 90-91.
68. Id. at 91.
versely, outsider scholarship offers some striking parallels with civic humanist methods.

A. Farber and Sherry on the Perils of Outsider Scholarship

Farber and Sherry argue that the invocation of identity and the use of narrative in outsider scholarship clash with sound criteria for assessing merit in legal scholarship. Although Farber and Sherry acknowledge that recounting experiences of subordination can help form a valid scholarly perspective, they point to a number of risks. Broadly speaking, Farber and Sherry's misgivings relate to positivist apprehensions about the breakdown of distinctions between reason and emotion. This breakdown will, Farber and Sherry fear, eventually translate into a breakdown of social order and an eclipse of truth.

Farber and Sherry's first point is that outsider scholarship creates a kind of "group-think" which stifles dialogue and stymies scholarly inquiry. They also worry that identity will precipitate a balkanization of America. As each group claims a piece of the action, American society becomes "an empty field on which groups battle for power."

Farber and Sherry view truth as largely synonymous with "fact," defined as matters that can be measured empirically. Their empirical criteria disfavor first person narratives. Such stories often are not verifiable through conventional empirical methods. Furthermore, according to Farber and Sherry, they trigger doubts about accuracy because of the merging of the scholar and narrator roles. Since the scholar has a thesis to propound, she faces a strong temptation to tailor her story to fit her views. This binding up of the scholar's identity as a person with her scholarship is dangerous, according to Farber and Sherry, because it replaces reason and cognition with rhetoric and emotion. Farber and Sherry describe Arendt as an ally in this debate, offering as support a paraphrase of her discussion of truth and politics: "[T]ruth cannot remain truth and yield to expediency; truth demands resistance to the...

69. For example, Sherry's concern with the "balkanization" of parent-controlled education echoes the Supreme Court's concern with balkanizing through the creation of majority-minority voting districts in Shaw v. Reno. See Sherry, Responsible Republicanism, supra note 3, at 161; Shaw v. Reno, 509 U.S. 603, 657-58 (1993).
70. Farber & Sherry, Anti-Semitism, supra note 10, at 864.
71. See Farber & Sherry, Telling Stories, supra note 10, at 835-38.
72. See Farber & Sherry, Legal Storytelling and Constitutional Law, supra note 10, at 50-51. Farber and Sherry also reject an aesthetic account of outsider narratives. See Farber & Sherry, Telling Stories, supra note 10, at 844.
blandishments of this world. And, conversely, governance cannot yield to truth without losing the forms of interaction that constitute politics."  

The consequences of ignoring these warnings will be dire for Farber and Sherry. All values will be up for grabs, and the monsters of our unreasoning imagination—anti-Semitism, Holocaust revisionism, and religious fanaticism—will take center stage. Brief consideration of Farber and Sherry's most provocative article to date, Is the Radical Critique of Merit Anti-Semitic?, conveys how Farber and Sherry arrive at this grim conclusion. In this piece, Farber and Sherry assert that radicals, including scholars of color and feminists, have engaged in a devious form of identity politics by critiquing the idea of merit in American political discourse, particularly on affirmative action. According to Farber and Sherry, radicals critique the rhetoric of merit in order to cover up the otherwise inescapable (to Farber and Sherry) conclusion that cultural factors, not discrimination, account for the difficulties faced by many people of color in various settings, including academia. The success of Jews and Asian-Americans in this country, particularly that of Jews in attaining positions in institutions of higher learning, proves, for Farber and Sherry, that the presence of discrimination has a relatively minor impact on a group's prospects in the marketplace.

73. Farber & Sherry, Scholarship and Truth, supra note 10, at 650.
74. See Farber & Sherry, Anti-Semitism, supra note 10.
75. See id. at 866-67. For a useful account of one outsider scholar's view on merit in the context of affirmative action, see Richard Delgado, Rodrigo's Tenth Chronicle: Merit and Affirmative Action, 83 GEO. L.J. 1711 (1995) (arguing that claims of merit must always be considered in context, and that the context of dominant groups' claims of merit, for example, as a basis for discrediting affirmative action, reinforces subordination).
76. The use of the term, "rhetoric" is mine, not Farber and Sherry's. Farber and Sherry believe that merit ultimately is not a rhetorical construct, but an unchanging, empirically verifiable set of principled criteria. See Farber & Sherry, Anti-Semitism, supra note 10, at 881. Indeed, Farber and Sherry contrast their empirical view with the focus on rhetoric of outsider scholars. See Farber & Sherry, Legal Storytelling and Constitutional Law, supra note 10, at 42-44. Yet, Farber and Sherry expressly decline to tell us exactly what their empirical criteria of merit might be. See Farber & Sherry, Anti-Semitism, supra note 10, at 882 ("It is not our purpose to offer our own theory of merit in place of radical constructivism."). Absent elaboration of these criteria, readers are left only with Farber and Sherry's rhetoric.
77. See Farber & Sherry, Anti-Semitism, supra note 10, at 866. Farber and Sherry's premise is not all that novel. Rather, it is a mainstay of conservative arguments, like those cited approvingly by Sherry in her Responsible Republicanism piece. Sherry, Responsible Republicanism, supra note 3, at 153 (citing Dinesh D'Souza and Charles Murray).
78. See Farber & Sherry, Anti-Semitism, supra note 10, at 867-69. Farber and Sherry do not deny that discrimination plays some role, but they argue that this role has been substantially overstated. See id. at 882.
According to Farber and Sherry, this alleged state of affairs imposes a special burden of responsibility on radical scholars, including scholars of color. Outsider scholars have critiqued the invocation of "merit"—including, for example, the identification of the traditional doctrinal law review article as the standard for legal academia—as an exclusionary device which stacks the deck against outsiders.\textsuperscript{79} However, in challenging the rhetoric of merit, Farber and Sherry warn radical scholars unknowingly encourage conspiracy and collaborationist theories about Jews and Asian-Americans by depriving these groups of any legitimate way to explain their success.\textsuperscript{80} Farber and Sherry imply that the best way for outsider scholars to avoid these dire consequences is to exercise responsibility by accepting the mainstream "scientific-legal paradigm."\textsuperscript{81} This paradigm values doctrinal and empirical work and shunts outsider narratives toward a tame existence as "case studies" that bolster quantitative analysis, or toward the oblivion of "stories told out of school."

Answering Farber and Sherry's charges is useful only to demonstrate how virtually their entire argument flows from false dichotomies like the reason/emotion distinction. For example, if one opens up the concept of merit, which Farber and Sherry seem to equate with marketplace success and standardized test scores,\textsuperscript{82} into an inclusive conception of virtue, the


\textsuperscript{80} See Farber & Sherry, Anti-Semitism, supra note 10, at 881.


\textsuperscript{82} See Farber & Sherry, Anti-Semitism, supra note 10, at 869-71 (citing market and educational successes); Farber, Outmoded Debate, supra note 10, at 913-14 (commenting on Law School Admissions Test scores). It is important to note that Farber and Sherry support affirmative action on corrective justice grounds. See Farber & Sherry, Anti-Semitism, supra note 10, at 859. They note this almost casually, however, and elsewhere make little effort to situate the debate about merit in the affirmative action context, where it arose.

As I discuss the narrow conception of merit offered by Farber and Sherry, candor compels the recognition that there is a notable elitist strain in civic republican theory.\textsuperscript{83} Arendt, for example, was extremely skeptical about one expansive form of affirmative action—open university enrollment—endorsed by advocates of "race consciousness" like Duncan Kennedy. See YOUNG-BRUEHL, supra note 34, at 417-18. Yet, as Arendt's biographer notes, Arendt's views here involved an abstraction from her rather limited experience with the early years of open enrollment at City College in New York. See id. at 418-19. One should not necessarily read them as a definitive verdict on affirmative action.

There is no question that tension existed between Arendt's elitism and her commitment to popular participation in politics which informed her thought. The multicultural humanism sketched in this Article is an endeavor to situate the themes of participation and narrative in Arendt's work as a base for subsequent explorations by outsider legal scholars like Patricia Williams, Derrick Bell, and Richard Delgado. In contrast, stressing Arendt's elitist side is an inadequate interpretation of her thought because it discounts
outsider scholars’ commitment to excellence is manifest. Moreover, Farber and Sherry’s stress on group culture becomes far more productive if one replaces their dichotomy between discrimination-based and culture-based explanations of inequality with a conception of subordination. This conception stresses the reciprocity, not dichotomy, of discrimination and culture.

We will put aside until the next section of this Article, which deals with hate speech, the obvious point that Farber and Sherry’s analysis hardly foresews emotion; indeed, it diligently presses virtually every button in sight. My main goal here is to demonstrate that Farber and Sherry’s approach represents a significant misunderstanding of civic republican ideas.

B. Civic Humanism, Identity, and Truth

To understand why Farber and Sherry’s argument is misguided, one must grasp a number of features of civic republican discourse. The first is the importance of stories. The second is the salience of identity. The third feature is the interaction of reason and emotion, and the fourth is the need for an interpretive, not just empirical, concept of truth.

We begin with the central role of storytelling in civic humanist thought. In a sense, civic republicanism is a series of sub-plots and scenic routes with one overarching narrative: the loss and subsequent “memory and recollection” of voice, freedom, and self. Machiavelli outlined his salient commitments to participation and narrative.

83. See infra notes 127-67 and accompanying text (noting virtues in outsider scholarship such as critical thought, interdisciplinary perspectives, and insight into connections between the personal and political, the many facets of identity, and the relationship between pedagogy and scholarship). Ironically, some academics on the Left who share Farber and Sherry’s skepticism about narrative have castigated outsider scholars for achieving even a modest level of market success and, thereby, losing their authenticity as outsider voices. See Coughlin, supra note 11, at 1229-34. Sometimes merit is not universally applauded, at least when outsiders achieve it.

84. See Austin, supra note 32, at 246 n.59 (noting how whites used lynching and race riots to destroy and discourage African-American economic enterprise); Malcolm Gladwell, Black Like Them, THE NEW YORKER, Apr. 29 & May 6, 1996, at 74-75 (discussing, in part through personal narrative, how differing economic prospects of Afro-Caribbeans and African-Americans in North America stem from the cultural impact of white prejudices and expectations). The self-selection process of immigration also influences what we perceive as group culture, as well as group success. See id. at 75-76.

85. ARENDT, ON REVOLUTION, supra note 12, at 266-67.

86. See MACHIAVELLI, THE PRINCE AND THE DISCOURSES, supra note 13, at 399. The urge to remember and recollect is so powerful, particularly for marginalized groups, that it can evoke a freedom that existed only as an aspiration. For scholars, the African-American civil rights movement was one such enactment of aspiration, itself fueled by biblical stories of deliverance. See David Luban, Difference Made Legal: The Court and
theories through stories about ancient Rome or contemporary Florence. He singled out villains and fools and those rare citizens who cared more about the future of the republic than about their own wealth or convenience. For Machiavelli, one virtue of storytelling was its entree into the world of the concrete and particular. He noted that "the quickest way of opening the eyes of the people is to find the means of making them descend to particulars, seeing that to look at things only in a general way deceives them." Similarly, Arendt employed storytelling in much of her work, using narrative to advance theories about the rise and fall of revolutions, the tragically joined history of racism, imperialism, and anti-Semitism, and the response of great men and women to times of trial.

The civic humanists' penchant for narrative also has engendered confusion about which scholarly discipline should claim them—confusion matched today by Farber and Sherry's anxiety about whether outsider narratives constitute "legal scholarship." Arendt's work has inspired substantial debate of this kind: was she doing history, philosophy, interpretive social science, or an elaborate and opinionated form of political journalism? Similar confusion has characterized analysis of Machiavelli's work for almost 500 years. Such attention from both scholars and general readers suggests that the challenge to disciplinary boundaries posed by civic humanist thought yields connections and resonances obscured by work within established categories.

Arendt's identity as an outsider helped drive her interdisciplinary explorations. As a refugee immediately after World War II, she described herself as trying to live "a decent human existence . . . on the fringes of

88. See generally ARENDT, ON REVOLUTION, supra note 12.
89. See generally ARENDT, ORIGINS OF TOTALITARIANISM, supra note 12 (stating that the eras of anti-Semitism, imperialism, and totalitarianism demonstrate the need for a new political principle, based upon the lessons of the old).
90. See generally ARENDT, supra note 1 (focusing on the experiences of men and women during the "dark times" of the first half of the Twentieth Century).
91. See Seyla Benhabib, Hannah Arendt and the Redemptive Power of Narrative, 57 SOC. RES. 167 (1990), reprinted in CRITICAL ESSAYS, supra note 12, at 115: [F]rom the standpoint of established disciplinary methodologies, Arendt's work defies categorization while violating a lot of rules. It is too systematically ambitious and overinterpreted to be strictly a historical account; it is too anecdotal, narrative, and ideographic to be considered social science; and although it has the vivacity and stylistic flair of a work of political journalism, it is too philosophical to be accessible to a broad public.

Id.
92. See BERLIN, supra note 13, at 25-35.
society, where one then runs the risk of starving or being stoned to death.”
For a thinker in such a marginalized position, with Arendt’s wide interests, no one discipline would suffice. For example, Arendt was steeped in the classics of philosophy, which she had studied with Karl Jaspers and Martin Heidegger. She also was a student of poetry and fiction, from Homer and Shakespeare to Kafka. She needed both to situate herself within the Western intellectual tradition, and to tell the story she had lived of the descent of the modern world into a bureaucratically administered genocide. To do justice to these goals required that Arendt develop her own genre, a kind of poetic and narrative prophecy of culture and politics, situated as she was “on the fringes” of extant disciplines.

The same need to work beyond traditional boundaries that leads civic humanists to embrace narrative also engenders an openness to claims of identity and emotion, and a conception of truth which is interpretive, not narrowly empirical. Consider first the civic republican stance regarding empiricism. Arendt’s approach to political theory and philosophy expressly rejected reliance on empirical method. She described empiri-


94. Arendt posthumously shocked the intellectual community through the recent revelation of her efforts some years after World War II to rehabilitate Heidegger, who had joined the Nazi Party in the 1930s. For Arendt’s description, immediately after the war, of Heidegger’s bad behavior, see ARENDT & JASPERS, supra note 93, at 47-48, describing Heidegger as a “potential murderer” for his role in the persecution of his teacher and colleague, Edmund Husserl. While these revelations have been somewhat exaggerated, any efforts on Arendt’s part to minimize Heidegger’s Nazi affiliations were inap-

propriate. In significant part, these efforts stemmed from Arendt’s conviction that Heidegger was a great philosopher, and that his thought was largely free of the affiliations of his personal history. Scholars since Arendt have found Heidegger to be an important source of insight. See, e.g., Rubin, supra note 11, at 944-47 (applying Heidegger’s thought to suggest criteria for evaluating legal scholarship, including outsider legal narratives).

95. For a sense of Arendt’s insight into her outsider status vis-à-vis established disciplines, see Hannah Arendt, “What Remains? The Language Remains”: A Conversation with Günter Gaus, in ARENDT, ESSAYS, supra note 12, at 1, in which Arendt responds to a question about whether she views “her role in the circle of philosophers’ as unusual or peculiar because she is a woman”:

I am afraid I have to protest. I do not belong to the circle of philosophers. My profession, if one can even speak of it at all, is political theory. I neither feel like a philosopher, nor do I believe that I have been accepted in the circle of philosophers, as you so kindly suppose.

Id.

96. Arendt’s disdain for the social sciences is pronounced, and probably unduly dismissive of the imagination reflected in the best empirical work. For more discussion of Arendt’s views on social science, see David Luban, Explaining Dark Times: Hannah Arendt’s Theory of Theory, 50 So. Res. 215 (1983), reprinted in CRITICAL ESSAYS, supra
ally-based social science as a reductive and imperialist discipline, in which “everything distinct disappears and everything that is new and shocking is (not explained but) explained away . . . through . . . reducing it to a previously known chain of causes and influences.”

This rejection of empiricism led Arendt to approach truth through interpretation, emotion, and the revelation of identity. The scholar did not pretend to be transparent—a mere pane of glass encasing neutral “findings.” Instead, she viewed scholarship in the best sense as an aesthetic enterprise, involving the selection and recounting of narratives. These narratives captured the alienation, domination, and anonymity of the modern world, and the precious echoes of voice, like those of the labor and civil rights movements, in a generally discouraging landscape. The aesthetic dimension of this enterprise transcends Farber and Sherry’s dichotomy between emotion and cognition, and implicates issues of identity: “personal experience,” Arendt wrote, “is necessarily involved in a historical investigation that employs imagination consciously as an important tool of cognition.” While Arendt noted, seemingly anticipating Farber and Sherry’s criticisms of first-person narratives, that some might view the invocation of personal identity as “talking out of school,” she saw that notion of scholarship as unnecessarily limiting. She viewed acknowledgment of her identity as a Jew, particularly in discussing anti-Semitism and the suffocation of voice during the Nazi terror, as itself a virtue. The virtue was two-fold. First, an affirmation of identity—in this context, belonging to a subordinated group—resists the assimilation to mass culture that Arendt diagnosed as a central consequence of anti-Semitism and other forms of group subordination. Second, an affirmation of identity, at least with regard to subjects of the enormity of anti-Semitism and the Holocaust, leads to a richer and more honest scholarship free from the distortions of a studied neutrality.

The best illustration of Arendt’s views is her reply to detractors of her controversial study, The Origins of Totalitarianism. This work uses narrative to relate the confluence of capitalism, racism, anti-Semitism, and modern bureaucratic organization that helped make Communism and Nazism possible. In the work, Arendt plainly expressed her disdain for...

98. See Minow, supra note 12, at 33-34.
100. Arendt, On Humanity in Dark Times: Thoughts About Lessing, supra note 1, at 18.
101. See Arendt, A Reply to Eric Voegelin, supra note 97, at 401-08.
the horrors of the modern age. Some of Arendt's contemporaries criticized her rejection of a neutral stance as being "emotionally determined."\textsuperscript{102} Arendt responded that "objective" scholarship merely affected a neutral stance. As a result, it could not do justice to the enormity of events like the Holocaust. Explicit emotion was sometimes necessary, Arendt argued, to restore a broader objectivity, defined as an appreciation of context and a rejection of a strained detachment. The goal, Arendt asserted, was to "describe the totalitarian phenomenon as occurring, not on the moon, but in the midst of human society."\textsuperscript{103}

This view also leads to a view of the most virtuous role for scholarship and its relation to "truth," which is far different from the perspective ar-

\textsuperscript{102} Disch, \textit{supra} note 12, at 679 (citing a criticism of Arendt's work by Eric Voege- lin). My discussion of the role of emotion in Arendt's conception of scholarship and history has been influenced significantly by Disch's account.

\textsuperscript{103} \textit{Id.} Arendt argued similarly about describing other inequities in society, such as those based on class:

The natural human reaction to such conditions is one of anger and indignation because these conditions are against the dignity of man. If I describe these conditions without permitting my indignation to interfere, I have lifted this particular phenomenon out of its context in human society and have thereby robbed it of part of its nature . . . . For to arouse indignation is one of the qualities of excessive poverty insofar as poverty occurs among human beings.

\textit{Id.}

Ironically, one of the most trenchant critiques of Farber and Sherry's model of scholarly objectivity comes from an authority they cite as an ally, Richard Posner. Posner observes that the guise of neutrality in legal rhetoric is basically a form of "rhetoric, in which the speaker enhances the persuasive power of his argument by persuading the audience that he is the kind of person who ought to be believed whatever he says." POSNER, \textit{supra} note 11, at 74-75. In contrast, Posner is ambivalent about first-person outsider narratives, using them as guides to interpretation in his judging, while inveighing against them in his scholarship, which is best known for a positivist economic analysis of law. Cf. Martha C. Nussbaum, \textit{Poets as Judges: Judicial Rhetoric and the Literary Imagination}, 62 U. CHI. L. REV. 1477, 1502-09 (1995) (discussing the Seventh Circuit's decision in \textit{Carr v. Allison Gas Turbine Division}). \textit{Compare Carr v. Allison Gas Turbine Div.}, 32 F.3d 1007, 1010 (7th Cir. 1994) (opinion of Posner, J.) (sexual harassment decision citing WILLIAMS, \textit{THE ALCHEMY OF RACE AND RIGHTS}, \textit{supra} note 2, at 129 for the proposition that, "it is a lot more uncomfortable to be the target of offensive words and conduct than to be merely an observer of them"), with POSNER, \textit{supra} note 11, at 384 (criticizing Patricia Williams for lack of objectivity).

Posner affirms the aesthetic character of legal reasoning, agreeing with Arendt's claim about the primacy of poets. \textit{See} POSNER, \textit{supra} note 11, at 75. Despite his reputation as a purveyor of reductive economic models, Posner the judge understands the dynamics of the power imbalance which also triggers outsiders' wariness about the dominant culture's definition of merit. \textit{See Carr}, 32 F.3d at 1011 (noting the "asymmetry of positions" between the female plaintiff and her male co-workers). In holding for the plaintiff and against the defendant, General Motors, Posner displayed the "imagination" and "indignation" which Arendt viewed as central to the description of manifest wrongs. \textit{See} Nussbaum, \textit{supra}, at 1509.
articulated by Farber and Sherry. It is quite true that Arendt drew a distinction between philosophy and politics. She argued that philosophy was preoccupied with abstract and timeless truths which had no purchase in the political realm. This is why Arendt, when asked to situate herself in one discipline, chose political theory. Arendt's interest in philosophy centered on the moment at which philosophy became political, engaging with the particular, and rendering "philosophical truth" through "teaching by example." The particular is the pathway to political action for the philosopher: "[B]y setting an example and 'persuading' the multitude in the only way open to him, [the philosopher] has begun to act." Ultimately, for Arendt, thought is the highest form of political action. Yet thought and action in this sense are also aesthetic, as Arendt noted. Indeed, the recollection of freedom, voice, and self, which lies at the core of civic republicanism, is ultimately, like all matters of memory, the province of storytellers and poets.

Machiavelli is remarkably close in his own views, articulated centuries earlier. To understand Machiavelli's work, one must understand his identity. After all, Machiavelli was not only a theorist but a person of action in the conventional sense—an advisor to politicians and princes in Renaissance Florence. He conceived of his work as a kind of blueprint for the restoration of the once-glorious Florentine republic. The separation of scholarship and politics contemplated by Farber and Sherry would have struck him as at best naive, and at worst disingenuous. In addition, Machiavelli rejected Farber and Sherry's narrow empiricism. He acknowledged that facts are not illuminating without interpretation. As one commentator puts it, Machiavelli believed that "fact . . . needs to be filled out with opinion, and it is the duty of the historian . . . [to add] sense to actions in order to arrive at truth."
One consequence of this commitment to interpretation is a critical approach to received wisdom. Machiavelli critiqued Christian pieties about goodness and charity as offering no guidance on the complex business of statecraft. In offering this critique, he outraged sanctimonious souls from the Renaissance to the present, becoming a symbol of ruthlessness and deceit in the Western cultural imagination while his advocacy of self-government was frequently forgotten. Arendt, a German Jewish refugee, became an intellectual pariah by arguing both that European Jews were not always well-served by their leaders, both before and during the Holocaust, and that the war criminal Adolf Eichmann posed a challenge to the mass culture of modernity not because of his monumental evil, but because of his banality—because “so many were like him . . . neither perverted nor sadistic, [but] terribly and terrifyingly normal.”

Arendt’s interpretation of the Eichmann trial is a fitting response to Farber and Sherry’s critique of the radical scholars. Sherry, in an essay that makes many of the same points as the Anti-Semitism piece co-authored with Farber, raises Holocaust revisionism—the belief that the Holocaust did not happen—as a beneficiary of the turn away from rationality that she associates with radical theories about the social construction of truth. Arendt, upon the publication of Eichmann in Jerusalem, was criticized with a fervor reserved for Holocaust revisionists.

Arendt received criticism even though her book argued vigorously that Eichmann had to be punished for his role as the chief administrator of the Nazi extermination apparatus, and her book also provided a relentless account of how the Holocaust was implemented by Eichmann and the Nazi bureaucracy. Arendt’s view differs from other accounts, however, on issues of interpretation. For many, the Holocaust permits only one interpretation: it is a singular symbol of pure evil. For

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FLORENTINE HISTORIES, supra note 13, at xi.
113. ARENDT, EICHMANN IN JERUSALEM, supra note 12, at 276.
114. See Sherry, Sleep of Reason, supra note 10, at 483.
115. See id. at 483-84.
116. See BARNOWU, supra note 12, at 146; CANOVAN, supra note 12, at 15.
117. See infra Part III (discussing Arendt’s critique of the Jewish leadership).
118. As Norman Podhoretz, the noted neoconservative, put it: “Murderers with the power to murder descended upon a defenseless people and murdered a large part of it. What else is there to say?” BARNOWU, supra note 12, at 244. For further discussion of the controversy generated by Arendt’s interpretation, see Pnina Lahav, The Eichmann Trial, The Jewish Question, and the American-Jewish Intelligentsia, 72 B.U. L. REV. 555, 569-75 (1992).
Arendt, however, this view was both too easy and too dangerous. Arendt did not believe in a pure evil; she wanted to know what conditions and social arrangements encouraged evil to work in an impure world. Her interpretation of Eichmann as an ordinary man reinforces the roots of genocide in a climate of persecution and defamation, economic displacement, and bureaucratic rationality. Without such knowledge, holocausts would continue to happen. Equipped with this critical understanding, however, one might have a chance at vindicating the pledge "never again" for Jews and all other human beings.

Viewed in this light, a critique, like Arendt's, is properly situated and is not an exercise in relativism or nihilism, but a fulfillment of one's responsibility as a participant in a community. Fulfillment of such re-

119. See Arendt, On Humanity in Dark Times: Thoughts About Lessing, supra note 1, at 18.
120. See ARENDT, ORIGINS OF TOTALITARIANISM, supra note 12, at 37.
121. See ARENDT, EICHMANN IN JERUSALEM, supra note 12, at 36-43.
122. See BARNOW, supra note 12, at 235 ("[Arendt's] argument was based on the assumption that one would be able to prepare, that one would be able to explain, and that precisely the attempt to do so might lead to prevention.").
123. Sherry acknowledges elsewhere the importance of critical thinking. See Sherry, Responsible Republicanism, supra note 3, at 172-75. Her point in Sleep of Reason seems to be that a radical skepticism about facts coupled with a view of cognition that stresses both reason and emotion can pave the way for the Orwellian language of dictatorship. See, Sherry, Sleep of Reason, supra note 10 at 472-84. Here, Sherry is beating at straw with reference to radical skepticism, and is just plain wrong about the effects of the interaction of reason and emotion. Most critical scholars are not radical skeptics. They recognize that interpretation is subject to some constraints, stemming from our common sense notions of plausibility. See Drucilla Cornell, From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation, 11 CARDOZO L. REV. 1687, 1692-99 (1990); Richard K. Sherwin, Law Frames: Historical Truth and Narrative Necessity in a Criminal Case, 47 STAN. L. REV. 39, 41 (1994); Steven L. Winter, The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning, 87 MICH. L. REV. 2225, 2270-71 (1989). For a critical scholar, Holocaust revisionism is not an option, not only because of moral considerations in the abstract, but because telling alternative stories about the evidence at hand is impossible.

Yet—and this is where Sherry is plain wrong—an assessment of which stories fit the evidence, and of what counts as evidence, necessarily calls on both reason and emotion. We cannot explain the haggard appearance of the residents of the liberated concentration camps by viewing them as anorexic models. We cannot explain the flood of photos "ordinary Germans" sent home to their families depicting their summary shooting of unarmed mothers and children as sick jokes. See generally DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS (1996). We cannot explain the stories of terror and loss told by fortunate survivors as a conspiracy or collective delusion. To assess the perverse claims of Holocaust revisionists, we need rationality, but we also need to heed our emotions, as both emerge in a sense of decency.

Two other sources of authority tell us that Sherry is wrong. First, totalitarian governments, precisely because they need to manipulate language, fear critical thinkers who dare to assert that there may be some version of the truth other than the "official" ver-
sponsibilities can create discord and discomfort. Yet such discord is far more healthy than a superficial calm for the future of democracy.\footnote{124}

\section*{C. The Inclusive Virtues of Multicultural Humanism}

Fortified with this discussion of civic humanist commitments, we can readily discern parallels between those commitments and the work of outsider scholars that I have called multicultural humanism. Outsider virtues\footnote{125} echo crucial values in the civic republican tradition, but also lend breadth, depth, and concreteness to areas where the civic tradition is limited by artificial distinctions. Ironically, the outsider virtues largely stem from the assertion of identity critiqued as balkanizing by Farber and Sherry. Asserting an identity always entails a risk—one can encounter indifference, envy, or animus, or, as Farber and Sherry rightly note, one can deploy identity to respond to others in the same manner.\footnote{126}


\footnote{124. Jefferson was more graphic than most on this subject. Hearing about Shay's Rebellion against the State of Massachusetts, Jefferson observed famously that "the tree of liberty must be refreshed, from time to time, with the blood of patriots and tyrants. It is natural manure." \textit{Arendt, On Revolution}, supra note 12, at 236 (citing correspondence between Thomas Jefferson and Colonel William Stephens Smith, Nov. 13, 1787). While Jefferson's maxim may seem reckless in the wake of the Oklahoma City bombing, civic humanists also have endorsed non-violent forms of direct action. See \textit{Arendt, Crises of the Republic}, supra note 12, at 101 (urging constitutional amendment protecting civil disobedience); \textit{Machiavelli, The Prince and the Discourses}, supra note 13, at 120 ("[G]ood laws . . . spring from those very agitations which have been so inconsiderately condemned by many."). See generally Gisela Bock, \textit{Civil Discord in Machiavelli's Istorie Fiorentine}, \textit{in Machiavelli and Republicanism}, supra note 13, at 181 (discussing Machiavelli's analysis of the virtues and risks of discord); Albert O. Hirschman, \textit{Social Conflicts as Pillars of Democratic Market Society}, 22 \textit{Pol. Theory} 203, 207-08 (1994) (updating Machiavelli's views).

\footnote{125. As Richard Delgado notes, much outsider scholarship exhibits the same virtues that Farber and Sherry presumably would applaud in any setting, including doctrinal acuity. \textit{See Delgado}, supra note 6, at 192-93. My focus here on distinctive outsider virtues should not be viewed as holding that outsiders do not possess, in large measure, the more conventional virtues that Farber and Sherry endorse. Nor should my argument be taken to mean that the virtues of voice described here are necessarily limited to outsiders.

\footnote{126. \textit{See Farber & Sherry, Scholarship and Truth}, supra note 10, at 654 n.45 (discussing controversy over Randall Kennedy's critique of outsider methods and claims).}
Where both outsider scholars and civic republicans differ with Farber and Sherry is in viewing the risks as both unavoidable and worth taking.

1. Critical Thought

One value of outsider legal narratives is critical thinking, which Sherry extols in children, although she seems to view it as a nuisance in adults. Sherry's brand of critical thinking is a kind of generic capacity which does not conflict with her and Farber's presumption in favor of the status quo. But, for outsider scholars, identity offers a safeguard against such smugness. As Patricia Williams notes:

I was acutely aware that the choice of identifying as black (as opposed to white?) was hardly mine; that as long as I am identified as black by the majority of others, my own identifying as black will almost surely follow as a simple fact of human inter-dependency.

An awareness of outsider identity gives outsider scholars an opportunity to look for sources of meaning besides the Mount Rushmore-like narratives often fed to schoolchildren. Outsider scholars can appreciate the promise of rights and equity embodied in the lives and deeds of Washington, Jefferson, Lincoln, and Roosevelt, yet also see (and indeed, feel) the feet of clay frequently worn by these mythic figures. Such a critical stance from outsiders engenders "balkanization" only if one sees balkanization in every principled demurrer from the prevailing consensus.

127. See Sherry, Responsible Republicanism, supra note 3, at 172-75.
128. See Sherry, Sleep of Reason, supra note 10, at 475-77.
130. Farber and Sherry assert that the commitment to social change demonstrated by the outsider narrative scholars risks a compromise of scholarly merit and distinguishes them from quantitatively-oriented scholars. Both Farber and Sherry's concerns are oversold. Ironically, a commitment to social change, as well as an interest in narrative, were characteristic of the Enlightenment, which Farber and Sherry eulogize as a pillar of "rational argument" standing in stark contrast with the rhetoric and emotion of outsider scholarship. See Farber & Sherry, Legal Storytelling and Constitutional Law, supra note 10, at 51. Enlightenment philosophies, such as Voltaire, Montesquieu, and Rousseau were all motivated, according to Arendt, more by the "search for political freedom" than by any abstract "quest for truth." See ARENDT, ON REVOLUTION, supra note 12, at 120-21. Many philosophers, especially Voltaire, made virtuosic use of narrative, as any reader of Candide will agree. See generally VOLTAIRE, CANDIDE (Penguin ed. 1947).

By the same token, empirical social scientists frequently have been motivated by a desire to create social change. Much of the social science literature on racism reflects this commitment. See Max Deutscher & Isidor Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. PSYCHOL. 259 (1948), reprinted in JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 150, 150 (3d ed. 1994) ("For social scientists interested in 'social engineer-
2. Crossing Disciplinary Boundaries

A better interpretation of multicultural humanism is that outsider scholars have resisted balkanization by crossing arbitrary boundaries between disciplines.\textsuperscript{131} Just as Arendt's work boldly partook of narrative, political theory, and history, outsider scholars have crossed disciplinary boundaries.\textsuperscript{132} And, just as Arendt was driven to cross such boundaries by her own awareness of marginalization, a similar awareness has animated the outsider scholars' explorations.\textsuperscript{133} Holding this work to a uniform metric of merit applicable to doctrinal and empirical work is, as Richard Delgado says, like judging the worth of a blues singer and an operatic soprano with no appreciation for their respective contexts.\textsuperscript{134}

Indeed, Farber and Sherry's view recalls the patronizing attitude of white critics assessing jazz decades ago, who avowed that, "[given] the chance to study . . . the Negro will soon turn from boogie woogie to Beethoven."\textsuperscript{135} Duke Ellington's reply was, "Maybe so, but what a shame!"\textsuperscript{136}

\textsuperscript{131} For a discussion of the discomfort that crossing such boundaries can engender in an audience of more traditional scholars, see Rubin, \textit{supra} note 11, at 908-11.

\textsuperscript{132} Patricia Williams observes that the staff at the Library of Congress wanted to classify her work, which combines narrative, legal analysis, and cultural criticism, as "Afro-Americans—Civil Rights" or "Law Teachers." In response, she suggested "Autobiography," "Fiction," "Gender Studies," and "Medieval Medicine." See WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, \textit{supra} note 2, at 256. I can testify personally to the degree to which Williams's work resists categories. With the assistance of a Borders sales clerk consulting her computerized inventory, I found Williams's second book, \textit{THE ROOSTER'S EGG}, in the "Sociology" section.


\textsuperscript{134} See Delgado, \textit{supra} note 79, at 9 n.44 (discussing the theory that even so-called merit standards are subjective).


3. Connecting the Personal and the Political

Just as multicultural humanists cross disciplinary boundaries, they cross boundaries between personal and political spheres. This kind of boundary crossing, pioneered in feminist literature, represents a substantial broadening of civic humanist thought. While the expression of identity is central to civic republican narratives, that expression usually involves issues of traditional public concern, such as war and revolution. Arendt, for example, drew distinctions between the public and private spheres, and consigned most of the small-scale encounters among human beings to the latter realm. In contrast, Patricia Williams argues that the personal is "where our most idealistic and our deadliest politics are lodged." To illustrate this point, outsider scholars have focused on the racism embodied in ostensibly "personal" encounters. Seemingly trivial when viewed in isolation, these "micro-aggression[s]" and "indignities du jour" gather into a spirit-numbing thud of racial domination. The domination ratified in personal encounters cuts off subordinated groups from full citizenship by denying such groups the respect necessary for the flourishing of voice.

137. Multicultural humanists, like civic republican thinkers such as Arendt, refuse to conceal themselves behind a neutral pose. Echoing Arendt's refusal to feign "objectivity" about the Holocaust, Patricia Williams, in discussing how stereotypes affect law school exams, notes that "[t]he denial of one's authority in authorship is not the same as elimination of oneself; it is ruse, not reality." WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, supra note 2, at 92. Assuming an objective pose is itself an arrogation of authority, Williams insists that it is an attempt to insulate oneself from risk. See id. at 93.


139. See ARENDT, BETWEEN PAST AND FUTURE, supra note 12, at 71.

140. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, supra note 2, at 93.

141. Peggy C. Davis, Law as Microaggression, in THE CUTTING EDGE, supra note 6, at 169.


143. I also address this theme in Part III dealing with hate speech.
Outsider scholarship illustrates how the "indignities du jour" of racial domination insinuate dread into otherwise routine transactions. One example of such a transaction is Pat Williams's story about trying to buy a sweater for her mother, only to find herself shut out of a Benetton store by a callow clerk and a buzzer system seemingly designed to maintain the "comfort level" of white patrons. In a later piece, Williams describes the weary resignation of a Harvard Law School classmate repeatedly mistaken for a baby-sitter when she picked up her child from school in an affluent neighborhood. African-Americans also receive racial slights from white professionals, as demonstrated by Peggy Davis's story, set in a courthouse elevator, of a city attorney's contempt for a black woman on the fifth floor who had the temerity to ask if the elevator was going down.

By recounting these stories, outsider scholarship "preserves reference to the world" of racism encountered even in the everyday rituals of shopping, child care, and the workplace. The outsider narratives about racism in everyday life should strike a common chord not only with black readers, but also with those who have never before viewed the familiar sites of stores, schools, and workplaces as crucibles of humiliation. This common chord, in turn, is not "merely" personal. Like Arendt's "friendship among citizens," in striking this chord, outsider scholarship "makes political demands" on insiders by requiring them to treat members of subordinated groups as citizens, worthy of respect.

144. See Williams, The Alchemy of Race and Rights, supra note 2, at 44-51.
145. See Williams, Note from a Small World, supra note 142, at 92. "[W]e don't say anything—we're just accustomed to it," Williams's classmate observes. Id. Along similar lines, consider the story of Isabel Wilkerson, a New York Times reporter returning from a trip to Europe with her husband after the explosion of T.W.A. Flight 800 off Long Island. "Increased security" in the wake of this disaster translated into Customs officials at Chicago's O'Hare Airport singling out Wilkerson and her husband—the only African-Americans whom Wilkerson had noticed on the flight—for an intrusive, 45-minute search. See Isabel Wilkerson, A Passenger Lands Safe, and Sorry, N.Y. TIMES, Aug. 4, 1996, at E3.
146. See Davis, supra note 141, at 170. The attorney's comment is, "You see? They can't even tell up from down. I'm sorry, but it's true." Id. Davis's story is a useful complement to Williams's. Mark Tushnet asserts that Williams's Benetton story is classist because it negatively portrays the clerk who refused to buzz in Williams. See Tushnet, supra note 11, at 270-71. Williams, however, never argues that people in pink-collar or blue-collar positions are more prone to racism than anyone else, and Davis's story indicates that racism is a pervasive phenomenon.
147. Arendt, On Humanity in Dark Times: Thoughts About Lessing, supra note 1, at 25.
148. Id. at 24.
149. Id. at 25.
150. On citizenship and race, see Roberts, supra note 7 (discussing racial politics and
4. The Complexity of Identity

Seeking such respect would be unavailing if outsiders viewed each other as Farber and Sherry view outsider groups, as introducing the specter of "balkanization," with each group fighting it out to the last with all others and maintaining rigid intra-group discipline to enhance its prospects for final victory. In fact, the view of identity in outsider scholarship is far more complex. The work of outsider scholars on the "intersectionality" of forms of subordination, such as race and gender discrimination, is a case in point.

By focusing on how race and gender intersect in the subordination of women of color, outsider scholars demonstrate that identity is multifaceted. Women of color experience racial subordination in the larger society, and gender-based subordination both in the larger society and in communities of color. Therefore, struggles against sexism and racism, respectively, address their situation only in part.

Intersectionality has important consequences both for Farber and Sherry's conception of "choice" and for their vision of balkanization. While choice for Farber and Sherry evokes the image of a consumer in a free marketplace, intersectionality theory suggests that decisions can often be far more painful. Consider the predicament of black women debating how to respond to the obscenity prosecution of an African-American rap group. On the one hand, the violent misogyny of some rap lyrics is manifest. On the other hand, black women are understandably hesitant to hand over black men to the ministrations of the approaches to welfare reform).

151. See Farber & Sherry, Antii-Semitism, supra note 10, at 864.
152. See Farber & Sherry, Scholarship and Truth, supra note 10, at 655-56.
154. Arendt, in her discussion of the predicament of German Jews, approaches this level of sophistication. However, Arendt's lack of interest in gender issues hindered her analysis.
156. See Kimberlé Williams Crenshaw, Beyond Racism and Misogyny: Black Feminism and 2 Live Crew, in MATSUDA, supra note 6, at 111, 112.
157. See id. at 120. This misogyny is particularly troublesome to black women, who, contrary to white myths about black male sexuality, arguably bear the brunt of such violence. See id. But see Paul Gilroy, "After the Love Has Gone": Bio-Politics and Ethno-Poetics in the Black Public Sphere, 7 PUB. CULTURE 49 (1994), reprinted in THE BLACK PUBLIC SPHERE 53 (Black Public Sphere Collective ed., 1995) (arguing that rap has emancipatory potential for men and women).
criminal justice system, especially when white rock groups like Guns n' Roses sport sexism, violence, and racism with impunity. Black women deciding on a stance on such an issue face conflicting loyalties, which makes any decision an agonizing one. Indeed, from this perspective, the "individual" as a unit of political analysis is not only too small, in failing to take into account the constitutive effect of groups, but also is too large, in failing to capture the tangled allegiances within people.

The good news here is that people facing such dilemmas cannot indulge in the group-think that Farber and Sherry associate with claims of identity. Confronting traffic from two directions, people at the intersection make pragmatic judgments about the best route to take. Women of color, for example, may find themselves dissenting from positions of the white-dominated feminist movement or from the sometimes patriarchal rhetoric of racial liberation. Such dissent ensures that neither movement will become the ideological monolith caricatured by Farber and Sherry.

Similarly, existence at the intersection also can reveal some unexpected connections. For example, in A Hair Piece, Paulette Caldwell notes her reluctance to discuss in her employment discrimination law class a case entitled Rogers v. American Airlines, which upheld "neutral" employer prohibitions of braided hairstyles. Despite evidence that braided hairstyles are a centuries-old tradition for black women, the Rogers court viewed hair as a matter of individual grooming and taste, not race, citing the white actress Bo Derek's popularization of braids in the movie 10. Juxtaposed with Derek's and Hollywood's appropriation of blackness as chic is the quiet insistence of an older white female student that Rogers is worthy of discussion.

Caldwell acknowledges to the reader that her reluctance to raise the case in class stemmed from her own regular and visible practice of the braiding tradition, coupled with her disquiet at being reduced to a law

158. People of color face such conflicts in other arenas as well. For an insightful discussion of a conflict of loyalties between a certain vision of legal professionalism and concern for the welfare of a subordinated group to which one belongs, see David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, 63 GEO. WASH. L. REV. 1030 (1995).

159. See Harris, supra note 153, at 586.


school hypothetical. The white female student saw something “personal” in Rogers too—an analog to the workplace barriers she experienced because of the intersection of her gender and age. Without the prodding of the white female student, Caldwell acknowledges, she might not have taught Rogers, or written about it. In Caldwell’s story, stories about identity break down barriers, instead of bolstering them, as Farber and Sherry would claim.

Another unexpected connection yielded by such outsider scholarship is the link between scholar and teacher. Of all aspects of identity jealously guarded by Farber and Sherry, none is more tightly held than the fact that they happen to teach for a living. In each of Farber and Sherry’s articles, once one strays beyond the confines of the first footnote, mention of teaching is so rare that it seems to have acquired the stigma that Sherry would like to restore to pregnancy out of wedlock.

Of course, it is unfair to single out Farber and Sherry for such coyness. Most legal scholars do not address pedagogical issues in their scholarship. This makes it all the more virtuous that outsider scholars are willing to acknowledge their pedagogical selves.

III. HATE SPEECH

The virtues of outsider scholarship also broaden and deepen civic republican theory on the controversial issue of hate speech. Here, too, issues of identity, choice, and responsibility are central. As in our discus-

163. See Caldwell, supra note 161, at 269.
164. See id. at 276 n.4.
165. This is not to argue that the connection between people of different races in A Hair Piece or other stories justifies a “Don’t Worry, Be Happy” attitude about subordination. As Richard Delgado has warned, this complacent glow of fellow-feeling is an occupational hazard for white readers of some outsider narratives. The better way to take such moments of connection in outsider stories is as a demonstration that building coalitions, while difficult, is not impossible. See DELGADO, supra note 6, at 106-34 (discussing the risks and rewards of the common cause); cf. Roberts, supra note 7, at 1592-95 (discussing the need to develop coalitions).
166. Farber is now a university administrator, a fact which he acknowledges only in the inaugural footnote. See Farber & Sherry, Anti-Semitism, supra note 10, at 853.
167. See Sherry, Responsible Republicanism, supra note 3, at 178-79 (discussing teenage sexual moves). Another critic of outsider narrative, Mark Tushnet, argues that outsider scholars’ commitment to teaching trivializes their scholarship. Tushnet purports to deliver the coup de grace to the stories of Derrick Bell by noting both their similarity to Bell’s teaching materials, and the stories’ homage to esteemed pedagogues like Boris Bittker and Lon Fuller. See Tushnet, supra note 11, at 274-75. Tushnet and a co-author, however, offer a more positive view of outsider narrative. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 195 (1996).
sions of school choice and outsider narrative, the narrow view of identity, choice, and responsibility outlined by Farber and Sherry undermines their arguments. The broader view of the outsider scholars is ultimately more plausible, suggesting that some form of normative framework governing hate speech is consistent with civic republican ideas of voice and citizenship.

A. Farber and Sherry's Case Against Hate Speech Norms

In arguing against regulation of hate speech, Farber and Sherry again invoke the marketplace as a metaphor for their conception of individual choice. The market Farber and Sherry describe is an arena of reason, not rhetoric. In this arena, individuals make decisions that are largely independent of social norms, assumptions, and stereotypes. The decisions made in the inner sanctum of rationality constitute an individual's virtue and merit. Therefore, to the extent that the decision to refrain from hateful speech reflects virtue, this "virtue... is an internal state
of mind.” As such, Sherry argues, it is beyond the reach of government action. Regulation of hate speech will be unavailing, since it will not contribute to formation of the “internal habit” of appreciating diversity.

Sherry links virtue and choice with responsibility in a further argument against hate speech regulation. She argues that such regulation not only fails to develop virtue, but actually undermines it. Sherry’s point here is that regulation is a form of coercion, which undermines choice. Without choice, there can be no responsibility for one’s actions. Without the prospect of taking responsibility for one’s actions, there can be no virtue, she concludes. In fact, Sherry goes even further in her condemnation of hate speech regulation. She suggests that students who demean others with slurs and stereotypes are virtuous, because they are vindicating the mission of the university to help “students and faculty participate together in a disinterested search for truth.” Expression of “unpopular viewpoints,” not lack of virtue, is the actual sin of students who do not observe limits on hateful speech.

Given what Sherry views as the folly of establishing norms to discourage hateful speech, what forces could motivate institutions to engage in such a quixotic enterprise? It should come as no surprise that Sherry finds the answer in her favorite target: identity. In an assertion of identity, groups on campuses foment a response to hate speech as a way of enforcing group-think. Mining a rhetorical lode which conservative commentators have made familiar, Sherry flays hate speech regulation as a self-interested plea for “political correctness” or, as Sherry puts it, “the use of raw political power to enforce orthodoxy.”

There are two problems with this account of hate speech. First, like Farber and Sherry’s other positions discussed in this Article, it is inconsistent with the civic republican tradition upon which Farber and Sherry purport to rely, particularly in its preference for markets over public

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173. Sherry, Hate Speech, supra note 10, at 943-44.
174. Id. at 935.
175. See id. at 944.
176. Id. at 943.
177. Id.
179. Sherry, Hate Speech, supra note 10, at 944.
norms. Second, this account does not square with Farber and Sherry's own approach, particularly in its dichotomy between reason and emotion and its definition of responsibility. The remainder of this Part examines these problems, and the light shed on them by outsider scholars, in discussing three issues central to the hate speech debate. These issues are: first, whether hate speech is a series of marketplace choices embodying a dichotomy between reason and emotion, and remediable through other opposing choices; second, whether public norms like hate speech regulations can affect "private" preferences about hate speech; and third, whether subordinated groups raising identity issues in the hate speech debate are trying to impose group-think or guard against the silencing of their own voices.

B. The Humanist Case for Hate Speech Regulation

1. Reason, Emotion, and the Market

Farber and Sherry's optimism about the market does not jibe with the civic republican view that markets, while necessary for democracy, also endanger our civic inheritance. Arendt cautions that markets, far from being a site for the rational choices envisioned by Farber and Sherry, reflect human beings' hunt for status. This hunt can extinguish our collective memory, including our commitment to public deliberation, as mass markets "literally consume . . . cultural objects, eat them up and destroy them." In Western society, as both Arendt and the outsider scholars note, the hunt for status often involves imposing second class
status on people who are perceived as different. These perceptions are
not rational, but stem from the exploitation of "all-pervasive influences
and convictions . . . tacitly and inarticulately shared."

Arendt and outsider scholars note that the goal of achieving status
through the subordination of others often submerges concerns about
mere economic well-being. Economic dislocation triggered by the va-
garies of the market exacerbates the quest for status through subordina-
tion of others, as demonstrated by the popularity of the anti-Semitic for-
gery, The Protocols of the Elders of Zion, among Germans rendered
unemployed and "superfluous" during the Weimar period, or the popu-
laritv of the racist and anti-Semitic, The Turner Diaries—which of-
fered a blueprint for the Oklahoma City bombing—in the downsizing
America of today. However, irrational stereotypes can shape the think-
ing even of those who enjoy ample prestige and conventional "merit-
based" qualifications: Enlightenment philosophies, and Supreme Court
justices all have indulged.

This analysis illustrates the flaws in Farber and Sherry's view of the
market as modeling the distinction between reason and emotion. Farber
and Sherry's distinction is artificial in any setting, including the market.
Indeed, Farber and Sherry’s own writing on hate speech best illustrates the artificiality of separating emotion from reason.

Consider the title of Farber and Sherry’s article, *Is the Radical Critique of Merit Anti-Semitic?* Even the most jaded consumer of law review literature would surely be jolted by the baldness of Farber and Sherry’s challenge. Few questions are more emotionally loaded in the legal academy, or indeed in American society. Mention of a “radical critique of merit” is alone enough to inspire anger. Merit seems so unqualifiedly—well, meritorious. What will these radicals do next, the reader wonders: deconstruct motherhood, tiramisu, or the Olympics? Add anti-Semitism to this already volatile mix, and you have an article that only a manufacturer of hypertension medication could love.

Farber and Sherry’s thesis in that piece more than delivers on the emotional charge promised by its title. Few readers can remain “objective” upon confronting Farber and Sherry’s concerns, related in the previous section, that radical scholars are critiquing merit to obscure the cultural causes of subordination, and in so doing risk inciting hatred against “successful” groups such as Jews and Asian-Americans. For our purposes, however, answering Farber and Sherry’s substantive charges is less important than investigating their method.

Analysis reveals that Farber and Sherry’s description of the anti-Semitism of radical scholarship undermines their distinction between emotion and reason in hate speech. Farber and Sherry do not suggest that the scholars they discuss actually harbor anti-Semitic views. They “accuse the theory, not the theorists, of anti-Semitism.” This concep-

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193. See generally FINEMAN, supra note 138.
194. See supra notes 168-79 and accompanying text (critiquing Farber and Sherry’s observations on hate speech regulation).
196. Id. Presumably another reason that Farber and Sherry refrain from accusing the theorists themselves of anti-Semitism is that a significant number of the scholars who appear in Farber and Sherry’s citations, as in some way associated with the anti-Semitic and anti-Asian-American critique of merit, are actually Jewish or Asian-American. See id. at 854 n.7 (citing Gary Peller); id. at 864 n.58 (citing Robert Chang); id. at 865 n.62 (citing Naomi Cahn); id. at 866 n.66 (citing Linda Hirshman); id. at 876 n.133 (citing Karl Marx, who was baptized, but whose parents were Jews); cf. Farber & Sherry, *Legal Storytelling and Constitutional Law*, supra note 10, at 41 n.15 (citing Joseph Singer, Mark Tushnet, and Steven Winter). Of course, Jews can be anti-Semitic or self-hating. But exploring this phenomenon requires the development of some notion of false consciousness, which
tion of theory, however, is much closer to holistic notions of "gestalt\[97]" "rhetoric,"\[198] or "ideology,"\[199] which Farber and Sherry identified with their opponents, than it is to Farber and Sherry’s own ideal of individual rationality. If theories and discourse, as opposed to Farber and Sherry’s atomized individuals, have so much power, then maybe proponents of hate speech regulation are correct that law, and not just argument, is sometimes the appropriate response to hate speech.\[200]

2. Public Norms, Virtue, and Self-Control

Civic republicanism provides substantial support for norms playing this role in the hate speech context. Sherry’s view that virtue is an "internal habit" not subject to external norms,\[201] like her preference for is anathema to Farber and Sherry’s conception of individual rationality.

197. Farber & Sherry, Legal Storytelling and Constitutional Law, supra note 10, at 41 (citing Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441, 1463 (1990)).
198. Id. at 50 (describing the force of rhetoric as more influential than reason).
199. Id. at 41 (quoting Joseph Singer).
200. Sherry’s article on hate speech similarly stakes a claim on the reader’s emotions, by painting people accused of insensitivity as virtuous victims of Orwellian group-think. Yet a closer look at particular cases discussed by Sherry reveals a different story. In one well-known case, Ian Macneil, a visiting professor at Harvard Law School, repeatedly interrupted his own class to ridicule the trend toward gender-neutral language. See D’SOUZA, supra note 178, at 198. Macneil would make comments like, “Posner was the grandfather or should I say grandmother? of this idea. That would be a strawman or do we use that word anymore? Sauce for the goose, sauce for the gander I don’t know, is that sexist?” Id. Macneil also included in his contracts casebook an analogy between the Battle of the Forms in contract law and the situation of Julia in Byron’s poem, Don Juan, who “whispering, ‘I will ne’er consent,’—consented” to the usual ambition of Byron’s hero. See Tushnet, supra note 168, at 141-42; see also George Gordon, Lord Byron, Don Juan, Canto I, in THE NORTON ANTHOLOGY OF POETRY 644, 663 (Alexander W. Allison et al. eds., 1975). Concerned students at Harvard noted that the analogy seemed to endorse the attitude that “women mean yes when they say no.” Tushnet, supra note 168, at 142.

Sherry’s account leaves out most of this information. See Sherry, Hate Speech, supra note 10, at 939-40. Her story does not mention Macneil’s pattern of ridicule of gender-neutral language. Sherry presents Macneil’s routine on gender-neutral language as an isolated incident, which makes it appear harmless. See id. at 940. As to Macneil’s analogy of Don Juan and the Battle of the Forms, Sherry asserts only that Macneil was persecuted for “suggesting that successful contract negotiation contained important psychological elements analogous to those in successful lovemaking.” Id. Sherry’s reference to success suggests that she regards both Macneil and Don Juan as additional victims of the radical critique of merit.

201. Cf. Sherry, Hate Speech, supra note 10, at 935-36. It is not clear whether Farber shares this view. Indeed, I doubt that Sherry fully subscribes to this position, which if taken to its logical conclusion would suggest that fundamental elements of the legal system, such as criminal law, have no role in developing a sense of morality in individuals. Such a view would be consistent with an extreme libertarian perspective which I do not understand Sherry to support, despite her praise for choice.
Inclusive And Exclusive Virtues

choice over voice in school reform, turns civic republicanism on its head. In contrast to Sherry’s view, civic republicans have always believed that public norms and individual virtues are reciprocal.

Evidence in the civic republican literature for this position is overwhelming. Aristotle’s analysis may be the most thorough. To Aristotle, Sherry’s notion of an “internal habit,” in which we first develop a state of mind and then manifest that state of mind through behavior, would be exactly backwards. According to Aristotle, we develop habits through our interaction with the external world, and we develop virtues through the cultivation of sound habits. As Aristotle noted, “[V]irtues... we acquire by first having put them into action... we learn by doing...”

This is true of artisans and artists: we “become builders by building houses, and harpists by playing the harp.” It is also true of the less tangible virtues we associate with good character: “we become just by the practice of just actions, self-controlled by exercising self-control, and courageous by performing acts of courage.”

Developing virtue through the cultivation of habit is for Aristotle a central role of law.

202. See supra notes 18-51 and accompanying text (surveying and critiquing Sherry’s scholarship favoring educational choice).

203. ARISTOTLE, NICOMACHEAN ETHICS 34 (Martin Ostwald trans., 1962). The Greek term for “moral virtue”—éthiké—has the same root as the term for habit—ethos. See id. at 33; cf. Galston, supra note 3, at 376-78 (analyzing the importance of habit in Aristotle’s conception of virtue).


205. ARISTOTLE, NICOMACHEAN ETHICS, supra note 203, at 34.

206. See id.; cf. KRONMAN, supra note 182, at 298-300 (arguing that the practice of law can develop the virtue of judgment). Libertarians object to this conception of government as overly intrusive. See Gey, supra note 3, at 847-53 (noting the potential for wholesale government dictation of private tastes in civic republican theory); cf. Davis, supra note 7, at 1349 (noting how government enforcement of “family values” can oppress minority communities and devalue minority citizenship). The difficulty with the libertarian argument from a civic republican perspective is, however, that with regard to a problem like hate speech, government inaction permits subordination through the market, patriarchy, and other sites of ideological domination. See Sunstein, supra note 3, at 1576-78; cf. Lawrence, supra note 168, at 62-66 (critiquing public/private distinction); Peter Margulies, Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice, 63 GEO. WASH. L. REV. 1071, 1071-74 (1995) (same).
This analysis has important consequences for hate speech regulation. We can view hate speech as a symptom of the human hunt for status: we deprecate others in order to enhance our own self-image in an uncertain world.\textsuperscript{207} Such vilification satisfies unconscious needs more pressing than economic self-interest.\textsuperscript{208} Indeed, the hunt for status through deprecation of others feeds on itself, as those in the hunt gorge themselves on images and anecdotes which depict others as inferior.\textsuperscript{209} Hate speech becomes a kind of addiction, requiring increasingly lurid fantasies—and sometimes acts—of domination.\textsuperscript{210}

In this sense, the hunt for status reflected in hate speech is like the excesses of the senses, for which Aristotle's remedy is "self-control."\textsuperscript{211} One task of good laws, according to Aristotle, is the nurturing of self-control.\textsuperscript{212} Laws and codes dealing with hate speech serve precisely this function. They hold people to a standard of self-control in discourse about others which people can ultimately internalize as virtue.\textsuperscript{213}

This notion of self-control is not altogether different from what Sherry describes as "responsibility."\textsuperscript{214} However, Sherry is selective in who she...
describes as being "irresponsible," for while she condemns corporations for irresponsible behavior, her criticisms fall most heavily on poor people and their allies. Sherry argues that rights have undermined responsibility. Yet she does not view people who claim a first amendment right to engage in hate speech as in any way irresponsible. Indeed, she lauds such individuals as virtuous opponents of group-think.

Sherry's disdain centers instead on single women who are irresponsible enough to become pregnant, and on parents who, for whatever reason, do not make the correct choice in her school choice plan. While Sherry vigorously opposes penalties for hate speech, describing them as defeating responsibility, she regards severe penalties like dismissal from a job for some pregnant women, and termination of parental rights for parents who lack savvy in school choice, as legitimate means for promoting responsibility. It is this disparate treatment that gives proposals for responsibility a bad name.

3. Identity and Voice in Hate Speech

While Sherry attributes the call for regulation of hate speech to the ills of identity politics, we have just seen how Sherry's notion of responsibility also entails a conception of identity—in effect, it divides the world into "them" and "us." People who are different from us—poor people whose stories we lack the patience to hear—run the risk of severe sanc-

215. See id. at 151 (citing Milton Friedman).
216. See id. at 150-55.
217. See id. at 145-52.
218. See id. at 146. Sherry does criticize Richard Epstein for suggesting that employers have a right to discriminate. See id. at 146 n.57.
219. See Sherry, Hate Speech, supra note 10, at 944. Moreover, she cites without caveat or critique to self-proclaimed experts like Charles Murray and Dinesh D'Souza, who have lent the patina of science to demonization of the poor. Cf. Sherry, Responsible Republicanism, supra note 3, at 140 n.31, 153 n.91, 155 n.106, 163 n.135, 165 n.145.
220. See Sherry, Responsible Republicanism, supra note 3, at 178-79.
221. See id. at 203-04.
222. See Sherry, Hate Speech, supra note 10, at 944.
223. See Sherry, Responsible Republicanism, supra note 3, at 178-80.
224. See id. at 204. Sherry seems enthusiastic about the responsibility which this threatened penalty will develop, although she also endorses a non-punitive plan which will offer children of these parents an education based on the considered choices of other parents. See id. at 204-05.
225. See Sherry, Hate Speech, supra note 10, at 944.
226. See Arendt, Bertolt Brecht: 1898-1956, supra note 108, at 238 (noting the "obscenity and oblivion" to which society consigns the poor); cf. Stephen Loffredo, Poverty, Democracy and Constitutional Law, 141 U. PA. L. REV. 1277, 1278 (1993) (arguing that recent Supreme Court decisions that recognize the corrupting role of wealth in political
tions. People who seem the same—middle-class college students who could be our children, siblings, or nieces and nephews—encounter no sanctions even if they vilify others.

Hate speech codes aspire to replacing this more subtle form of identity politics with a regime of equality. They also can be viewed, as one argument from Aristotle suggests, as a means of teaching self-control. For a civic republican standpoint, however, their central role is a remedy for the stifling of voice in a climate of "defamation and persecution."227

For Arendt, the steepest price of the defamation heaped on subordinated groups was this constrictions of voice. Faced with an atmosphere of scorn but enticed by reduced de jure segregation, members of a subordinated group have three limited options.228 As Arendt described the situation of European Jewry before the rise of Hitler, they could first become parvenus or "exception Jews,"229 largely isolating themselves from their own communities in the quest for material success, while trading on the lure of the exotic which is the flip side of contempt. Second, they could become pariahs, outsiders critiquing the status quo, comporting themselves with conscience yet cutting themselves off from participation in routine political life.230 Third, they could seek to straddle these polarities, with an ambivalent assimilation that stressed their differentiation from the poorer, more despised members of their own community, but left a slender space for affirmation of a group identity in the domestic sphere.231 The upshot of these limited options was that, for Arendt, no stance was available for members of a subordinated group who wished to participate in ordinary politics while acknowledging their own communal ties.

In times when group defamation becomes particularly intense, even this range of options disappears, and all members of the group are pushed into the pariah role, willingly or unwillingly. Such was the nature of the time Arendt spent in France, where she had fled from Germany in 1933. As Hitler grew more bold in Germany, the climate in France like-

process offer support for constitutional protection of people living in poverty).


228. See ARENDT, ORIGINS OF TOTALITARIANISM, supra note 12, at 56-68.

229. Id. at 74.

230. See id. at 66. Our current situation suggests that even if one responds to hate speech, as Arendt urges, with a strong statement of identity and commitment, such vigorous advocacy will only earn disdain from scholars like Sherry, as a self-interested plea for "political correctness." Cf. id.

231. See id. at 65. Peace of mind was particularly elusive for a member of this third cohort, who as Arendt observed ironically, strove to "be a man in the street and a Jew at home." Id. (quoting a Hebrew poem).
wise grew threatening for Jews. Arendt spent much of her time in Paris helping Jewish refugee children cope with the psychic stress of this atmosphere. Bolstering the children’s self-image, a task so marginalized by Farber and Sherry, was central for Arendt in this troubled time. Arendt sought to save the children from a “despair” and self-hatred which she knew from her experience in Germany had “poisoned the souls of many children.”

The outsider scholars’ analysis of hate speech echoes Arendt’s discussion of the stifling effects of group defamation on voice. Mari Matsuda, for example, notes that hate speech increases pressure to assimilate—to “reject one’s own identity” even given the psychic costs of such denial. Hate speech can also push members of subordinated groups into a pariah’s role, shaped by suspicion of members of the dominant group or pessimism about the possibility of change. In addition, hate speech effectively sets the agenda for subordinated groups, forcing them to react instead of setting their own priorities. Hate speech curdles a group’s hopes for the future by damaging its children and young adults. By traumatizing the young, hate speech renders the refuge of home unsafe, forcing parents to run a perpetual gauntlet between helplessness, stoicism, and rage.

For the young, a climate of hate speech is much like the more readily cognizable wrong of de jure discrimination: it sends a message that soci-

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232. See Sherry, Responsible Republicanism, supra note 3, at 169-70 (rejecting the notion that one purpose of education is instilling in children “a pride in their ancestral pasts”).

233. YOUNG-BRUEHL, supra note 34, at 143.


235. MATSUDA, supra note 6, at 25.

236. See id.; Roberts, supra note 7, at 1595-98.

237. See MATSUDA, supra note 6, at 25-26; Lawrence, supra note 168, at 82 (citing Delgado).

238. Cf. Lawrence, supra note 168, at 87-88. Farber and Sherry acknowledge the originality of Lawrence’s analysis. See Farber & Sherry, Legal Storytelling and Constitutional Law, supra note 10, at 48.

239. Matsuda argues that college students’ transition away from dependence on parents and into adulthood renders them particularly vulnerable. See Matsuda, supra note 6, at 44-45. On parents’ roles, see the discussion immediately following this note.

240. There are striking similarities in Arendt’s and Lawrence’s accounts. Compare Arendt, “What Remains? The Language Remains”: A Conversation with Günter Gaus, supra note 95, at 8 (“[M]y mother was always convinced that you mustn’t let it get to you. You have to defend yourself!”), with Lawrence, supra note 168, at 87 (“My parents have told me to ignore this word that is ringing unuttered in my ears. ‘You must not allow those who speak it to make you feel small or ugly,’ they say.”).
ety can deem a class of persons a stranger. As the Supreme Court said in *Brown v. Board of Education*, the injury of this message is “unlikely ever to be undone.” The enforced estrangement wrought by hate speech thus has lasting effects, even on those, like Arendt and many of today’s scholars of color, who have claimed the outsider’s role as an emblem of conscience.

Arendt’s inhabiting of the outsider’s role involved an uneasy balance between disclosure and detachment. Acknowledgment of her identity as a Jew was, she felt, the only honorable way to respond to persecution and genocide. This acknowledgment had its roots in the idea of dignity, which Arendt’s mother had instilled in Arendt as a young girl growing up in Königsberg, Germany, in order to cope with the anti-Semitic comments of other schoolchildren. Yet this same sense of dignity also led Arendt’s mother to forbid Arendt from mentioning such slights at home. Instead, Arendt was supposed to “defend [her]self.” In this way, Arendt’s childhood experience with hate speech helped form a life-long habit of exalting public, agonistic encounters over the “warmth of intimacy” found in relationships within subordinated communities.

This turn of mind, reminiscent of the Aristotelian view of self-control discussed above, had distinct advantages. For example, it gave Arendt sufficient independence to critique the strain of narrow nationalism in

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245. See *id.* Arendt’s mother insisted, however, that Arendt immediately report to her any anti-Semitic remarks from Arendt’s teachers. See *id.*

246. *Id.*


248. See Canovan, *supra* note 12, at 244-49 (contrasting Arendt’s impressions of nationalism and community in both Europe and the United States).

249. See *supra* notes 85-124 and accompanying text. For more views on Arendt’s fascination with classical thought and politics, see Ralph Ellison, *Shadow and Act* 108 (1964) (noting Arendt’s occasional assumption of a tone of “Olympian authority”); Benhabib, *supra* note 91, at 129 (noting Arendt’s attachment to the agonistic political ethos of Greco-Roman civilization).
Zionist thought. However, it also made Arendt frequently neglect the links between the personal and the political. Most prominently, it made Arendt appear unduly harsh in her controversial study, *Eichmann in Jerusalem*, toward the Jewish leaders who witnessed their world crumble into the horror of the Final Solution.

Much of what Arendt reports in the few pages devoted to the subject in *Eichmann in Jerusalem*—namely that some leaders in Jewish ghettos participated in the bureaucratic organization of deportation to the concentration camps, before these leaders, too, were deported to their deaths—is empirically accurate. It is also eminently rational: Arendt upbraided the Jews for not escaping, because only fifty percent of those escaping were killed, compared with ninety-nine percent of those who did not try to escape. Such empirical and rational arguments meet Farber and Sherry's criteria for scholarship. However, as Arendt recognized elsewhere, empiricism and rationality are not enough. Arendt needed imagination to understand the fear, disbelief, and self-deception

250. See BARNOUW, supra note 12, at 97; CANOVAN, supra note 12, at 245.
251. For a sympathetic view of Arendt's work on the interaction of the personal, the political, and gender, see Maria Markus, *The 'Anti-feminism' of Hannah Arendt*, in HANNAH ARENDT: THINKING, JUDGING, FREEDOM 119 (Gisela T. Kaplan & Clive S. Kessler eds., 1989).
252. See ARENDT, EICHMANN IN JERUSALEM, supra note 12, at 112-34 (arguing that Eastern European Jews could have done more to resist Nazis during World War II). Compare Lahav, supra note 118, at 573 (describing Arendt as a "self-hating Jew"), with BARNOUW, supra note 12, at 231-51 (arguing that Arendt's view reflected her humanist commitment to interpreting history); and Margulies, *Progressive Lawyering and Lost Traditions*, supra note 12, at 1142-43 (same).
253. See ARENDT, EICHMANN IN JERUSALEM, supra note 12, at 115-23.

256. See Farber & Sherry, *Telling Stories*, supra note 10, at 808.
of the Jewish leaders, who seemed to be hoping against hope that time would bring the Nazis to their senses.

On this occasion, Arendt's imagination failed her, stymied by the detachment she had learned from her mother's response to hate speech. This narrowing of voice reduced Arendt's resonance for contemporary scholars who wish to integrate the personal and the political, or celebrate ritual and relationships within subordinated communities as a component of public space.  

Similar tensions run through the work of outsider scholars today. Outsider advocacy of hate speech regulation has been linked with the outsider search for safer spaces to reveal the self—to tell some of the stories which Farber and Sherry also discount. An outsider, whether a teacher or a student, can reveal more of herself in an atmosphere free from overt sexism and racism. In the process of revelation, anger and vulnerability emerge along with reflection, ambivalence, and insight. The revelation of such human complexity ultimately diffuses stereotypes. It also counters the narrowing of voice experienced by earlier pariahs like Arendt. Moreover, for teachers, the revelation of self can promote communication with students, who have their own vulnerabilities regarding grades and job prospects.

However, as Angela Harris notes, such disclosure of the self is not prudent in a racist climate where disclosure can expose one to attack.

257. See Seyla Benhabib, The Pariah and Her Shadow: Hannah Arendt's Biography of Rahel Varnhagen, 23 POL. THEORY 5, 5-6 (1995) (discussing Adrienne Rich's criticism of Arendt). For discussion of African-American family life as a site of resistance to racism, see Davis, supra note 7, at 1349, BELL BOOKS, YEARNINGS: RACE, GENDER, AND CULTURAL POLITICS 41 (1990). Fittingly, Arendt moved closest to encompassing these current concerns when she told stories close to her own experience. One such example is her essay on her friend, the brilliant but unlucky critic Walter Benjamin, who killed himself at the Franco-Spanish border in 1940 because he had not been able to get out of France, even though friends in New York had secured a visa for him to emigrate to America. See Hannah Arendt, Walter Benjamin, 1892-1940, THE NEW YORKER (1968), reprinted in ARENDT, MEN IN DARK TIMES, supra note 1, at 153.

258. This process should not be one which focuses solely on emotion. To narrow the focus in this manner falls into the trap, noted by Richard Delgado, in which outsider scholarship is both extolled but subtly marginalized, just as outsiders have always been viewed by the dominant culture as exotic and spontaneous, as well as threatening. Each view is a facet of the image of outsiders in a racist ideology. See generally Richard Delgado, "The Imperial Scholar" Revisited: How to Marginalize Outsider Writing, Ten Years Later, 140 U. PA. L. REV. 1349 (1992), reprinted in THE CUTTING EDGE, supra note 6, at 401.


260. See Harris & Shultz, supra note 7, at 1802. This is as true for young outsider
As a result, outsider scholars have to emulate Arendt and cultivate a firm Aristotelian self-control to make up for the lack of self-control in the dominant culture's treatment of outsiders. Yet, as with Arendt, this compensatory self-control does not come without costs. A distancing occurs which may be necessary for survival, but which also limits possibilities for communication in the classroom and elsewhere.

The goal of normative frameworks for hate speech is to provide a safe space where such a narrowing of voice need not occur. This concern with voice makes hate speech regulation consistent with civic republicanism. Hate speech regulations' primary allocation of responsibility for self-control to perpetrators, not victims, is also consistent with civic republican theory, even in the agonistic account of civic republicanism offered by Arendt.

Ultimately, however, it is as much Arendt's story as it is her thought that provides the justification for limits on the vilification of subordinated groups. Arendt's acknowledgment of her identity as a Jew in the face of persecution, along with her work with damaged Jewish children and other refugees in Paris, demonstrates how identity acts as a spur to virtue. Arendt's detachment demonstrates how relying merely on individual dignity to withstand vilification can narrow voice. Learning from Arendt's story by creating institutions where such a narrowing of voice need not occur is a welcome vindication of the civic republican tradition.

IV. CONCLUSION

The outsider scholars' focus on voice reveals the humanist roots they share with civic republican theory. Machiavelli strove to preserve republics from the tyranny of princes and foreign powers. Similarly, Hannah Arendt strove to find a place for humanism in the slaughter of the twentieth century. As this century gives way to the next, it seems appropriate to view outsider scholars such as Derrick Bell, Richard Delgado, and Angela Harris as multicultural humanists, bringing a richer appreciation to the role of both diversity and connection in the cultivation of voice.

Multicultural humanists share distinctive perspectives on identity, responsibility, and merit. Identity for multicultural humanists is a pathway toward finding a voice. Storytelling is one method in the search. For multicultural humanists, conceptions of responsibility and merit arise out of the need to nurture institutions in which voice can flourish.

scholars, who often are without meaningful counsel and support as they confront the rigors of the tenure and promotion process at their institution, as it is for students of color. See Matsuda, supra note 168, at 45.
In contrast, while Farber and Sherry talk humanist talk, they do not walk the walk. Instead, their orientation is positivist. They regard voice as an invitation to balkanization, and identity as the vehicle for that one-way trip. Farber and Sherry link responsibility and merit with the comforting presence of supposedly neutral metrics like the market or empiricism. They hope that these metrics will tame the subjectivity of voice. Unfortunately for the consistency of their conception, Farber and Sherry are as subjective as anyone else. Like others who assert the presumptive justice of the status quo, however, their approach seems neutral, even as it favors the winners.

The differences in these approaches is apparent in the three areas discussed in this Article. In the school reform setting, multicultural humanists urge that subordinated communities have a chance to make their voices heard in the curriculum. This use of voice suggests that curricula centering on the study of the achievements of subordinated communities, including some Afrocentric curricular plans, are appropriate. In contrast, multicultural humanists generally distrust choice plans like the one suggested by Sherry, because such plans circumvent voice and threaten venerable institutions like the public schools. Similarly, consistent with the narrative bent of civic republican theory and practice, multicultural humanists frequently embrace storytelling as a way of amplifying suppressed voices. They reject the neutral tone and narrowly empirical account of truth offered by positivists as both reductive and misleading, and pursue an interpretive method that allows for the revelation of self, exploration of context, and connection with others.

Finally, multicultural humanists propose hate speech regulation as a way of nurturing voice. A normative framework for hate speech rejects the familiar positivist dichotomy of reason and emotion proffered by Farber and Sherry. It combines reason, emotion, narrative, and image into rhetoric, discourse, and ideology. It allocates to institutions, such as universities and governments, the responsibility for teaching self-control to those who speak with hate, instead of putting the entire burden of self-control on the unwilling listener. In this way it encourages the full flourishing of voices that might wither in a climate of defamation.

As this discussion demonstrates, multicultural humanism can celebrate many virtues. Multicultural humanists have enlarged the space for revelation of self and connection with others. They have crossed disciplinary boundaries, hurdled the barriers between public and private, and deconstructed verities like merit and success. In fact, the story of multicultural humanism is so powerful that it could also call back Farber and Sherry to first principles. Sherry once outlined a jurisprudence featuring
a distinctive feminine viewpoint which could promote "political or intellectual diversity," without stereotyping women in a domestic or caregiving role. Farber once displayed an irreverence about the work of law professors which is a welcome antidote to the solemn intonements about "legal scholarship" in *Telling Stories Out of School*. If Farber and Sherry cast off their positivist blinders, they could join outsider scholars in expanding the horizon for multicultural humanist thought and action in the new millennium.


262. See Farber, *supra* note 14, at 917.