Not Only for Myself: Identity, Politics, and Law

If I am not for myself, who will be for me?
If I am not for others, what am I?
And if not now, when?

—Hillel

Hillel’s famous comments usually, and rightly, summon up a challenge occurring on psychological, moral, and political levels. How can we each have self-respect but also regard for others (as well as a proper sense of urgency about doing what is right)? I thought about Hillel when my nephew, Ben, told me his difficulties in running for a sixth grade class election. Ben wanted to vote for himself, but he did not want to seem arrogant. He also predicted that all the girls would vote for a girl candidate, and with more girls than boys in the class, that would determine the election. So his speech included a request that people not vote along gender lines but really listen to the candidates and what they wanted to do for the class. Ben got elected; he thinks it was his long boring speech which made people think he was a real politician.

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Ben's sixth grade class already struggles with a contemporary problem that Hillel may not have fully had in mind. Group-based identity politics compound Hillel's questions. If we girls are not for ourselves, who will be? But if we are not for the boys too, what are we? If we whites are not for ourselves, who will be? But if we are not for others, what are we? And so forth; we can substitute sexual orientation, disability, religion, region, ethnicity, nationality—all the familiar categories of group division and identity politics. Then hear how familiar at least the first question seems. The second question, what are we if we are only for ourselves, is less common. Sometimes it is expressed in terms of universal good: why don't we all come together, or get along; why can't we emphasize our commonality rather than our differences? But the universalist appeal is so often read as a denial of differences that it fails to be heard.

I want to explore this dynamic particularly in the context of arguments that reflect the contemporary debate over identity politics. By identity politics, I mean the mobilization around gender, racial, and similar group-based categories in order to shape or alter the exercise of power to benefit group members. These days, identity politics infuse debates over electoral politics, jury selection, school curricula, law school hiring practices, and even casting of Broadway plays. Identity politics help people

1 Todd Gitlin describes a three-stage process of identity politics by racial and ethnic minorities, women, and gays and lesbians:

Subordination on the basis of sex and sexuality became the basis for a liberationist sequence: first, the discovery of common experience and interests; next, an uprising against a society that had imposed inferior status; finally, the inversion of that status, so that distinct qualities once pointed to as proof of inferiority were transvalued into the basis for positive distinction.


2 See generally Minow, From Class Actions to “Miss Saigon”: The Concept of Representation in the Law, 39 CLEV. ST. L. REV. 269 (1991), reprinted in REPRESENTING WOMEN: LAW, LITERATURE, AND FEMINISM 8 (Susan S. Heinzelman & Zipporah B. Wiseman eds., 1994). In an earlier period, scholars addressed “the rise of the unmeltable ethnics.” See, e.g., NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY (2d ed. 1970); MICHAEL NOVAK, THE RISE OF THE UNMELTABLE ETHNICS: POLITICS AND CULTURE IN THE SEVENTIES (1972). Many have observed that the late 1960s ushered in an era of ethnic and racial pride in the United States that challenged prior views of assimilation as the shared national goal. See, e.g., GITLIN, supra note 1, at 100-01; STEPHEN STEINBERG, THE ETHNIC MYTH: RACE,
overcome a sense of anonymity and anomie while also giving shape to perceptions of unequal power and recognition. Identity politics also stimulate controversy, largely by those who claim it undermines unity, individualism, or a nationalism founded upon individualism.

Consistent with Hillel's first question, there is a healthy dimension to being for ourselves. The politics of identity have this dimension but seem generally to neglect Hillel's second question, what are we when we are only for ourselves. Identity politics takes one step out toward others—but limits this concern to those who match the individual's own identity trait. In identity politics, I am for others, but only those like myself.

I will consider here the ways in which this politics of identity lacks internal coherence; defining those like myself proves an unstable task. Moreover, the very origins of identity politics as responses to a world that has made group differences occasions for invidious discriminations and oppressions suggest the dangers of foreshortening concern along group lines. In such a world, I will argue, we need to be both for ourselves and for others. At the same time, calls for unity before excluded groups actually have been heard and respected do not fulfill Hillel's call, nor do commitments to individualism.

I take as my initial context the legal problems posed by representation, meaning, who may speak for whom and who may stand in for another. I will explore how political uses of identities seem to be pressing people toward demanding representatives who look like themselves. I then will examine the difficulties internal to identity politics as well as the powerful and

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4 See infra part II (discussing unity and individualism theorists).

5 Representation in a more ambitious sense preoccupies many literary and social theorists; they are concerned with the substitution of language and images for experience, the interrelation among discourses and disciplines, or methods and contents of depictions of people in various media. See Law and Literature: Breaking Down the Walls, in Representing Women, supra note 2, at 2-7; Anne Norton, Republic of Signs: Liberal Theory and American Popular Culture 1-7 (1993) (connecting semantic and political representation). Although those topics resonate with this effort, they are not the focus of this Article.
deserving motivations behind identity politics. In search of ways to address historical and present group-based harms without falling into the confusions and mistakes of either identity politics or opposition to it, I will explore six strategies and consider how each may advance Hillel's inquiries, and our own. Just like Hillel's questions, the strategies I suggest build upon, instead of ignore, the paradoxical qualities of human separateness and connection.

I
WHO CAN SPEAK FOR WHOM?

Who can speak for someone else? Who can stand in for me to advance my interests and remind others who I am? Sometimes for these roles we want someone who symbolizes or mirrors us. Sometimes we want someone quite different from ourselves in talents, experiences, and appearance. The issue arises on occasion in selecting a lawyer. I have myself encountered a woman seeking a divorce who asked for a female lawyer, a poor person who wanted a wealthy lawyer, a gay person who wanted a gay lawyer, and a white male charged with employment discrimination who wanted a black female attorney. Tactical judgments about who will produce a victory in particular settings of negotiation or adjudication and concerns for symbolic expression motivate such preferences.

A similar bundle of concerns arises with the composition of a jury. Racial and gender diversity in jury membership seems to advance hopes for both more accurate judgments and ones more legitimate to a community that is itself diverse, though tactical and expressive interests may lead each side to try to shape the membership more specifically. Recently, the Supreme Court has permitted Equal Protection challenges to the use of peremptory challenges by parties to exclude jurors in noticeable racial or gender patterns.6

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These developments reflect longstanding struggles to overcome historic exclusions of African-Americans and women from jury participation, from voting, and from the full status of citizenship. Reformers' focus on group-based identities responds directly to exclusions on those grounds. The insistence on group identity claims also reflects efforts to expose allegedly universal guarantees as partial and discriminatory in practice. Jury composition and selection of an attorney are simply two areas in which identity politics seems to be both flourishing and controversial. People who support the politics of identity emphasize the value of a representative who shares the groups' identity. In the context of electoral politics, political philosopher Anne Phillips has recently defended what she calls "the politics of presence." Recognizing the demands for representatives who mirror the differences in society, Phillips identifies and defends three aspects of these demands. First, there is a symbolic significance surrounding who is present in the chambers that wield democratic power. Second, there is an independent value to the inclusion of groups that have been previously suppressed. Third, there are predicted changes in policies from changes in the composition of the governing bodies that raise issues and shape responses to them. As Phillips herself explores, serious

Angiulo, 847 F.2d 956 (1st Cir. 1988) (Italian-Americans). The rationale has not been applied to many other groups. See, e.g., Davis v. Minnesota, 114 S. Ct. 2120 (mem.) (1994) (religious people); Murchu v. United States, 926 F.2d 50 (1st Cir. 1991) (Irish people; Irish-Americans); United States v. Cresta, 825 F.2d 536 (1st Cir. 1987) (young people); State v. Spitler, 599 N.E.2d 408 (Ohio Ct. App. 1991) (homosexual people).


10 Id. at 45. Phillips explores the consequences of her argument for bodies of influence outside electoral offices. See id. at 185-87 (discussing how entrance of wo-
difficulties arise when this view appears. Which groups should be represented, and who decides that basic question? Should quotas or other techniques be used to ensure group representation?

Related but less commonly addressed are problems of over-representation by members of minority groups. Disproportionate numbers of children of color land in special education classes. African-American males are the majority of American prisoners. People with mental disabilities are also over-represented in the criminal justice system. Is statistical representation a valid norm against which to test such practices? What remedies, if any, should law or politics pursue for these problems of too much presence?

Even deeper problems arise, though, with the politics of presence or any other version of identity politics. Picking one person to mirror the group is bound to expose the central difficulties with identity politics, which I will now explore.

II
"Identity" Problems

Some people oppose identity politics from the start. They place the individual centrally in political and moral discussion and worry about any emphasis on groups, or they think that the men into Australian civil service altered the content and direction of public policy and diversity concerns in selecting judges).

11 How can a group gain representation in the larger polity when it also wants self-determination and insulation from the polity’s control? See id. at 122-26 (discussing Canada’s Québecois).

12 Phillips herself is a good guide to some of these difficulties. See id., at 74, 188 (problems of essentializing difference). Her responses call chiefly for mechanisms to assure the accountability of representatives to specified groups. See id. at 82, 145-67. This tends simply to move the problem back a step: which groups, organized under what auspices, should be the reference points for representatives’ accountability?

13 Richard Bernstein, Dictatorship of Virtue: Multiculturalism and the Battle for America’s Future (1994); Arthur M. Schlesinger, Jr., The Disuniting of America (1992). Western political theories have long acknowledged the human tendency toward factions and the human experiences of individual differences but have urged conceptions that would subordinate such divisions under a collective unity.

Whether read from the frontispiece of Hobbes’ Leviathan, in which the many are made one through the unity of the sovereign, or from the formulations of tolerance codified by John Locke, John Stuart Mill and, more contemporaneously, George Kateb, in which the minimalist liberal state is cast as precisely what enables our politically unfettered individuality, we are invited to seek equal deference—equal blindness from—but not equalizing recognition from the state, liberalism’s universal moment.
focus on ethnic, racial, and gender identities distracts attention from economic disparities. Whether motivated by practical concerns about balkanized politics or theoretical concerns about individualism, these opponents of identity politics resist arguments for group-based representation, however they may be framed.

But there are others more sympathetic to identity politics who nonetheless find real difficulties with political uses of identities. Three difficulties have exploded in sympathetic discussions about identity politics in scholarship and also political action. The first is the tendency to "essentialize." This involves reducing a complex person to one trait—the trait drawing that person into membership in a particular group—and then equating that trait with a particular viewpoint and stereotype. This tendency leads people to treat a particular trait as the equivalent of a particular viewpoint and set of experiences, even though the group trait, such as race or gender, is at best a rough proxy for those views or experiences. To be a lesbian does not mean that one hates men, or wants to be one; to be Chicano does not entail advocacy for bilingual education or even fluency in Spanish.

Selecting a particular person to represent the group exposes faults of essentialism. Justice Clarence Thomas does not express the viewpoint of many who seek to advance African-American interests, nor does Margaret Thatcher embody the viewpoint of women advocated by feminists. People who share a trait, like race or gender, may differ in many other ways, including power to injure others who share that same trait. The gap between the representative who shares the group trait and the interests and needs of people in the group may lead to debates over authenticity and over the relationship between identity and experi-


14 See Gitlin, supra note 1.

15 See generally *After Identity: A Reader in Law and Culture* (Dan Danielsen & Karen Engle eds., 1995).


ence. Those debates immediately challenge the simplicity of the identity category as a focus for mobilization and representation.

On this point, social theorist Judith Butler has commented:

The minute that the category of women is invoked as describing the constituency for which feminism speaks, an internal debate invariably begins over what the descriptive content of that term will be. . . . In the early 1980s, the feminist "we" rightly came under attack by women of color who claimed that the "we" was invariably white, and that that "we" that was meant to solidify the movement was the very source of a painful factionalization. The effort to characterize a feminine specificity through recourse to maternity, whether biological or social, produced a similar factionalization and even a disavowal of feminism altogether. For surely all women are not mothers; some cannot be, some are too young or too old to be, some choose not to be, and for some who are mothers, that is not necessarily the rallying point of their politicization in feminism.18

The defect in identity claims signaled by the charge of "essentialism" expresses the faulty assumption that any given trait of an individual determines viewpoint, experience, or political interest and commitment. Essentialist notions of identity also mistakenly reduce individuals to one trait when they themselves think that other traits also matter. Groups may try to use single identities for strategic political goals, but simply invoking a shared trait of identity does not produce political solidarity and action.19 June Jordan explained the difficulty this way:

So far as I can see, the usual race and class concepts of connection, or gender assumptions of unity, do not apply very well. I doubt that they ever did. Otherwise why would Black folks

18 Judith Butler, Contingent Foundations: Feminism and the Question of "Postmodernism," in Feminists Theorize the Political 3, 15 (Judith Butler & Joan W. Scott eds., 1992). The words marked by ellipses in the quoted portion are:

There are those who claim that there is an ontological specificity to women as childbearers that forms the basis of a specific legal and political interest in representation, and then there are others who understand maternity to be a social relation that is, under current social circumstances, the specific and cross-cultural situation of women. And there are those who seek recourse to Gilligan and others to establish a feminine specificity that makes itself clear in women's communities or ways of knowing. But every time that specificity is articulated, there is resistance and factionalization within the very constituency that is supposed to be unified by the articulation of its common element.

Id. See generally Denise Riley, "Am I That Name?" Feminism and the Category of "Women" in History (1988); Spelman, supra note 16.

19 See Gitlin, supra note 1, at 206.
forever bemoan our lack of solidarity when the deal turns real. And if unity on the basis of sexual oppression is something natural, then why do we women, the majority people on the planet, still have a problem?  

The second, related difficulty is the tendency of identity politics to neglect "intersectionality." This notion refers to the way in which any particular individual stands at the crossroads of multiple groups. All women also have a race; all whites also have a gender; and the individuals stand in different places as gender and racial politics converge and diverge. Moreover, the meanings of gender are inflected and informed by race, and the meanings of racial identity are similarly influenced by images of gender.

Black women have confronted male violence and white domination in ways quite different from the experiences of either white women or black men. Black women and black men have different experiences and interests, argues Kimberlé Crenshaw. She provides vivid illustrations with black women’s responses to the obscenity prosecution of the music group 2 Live Crew and to the Senate’s treatment of Anita Hill during the confirmation hearings for Justice Clarence Thomas. Men who are black may experience racial discrimination while also participating in harassment or discriminatory practices toward women. Women who are white may experience gender discrimination while simultaneously participating in exclusionary practices against blacks and Hispanics. Neither gender nor racial identity groupings alone

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21 Kimberlé Crenshaw’s work is pivotal in this analysis. See Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991); Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 U. Chi. Legal F. 139 [hereinafter Crenshaw, Demarginalizing the Intersection of Race and Sex]. See also Abrams, supra note 16. A different kind of intersectionality arises for those who have ancestors of different races, ethnicities, and religions; they may claim one or all of them. or instead claim the experience of intersection as crucial to their self-understanding. See Maureen T. Reddy, Crossing the Color Line: Race, Parenting, and Culture 97-103 (1994).

22 See Crenshaw, Demarginalizing the Intersection of Race and Sex, supra note 21, at 157-59.


24 Patricia Hill Collins offers the following perspective:
can describe common experiences, standpoints, and relationships with others.\textsuperscript{25}

Is it adequate, then, to identify a group representative who shares a race with other members, but a gender only with some of them, or a gender with other members but a race with only some of them? What about sharing a gender but not a religion? The challenge to a conception of representation based on one shared trait compounds with the recognition of further intersections. Individuals manifest not only race and gender but also other bases for potential group membership, such as age, disability, religion, immigrant status, and sexual orientation. Then political affiliation, music preferences, favored sports, and other commitments further bisect and realign groups. Some of the intersections seem to invite new "identity groupings," such as black women, Chicana lesbians, and male bikers. They may also expose and perhaps solidify the self-affirmations of other intersectional groups, such as "white men" or "married women."\textsuperscript{26} At a minimum, recognizing intersectionality threatens to complicate identity politics with a proliferation of new, and old, identity groupings.

The idea of individual membership in multiple, intersecting groups implies a more profound challenge, though, to identity politics and, indeed, to the especially simplistic focus on the black-white racial divide.\textsuperscript{27} It implies ultimately that each person is alone at the unique crossroad of each intersecting group.\textsuperscript{28}

\textsuperscript{25} White feminists routinely point with confidence to their oppression as women but resist seeing how much their white skin privileges them. African-Americans who possess eloquent analyses of racism often persist in viewing poor white women as symbols of white power. . . . In essence, each group identifies the oppression with which it feels most comfortable as being fundamental and classifies all others as being of lesser importance.


\textsuperscript{27} See Patricia J. Williams, \textit{The Rooster's Egg} 188-89 (1995):

One reason discussing race is so difficult in the United States is that moving past the divide of "black/white" requires juggling so many other factors: color has long been a powerful tool for assimilative erasure of class, religion, history, most ethnicity, gender and sexual orientation, disembodied institutional power, and so on.

\textsuperscript{28} An alternative formulation looks at each person as an ensemble of social relations with a variety of people in a variety of roles. See Stanley Aronowitz, \textit{Reflections on Identity, in The Identity in Question}, supra note 13, at 111, 114 (discussing and endorsing views of George Herbert Mead).
are each the unique member of the sets of the endless groupings that touch us, whether called racial, gender, disability, family, regional, and so forth. Perhaps for strategic purposes we may choose to affiliate along one or a few lines of group membership, but these lines may shift as our strategies and goals also change. Sociologist Mary Waters reports on many Americans who choose an ancestry from among options they find in their past and present.\textsuperscript{29} As Leon Wieseltier has asserted, “The American achievement is not the multicultural society, it is the multicultural individual.”\textsuperscript{30} Perhaps the very felt experience of multiple affiliations deepens people’s desires to belong to one, if only temporarily.\textsuperscript{31}

Yet even these complications seem modest compared with the third difficulty. It stems from contemporary challenges to the basic coherence of group definitions. Consider the tensions among self-identification, assignment by self-claimed group members, and assignment by self-claimed group opponents.\textsuperscript{32} You say you are a Choctaw, but do the Choctaws say so? The Catholics claim you, but do you claim them? The Apartheid government declared you to be colored, whether you did or not. The gaps and conflicts among self-identification, internal group membership practices, and external, oppressive assignments have given rise to poignant and persistent narratives of personal and political pain and struggle.\textsuperscript{33} These gaps and conflicts also expose the inconsistent meanings of group membership. The persistent failure of group-based categories to yield consistent applications hints at the defects in their boundaries, their origins, their applications,

\textsuperscript{29} Mary Waters, Ethnic Options 22-51, 150-64 (1990). Walters is careful to note that the latitude for choice about ancestral identity is smaller for nonwhites. \textit{Id.} at 167. See also Aronowitz, \textit{supra} note 28, at 115-16 (describing creation of Puerto Rican racial identity as a strategy response to American experiences in the 1940s).

\textsuperscript{30} Gitlin, \textit{supra} note 1, at 207.

\textsuperscript{31} See Jodi Dean, Solidarity of Strangers: Feminism After Identity Politics 177 (1996) (“Many of us have diverse and conflicting identifications that escape categorization yet remain in need of articulation.”).

\textsuperscript{32} See generally Christopher A. Ford, Administering Identity: The Determination of “Race” in Race-Conscious Law, 82 CAL. L. REV. 1231 (1994). The contrasting answers coming from self-identification, group recognition, and assignment by opponents are further complicated when the consequences of identification are positive, negative, or a mixture of both.

and their ultimate meaningfulness.\footnote{See Williams, supra note 27, at 210 (discussing cultural histories of friends who use the "laconic categories of the census" but are "the grandchild of a German Lutheran artist killed by the Nazis" and a Romany who was passing because "people don't trust gypsies").}

The coherence is further challenged, though not automatically undermined, by historically shifting boundaries. Frequent border crossing can render the border uncertain. A "one-drop rule" defines who is nonwhite for purposes of much of U.S. history; but some parts of this country, and other countries at times, have instead recognized other degrees of ancestry, multiple ancestry, or the categories of biracial or multiracial.\footnote{See F. James Davis, The Hawaiian Alternative to the One-Drop Rule, in American Mixed Race: The Culture of Microdiversity 115-31 (Naomi Zack ed., 1995); Virginia R. Domínguez, White by Definition: Social Classification in Creole Louisiana (1986); Neil Gotonda, A Critique of "Our Constitution Is Color-Blind," 44 Stan. L. Rev. 1 (1991).} Certain groups, once defined as nonwhite, secured the status of whiteness over time.\footnote{See Ian Haney Lopez, White by Law: The Legal Construction of Race (1996); Neil Ignatiev, How the Irish Became White (1995).} Certain individuals who "cross over" from one racial identity to another expose the incoherence of the racial categories just as do those who insist on a racial identity that does not match others' expectations.\footnote{See generally Haizlip, supra note 33; Judy Scales-Trent, Notes of a White Black Woman (1995); Adrian Piper, Passing for White, Passing for Black, 58 Transition 4 (1992). See also Jane Doe v. State, 479 So. 2d 369, 372 (La. App. 1985) (state declares that a woman is black based on her parents' answer on birth certificate although her skin is white and she thought of herself as white).} Some people struggle to claim two cultures, based on ancestry, but feel alien or rejected by both.

Similar boundary issues arise for the category of gender. Obvious boundary problems are posed by persons who claim to be in the wrongly gendered body and may secure transgender surgery, and by others whose embodiment fails to match comfortably the expected bodies of females and males.\footnote{See Michel Foucault, Herculine Barbaine, Being the Recently Discovered Memoirs of a Nineteenth Century French Hermaphrodite (Richard Mon Dongall trans., 1980); Patricia Williams, The Alchemy of Race and Rights (1991) (discussing transgendered student who was rejected from each of the single-sex bathrooms).} Efforts to define the boundaries between sexual orientations are stymied by the claims of bisexuality, claims that threaten the easy distinctions between homosexual and heterosexual.\footnote{Marjorie Garber, Vice Versa: Bisexuality and the Eroticism of Everyday Life 65-66 (1995): If bisexuality is in fact, as I suspect it to be, not just another sexual orienta-}
ties controlled by medication or surgery challenge the boundary between ability and disability just as do people who by age and exposures to life's difficulties acquire disabilities gradually or late in life.

Incoherence difficulty arises not only because boundaries are difficult to draw. Ambiguous boundaries around racial, gender, and other identity categories expose their instability. For example, scholars have persistently questioned the coherence of "race" as a concept. In so doing, they criticize any claims to its biological basis. They also locate its precise origins as a historical idea. Richard Ford suggests, "Because race is an unstable identity, its deployment depends on a symbolic connection between the characteristics that code as race but to which race can-


40 See Kwame A. Appiah, Race, in Critical Terms for Literary Study (Frank Lentricchia and Thomas McLaughlin eds., 1990).


not be reduced (skin color, facial features, etc.) and some stable referent." When Ian Haney Lopez examined United States judicial opinions interpreting the meaning of "white person" used in the naturalization statute, he found no consistent meaning. Skin color, national origin, facial features, language, public perceptions, social science, and ancestry each became candidates for defining whiteness, but no single factor, nor combination of factors, could maintain a consistent place in the judicial texts.

Scientists dispute whether biological bases produce differences in the behavior of men and women, and whether genetics explains sexual desire for someone of the same sex. Studies of gender emphasize that differences among a variety of physical and other attributes, except reproduction, range as broadly within groups of males and females as between those groups. To some theorists, the significance of gender in explaining human differences lies with cultural practices that are subject to change rather than with inherent features of nature. A compatible but somewhat different view stresses gender as a set of performances changing through time rather than a pre-existing nature.


44 Haney Lopez, supra note 36, at 2.

45 Id. at 2, 96-107. For reasons like these, observers may call identity a myth, see Karst, supra note 39, at 282-89. Yet the weight of identities in people's lives is not well captured by this word. See id. at 307, 311-22. Nor does it adequately describe some identities, such as religious ones, which an adherent could view as a consequence of sincere personal belief rather than social convention.


47 See Fausto-Sterling, supra note 46; Hubbard, supra note 46.

48 Degler, supra note 46; Hubbard, supra note 46.

Some people argue that social practices, such as legal rules and institutions, layer upon women the image of people who are mothers, who are sexualized, and who are terrorized; these images are mutable and could come to encompass men too or come to be moved away from the gender line altogether.\textsuperscript{50} Many people attest to the contingent quality of their identities. For example, while talking with a Hindu landlord in an Indian community hostile to Muslims, philosopher Akeel Bilgrami asserted almost to his own surprise his identity as a Muslim.\textsuperscript{51} "It seemed hardly to matter that I found Islamic theological doctrine wholly noncredible, that I had grown up in a home dominated by the views of an irreligious father, and that I had then for some years adopted the customary aggressive secular stance of those with communist leanings."\textsuperscript{52} Self-identification with Muslims seemed the only self-respecting response in the circumstances of bigotry. For purposes of political goals or in response to immigrant experiences, previously distinct groups may merge together, exposing another way in which identities can be contingent.\textsuperscript{53}

A distinguished philosopher notes that the very concepts of similarity or kind reflect more about human mental processes than logic, since sets include things that are not alike as well as alike, and cultural practices instruct people about how to categorize.\textsuperscript{54} Scholars of cognitive development herald the human capacity to subsume objects within a general category based on a selected attribute—but also to readily shift from one attribute to another and move freely among categories.\textsuperscript{55} Moreover, people are able to use categories to reach objects by association and practical usage even if they exceed the familiar definition of the categories.\textsuperscript{56} Thus, work on the nature of human knowledge it-

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\textsuperscript{50} See Mary Joe Frug, Postmodern Legal Feminism 129-53 (1992).

\textsuperscript{51} Akeel Bilgrami, What Is a Muslim? Fundamental Commitment and Cultural Identity, in Identities, supra note 2, at 198.

\textsuperscript{52} Id. at 199.


\textsuperscript{54} W.V.O. Quine, Natural Kinds, in Ontological Relativity and Other Essays 114 (1969).


\textsuperscript{56} Id. at 98. Yet some categories seem at time to freeze, and people seem to lose
self seems to undermine the stability and naturalness of the kinds of categories used in identity politics. As Jane Schacter notes, group-based identity categories seem both too particular to acknowledge the fundamental commonality of each individual and too general to capture the provisional complexity and specificity of an individual’s process of identity definition.\(^{57}\) Other scholars of group identity emphasize the fluidity and dynamism, the processes of becoming, as characteristic.\(^{58}\) However much people may want to mobilize politically around identity groups, those groups are difficult to define and defy simple criteria.

To identify fluidity, change, border-crossing, and unstable categories is not to deny the real force and power that some people have accorded group labels and categories, to the clear detriment of others.\(^{59}\) What else could explain a regime that, in historian Barbara Fields’s words, “considers a white woman capable of giving birth to a black child but denies that a black woman can give birth to a white child”?\(^{60}\) As another historian, David Hollinger, puts it in his recent book, *Post-Ethnic America*, “Racism is real, but races are not.”\(^{61}\) The power to create groups and oppress them is real, but the rationale for those groups or for the assignment of members is not. Benedict Anderson’s book *Imagined Communities* artfully traces the creation of nations as official ef-

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58 Harold R. Isaacs, *Idols of the Tribe: Group Identity and Political Change* 205-07 (1989). Isaacs emphasized that groups are not defined solely by reference to physical characteristics, history, nationality, or language but instead amalgams of these and other features as well as interactions between inherited and acquired experiences. *Id.* See also Craig Calhoun, *Social Theory and the Politics of Identity*, in *Social Theory and the Politics of Identity* 9-36 (Craig Calhoun ed., 1994).


forts by dynastic regimes to control workers and peasants; in the process, colonial powers created census categories that in turn stamped racial categories to replace previous religious, status, and anonymous identities. Thomas Scheff argues that these cognitive maps of difference join with emotions of pride and shame to fuel prejudice and oppression.

In this view, group-based differences need not have a foundation in biology, or anything but historic oppressions, to make them real enough to warrant recognition and mobilization. We do not need refined understandings of identities to acknowledge how much people in power have hurt others along lines producing the harsh reality of identities. The Nazis resolved the question of who is a Jew in the most definitive way. Similarly, "black means being identified by a white racist society as black." Thus, Catharine MacKinnon locates gender difference not in biology but historic oppression when she asks, "Can you imagine elevating one half of a population and denigrating the other half

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62 Anderson, supra note 59, at 109-10, 149-50, 163, 166-81. He also acknowledges yearnings for solidarity that fueled movements by peasants and workers under the heading of ethnicity, which elites in control then converted for their own purposes. Id. Stephen Steinberg explores how people use ethnicity as a medium to imagine connections with the past and to fulfill a yearning for meaning in the face of present discontents. Steinberg, supra note 2, at 262. Mary Waters found people ascribing to their ethnic group values held by many others. Waters, supra note 29, at 134. Thus, individuals imagine a group as a basis for both community and individuality against a backdrop of historic practices articulating group identities. Id. at 147-64. See also Margaret Conavan, The Skeleton in the Cupboard: National, Patriotism and the Limited Loyalty (forthcoming).


64 See Hollinger, supra note 41, at 38-39 (group categories in the U.S. derive not from biology or culture, but "from the dynamics of prejudice and oppression in U.S. history and from the need for political tools to overcome the legacy of that victimization").


and producing a population in which everyone is the same?"67 Judith Butler argues that the meaning of anyone's gender is troubled and unfixed except by exercises of convention and authority.68 Marilyn Frye and Peggy MacIntosh, among others, have detailed the ways in which part of the comforts enjoyed by those with more power is the distance from other people's pain and the seeming invisibility of their own privileges.69 Empirical studies of individuals' self-understandings highlight the impact of societal views about groups and discrimination by more powerful groups.70

Regardless of the theoretical arguments against essentialism and for intersectionality, many people believe and perceive that their identities are bound up with experiences of subordination along simplistic group lines.71 Experiences of mistreatment along group lines influence how individuals view people from their own groups, and people in other groups. Todd Gitlin's book, which is chiefly an attack—from the progressive left—on identity politics as a distraction from deeper issues of poverty and economic dislocation, nonetheless asserts confidently that "[b]lacks are more likely than whites to doubt the promise of America; women more likely than men to care about children and fear rape; Jews more likely than Buddhists to study the Holocaust."72 The racial divide in public responses to the verdict in the murder trial of O.J. Simpson is only one recent confirmation

67 Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 37 (1987) [hereinafter Feminism Unmodified].
68 See Butler, Gender Trouble, supra note 49.
69 Marilyn Frye, The Politics of Reality: Essays on Feminist Theory 110-27 (1983); Peggy McIntosh, White Privilege and Male Privilege: A Personal Accounting of Coming to See Correspondences Through Work in Women's Studies, in Race, Class, and Gender: An Anthology 70-80 (Margaret L. Anderson & Patricia Hill Collins eds., 1992); Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1709, 1761 (1993) (whiteness includes the power to make rules and the settled expectation that whites will face no undue obstacles while also controlling the legal meanings of group identity).
70 Angelo Falcón, Puerto Ricans and the Politics of Racial Identity, in Racial and Ethnic Identity: Psychological Development and Creative Expression 193, 201 (Herbert W. Harris et al. eds., 1995) [hereinafter Racial and Ethnic Identity]. There is a curious tendency, though, of scholars who advance this view to treat "power" as singular in its form and direction.
71 Avery Gordon & Christopher Newfield, White Philosophy, in Identities, supra note 2, at 380, 399.
72 Gitlin, supra note 1, at 203. But see Jennifer L. Hochschild, Facing Up to the American Dream: Race, Class, and the Soul of the Nation (1995) (studies of views by racial groups).
of this perception.\textsuperscript{73}

Focusing on historical and ongoing oppression cannot, however, fully rehabilitate identity politics.\textsuperscript{74} The problem here is less incoherence than the personal, psychological, and political costs of engaging in politics around group identifications. Individuals' experiences of membership in more than one group may produce complicated responses to discrimination. For example, a study suggests that some young African-American males develop an exaggerated conception of male power and devaluation of females, apparently as a coping response to racial and economic disadvantage.\textsuperscript{75}

Privilege and oppression both can mark a person's experience, even simultaneously. Simply validating experience affords no guarantee of ending a person's own role in dominating others. Mobilizing African-American males is a current development in identity politics, as in the Million Man March, but that strategy risks splintering men and women who could be working together.\textsuperscript{76} That strategy also could seem to condone sexist attitudes that undermine the vision of equality and human liberation behind identity politics. Here, then, is a place where the errors of essentialism, the insights of intersectionality, and the basic incoherence of group identities run up against the case of adopting categories that were never designed to help those assigned to them.

Mobilizing in resistance to oppression based on a group trait may strengthen that oppression and the conceptions that it unleashes. As one observer recently put it:

This politics of being, essentializing or fixing who we are, is in actuality often an inversion or continuation of ascribed colonial identities, though stated as "difference." The stereotypi-

\textsuperscript{73} For related reasons, Harlan Dalton argues that even though the black community is not monolithic, it is still possible to talk about what it needs and believes, just as people talk about American aspirations. \textit{Harlan Dalton, Racial Healing} 163 (1995).

\textsuperscript{74} Nor can it fully capture what identities mean to people. As Karst writes, "It would be erroneous and patronizing to reduce the culture of black Americans to a simple legacy of oppression." Karst, supra note 39, at 318.

\textsuperscript{75} Margaret B. Spencer et al., \textit{Identity as Coping: Adolescent African-American Males' Adaptive Responses to High-Risk Environments}, in \textit{Racial and Ethnic Identity}, supra note 70, at 31, 49.

\textsuperscript{76} The risk of splintering is, however, coupled by the possibility of a therapeutic sense of connection. For a discussion of both, see Debra Dickerson, \textit{Queen for a Day?}, \textit{The New Republic}, Nov. 6, 1995, at 22; Glenn C. Loury, \textit{One Man's March}, \textit{The New Republic}, Nov. 6, 1995, at 18-22.
cal contents of Africanness or Indianness, for example, are in the end colonial constructs, harbouring the colonizer’s gaze. We look at ourselves with his eyes and find ourselves both adorned and wanting.\footnote{Himani Bannerji, Thinking Through: Essays on Feminism, Marxism and Anti-Racism 183-4 (1995). See also Gitlin, supra note 1, at 208 (“Hasn’t history already done its detestable and irreversible work, stamping inferiority on dark-skinned peoples, enslaving them in the name of that classification? Without doubt, the group identities that have lasted longest and cut deepest are the ones that persecution has engraved.”).}

The internalized sense of inferiority and the assumption that human relationships must be marked by hierarchy and domination are legacies of oppression. A piece of the oppressor, then, lies within each person, as Franz Fanon, Albert Memmi, George W. Hegel, and so many observers recount.\footnote{Frantz Fanon, Black Skin, White Masks (1967); Paulo Freire, Pedagogy of the Oppressed (1970); Georg W. F. Hegel, Phenomenology of Spirit 179-96 (A. V. Miller trans., 1977); Albert Memmi, The Colonizer and the Colonized (Beacon Press 1967) (1965); see also Toni Morrison, The Bluest Eye (1970) (young black child yearns for blond hair and blue eyes, having internalized racist culture).} Paulo Freire has argued that the true focus of revolutionary change is never merely the oppressive situation, but also the piece of the oppressor which is implanted within each person and which knows only the oppressor’s tactics and relationships.\footnote{Freire, supra note 78.} This insight undergirds Jacques Rancière’s observation that emancipation is never the simple assertion of an identity; it is always, at the same time, the denial of an identity given by the ruling order.\footnote{Jacques Rancière, Politics, Identification, and Subjectivization, in The Identity in Question, supra note 13, at 63, 68.} Efforts to reclaim identities produced by oppression can express creative resistance,\footnote{See Mary Daly, Beyond God the Father: Toward a Philosophy of Women’s Liberation (1973) (reclaiming hag and witch).} but it is not clear they can extirpate either the specific category’s origins or the reductionism of categorical thinking.

Besides strengthening the categories and methods of oppression, identity politics may freeze people in pain and also fuel their dependence on their own victim status as a source of meaning. Wendy Brown has written powerfully about these dangers; she argues that identity-based claims re-enact subordination along the lines of historical subjugation.\footnote{Brown, Wounded Attachments, supra note 13.} This danger arises, in her view, not only because of the ready acceptance of those very
lines of distinction and oppression in a society that has used them, but also because people become invested in their pain and suffering, or in her terms, their “wounded attachments.”  

She writes:

*Politized identity, premised on exclusion and fueled by the humiliation and suffering imposed by its historically structured impotence, is as likely to seek generalized political paralysis, to feast on generalized political impotence, as it is to seek its own or collective liberation through empowerment. Indeed, it is more likely to punish and reproach . . . than to find venues of self-affirming action.*

Brown urges efforts to shape a democratic political culture that would actually hear the stories of victimization while inciting victims to triumph over their experiences through political action. Toward this end, she proposes shifting the focus from identity toward a focus on desires and wants, from the language of “I am” to the language of “I want.” In this way, perhaps politics could move beyond the artificially fixed and frozen identity positions and blame games toward expressive and engaged political action, but Brown has yet to sketch a language of solidarity rather than individual self-interest.

Therapeutic understandings of trauma and recovery support this call to shift from what an individual lacks to what an individual, with others, can envision and seek. Judith Herman’s work on child abuse, incest, rape, and war-time trauma emphasizes the crucial importance to individual psychological health of recovering memories and learning to speak about atrocity. She also stresses the significance of moving on through mourning, acting

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83 Id. at 202, 220; see also Gayatri Chakravorty Spivak, *Acting Bis/Identity Talk*, in Identities, *supra* note 2, at 147 (describing identity as a wound).

84 Brown, *Wounded Attachments*, *supra* note 13, at 217. The omitted language is a quotation from Nietzsche’s *Zarathustra*: “[P]unishment is what revenge calls itself; with a hypocritical lie it creates a good conscience for itself.” *Id.* at 217, 226 (quoting *Thus Spoke Zarathustra*, in *The Portable Nietzsche* 252 (W. Kaufmann ed., 1954)). In a companion piece, Judith Butler acknowledges how terms of identity that injure also create social recognition, and how embracing the injurious term is necessary as a stage in learning to resist and oppose it. Judith Butler, *Subjection, Resistance, Resignification: Between Freud and Foucault*, in *The Identity in Question*, *supra* note 13, at 229, 245 [hereinafter Butler, *Subjection, Resistance, Resignification*].


86 *Id.*

87 Judith Lewis Herman, *Trauma and Recovery* (1992).
and fighting back, and reconnecting with others. Identity politics risks directing all energy and time to pain without moving through recovery, action, and reconnection with larger communities. There remains a crucial place for anger and recrimination, as well as forgiveness and reconciliation. But when identity politics takes the form of claiming excuses due to past victimization, it even makes it difficult for others to remember and acknowledge past wrongdoings and harms.

Personal testimony about oppression displaces analysis of social structures that produce and maintain it. Identity politics tends to locate the problem in the identity group rather than the social relations that produce identity groupings. Cornel West observes: "[w]e confine discussions about race in America to the 'problems' black people pose for whites rather than consider what this way of viewing black people reveals about us as a nation." Serious discussion of race in America, he argues, "must begin not with the problems of black people but with the flaws of American society—flaws rooted in historic inequalities and long-standing cultural stereotypes." Identity politics is likely to reinforce white people's conception of blacks as "them" rather than pressing home everyone's mutual dependence and relationships. Identity politics also tends to not only produce defensiveness among white men, but also to make it easier for white men to abandon and even blame people of color and women of all sorts for their circumstances. Blame should not be placed on identity politics for the indifference or selfishness of those who wish it would go away, but nor should those who pursue identity politics be excused of its effects.

Adjudicating who is right and who is wrong in the conflicts between identity politics advocates and those who charge identity politics with threatening unity occupies too much time and attention compared with the stakes really at issue. After all, if

88 Id.
89 See Jeffrie G. Murp\text{h}y \\text{&} Jean Hamptom, Forgiveness and Mercy (1988).
90 \text{Dalton}, supra note 73, at 148-49.
91 Id. at 10. See also Martha Minow, Surviving Victim Talk, 40 UCLA L. Rev. 1411, 1413 (1993).
92 See Joan W. Scott, Multiculturalism and the Politics of Identity, in The Identity in Question, supra note 13, at 3-6 [hereinafter Scott, Multiculturalism].
94 Id. at 3.
95 "As long as black people are viewed as a 'them,' the burden falls on blacks to do all the 'cultural' and 'moral' work necessary for healthy race relations." Id.
the alternative is a notational unity, then the fight simply focuses on which kind of identity ought to trump others. Those caught up in this debate too often fail to focus on, much less remedy, the savage brutalities affecting the most vulnerable members of society—and therefore the entire quality of the society. Thus, amid rancorous debates over multicultural curricula, actual school performance by children most at risk of failure remains largely neglected.\(^9\) Intense university debates over identity-based issues in faculty promotions mobilize students while eviscerated public budgets for higher education do not.\(^7\) Devastated urban neighborhoods; massively widening gaps between a small group of wealthy people and the rest of the society; evaporating public sector support for art, libraries, and human services; the disruption of families caused at least in part by economic hardship; and the substitution of market values for all other vocabularies of moral and political reasoning occur before our eyes.\(^8\) Racial patterns of inequality persist or grow larger in some respects than in the past.\(^9\)

The language and tactics of identity politics do not provide a purchase on these events, nor do they seem to entice people to engage in political resistance to them.\(^10\) The invocation of racial, gender, or other identities helps develop not only a rich sense of who you are, but also what explains your life circumstances.\(^11\) Judith Butler put it bluntly: "You can articulate your

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\(^9\) John U. Ogbu, Professor of anthropology at the University of California, Berkeley, reports that neither the ideal of the common curriculum nor the ideal of multiculturalism is likely to enhance the academic achievement of members of minority groups who traditionally do not succeed in school. See Gitlin, supra note 1, at 30.

\(^7\) Id. at 158.

\(^8\) Id. at 160-61, 236-37. See also West, supra note 93.

\(^9\) Orlando Patterson, The Paradox of Integration: Why Whites and Blacks Seem So Divided, The New Republic, Nov. 6, 1995, at 24-27 (describing average improvement for African Americans but increase in percentage living in poverty since 1969, Depression-level unemployment, one in three black men between 25 and 29 supervised by criminal justice system, and racism in police departments); Gordon and Newfield, supra note 71, at 382; Conversation with Barry Bluestone (research for forthcoming study of data on workplace participation, showing effect of access to a computer and to education very helpful for whites, not so for blacks, Hispanics).

\(^10\) See E.J. Dionne, Jr., Why Americans Hate Politics 21 (1991). Some observers mourn the decline of class as a meaningful identity category and imagine it could better mobilize political action and challenges to inequality; for complex economic, political, and psychological reasons, it just has not worked that way. See West, supra note 93, at 15-18.

\(^11\) Dalton, supra note 73, at 154. "For most of us Black folk, the problem is not
identity all you want; you need the damn resources in order to respond to the concrete problems of bodies in pain.” 102 To get the resources, you need to work with others; to care about other bodies in pain, you need to move beyond your own circumstances.

I am not urging renewed claims of unity, a contested notion in politics. 103 Unity and universalism, however appealing as ideals, have in practice often saved only some. 104 Perhaps those terms are doomed to fail because they invoke too enormous a set of notions of community and commonality; perhaps they have failed in the past but might inspire effective political struggles in the future. 105 In any case, universalist ideals have often failed to expose structures of power and processes through which differences among people become excuses for misallocating resources. 106

Identity politics offers valuable conceptions and occasions for

that we are mired in victimhood; it is that we no longer are able to give a satisfactory account of who we are and why we remain on the bottom.” Id. at 150.

102 Judith Butler, *Discussion, in The Identity in Question*, supra note 13, at 139 [hereinafter Butler, *Discussion*]. Butler herself resists the idea of surpassing identities, however, given reactionary politics, and instead urges efforts to invoke identity provisionally, for strategic purposes, while questioning notions of identity and emphasizing the contingent and fluctuating aspects of identity. Id. at 129-31.


104 See Childs, supra note 103 (discussing false universality); see also Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).


106 See Gordon & Newfield, supra note 71, at 380-81; Scott, supra note 92, at 5-6. Some mourn the loss of a proletarian struggle, Marxism, or other progressive universalisms to frame responses to poverty, racism, and xenophobia, but reinventing poli-
being for oneself and forging solidarity with others based on a perception of a shared trait; it has also offered important challenges to exclusionary practices. Identity politics effectively questions exclusionary practices that claim to be inclusive, such as color-blind policies that nonetheless produce all-white beneficiaries. Identity politics also disturbs the repression of historic and continuing group-based injuries. Identity politics sustains crucial institutions, such as black churches, and significant gains in respect for difference, such as the growing prevalence of sign-language interpreters at public events. Yet identity politics has not yet much helped people forge coalitions across groups, or learn to understand how these interests are interconnected, or practice talking across differences and divides.\(^{107}\) Instead, identity politics tends to breed more identity politics.\(^{108}\) Summoning up unity produces splinters. Rather than building bridges, the only point of agreement between those who assert the significance of group identities and those who resist is the reality and

\(^{107}\) Several scholars have drawn from identity politics the ideas that we each are "other" to others, and indeed strangers to ourselves, as efforts to promote openness to others, but this somewhat elusive set of notions is not the dominant or even widely understood message of identity politics. See Dean, supra note 31; Julia Kristeva, Strangers to Ourselves 169, 194-95 (Leon S. Roudiez trans., 1991); infra note 108 (noting Butler's attention to Cornell, Connolly, Irigaray). Instead, the practices of identity politics are too often characterized by personal testimony that uses experience as authority and grounds for exclusion and silencing of others. See Scott, Multiculturalism, supra note 92, at 10; Joan W. Scott, Experience, in Feminists Theorize the Political 22, 23-24, supra note 18 [hereinafter Scott, Experience].

\(^{108}\) There has been a shift from discussion of "identity" to discussion of "identities." See Judith Butler. Collected and Fractured: Responses to Identities, in Identities, supra note 2, at 439. Yet rather than expanded attention and concern, this shift continues to limit and confirm the preoccupations of inwardness. "If identity becomes the unit that is multiplied, then the principle of identity is repeated—and reconfirmed—without ever yielding to another set of terms." Id. The proliferation of multiple identities leads some to try to "harden the categories" to strengthen the chances of political mobilization. Steven Epstein, Gay Politics, Ethnic Identity: The Limits of Social Constructionism, 9 Socialist Rev. 12 (1987). Butler maintains that some identity theorists pursue its potential for an ethical stance of openness. See Butler, supra at 441 (referring to thinkers such as William Connolly, Kendall Thomas, Drucilla Cornell, and Luce Irigaray). But the actual unfolding of politics around identity themes has not had that effect, and the abstruseness of theorists' prose on this point does not bode well for changes in this regard in the future. Some exceptions can be found. John Brown Childs, for example, reports experiments in "transcommunality" such as a Gang Truce and other grassroots dialogues. Childs, supra note 103, at 48-51.
apparent immutability of polarization and disagreement.\textsuperscript{109}

Identity politics ironically responds to group-based exclusions by reiterating group boundaries. The problem is not only that responses to oppression reiterate the oppressive move of treating identity as fixed. The potentially multiple, fluid qualities of any person's identity seem to disappear in the assertion of one trait—but considerable power must be marshalled to accomplish this disappearing act, given the nonessential, intersectional, and incoherent qualities of group-based identities.

The question, then, is not whether identities are fluid and contestable—they are. Rather, the question is why we ever forget this. A major reason is the deployment of governmental power, through official categorizing schemes and policies.\textsuperscript{110} Governments enjoy near monopoly on lawful violence.\textsuperscript{111} Holding that most basic power, governmental authorities can work with the more subtle devices of words and texts.\textsuperscript{112} The legal reliance on sharply bounded categories reinforces group status differences when applied to issues of personal identity.\textsuperscript{113} When governmental power is mobilized to invest group categories with significance and to assign individuals to those categories, the use of identity groupings can injure as easily as it can help.\textsuperscript{114} This is one of the

\textsuperscript{109} See Gitlin, supra note 1 at 167; Minow, supra note 91.

\textsuperscript{110} See Anderson, supra note 59, at 164-70 (discussing role of census-taking in the creation of group identities); Homi K. Bhabha, The Location of Culture 66 (1994) ("Fixity, as the sign of cultural/historical/racial difference in the discourse of colonialism, is a paradoxical mode of representation: it connotes rigidity and an unchanging order as well as disorder, degeneracy and daemonic repetition."); Karst, supra note 39, at 289-96 (discussing legal "factfinding" that assigns identity).

\textsuperscript{111} Increasingly, consumer-oriented markets also produce and sell identities, with an emphasis therefore on the visible and distinguishable. See Linda Alcoff, Mestizo Identity, in American Mixed Race: The Culture of Microdiversity 257, 270-71 (Naomi Zack ed., 1995) [hereinafter American Mixed Race].

\textsuperscript{112} Self defense is the chief exception.


\textsuperscript{114} Governmental and other powerful forces also complicate any assertion that a particular identity is freely chosen, or freely rejected. Kenneth Karst puts the point this way:

Among the teachings of our history of identity-labeling by government, one lesson is clear: When the law and other controls make the social environment hostile to people who wear a particular public identity label, it is hard to locate any authenticity in an individual's "choice" to repudiate the disfavored label.
reasons why the Constitution treats as unlawful entanglement with religion, efforts by the government to decide who is or is not a bona fide member of a religion.\textsuperscript{115}

Governmental—and personal—preoccupation with group identity works to hide each person’s uniqueness, membership in multiple groups, and subjection by the incoherencies of group-based notions. Governmental force tends even to deny the interconnections among official norms and norms generated and sustained in resistance to or simply outside of them.\textsuperscript{116} Thus, group-based identity can be a source of self-esteem and spiritual meaning; a defensive response to negative treatment along group-based lines; a way to forge alliances and engage in self-definition; and also a way to ensure schisms and to hide from oneself and to withdraw from others.\textsuperscript{117} Especially when imposed or reiterated by governments, group identities obscure and hinder people’s connections with those assigned to other groups.

What elements of identity politics can help people find commonalities or forge bridges across different kinds of group memberships? Individuals can and do find commonalities and forge bridges every day. June Jordan recounts both her worries in advance and the immediate success of her effort to connect a black South African woman with an Irish woman.\textsuperscript{118} Both had experienced violence at the hand of a beloved male family member. They thus found a commonality based on experiences they have shared despite other kinds of differences in identities.

Groups also work to build bridges—bridges between groups, not just individuals—and for this purpose identity politics may provide the vital requirement of self-respect and respect for difference. The idea of deliberative democratic processes rests on the hope, and the experience, of individuals and groups learning to be for something larger than themselves, although the practice

Karst, supra note 39, at 323.

\textsuperscript{115} See Lemon v. Kurtzman, 403 U.S. 602 (1971). Instead, the government may only inquire as to the sincerity of the individual’s belief. See generally Laurence H. Tribe, American Constitutional Law (2d ed. 1988).

\textsuperscript{116} Cover, Supreme Court, supra note 112.

\textsuperscript{117} Dean, supra note 31, at 177. Although “the critique of identity politics has taught us that we can neither solve the problems of social and legal exclusion nor do justice to the complexity of multiple, shifting, and situated identities so long as we continue to struggle on the terrain of identity politics,” identities seem to offer security and belonging. Id.

\textsuperscript{118} Jordan, supra note 20, at 48-49.
of democratic politics falls considerably short.\textsuperscript{119} Outside of politics, a recent, powerful example occurred when many people of Billings, Montana, rallied to support a Jewish family after a cinderblock smashed their window displaying a menorah. In response to this event and the increasingly vocal presence of the Ku Klux Klan, many members of the community displayed menorahs in their own windows and organized a vigil outside the synagogue.\textsuperscript{120}

People find a connection in their common experiences of betrayal and assault. Perhaps this is another kind of wounded attachment, but one that does not cling to lines of racial, gender, or other assigned group differences. Connection through experiences perceived as common itself becomes a common experience as well. All of us have been betrayed at times by those who claim to be like us; we have also, at times, felt understood by or allied to people who seem quite different from ourselves.

What collective, societal projects could encourage people to have more experiences of connection with those who seem different? What initiatives can governments or private groups adopt to promote people's abilities to be for themselves and also for others? How do practices of representation—and alternatives to them—enhance or undermine this end? What stances toward group identities should a government informed by critical reflection take? I will consider these questions next, in my concluding section.

III

FOR ONESELF AND FOR OTHERS

Identity politics, especially when addressed to issues of representation, directly expresses distrust about the ability of people to speak and stand in for those who seem different from themselves. The obvious sources for this distrust lie in historic and continuing practices of group exclusions and oppressions, and persistent evidence of at least some predictable differences in interests and attitudes, again along group lines. The language and ideals of universal commitment to individualism have not produced equality and freedom for all, and thus have earned the distrust manifested by identity politics.

\textsuperscript{119} See infra text at notes 154-61 (discussing limitations of contemporary politics).

\textsuperscript{120} DEAN, supra note 31, at 180.
To encourage people to trust others, a basic sense of security—economic, social, and psychological—would help. Security along these dimensions would also enhance people's abilities to be for themselves and also for others. As Todd Gitlin observes, "Who got seated at the table and in what order mattered less if the table was piled high." We end with a circularity of problems, though, if collective security is a precondition for mutual concern—and coalitions for mutual support are necessary for economic, social, and psychological security. Such circularity may suggest promise in aligning methods and goals. Working to build political coalitions, for example, to seek the economic well-being of children of all colors and incomes, could strengthen sources of mutual regard while also improving material conditions. Marion Wright Edelman's inspired and hard work in this vein, along with other efforts on behalf of children, strikes me as vitally important. I also think that focusing on an issue such as the well-being of all children could join people who otherwise feel divided. Even if people joined together for different reasons, a shared goal could produce collective efforts and also the kinds of common experiences that can nurture trust. But this does not seem to describe contemporary American politics. Instead, coalitions that cross lines of race, ethnicity, and class in particular do not seem to happen when people do not trust one another. Moreover, such political and social projects do not themselves address the wounds that propel and sustain identity politics.

What could address those wounds and wounding conditions? We need, I think, both to acknowledge the injuries and rewards of group-based experiences while also weakening the collective processes that seem to fuse otherwise fluid identity possibilities for individuals. Both defenders and opponents of identity politics should address the systemic harms that animate and perpetuate identity politics. This will require committed response to the harms and inventive approaches toward the future. Crucial here are both sustained public acknowledgment of past and continuing oppressions on group-bases and support for individual self-fulfillment without the truncated effects of assigned group identities. And also crucial here are efforts to draw individuals into the

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121 Gitlin, supra note 1, at 232.
122 See Martha Minow, Children's Studies: A Proposal, 57 OHIO ST. L.J. 511 (1996); Minow, supra note 105.
rewarding, maddening process of debating with others over collective governance.

This double mission requires not only settings for telling and knowing the truths about exclusions and degradations, and the processes that produce group identities and faulty stereotypes, but also structures that permit people to experiment with and negotiate through the groups, interests, and practices that can afford them personal meaning.\(^ {123}\) It calls for language and politics that permit people to be for themselves, but also for others. These efforts should problematize group affiliations while enhancing people's chances to claim more than one of them. This approach also invites efforts to expose persistent findings of group differences in social and economic status as clues to problems in societal practices, rather than problems located in the disadvantaged groups.\(^ {124}\)

Let's consider adopting deliberately competing societal strategies. Some specify roles for the government; some urge governmental restraint; others could well be advanced through collective but private means: social movements, philanthropy, grass roots activities, religious group efforts. Some will resist any use of group names; others will revel in them. I mean to invite debate and promote a proliferation of strategies rather than to pronounce any one of them the answer. To fight against ignorance about historic discrimination and rigid group assignment will involve different and, at times, inconsistent strategies.

A. Remembering and Remedying Group-Based Harms: Using Law and Settings for Public Discussion to Force Attention to Group-Based Harms

I. Intensive and Aggressive Enforcement of Anti-Discrimination Laws

Laws already adopted at the federal, state, and local levels forbid discrimination in hiring, housing, public accommodations, and school admissions against otherwise qualified people on vari-

\(^ {123}\) Joan Scott calls for efforts "to treat identity as the unstable, never-secured effect of a process of enunciation of cultural difference," as historically conferred with political salience for different contexts and subject to redefinition, resistance, and chance. Scott, Multiculturalism, supra note 92, at 11.

\(^ {124}\) See FRUG, supra note 50, at 38-48 (urging a progressive use of identified sex differences to expose them as contingent).
ous group-based grounds. Vigorous enforcement of such laws could strengthen, especially for people who identify with victim categories, the sense of trust in the larger community. Such enforcement could, of course, fuel resentment by others, especially if the remedies pose losses to them in what may seem like a zerosum game. Hence the ongoing debate over affirmative action and “reverse discrimination.”

On quite different grounds, Wendy Brown criticizes a city ordinance against discrimination in employment, housing, and public accommodation that covers a long list of group identities, including not only the familiar categories of race, ethnicity, gender, sexual orientation, and disability, but also the category of appearance. She objects to this effort to render as equivalent the risks faced by African-Americans and white teens who dye and spike their hair; she worries that the use of identity categories even in a remedial mode becomes complicit with the regulatory regimes that produce them; she cautions against the regulation that obscures the effects of social power. Similarly, Kristin Bumiller has examined the danger that civil rights laws require individuals to claim the status of victims in a way that recapitulates their group-based exclusions.

These cautions warrant attention. But before ceding to them, I wonder if it could be possible to refine the anti-discrimination effort to attend specifically to the constructed nature of group identities and the critiques of their essentialism, monolithic rigidity, and pretended coherence. The recent federal civil rights law forbidding discrimination on the basis of disability

125 Sexual orientation receives no federal protection against discrimination, and protection in only some municipalities and states.
126 See generally Christopher Edley, Jr., Not All Black and White: Affirmative Action, Race, and American Values (1996).
127 Brown, Wounded Attachments, supra note 13, at 211.
128 Id.
129 Kristin Bumiller, The Civil Rights Society (1988). Karst also suggests that the equal protection doctrine of “suspect class” makes it seem that those who have been injured must persuade the courts that they are qualified members of a group that truly satisfies the protected identity category. Karst, supra note 39, at 326.
130 For careful rejections of neutral, “race-blind” governmental policies that forbid group-based remedies, see Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107 (1976); Karst, supra note 39, at 331-52.
131 See supra part II (three problems in identity politics). See also Karst, supra note 39, at 328 (arguing that recognition of the mythical qualities of racial identity should deepen rather than undermine commitment to enforcing anti-discrimination laws).
explicitly defines disability to include being regarded by others as having a disability.\textsuperscript{132} Litigation enforcement under this provision directly invites examination of the processes through which people form attitudes and misapprehensions about others who seem different. Perhaps a similar invitation could be built into regulations against discrimination on the basis of race, gender, ethnicity, and other group-based categories.\textsuperscript{133}

In this spirit, I think that legislatures, police departments, prosecutors, governors, and mayors should examine massive group disparities in their purview as clues to underlying problems deserving remedy, rather than accurate reflections of real differences among people. For example, if one out of three African-American males in their twenties are supervised by the criminal justice system, this should be a clue that something is terribly wrong in that system and in the larger society—and not instead serve as a confirmation of stereotypic notions of African-American male criminality.\textsuperscript{134} Investigation into these practices might not justify compensation or relief to particular individuals, the sort of remedies a court normally would consider. Structural changes in the operations of police and prosecutors might be called for, although they probably would be more effective if designed by those personnel than by courts. The adoption of community police approaches that try to ensure access to sports and constructive out-of-school activities, especially for young black and Hispanic males, is an example of the view that their overrepresentation in the criminal justice system reflects failures in the broader environment rather than defects in themselves. Governmental practices that yield massive racial, gender, or ethnic disparities should raise questions for those in charge about those practices and challenge assumptions that the problem lies in "those people." The disproportionate presence in prisons and people with mental disabilities should also prompt inquiry into


\textsuperscript{133} Such an argument was proposed but rejected when a Jewish group sought protection against racial discrimination on the grounds that they were—wrongly—perceived to be a race. See Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). The Supreme Court decided to turn to nineteenth-century definitions of race and thereby treated Jews as a race. \textit{Id.} at 617-18. See MINOW, supra note 104, at 55. Karst suggests that by using the nineteenth-century dictionary definition, the Court did implicitly move away from the pretense of biological foundations for race. Karst, \textit{supra} note 39, at 325.

the societal practices that make this seem like an appropriate response.

More basically, challenges to the hypocrisy—the gap between our ideals of equality and freedom and the reality—offer the best hope for pulling this country together. From the beginning, the ideals of equality and freedom were not manifest in practice, and nor are they fully now. What makes politics and law capable of drawing us together is their readiness for individuals brash enough to say, "But you said ...," and courageous enough to hold people accountable to the ideals so often stated.

2. **Facilitate Public Compensation and Reparations for Past and Continuing Group-Based Harms**

Compensation involves payments for specific losses or damages identified and measured through a legal procedure; reparations involve payments to amend for more general wrongs and injuries through a political process. Greater use of public fora for debating compensation and reparations for group harm could air enduring grievances, educate broader publics, and produce some sense of closure. The very same practices could trivialize atrocities, encourage unmanageable numbers of claims and wounded attachments, invite trivial claims, or feed resentment by those who do not personally benefit.

Although these negative consequences deserve attention, so do the positive possibilities. Consider these two examples: (1) in May 1994, the Governor of Florida signed into law a claims bill passed by the legislature for the destruction in 1923 of the town of Rosewood, Florida; and (2) a group of whites burned the town which was inhabited entirely by African-Americans (except for the sole white store owner), and killed at least eight people. The precipitating event was the claim by a white woman in a neighboring town that she had been raped by a black man, although no such man was ever found. The law enforcement officials knew and did not intervene during the week of destruction. After an investigation, an adversarial hearing, and a public debate, the state senate approved a bill to compensate survivors, to

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compensate families of residents who lost property, and to create a minority college scholarship fund with preferences to descendants of Rosewood. The state law enforcement department was also directed to conduct a criminal investigation.\textsuperscript{137}

The incident could be distinguished from others, such as the massive Southern lynchings, because of the extended time during which the public officials could have acted but did not; in addition, good evidence, including considerable contemporaneous press coverage, substantiated the claim. Thus, this instance would not necessarily inspire massive and unmanageable additional claims.\textsuperscript{138} The allocation of money for Rosewood did produce tension and conflict: first, by whites opposed to the bill, and second, by claimants for the compensation itself.\textsuperscript{139} The ultimate amount of the compensation was small when divided among the claimants, and many found the experience incomplete, if not anticlimactic.\textsuperscript{140} But the experience unearthed a history that had been suppressed, permitted many individuals to work through trauma they and their families had experienced, and taught a watching nation about the prejudice, violence, and official complicity.\textsuperscript{141}

A second example is reparations for the internment of Japanese-Americans and Japanese residents in the United States during World War II.\textsuperscript{142} Again, the risks of trivializing the harms competed with the risks of provoking majority resentment and hostility. Yet the process of seeking and substantiating the basis for reparations could afford a constructive method for recalling history and acknowledging group harms.\textsuperscript{143}

Serious scholarly arguments for reparations to African-Ameri-

\textsuperscript{137} Id.; see also D'Orso, supra note 135, at 297.
\textsuperscript{138} Bassett, supra note 136, at 521.
\textsuperscript{139} D'Orso, supra note 135, at 162-69, 306-17.
\textsuperscript{140} Id. at 318-20.
\textsuperscript{141} See id. at 93-106, 318-23. The story has inspired a book and two movies.
\textsuperscript{143} Another example is the United States Indian Claims Commission, established in 1946 and closed in 1978, which heard claims concerning abrogation of tribal or other Indian property rights occurring prior to the 1940s. See \textit{Robert N. Clinton et al.}, \textit{American Indian Law} 721-24 (3d ed. 1991).
cans for slavery have yet to spark political success, and the topic may raise particular complexities.\textsuperscript{144} Nonetheless, sustained political debate on this issue could permit people to express long-standing perceptions about the scope and consequences of group-based injuries.

3. \emph{Frame a Variety of Settings for Eliciting Facts and Narratives of Past and Continuing Group-based Harms}

South Africa has recently established what it calls the "Truth and Reconciliation Commission." It will have no law enforcement duties nor any power to hear compensation or reparations claims. Instead, this official body will seek testimony and evidence about what really happened under Apartheid in order to get a truthful record, acknowledgment of suffering, and a basis to permit the entire society to move ahead in forging a new future. To achieve these ends, the Commission plans to grant immunity from prosecution or liability to those participants in Apartheid policies and also to African National Congress (ANC) participants for violent or other criminal conduct, but only if they voluntarily come forward to speak.

There may be no direct analogue for this device in an ongoing, as opposed to new, governmental regime such as the contemporary United States.\textsuperscript{145} Nonetheless, the idea of a procedure designed to elicit narratives, freeing the participants from legal consequences, may hold promise here. In his recent book, \textit{Racial Healing}, Harlon Dalton calls for attention to the contemporary consequences of slavery rather than exclusive concern with slavery as history.\textsuperscript{146} Quite beyond the "monstrous but transitory harms"\textsuperscript{147} to the enchained, slavery "served to indelibly link

\textsuperscript{144} See \textsc{Boris I. Bittker}, \textit{The Case for Black Reparations} (1973) (finding black reparations constitutional but partial, and therefore at risk of unfairness; urging national debate on the subject); Rhonda V. Magee, Note, \textit{The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse}, 79 \textsc{Va. L. Rev.} 863 (1993); Vincene Verdun, \textit{If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans}, 67 \textsc{Tul. L. Rev.} 597 (1993).

\textsuperscript{145} For an extensive consideration of the effects on collective memory of prosecutorial approaches to state-sponsored mass brutality, see \textsc{Mark J. Osiel}, \textit{Ever Again: Legal Remembrance of Administrative Massacre}, 144 \textsc{U. Pa. L. Rev.} 463 (1995).

\textsuperscript{146} \textsc{Dalton}, supra note 73, at 157.

\textsuperscript{147} Id. at 155.
Blackness and subservience in the American subconscious. At a deep level, slavery stamped Black people as inferior, as lacking in virtue, as lacking the capacity to order their own lives"\(^{148}\) and therefore inexorably headed for prison. Creating public settings in which interracial groups could examine such claims would instruct all involved and trigger a probing exploration of the processes producing group identity and prejudices against groups.

Dalton also suggests that attention to the consequences of slavery would require considering the paradoxical benefits of racial separation in strengthening a sense of community and actual independent institutions.\(^{149}\) This kind of insight would also highlight the processes producing group identities and attachments to them while inviting comparisons with other ways to build and sustain community responsibility and vibrant institutions. To learn from the still new model of South Africa's Truth and Reconciliation Commission, a parallel activity here would need to consider criticisms of the oppressed group as well.

Alongside or instead of large public gatherings for such explorations, electronic discussion groups, interfaith gatherings, and therapeutic support groups should be promoted with public and private support. People with chronic illnesses and disabilities may find conversing in electronic spaces a remarkable opportunity to connect with others before falling into negative attitudes about their conditions, and efforts to promote their access to electronic discussion groups would be justifiable on these and other grounds. The point would be to convene people to talk and listen about why group statuses have taken the shapes they have, complete with paradoxes and complexities, rather than simplistic and blaming claims. Opportunities for individuals to construct and present their stories could be instructive to others and deeply healing for themselves. Trauma and recovery require recollection and remembrance if they are not to halt productive daily life; this is the insight behind the South African Truth and Reconciliation Commission as well as trauma recovery groups elsewhere.\(^{150}\)

Many settings for truth telling and support should be framed to

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\(^{148}\) Id. at 156 (referring to the work of Professor D. Marvin Jones).

\(^{149}\) Id. at 157-58; see also bell hooks, Yearning: Race, Gender, and Cultural Politics (1990) (discussing homeplace).

\(^{150}\) See Herman, supra note 87.
feel safe, and therefore less than fully diverse across groups that do not trust one another. But constructing settings precisely for mutually mistrusting individuals and groups would be a crucial, complementary part of this strategy, as would devising settings for people to rub elbows or collaborate on issues unrelated to past and present group conflicts. Such settings could be privately sponsored and confidential, or privately sponsored but open, or even broadcast through varied mass media or interest means. Robert Cover explored the dramatic efforts to use trial-like formats with no claim of official power, such as a Vietnam war crimes inquiry framed by philosophers Bertrand Russell and Jean Paul Sartre.\footnote{151} Lacking the coercive powers of the State, privately sponsored settings may support normative explorations and commitments at odds with prevailing views more easily than do governmental agencies.\footnote{152}

**B. Expand Possibilities for Individual Self-Determination**

Three further strategies create tensions with the previous force by fostering materials for individual self-definition. If individuals in turn reinvigorate existing view groups, they will afford cherished sources of meaning.

1. **Devise Governmental Policies That Permit Individuals to Affiliate or Identify Themselves with Groups Temporarily and for Specific Purposes Rather Than Rely on Governmental Assignment to Fixed Groups**

   If one of the problems behind identity politics is the assignment of individuals by government or powerful actors to groups beyond their own control or choice, renewed assignments to groups, even for remedial purposes, can reinstall the injury and incoherence, constraint and mythology of forced group identity. One alternative worth exploring is governmental structures that permit people to identify themselves in temporary groups for specific purposes.

   Consider rules for electing representatives to Congress or another legislative body. Two kinds of voting rules are at stake: the


\footnote{152} See Cover, *Supreme Court*, supra note 112.
rules about what constitutes a voting district for purposes of aggregating votes, and the rules about how to count votes for purposes of declaring winners and losers. The conventional rules determine which votes to aggregate and divide the electorate into geographic districts; and the selected geographic lines may split a given group of voters into ineffective minorities between more than one district. Yet equally troubling are districting plans that concentrate a group within one or a few districts, removing their views from any influence in other districts and therefore ensuring that their elected representatives become a minority among the entire group of representatives. The conventional rule determining how to count votes is that the majority rules, which means 51% of the votes determine 100% of the outcome.

The Voting Rights Act specifically permits challenges to voting districting that dilutes the voting power of racially identified groups. Civil rights advocates have supported the enforcement of these provisions with the particular hope of increasing the number of minority representatives elected to office. Critics of race-consciousness attack the Act and its implementation for designing districts artificially to yield more minority representatives.

Lani Guinier has led an alternative line of critics who challenge pre-existing districts as neither natural nor neutral, and question the majority-take-all method for counting votes. She proposes two changes: first, the creation of multi-representative districts, or at-large elections, in which all the voters in the district vote to elect more than one representative; and second, proportional voting, which mathematically determines the minimum number of votes necessary to produce a winner and devises a random method for distributing the "losing votes" to other candidates so that some of them may also win enough to meet the minimum number of votes to be elected.

When Guinier was nominated to serve as the head of the Civil Rights Division of the Clinton Justice Department, a right-wing campaign successfully defeated her after portraying her as a "Quota Queen." Critics maintained that Guinier wanted the

155 The term also had racist overtones. See Stephen Carter, Foreword, to GUINIER, supra note 154, at vii, xix.
electoral rules to produce fixed numbers of Black, Hispanic, Asian, and white representatives. In fact, Guinier’s scholarship challenges precisely those conceptions. Instead, her proposals seek to make each vote have equal value and, therefore, to prevent majority groups from freezing out minority group members from exercising an effective vote.156

Guinier specifically endorses cumulative voting, the method commonly used within corporate governance, which gives each voting member the same number of votes as there are open seats, and allows the voter to assign more than one vote to a given candidate to reflect her own intensity of preference.157 Guinier notes that this method would permit minority group voters to obtain their preferred candidate if they work together. However, this method also permits other groups to coordinate that way. “[A]ll voters have the potential to form voluntary constituencies based on their own assessment of their interests. As a consequence, semiproportional systems such as cumulative voting give more voters, not just racial minorities, the opportunity to vote for a winning candidate.”158 Further, “[r]acial-group interests become those self-identified, voluntary constituencies that choose to combine because of like minds, not like bodies.”159 The goal is to produce a voting method that permits individuals freedom to move beyond artificial groups based solely on residence, race, or any other feature besides the individual’s choice to affiliate with other like-minded voters.160

Thus, individuals may identify themselves, through their vote, with others who share a race, a gender, a concern for the environment, or any other factors. The grouping occurs upon the act of voting and only for that purpose at that time. This conception of voting thus exhibits the possibility of structures to permit self-identification by individuals as temporary, contingent members of self-formed groups.161 This conception is especially helpful in

156 That both the Reagan and Bush administrations pursued remedies for Voting Rights Act violations using multidistrict and proportional representation rules seems to have escaped Guinier’s critics. Carter, supra note 155, at xi.
157 Guinier, supra note 154, at 149.
158 Id.
159 Id.
160 Id.
161 This approach is compatible with a more general argument made by Chantal Mouffe: “The issue is to create a new conception of citizenship in which the distinction of gender becomes nonpertinent . . . . What I’m against is a certain type of identity politics that says what politics is about is the representation of all those
supporting the conception of American pluralism that acknowledges peoples’ membership in and affiliation with multiple groups.

Would this conception have application elsewhere? One hotly contested context is the United States Census. In 1997, a mini-survey in preparation for the census of the year 2000 will test a new category, “multiracial,” in response to the demands of organizations of mixed race parents.\(^{162}\) Others wish to more finely tune racial self-identification groups by subdividing existing categories to permit identification such as Pakistani or Polynesian, for example.\(^{163}\) The standard classifications of white, Asian-American, African-American, Hispanic-nonwhite, and Native American/Pacific Islander are themselves arbitrary and certainly confining for those who identify with more than one, or none of these categories.\(^{164}\) Powerful articulations of difficulties faced by persons of mixed race attest to the cruelties as well as the incoherence of standard distinctions.\(^{165}\) In addition, the U.S. Census classifications contribute to a false view of “pure” race while also confusing race and ethnicity.\(^{166}\)

Yet the practical uses of the Census, for example, to enforce school desegregation, fair housing, and employment laws make the choice of categories and method of assignment politically significant and politically charged.\(^{167}\) Given the historic practice of

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identities as they already exist.” Discussion, in The Identity in Question, supra note 13, at 31 (statement by Chantal Mouffe).


163 Karst, supra note 39, at 329.

164 See generally American Mixed Race, supra note 110; Hollinger, supra note 41, at 22-38. See also Lise Funderburg, Black, White, Other (1994) [hereinafter Funderburg, Black, White, Other]. Lisa Funderburg, Boxed In, NY Times, July 10, 1996, at A15.

165 Alcoff, supra note 110; Gloria Anzaldua, Borderlands/La Frontera: The New Mestiza (1987).


167 See Mike McNamee, Should the Census Be Less Black and White?, Business Week, July 4, 1994, at 40. Similarly, census questions about disability could be reformed to permit people to identify themselves in ways other than perjorative categories while still producing information relevant to the societal need for support for persons with disabilities.

These questions suggest that there could be a practical side to what philosophers have called “attributive meaning,” picking out an object simply for a present purpose but not for unrelated purposes. See Keith S. Donnellan, Reference and Definite Descriptions, in Naming, Necessity, and Natural Kinds (Stephen P. Schwartz ed., 1977).
assigning anyone with "one drop" of nonwhite ancestry to the nonwhite category, remedial civil rights laws justifiably could treat "multiracial" as nonwhite, but this would not resolve difficulties posed where allocations turn on the comparative presence of Blacks, Hispanics, Asians, or other nonwhite groups. It is difficult to know who would be helped and who would be hurt if people could identify themselves as "multiracial," but I do find compelling this poetic comment by Michael Gorra: "the box on the census form of the self does need to be checked, if only to make sure there's someone at home. And it would be better if you could always do it yourself, but too often other peoples' pencils get there first." The move to self-identification, rather than labeling by a census official, is a crucial and already accomplished reform.

My own suggestion would permit individuals to check as many boxes relevant to race and ethnicity as seem relevant. Total or regional responses can be divided by the actual number of people counted by the census. The resulting fractions will help remind anyone using census information of its sources in self-identification and of the roughness of its truths.

2. For Prospective Governmental Action Rather Than Efforts to Remedy or Comprehend Past Group Harms, Try Achieving Governmental Purposes Without Deploying Group-Based Categories While Remaining Committed to Overturning the Effects of Categorical Exclusions in Social and Political Realms

This is not a call for color-blindness, gender neutrality, or other pretenses that we have already achieved a world free from the legacies of group-based exclusions. Instead, it is an invitation to invent ways to achieve governmental purposes that do not deploy yet again the group-based identities. Architectural designs for buildings that accommodate people who use wheelchairs without segregating them in separate entrances and elevators are a concrete example. Three legal examples are discussed below.

168 Karst, supra note 39, at 399. He suggests a different approach where race is an issue in adoption. Id. at 348 (citing Julie Lythcott-Haims, Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption, 29 Harv. C.R.—C.L. L. Rev. 531, 551-57 (1994)).

169 Karst, supra note 39, at 341.

170 Michael Gorra, Response to Identities, in Identities, supra note 2, at 434, 438.
a. Peremptory Challenges

After a lengthy struggle by civil rights and defense attorneys, the Supreme Court adopted the view that prosecutors’ uses of peremptory challenges that resulted in excluding persons of a particular race could violate the Equal Protection Clause. The Court extended this decision quickly to civil cases and to exclusions based on gender as well. Why should the Equal Protection scrutiny stop at race and gender—rather than extend to ethnicity, linguistic minority, religion, sexual orientation, disability, and age, not to mention intersectional categories such as immigrant woman? Alternatively, why not adopt quotas to assure racial, gender, and other categorical representation on juries?

Before we go down that path, however, it is worth considering whether we can achieve the goals behind equal protection and behind the jury system another way. At stake in the composition

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171 Batson v. Kentucky, 476 U.S. 79, 79-98 (1986). The challenger has to make out a prima facie case that the pattern of exclusions triggers an Equal Protection concern, and then the other side has the chance to offer non-prejudicial grounds for the struck jurors. Id. See also Hernandez v. New York, 500 U.S. 352, 360-62 (1991) (Kennedy, J., plurality opinion) (finding it a sufficient explanation for the exclusion of Spanish-speaking jurors—treated as a racial exclusion—that the jurors might have difficulty accepting the English translator’s version of the Spanish testimony). The relative ease with which parties may defend against the prima facie case renders the Batson test quite limited if the goal is to end invidious racial, ethnic, religious, or sex discrimination in jury selection. Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 259-60 (1994).


173 Justice Thomas, joined by Justice Scalia, dissented from the Supreme Court’s denial of review of a case in which the criminal defendant claimed that peremptory challenges should also be tested against exclusions based on religious bias. See Davis v. Minnesota, 114 S. Ct. 2120 (1994) (mem.) (Thomas, J., dissenting). Justice Ginsburg wrote in her concurrence in the denial of the petition for a writ of certiorari that the state court had itself rejected the claim in part because it is usually improper to even ask questions about the jurors’ religious affiliations and beliefs. Id. (Ginsburg, J., concurring).

of juries is a conception of the decision-making body as a representative cross-section of society who are peers of the parties. Longstanding legal and social practices excluded certain groups from jury service altogether. Discriminatory practices may occur in the gathering of names for the general jury pool, the selection of particular individuals from the pool to serve on juries, and the exclusion of particular individuals from a jury through the process of voir dire.

Such exclusions interfere with the parties' rights to have a representative jury and the citizen's right and duty to serve on the jury. Besides providing the appearance of fairness through representation, the cross-sectional jury also can generate insights based on a range of experiences and perspectives. The historic right of the parties to strike a specified number of jurors without stating a reason risks undermining these purposes; for these reasons, the Court has erected the Equal Protection scrutiny of use of the peremptory challenge. Yet an alternative solution would be to eliminate the peremptory challenge altogether.

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175 Strauder v. West Virginia, 100 U.S. 303, 308 (1879); Altman, supra note 174, at 787-93.
178 For a thoughtful discussion of the issue, see ABRAMSON, supra note 171, at 99-141.
179 [A]s ancient as the peremptory challenge's credentials are, the theory of impartiality that underlies its use (that both sides should be free to eliminate persons suspected of racial, sexual, or ethnic bias against them) is in conflict with the theory of impartiality in the cross-sectional ideal (that such bias needs to be represented on an impartial jury because there is no way to escape from it, there are only ways to balance it).
180 The peremptory challenge began in England with the King's power to challenge any juror and was gradually accepted into the common law and carried over to the United States with the endorsement of Joseph Story. See VAN DYKE, supra note 7, at 148-49. The Supreme Court granted peremptory challenges to the prosecutor in 1887. Id. at 150.
181 See Batson v. Kentucky, 476 U.S. 79, 102-03, 107-08 (Marshall, J., concurring) (arguing for the elimination of peremptory challenges in order to end discrimination in jury selection). See also ABRAMSON, supra note 171, at 258-64 (recommending elimination of all peremptory challenges because Batson fails to guard against discrimination in jury selection even for groups gaining Equal Protection coverage as well as for groups lacking Equal Protection coverage).
Several benefits could emerge from this elimination of the peremptory challenge. The messy administration of the Equal Protection challenges and the strategic gamesmanship surrounding jury selection would end. So would the unresolved debate about which groups deserve this kind of Equal Protection. Eliminating peremptory challenges would reduce the parties' (and lawyers') abilities to shape the jury and seek to influence their results, which could hurt, but also help members of disadvantaged groups. The very practice of trying to shape the jury through peremptory challenges has been so deeply characterized by stereotypic predictions about how members of particular groups would respond to the topics on trial that elimination of the peremptory challenge could rule all such thinking out of bounds when selection of a jury is at stake.

Indeed, parties, and lawyers, commonly seek to remove jurors based on their group characteristics because they load many presumptions—and prejudices—onto those identities. The prosecution tries to exclude people who look like the defendant on the assumption of undue sympathy; the defense tries to exclude those of different racial and ethnic groups from the defendant. Why permit peremptory challenges that presume that people cannot empathize across lines of difference? Not only would such a rule be untrue to human possibilities; it might also be a self-fulfilling prophesy.

Eliminating peremptory challenges would not halt attention to group-based categories, for aggressive anti-discrimination enforcement would still be needed at the systemic levels defining the pool of available jurors and calling up specific people to serve. Eliminating peremptory challenges would, however, afford one way to restrict the use of governmentally imposed

\[182 \text{Abramson, supra note 171, at 12. (Lawyers use peremptory challenges "on the basis of some suspicion that young or old, rich or poor, white-collar or blue-collar, Italian or Irish, Protestant or Jewish jurors will be favorable to the other side"—but most of these stereotypes would elude Equal Protection scrutiny because they do not refer to "suspect classes" protected under the Batson test.).)}

\[183 \text{See generally Sheri L. Johnson, The Language and Culture (Not to Say Race) of Peremptory Challenges, 35 WM. & MARY L. REV. 21 (1993).}

\[184 \text{See Altman, supra note 174, at 800-01 (discussing possibility that people are more or less empathetic in relation to rules and institutional expectations).}

\[185 \text{Efforts to supplement voter registration lists may be necessary to produce inclusive jury pools, given the disparities in voter registration rates across groups. See generally David Kairys et al., Jury Representativeness: A Mandate for Multiple Source Lists, 65 CAL. L. REV. 776 (1977).}
group-based categories while still achieving the underlying governmental purpose. It would signal one more place where government power will not be used to reinforce artificial group identities.

b. Reasonable Person

Scholars, lawyers, and judges have justly attacked this pervasive legal concept for installing the views and beliefs of only some people—typically, middle-class white Protestant able-bodied men—rather than create new common law categories for setting standards of care or reasonableness. But should the "reasonable person" standard be replaced now with the "reasonable woman" when a woman is the defendant or plaintiff, or the "reasonable Carribean-American male," or further efforts to articulate sub-group identities? These may well be improvements over a pretended universal but actually partial notion, better called the reasonable middle-class, Protestant, able-bodied man. Yet the practical problems posed by proliferating sub-group standards are immense, and so are the more symbolic and psychological risks of confining individuals to governmentally prescribed group categories.

Is it possible to devise an alternative that also avoids sliding back into the faulty neutrality of the "reasonable person" standard? One route would retain "reasonable person," but link it to "the circumstances" where circumstances include encountering the meanings of group identity in a given community during the specific time period. This route would permit testimony and even expert evidence about such meanings while resisting the easy but faulty route of assigning individuals to group categories that then acquire the force of a legal norm.

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186 See generally Martha Minow & Todd Rakoff, Is the "Reasonable Person" a Reasonable Standard in a Multicultural World?, in AUSTIN SARAT ET AL., EVERYDAY PRACTICES AND TROUBLE CASES (forthcoming). I thank Todd Rakoff for the many conversations that inform the discussion there and here.

187 Is it so different to use "reasonable person who is blind," rather than "reasonable blind person;" or "reasonable person who is Chicano," rather than "reasonable Chicano"? Two differences would emerge: (1) the circumstances considered under the first formulation for each case would not stop with the group identity label, but continue and thereby permit consideration of the intersecting experiences of gender, region, age, and so forth; and (2) the test would avoid being treated as if it were solid and fixed on identity that is inevitably mutable and affected deeply by other unnamed dimensions.

188 Where a woman is a plaintiff, as in a sexual harassment suit, another alternative would set as the standard the treatment anyone would want for a sister, daugh-
c. Hate Speech Codes

Colleges and universities for several years have debated and some have adopted codes of conduct that proscribe "hate speech." Students of color and women had argued that they often feel silenced in classrooms and injured elsewhere on campus by epithets or other speech stereotyping and degrading members of their groups. Some white male students counter that they feel silenced by the implicit demand for "politically correct" speech. The intense campus and public debates surrounding proposed speech codes tend to polarize communities. Arguments against regulation tend to assert the First Amendment as the end of the discussion, while arguments for the codes tend to identify opponents as insensitive, prejudiced, or hostile. Richard Abel has characterized the debates this way: "If the dominant trivialise the harm they inflict, the subordinate abuse their moral leverage by playing identity politics, claiming exclusive rights to speak for or about their group."
Of course, restrictions on speech are extensive throughout college campuses: in professors' rules about who speaks and when in class, in rules confining public assemblies and posters, and in the usual rules of libel and defamation that govern the entire society. Informal norms present in the general culture or cultivated in the local one also powerfully regulate what people think they should say and what people do say. No one, therefore, is truly in favor of completely unfettered speech in college settings. In addition, even defenders of codes carve out exceptions to assure speech freedom and, indeed, invite test cases at the boundaries of the restrictions.  

So the debate, although usually not characterized this way, could be viewed as one over which kinds of restrictions are justified, not over whether to have any.

In the analogous area of hate crimes, the Supreme Court has rejected on First Amendment grounds laws that focus exclusively on groups that historically have suffered from discrimination. According to one commentator, the Court seemed to construe the First Amendment as forbidding governments from telling the world that "violence driven by racial hatred is more destructive than violence driven by class hatred, political animosity, labor strife or just plain greed."  

Rather than join the debate about degree of victimization and about which kinds of categories should or should not receive protection through speech codes or hate crime statutes, I would like to consider the ways in which the debates over these issues distract attention from the conditions that permit hateful expression. In a sense, the hate speech codes reinforce and reify exceptions for politics, art, and scholarship that engulf the rule, and evasions through parody, ambiguity, and romantic defiance.  


R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992). The majority also found defective the prohibition of some kinds of fighting words—those using race, color, creed, religion, or gender—but not others, such as "aspersions upon a person's mother." Id. The Supreme Court later approved legislation that does not criminalize hateful expression itself but instead permits enhanced penalties for acts already criminalized if committed "by reason of the race, color, religion or national origin of another person or group of persons." Joel Zand, Hate Crime Laws: Disagreement in the Courts, ADL ON THE FRONTLINE (Anti-Defamation League), Oct. 1992, at 7 (describing legislation upheld in Ohio v. Wyant, 508 U.S. 969 (1993)).


Though I do so in Minow, supra note 91, at 1423.

I explore this argument more fully in Martha Minow, Speaking and Writing
identities for the future without doing anything to redress the historic and ongoing processes that produce hateful expressions geared to categories such as race and gender. The greater diversity of students on college campuses over the past decade means that many students encounter, for the first time, people who are very different from themselves in the intense and intimate settings of classrooms and dorms. Yet colleges have not taken many steps to acknowledge these encounters. Most have not diversified faculties as much as student bodies, nor have they altered curricular offerings. Nor have most developed ways to teach students about the displacement of economic insecurity—in the current global economy—onto issues of group difference.

The focus on disciplinary codes and First Amendment defenses does not address the sources and forms of hate nor the institutional contexts that could alter hateful expressions. Colleges should articulate and enforce codes of conduct that prohibit acts that injure others; students, faculty, and administrators should protest and condemn statements of hatred. But more basic reforms to the structures of important centers of learning should proceed to address the causes for hateful expressions in what should be places of civility and respect.

C. Public Support for Art and Artistic Opportunities to Address Topics of Past and Present Identities and Affiliations, Oppressions and Resistances, and Individual Freedom.

Alexis de Tocqueville may have been the first but surely not the last to observe that American tendency to convert social issues into legal debates.\(^{197}\) Law provides crucial settings and vocabulary for working out issues and dilemmas in a society that shares little besides a Constitution and the civic culture that surrounds it.\(^{198}\) Yet perhaps the dominance of law grows also from inadequate opportunities for expression in other settings and vocabularies. One vibrant alternative is art. Theatre, visual arts,
dance, music, fiction, public memorials, and other forms of creative expression can provide avenues for provocation, catharsis, remembrance, and invention, all of which would enhance richer and more complex renditions of identity and all it does and could mean for people.¹⁹⁹

Maya Lin's Vietnam Memorial and the debates it triggered provide a vivid example. Her vision of a wall placed as a gash in the land, a wall polished and engraved with the names of those Americans who died in the Vietnam War, offended many who sought greater majesty and appreciation for those who served in that most contentious war.²⁰⁰ In response, veterans groups organized to fund and commission a more representational sculpture of men in combat; another group of women veterans organized to fund and commission a similarly representational sculpture.²⁰¹ Meanwhile, the crowds visiting the Wall found it permitted stunning occasions of personal and collective grief. Many have commented on the power of seeing themselves reflected in the polished marble. One ritual of producing paper rubbings of the names and another of leaving distinctive personal objects as tributes to those named have themselves stimulated new kinds of art and expression.²⁰²

Sadly, these possibilities for the public dimensions of art are seldom offered in defense to cost-cutting and attacks on art as frivolous, offensive, or dangerous.²⁰³ Cultivating greater appreciation for the possibilities of the arts—and greater opportunities for public participation in the creation as well as appreciation of

¹⁹⁹ Schools can be wonderful settings for exploring artistic expression especially around the complexity of group identities. See Kathy Greeley, Making Plays, Making Meaning, Making Change, in Social Issues and Service at the Middle Level (Samuel Totten & Jon E. Pedersen eds., 1995) (discussing elementary school teacher's use of playwriting to help students grapple with past injustices and to take risks in self-expression and change).


²⁰¹ See Robert Atkins, When the Art Is Public, the Making Is, Too, N.Y. TIMES, July 23, 1995, § 2, at 1.


art—may be one of the most significant ways to enhance people’s abilities to be for others as well as for themselves. Chances to participate as actors in community theatre or as singers in a multiracial choir afford people room to express what they already know and space to learn with people unlike themselves. For it is through the imaginative identification with others unlike oneself that art can transport; it is through the suspension of disbelief about others unlike oneself that people can discover their own deep sensibilities. Although art is not the only arena for self-expression and imagination, it remains a rich realm in which to be for yourself and for others.

Greater attention to the history of the arts in America would also enhance understanding of the complex interconnections among people of different groups in forging artistic expression. From jazz to American fiction, the mutual influences of Blacks and whites, Latin Americans and Europeans, men and women, immigrants, and natives is a wondrous story of interconnection and strife. The burgeoning world of deaf theatre owes much to American artists while also borrowing from the traditions of Yiddish and other cultural theatres. The tales of the unmelted ethnic—the compound identity—may be distinctively American. Artistic forums allow creators and viewers to explore group identities in complex and subtle ways that challenge simple labels. Art also invites people to cross over gender, racial, and generational lines, lines between self and other, and lines between what is and what could be.

Conclusion

If you thought I would now proceed to adjudicate among these six strategies, I am sorry to disappoint you. I think we need them all, or at least debate about them all. And if you hoped I’d re-


[It] is one thing to romanticize the notion of culture as fixed and pure, and quite another to ignore the legal and economic consequences of a dominant social gaze that habitually, repeatedly sees its own cultural production in such naturalized yet unreflectively nativistic terms that there is little vision for how much has been borrowed or given, little appreciation for the generosity of our interdependence.

solve my opening questions about who may speak for someone else, again, I am sorry to disappoint. But I hope that the issues of representation have reverberated in new ways, in my consideration not only of election methods and juries, but also art and therapy, compensation and reparations, hate and recovery. Indeed, identity categories should more basically be understood in terms of their representations—in art, advertising, fashion, fiction, and self-presentation.

Identity politics have been crucial and perhaps inevitable responses to perceived oppressions. So are the as yet unrealized ideals of universal equality and individual liberty, unity and commonality, at least in supporting basic democratic institutions and a civic culture that makes it possible to call people hypocritical if they betray these ideals. But the debate over identity politics as an assault on individualism—and universal ideals as tools of oppressor classes—has reached a point of repetitious stalemate. I think it is time to stop or at least expand the ways to address the injuries that animate these debates.

This will require a constant double move: attentive to the continuing practices of group-based oppression and the gratification of group-based mobilization, the new efforts must also welcome the undefinable, multiple quality of each individual's experience. Aggressive and ambitious challenges to continuing group-based harms; debates over reparations for past group-based harms; acknowledgment in public settings of as yet unacknowledged histories; exploration of methods that permit individuals to choose their own, temporary affiliations; experimentation with achieving governmental ends by neither reiterating group-based categories nor ignoring them, and expanding the opportunities for artistic expression and participation—deliberately contradictory strategies could help one by one, but would be even better taken together. The tension among these suggestions is a plus, not a minus, in a world that has too often tried to suppress the tensions around identity. If reparations and truth-telling push people more into group identities, then temporary affiliations, alternatives to group-based categories, and proliferation of artistic expressions encourage fluid and individualist explorations resisting assigned group status. If aggressive anti-discrimination matters risk reinvesting identity categories with governmentally imposed coherence, then efforts at temporary affiliations and alternatives to group-based categories work in the other direction.
Especially where the government acts, installing group-based categories as if they were fixed, singular, and coherent poses dangers for individuals and hinders efforts to build bridges. Ignoring historical and continuing patterns of group-based oppression would be a supreme act of denial, but reflexively repeating those very group lines will not overcome the psychological and social consequences of that oppression. We need, I think, to return to Hillel’s questions: If we are not for ourselves, who will be? But if we are not for others, what are we? It is time to be not only for ourselves.