Disorderly Differences: Recognition, Accommodation, and American Law

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> [H]ow will the prophecy come true that someday there will be only one shepherd and one flock? . . . [D]o not allow yourselves to be deluded! In order to be under the care of this omnipresent shepherd the entire flock need neither graze in one pasture nor enter and leave the master's house through a single door. This is neither what the shepherd wants nor advantageous to the prosperity of the flock.
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> Moses of Mendelssohn, *Jerusalem*

> You do not have to be me in order for us to fight alongside each other. I do not have to be you to recognize that our wars are the same. What we must do is commit ourselves to some future that can include each other and to work toward that future with the particular strengths of our individual identities. And in order to do this, we must allow each other our differences at the same time as we recognize our sameness.
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> Audre Lorde, "Learning From the 60s," in *Sister Outsider*

> We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide by someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies.
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> Justice Brennan, *Michael H. v. Gerald D.*

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* Earlier versions of this paper were presented at the Conference on Democracy and Difference, Indiana University, April 22-25, 1993; the Annual Meeting of the Law & Society Association, Chicago, May, 1993; and at Miami University, November 5, 1993. We are grateful to participants in those events for their helpful comments and for the advice and criticism of Lawrence Douglas and Tom Dumm.

> [P]rovidence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs.
>
> John Jay, *Federalist #2*

> What happens when people of different origins, speaking different languages and professing different religions, inhabit the same locality and live under the same political sovereignty? Ethnic and racial conflict—far more than ideological conflict—is the explosive problem of our times.
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> Arthur Schlesinger, "The Cult of Ethnicity, Good and Bad," *Time*, July 8, 1991, at 21.

I. INTRODUCTION

In January 1992, *People* magazine ran a story entitled "Die, My Daughter, Die!"[1] describing the murder of sixteen-year-old Tina Isa, the daughter of Zein and Maria Isa, Palestinians who emigrated with their seven children to the United States from the West Bank in 1985. Opposite a half-page photo of Zein in a bloodstained sweater, the *People* article explained that he had hoped to arrange a marriage for Tina, as he had for her three older sisters. He wanted Tina to return to his native village and marry a relative of one of his sons-in-law. Tina resented and resisted her father's plans concerning her marriage and defied the strict, traditional values of her parents by taking a job and dating an African-American schoolmate.[2] As a result, Tina and her father had frequent fights during which he warned her about her "offensive" behavior (e.g., allowing herself to be seen in public with her boyfriend) and threatened to vindicate the family's damaged honor.[3] On the night of Tina's death, Zein again confronted her and accused her of shaming the family by virtue of her allegedly promiscuous behavior. Then, while Tina's mother held her down, Zein stabbed Tina to death with a seven-inch knife.

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1. *Die, My Daughter, Die!*, PEOPLE, Jan. 20, 1992, at 71 [hereinafter PEOPLE].

2. *Id.* at 75. Tina and her brothers and sisters had all been forbidden to go on school trips, to go to concerts, to visit friends on weekends, or to date. Unlike her siblings, Tina refused to abide by these prohibitions. In so doing, she apparently violated longstanding Arab understandings concerning appropriate behavior for young women and, in the eyes of her parents, brought shame and dishonor on their family name.

3. For an interesting discussion of crimes of honor, see Lamma Abu-Odeh, Honor Crimes and the Construction of Gender in the Arab World (1993) (unpublished manuscript, on file with Austin Sarat). *See also* Michael Humphrey, *Community Disputes: Violence and Dispute Processing in a Lebanese Muslim Immigrant Community*, 22 J. LEGAL PLURALISM 53 (1984).

Charged with first-degree murder, the Isas presented a "cultural defense."[4] They claimed that they should not be found guilty since what they did to Tina would not have been treated as a serious crime in their homeland.[5] They maintained that they were obeying the law as they (and Tina) knew and understood it, and that Tina's disobedience called for her punishment. The Isas' cultural defense failed, as it generally does,[6] and they were each convicted of first-degree murder and sentenced to death.

At one level, Tina's story is about cultural difference and a clash between different moral and legal orders. Indeed, the honor code invoked by Tina's parents is an example of the kind of meaningful cultural commitment frequently romanticized by those who seek to retrieve what they perceive to be the lost ideals of community and solidarity. But Tina's story is also an example of difference turned violent. It is a story of what we will call "disorderly differences"—differences that threaten society's allegedly fragile harmony and stability. When acted upon, disorderly differences impose themselves violently and brutally on others. They forcefully present the question of when and how differences can (and should) be recognized and accommodated.[7] Disorderly differences require us to ask whether we[8] can (or should) justify or excuse conduct which,

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4. *See* Note, *The Cultural Defense in Criminal Law*, 99 HARV. L. REV. 1293 (1986); *see also* John C. Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87 (1986); Alison D. Renteln, *Culture and Culpability: A Study of Contrasts*, 22 BEVERLY HILLS B. ASS'N J. 17 (1987-88); Julia P. Sams, *The Availability of the 'Cultural Defense' as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Malek-Mithra Sheybani, Note, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987).

5. PEOPLE, *supra* note 1, at 75. The article quotes an anthropologist, himself born and raised in Jerusalem, who said that "the way Tina lived offended her father's sense of honor. 'Everyone growing up [as Tina had] in the Middle East knows being killed is a possible consequence of dishonoring the family.'" *Id.*

6. *See, e.g.*, People v. Helen Wu, 235 Cal. App. 3d 614, 634-46 (1991) (discussing the applicability of a cultural defense to the reasonable person standard of the provocation defense to murder); Eduardo Trujillo-Garcia v. Rowland, 9 F.3d 1553 (9th Cir. 1993) (discussing the application of a reasonable Mexican male standard to the provocation defense); State v. Aires Correia, 600 A.2d 279, 286-87 (R.I. 1991) (upholding trial judge's decision to exclude psychiatric testimony on cultural acceptance of violence); People v. Kimura, No. A-091133 (Los Angeles Cty. Super. Ct., Apr. 24, 1985) (addressing the Japanese cultural practice of parent-child suicide). *But see* People v. Moua, No. 315972-0 (Fresno Cty. Super. Ct., Feb. 7, 1985) (mitigation of a sentence for kidnapping based on a recognition of the Hmong tribal practice of "Zij poj niam" or "marriage-by-capture").

7. Even by framing the question as one of accommodating difference, we have presupposed a hierarchical legal structure with the authority to annihilate or accommodate difference. Any attempt to address the problem of difference within a legal framework must inevitably establish some hierarchical authority for the resolution of conflicts. For an important discussion of the challenge of recognizing and accommodating difference through the law, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990), and Martha Minow, *Partial Justice: Law and Minorities*, *in* THE FATE OF LAW 15 (Austin Sarat and Thomas R. Kearns eds.,1991).

8. By invoking the first person plural pronoun, we have identified ourselves, as judges do in their opinions, with the interests of a society that has the right and the responsibility to decide whether or not to recognize or accommodate differences. While such an identification often represents an "'arrogance of power' behind the patronizing usurpation of the right to speak for the 'free' people of the world, when they have never been asked," we intend it rather as an invitation to disagree. *See* Herbert Spiegelman, *On the Right to Say "WE": A Linguistic and Phenomenological Analysis*, *in* PHENOMENOLOGICAL SOCIOLOGY 129, 130 (George Psathas ed., 1973).

while seemingly reprehensible to us, reflects another person's deeply felt cultural or religious conviction.

As the story of Tina Isa suggests, contemporary dialogue about identity and difference grows more complicated as new groups enter our national life.[9] Everywhere, it seems that the more difference is recognized, the more vexing the effort to accommodate difference in our institutional lives and practices becomes. Difference frequently appears to be the fearsome presence within democratic culture, rather than its enlivening wellspring. Difference, as the epigraphs from John Jay and Arthur Schlesinger suggest, is a source of dread: a fear of the unknown, an "apprehension of a future heavy with the possibility of danger."[10]

To understand difference, one must take the dread which it inspires seriously. One must recognize that disorder is the often-unspoken specter that haunts all discussion of difference. As Kenneth Karst puts it, "In all times and places, cultural differences have bred suspicion and fear. . . . [Thus] behind the bland terms 'intercultural relations' lies the menace of violence."[11] Each claim for exemption or special recognition is seen as implying others, in a multiplying and unlimitable progression.[12] It is as if every demand for recognition and accommodation raises the question: If this, then what? Or as Alison Renteln says of criminal law: "Anarchy would reign if each person could claim a different cultural immunity from prosecution."[13] While such questions and statements sometimes are an indication of bad faith,[14] they also reflect the reasonable belief that the proliferating recognition of difference might itself generate an accelerating and potentially destabilizing realignment of institutional practices.[15]

Those who reject calls for such a realignment by equating difference with disorder can be condemned as naive, intolerant, or just fearful of losing the privileges to which they have grown accustomed. Though such condemnations may sometimes be appropriate, they do little to advance the

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9. *See* BARBARA JOHNSON, A WORLD OF DIFFERENCE (1987).

10. Gretchen Craft, Note, *The Persistence of Dread in Law and Literature*, 102 YALE L.J. 521, 521 (1992).

11. Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 305, 310-11 (1986).

12. *See* U.S. v. Moylan, 417 F.2d 1002, 1008-09 (1969). *See also* David Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991).

13. Renteln, *supra* note 4, at 26.

14. *See, e.g.*, Stanley Fish, *Bad Company*, 56 TRANSITION 60 (1992) (critiquing ARTHUR SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1992)). For Schlesinger, the "great unifying Western ideas of individual freedom, political democracy, and human rights," SCHLESINGER, DISUNITING OF AMERICA, at 138, define a unique American nationality and are opposed to the "cultures based on despotism, superstition, tribalism, and fanaticism," *id.* at 128, which exist in non-European (African) civilization.

15. For example, see Patricia Williams's evocation of the proliferation of rights. "Unlock them," Williams urges, "from reification by giving them to slaves. Give them to trees. Give them to cows. Give them to history. Give them to rivers and rocks. Give to all of society's objects and untouchables the rights of privacy, integrity, and self-assertion . . . ." PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 165 (1991).

claims of difference or to increase the likelihood of a politically progressive response to, and accommodation of, those claims. Disorder, as the quotations from Jay and Schlesinger suggest, is an imagined twin of difference; thus, a productive response to the dilemmas of difference must confront the problem of order and disorder.[16] Those who champion difference and seek to make it an energizing presence in American society must learn to constitute difference in a way that controls disorder even as it celebrates the multiple, contradictory affiliations and identities that give our lives meaning.[17]

Our broad claim in this Article is that friends of difference must learn to think and speak about order—indeed, to recognize order as the indispensable partner of difference itself. What is required is not only a more accommodating understanding of difference, but also an enhanced vocabulary for speaking about order. All too often, the friends of difference refuse to speak of order; in so doing, we leave the field to

16. In addition to the perceived disorderliness of difference, a second explanation for the dread associated with difference is that difference is often understood as a threat to individual and collective identities. The myth of stable identities—in which one's identity is one's own rather than differentially defined against others—requires that there be others who are excluded from the "We" or the "I." "[T]he maintenance of one identity . . . involves the conversion of some differences into otherness, into evil, or one of its numerous surrogates. Identity requires difference in order to be, and it converts difference into otherness in order to secure its own self-certainty." WILLIAM CONNOLLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX 64 (1991). As William Connolly argues, difference usually fosters a reaction that seeks to protect the stability of an "Us" or an "I" by converting some differences into an evil otherness. As a result, Connolly argues that "any ordered way of life [is probably unable] to house together in one harmonious whole all the identities that might otherwise make a claim upon it. No order can enable everything to flower in the same garden: this is a 'necessary injustice.' . . ." *Id.* at 159-60. If Connolly is right in his belief that the imagined threat of difference is its challenge to stable and coherent identities rather than to order, then our attempt to show that difference can be consistent with order would not fully tame the threat of difference in American culture and law. Nevertheless, we believe that making difference compatible with order remains a necessary and viable first step in the effort to take difference seriously.

17. *See* Pauline V. Rosenau & Harry Bredemeier, *Modern and Postmodern Conceptions of Social Order*, 60 SOC. RES. 337, 341, 359-60 (1993). As Dennis Wrong argues, "The 'problem of order' has come to be widely recognized as . . . the major, perennial issue of social theory." DENNIS WRONG, THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY 37 (1994).

others.[18] As a result, the potential for orderly difference remains unrealized.

In Part II, we argue that, in American law, difference is rhetorically imagined as an invitation to disorder or, alternatively, difference is made to disappear in the name of reassuring orderliness. This should not be surprising given that law always speaks in the name of order and seeks to "impose an artificial order on chaotic reality."[19] Only those differences that pose no threat to order, or whose threats can be assimilated in a narrative of predictable change—that is, only those differences that have been sufficiently domesticated to fit within prevailing cultural assumptions and institutional routines—are recognized and accommodated.

We develop our argument in Part II through a reading, informed by Tzvetan Todorov's *Conquest of America*,[20] of two Supreme Court cases—*Reynolds v. United States*[21] and *Wisconsin v. Yoder*.[22] Separated by almost a century, *Reynolds* and *Yoder* both involve claims of distinct religious groups to exemption from the demands of the law of the state. In *Reynolds*, the claim was rejected; in *Yoder*, it was accepted. In the former, difference was made disorderly in such a way as to demand rejection; in the latter, difference was domesticated and made to disappear.

In Part III, we argue that *Reynolds* and *Yoder* exemplify the poverty of the prevailing vocabularies of order and difference provided by liberalism, with its focus on individualism and tolerance, and by civic republicanism, with its focus on community and virtue. If we are ever to "discover the other" and embrace Todorov's vision of different but equal,[23] we must find a vocabulary that welcomes difference while acknowledging claims for

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18. Academic reaction to the violence following the first Rodney King verdict rightly countered the media's demonization of the Black, Hispanic, and Latino communities living in South Central Los Angeles. *See* READING RODNEY KING/READING URBAN UPRISING (Robert Gooding-Williams ed., 1993). But academics generally refused to speak about order. Instead, it was the local community and religious organizations who angrily resented the riots and who stressed the need to bring order to the area.

Here, the dialogue about difference in democratic culture might take a lesson from what is called "left realism" in criminology. *See* Jock Young, *The Failure of Criminology: The Need for a Radical Realism*, in CONFRONTING CRIME 4 (Roger Matthews and Jock Young eds., 1986). Left realism in criminology emerged as a response to the utopian idealism of radical criminology in the 1960s and 1970s, which criticized those who made "too much" of the problem of crime and advocated decarceration and eventually the abolition of prisons. *See* STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION (1985); Stanley Cohen, *Intellectual Skepticism and Political Commitment: The Case of Radical Criminology*, 13 STUD. L. POL. & SOC'Y 187 (1993). The left realist maintained that progressive scholars had to take seriously the demand for order and carefully assess the costs of rearranging social institutions. It was necessary, in other words, to put the problem of order on the agenda of those who sought to alter and reform the practices of the criminal justice system.

19. Craft, *supra* note 10, at 536.

20. TZVETAN TODOROV, THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER (Richard Howard trans., 1985).

21. 98 U.S. 145 (1878).

22. 406 U.S. 205 (1971).

23. For a critique of this notion, see CONNOLLY, *supra* note 16, at 45-48.

order. Neither liberal tolerance nor civic republican virtue meet that challenge. As a result, American law obliterates difference in the name of order, or treats orderly difference as no difference at all.

In Part IV, we argue that at a time when the notion of stable identities is exposed in popular culture and the academy as illusory and when the search for solidarity is revealed in its genocidal potential, the simple formula of either annihilating or assimilating difference must be transcended. In short, our vocabulary for speaking about and structuring difference must be changed. We see in scholarship on legal pluralism one resource for making that change, in part because legal pluralism provides communities with a set of principles that can be used to decide which claims of difference to honor and which demands for order to respect.

II. THE LEGAL CONSTRUCTION OF DIFFERENCE

A. Reynolds v. United States: *Imagining the Savage*

Over one hundred years ago, the United States Supreme Court confronted what might now be called a cultural defense claim in a case involving an admitted violation of a law against polygamy by a member of the Mormon Church.[24] The defendant, George Reynolds, claimed that he should not be convicted of the offense because the Utah statute conflicted with his religious beliefs and practices. Reynolds maintained that it "'was the duty of male members of . . . [the Mormon Church], circumstances permitting, to practice polygamy . . . [and] that he had received permission from the recognized authorities in said church to enter into polygamous marriage.'"[25] It is important to note, as the Court did not, that Reynolds's request for an exemption from the statute prohibiting polygamy employed not the language of freedom or willfulness, but the language of "duty" and "authority." In other words, Reynolds's claim for the recognition of difference was expressed as an acknowledgement of the need for order. Even as he asserted the limits of the sovereign prerogative of the state, Reynolds claimed not to be free, but to be bound by a different law.

As the Court described Reynolds's position, however, his deference to "duty" and "authority" disappeared. The question before the Court as framed by Chief Justice Waite was whether one could be found guilty of violating a properly enacted law "if he entertains a religious belief that the law is wrong."[26] This artful alteration of Reynolds's original claim framed Reynolds's difference as a threat to state law itself.[27] Reynolds,

24. *See Reynolds*, 98 U.S. at 145.
25. *Id.* at 161.
26. *Id.* at 162.
27. On the importance of the way questions are framed in judicial opinions, see Robert A. Ferguson, *The Judicial Opinion as a Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990).

in fact, advanced no view as to whether the law against polygamy was right or wrong outside the Mormon community. Rather, he argued that he should be exempt from the law's reach because of the unresolvable conflict between his civic and religious obligations.

In response, Waite quoted Thomas Jefferson for the proposition that a citizen "has no natural right in opposition to his social duties."[28] Reynolds, of course, had raised the thorny question of what those social duties were and who could legitimately require him to perform them. He argued that in the case of religious marriage, the state's claimed authority was too expansive and intrusive. But Waite did not take up the challenge as posed. Instead, the Chief Justice merely noted that polygamous marriage was prohibited throughout American society and that while Reynolds was free to believe whatever his conscience dictated about the morality of polygamy, he was not free to turn that belief into action. The First Amendment, Waite argued, deprived Congress of "all legislative power over mere opinion, but . . . left [Congress] free to reach actions which were in violation of social duties or subversive of good order."[29] But was Reynolds really a subversive? Was he really a radical proponent of the view that each person should be free to decide on the nature and limits of his social duties? Or was he instead so committed to his religious duties that he was prepared to defy what social theorists today might call a "colonial" legal order.[30]

Waite's treatment of Reynolds's argument provides a powerful example of what Mark Tushnet calls the "reduction principle"[31] and of the Supreme

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28. *Reynolds*, 98 U.S. at 164.

29. *Id. See also* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967); Note, *Burdens on the Free Exercise of Religion: A Subjective Approach*, 102 HARV. L. REV. 1258 (1989).

30. For a valuable discussion of the nature of colonial legal orders see Sally E. Merry, *Law and Colonialism*, 25 L. & SOC'Y REV. 889 (1991).

31. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986). *See also* David Williams & Susan Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991). The origins of the "reduction principle" can be found in John Locke, *A Letter Concerning Toleration*, *in* JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 167 (Charles L. Sherman ed., Appleton-Century 1937) (1689). There Locke's argument for the toleration of religious difference reduced religious beliefs into subjective opinions to be confined to the private sphere. *Id.* at 171-75. Such a move could not be made except by changing the terms of debate in which religious differences are held to be insurmountable. Locke restructures the dilemma of difference by transforming the meaning and significance of difference from the public and objective spheres to the private and subjective. Kirstie McClure refers to Locke's semantic move as the distinction between difference and diversity. Kirstie McClure, *The Limits of Toleration*, 18 POL. THEORY 361, 376 (1990).

As McClure observes, to "difference" something is to construct a "hierarchical relation between things, but a hierarchy that . . . will be persuasive only to such others as concur with the principle of difference deployed in the particular case." *Id.* at 373. But, from the perspective of the religious believer, the difference religion makes can often be the difference between corruption and salvation, disgrace and honor, and righteousness and repugnance. The difference of religion is not simply the difference of opinion, but rather, a belief rooted in a communal ideal through which an individual transcends that individuality and becomes part of a shared faith. *See* Emile Durkheim, *Elementary Forms of Religious Life*, *in* ON MORALITY AND SOCIETY 187 (Robert N. Bellah ed., 1973). "A philosophy may well be elaborated in the silence of the interior imagination, but not so a faith. For

Court's tendency to convert questions of difference into questions of order. In Tushnet's view, the Court has, throughout its history, treated religion as a private and solitary act of individual conscience, as a belief, like any other belief, with no greater or lesser right to inform civic practices. As a result, claims of religious difference are just another expression of the kind of idiosyncratic preferences which a liberal society generates and supports. "It matters not," Waite wrote, "that his [Reynolds's] belief was part of his professed religion; it was still belief and belief only."[32] In other words, people are free to believe whatever they want, but they are not free to act on even their most sincerely held religious beliefs.[33] All differences are, in the end, merely differences of opinion. To imagine that religious belief could be the basis for selective exemptions from the obligations of state law would, again in Waite's words, be "subversive of good order."[34]

Here Waite provides a traditional liberal response to religious difference. After defining questions of religious truth as questions of subjective belief that are properly confined to private lives, liberals, like John Locke in *A Letter Concerning Toleration*, construct the civic realm as the place where "[p]articular matters of fact are the undoubted foundations on which our civil and natural knowledge is built."[35] Kirstie McClure describes Locke's move as "a way of converting sectarian 'differences' in religious matters into 'diversity,' by constituting a realm of civil facticity to dissolve those

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before all else, a faith is warmth, life, enthusiasm, the exaltation of the whole mental life, the raising of the individual above himself." *Id.* at 198. For a contrary view, see Thomas Jefferson, as quoted in *Reynolds*, 98 U.S. at 164 ("Believing with you that religion is a matter which lies solely between man and his God . . . .").

32. *Reynolds*, 98 U.S. at 167.

33. *See* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984). *See also* Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217.

34. A recent example of this argument is found in Employment Division v. Smith, 494 U.S. 872 (1990). In that case, two members of the Native American Church were fired from their jobs for smoking peyote in violation of Oregon law and were consequently deemed ineligible for unemployment insurance. In response to their claim that they were smoking peyote at a religious ceremony in accordance with their religion, Justice Scalia's majority opinion held: "Precisely because 'we are a cosmopolitan nation made up of a people of almost every conceivable religious preference' we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct . . . ." that impinges on his religious beliefs. *Id.* at 888. In addition, Scalia quoted from Waite's opinion in *Reynolds*: "To permit this [exemption from law] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879. Any society doing so would be, in Scalia's words, "courting anarchy." *Id.* at 888.

35. McClure, *supra* note 31, at 375 (citing Locke). The care of the soul, as the quintessential private and subjective entity, is not a factual or outward force that can or ought to be subject to civil authority. As Locke writes,

> Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls. . . . [T]he care of souls cannot belong to the civil magistrate, because his power consists only in outward force . . . .

LOCKE, *supra* note 31, at 172-73.

hierarchical and intrinsically relational conscientious 'differences' of religious practice into equivalent and independent . . . religious communities."[36] Put differently, both Locke and Waite align civil authority with fact and religious diversity with a fictional subjectivity.

Waite's concern for order and his desire to assert civil power, limited only by respect for conscience, set the stage for the Court's transformation of religious difference into a threatening diversity. Properly religious questions are those that concern salvation and do not threaten the civil interests—life, liberty, and property—of others. As soon as one's actions cross the line from the religious into the civil—i.e., as soon as one's actions are seen to harm another—they are subject to civil jurisdiction. "The rule of toleration that results is thus constructed not on the principle of conscience but on the absence of worldly injury . . . ."[37] The vocabulary of liberal toleration transforms freedom to live one's life in accordance with the laws of one's religion into a limited freedom of worship as permitted by a civil law regime.

As a result, in *Reynolds* religious difference becomes a disorderly difference pressing its claims against social duty and state order. This is, in fact, the way Waite rhetorically constituted the Mormon practice of polygamy; his figures and allusions represent polygamy as both a savage practice and the practice of savages. Resistance to polygamy was, therefore, the mark of a civilizing progress. "Polygamy," Waite confidently noted, "has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost

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36. McClure, *supra* note 31, at 376.

37. *Id.* at 380. The construction of harm is necessarily culturally relative. The Isas, for example, claim that Tina harmed their honor as well as herself by forsaking her religion and culture. In the case of Mormon polygamy, it is not Mormon women who are claiming a harm, but the U.S. government; from the perspective of the Mormons, it is the restriction of polygamy and not polygamy itself that represents a harm. We may all agree that harms to others are to be avoided, but our political battles are fought at the level of what exactly constitutes a harm. *Id.* at 383.

Locke's separation of religious and civic realms defined by the absence or presence of worldly harm is extended, by John Stuart Mill, to a more generalized separation of individual and social realms. Mill writes:

> To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society. . . . As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion.

JOHN STUART MILL, ON LIBERTY 141 (Penguin Books 1987) (1859). But Mill's extension of the harm principle is problematic precisely because it, as did Locke's, begs the question of what constitutes a harm.

The relativity of the harm principle makes it difficult if not impossible for Locke and Mill to extend the concept of toleration to more generalized issues of difference. Locke's formulation only works when there is a consensus on the line demarcating public and private concerns. But it is precisely that line which has been successfully and repeatedly challenged. As the division of political and private is dissolved and issues that used to be considered private—from religious claims for rights to women's claims for protection from their spouses—become public, we are seeing the limitations of the theory of tolerance for dealing with issues of difference.

exclusively a feature of the life of Asiatic and of African people."[38] As Waite understood it, that savage practice posed a grave threat to the institution of marriage, which was also viewed through the lens of order. Marriage was the basis on which "society may be said to be built."[39] To honor Reynolds's request for an exemption would be to threaten society and civilization itself.

This exemption would, on Waite's account, lead immediately onto a slippery slope, in which savagery would find its place in the midst of civilization. The Mormons now stand in for African-Americans who, though free, cannot, in Tocqueville's words, be made "otherwise than an alien to the European. Nor is this all; we scarcely acknowledge the common features of humanity in this stranger . . . amongst us."[40] The job of law, then, would be to counter the dread conjured up by disorderly difference—first by marking the stranger and then by civilizing or at least taming him through repression of his savage difference. To condone that difference, to welcome the stranger, would be an invitation to an escalating danger.

Waite evokes the slippery slope by posing two rhetorical questions. "Suppose," Waite asked,

> one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her from carrying that belief into practice?[41]

Through these questions, Waite again frames the question of difference as a question of civilization versus savagery. The polygamous Mormons move from wanting to marry many women to wanting to sacrifice them in religious rituals or to tolerating ritual suicide by the grieving widows. The tranquil voice of duty and authority with which Reynolds framed his request for exemption is translated into a series of imagined horrors.

Here the law's harsh rebuke of the duty-invoking, authority-obeying Reynolds becomes comprehensible as a semiotics of colonialism itself. Law's passion for order and for imposing itself against disorderly differences is a passion for "civilization" against a brutal, lawless

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38. *Reynolds*, 98 U.S. at 164.
39. *Id.* at 165.
40. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 459 (Henry Reeve trans., 6th ed. 1876) (1835).
41. *Reynolds*, 98 U.S. at 166.

"savagery."[42] Because "we" would not sanction human sacrifice or wife burning, we should not sanction polygamy. To sanction the latter is to invite, in an axiomatic fashion, the former.

As Peter Fitzpatrick has observed in another context, "law and order . . . [are] constantly combined not just in opposition to but as a means of subduing the 'disordered and riotous' savages in their state of lawless 'anarchy'. . . . [T]his scenario precisely reverses what was the case."[43] In other words, the Mormons in *Reynolds* need to be portrayed as what they are not—disorderly savages—and contrasted with what "we" imagine ourselves to be—purveyors of a unitary order. This double mythology, which denies order to difference and denies that law itself is a source of disorder, is necessary to maintain the coherent national and legal identities Waite imagines to be threatened by Reynolds's claim. As Fitzpatrick has so usefully reminded us, the history of western law is the history of a rhetorical inversion, in which the law of colonial states regularly disrupts the order of various subcultures and, at the same time, labels itself the champion of order. For law to pull off this trick the "sources of disorder must exist outside of law—in the eruptions and disruptions of untamed nature or barely contained human passion against which an ordering law is intrinsically set."[44] Disorderly differences, especially the differences associated with religious, racial, or linguistic variation, serve this rhetorical purpose quite well.

Implicit in Reynolds's claim, as understood by Waite, was the prospect of escalating disorder. Reynolds must be asked to sacrifice his religious practice to prevent the sacrifice of (ordered) life in the name of religion. Religion that sanctions polygamy is imagined to exert such a powerful, mysterious, and ultimately irrational pull that, once it is let loose in the world, it challenges government itself. "To permit . . . [a man to excuse his practices to the contrary because of his religious belief] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[45] To recognize and honor the difference Reynolds asserted was to

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42. It is also a way of reaffirming "our" own sense of identity. As William Connolly puts it,

> The definition of difference is a requirement built into the logic of identity, and the construction of otherness is a temptation that readily insinuates itself into that logic—and more than a temptation: a temptation because it is constantly at work and because there may be political ways to fend it off or to reduce its power; more than a temptation because it typically moves below the threshold of conscious reflection and because every attempt to come to terms with it encounters stubborn obstacles built into the logic of identity and the structural imperatives of social organization.

CONNOLLY, *supra* note 16, at 9.

43. PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 80 (1992).

44. *Id.* at 81.

45. *Reynolds*, 98 U.S. at 167.

take the plunge into the abyss of anarchy, to insure that "government could exist only in name."[46]

Again Waite reads Reynolds's claim through the lens of order and in the guise of a radically individualist version of liberal political thought in which each person's preferences assert sovereignty, unless checked by a neutral state. It made no difference to Waite that this was not the claim that Reynolds actually made, or that Reynolds approached the court as a member of a community that itself asserted the right to govern his conduct.[47] In fact, Reynolds did not claim the right to "become a law unto himself." Instead his request for exemption from the reach of state law was based on a recognition of another kind of obligation, a different sphere of obedience rather than licentious freedom.

The difference Reynolds pressed was disorderly not because it was either anarchic or savage. It was disorderly precisely because it challenged a prevailing institutional practice—monogamous marriage—and because it did not reflect an idiosyncratic belief, but rather the "legitimate" practice of an entire subculture.[48] Rejecting polygamy was not a rejection of disorder, but was instead the violent gesture of one legal order against another.[49] Waite's resistance to polygamy—his identification of difference with disorder—was, and remains, typical of the response of law that marks the different as strange and renders the strange a dangerous, disordering presence in our midst. For law to welcome difference it must code that difference in a way that tames its disordering potential and reassures itself and its audience that difference is not dangerous. Coming to terms with the problem of order is thus a legal prerequisite to the recognition and accommodation of difference.

B. Wisconsin v. Yoder: *When Difference Is No Difference at All*

An important contrast to Waite's judgment and rhetorical strategy in *Reynolds* is provided by Chief Justice Burger's majority opinion in *Wisconsin v. Yoder*.[50] Although Burger's opinion accommodates Yoder's claim for difference, his opinion so completely co-opts the difference claimed by the Amish that, as Burger presents the case, the Amish are not different at all. Burger's denial of the Amish's difference allows him to accommodate their claim, but in so doing he does not resolve the question of how difference can coexist with order.

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46. *Id.*
47. *See Developments in Law—Religion and the State*, 100 HARV. L. REV. 1703 (1987).
48. For a more recent expression of Waite's rejection of subcultural differences, see Employment Division v. Smith, 494 U.S. 872 (1990).
49. *See* FITZPATRICK, *supra* note 43, at 80.
50. 406 U.S. 205 (1971).

Decided in 1971, *Yoder* also included a request for exemption by a religious group, and again the request dealt with an important social institution—public education. Members of the Old Order Amish challenged a Wisconsin law that required them to send their children to a certified public or private school until they reached the age of 16. The Amish refused to send their children to a state-sanctioned school after the eighth grade, so that most Amish children were removed from school by the age of fourteen. As a result, Jonas Yoder, Wallace Miller, and Adin Yutzy were convicted of violating the Wisconsin compulsory-attendance law.

The Amish argued that the law infringed upon their rights under the First and Fourteenth Amendments. Echoing George Reynolds, they said that compliance with the state statute would require them to disobey the commands of their church and also "endanger their own salvation and that of the children."[51] They noted that their religion required "life in a church community separate and apart from the world and worldly influence."[52] In addition, high school and higher education were objectionable "because the values they [public schools] teach are in marked variance with Amish values and the Amish way of life; they [the Amish] view[ed] secondary school as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs."[53]

Yoder is one of the relatively few cases in the American constitutional tradition in which a court granted a request for exemption from a valid law.[54] Yet in Burger's rhetorical figuration, difference is neither recognized nor accommodated; instead, Burger makes difference disappear. He overcomes the problem of disorder by portraying the Amish, through an image of sameness, as exemplars of fundamental American values and, in their timeless simplicity, as the true embodiment of a threatened, precious way of life.[55] Through a not coincidental intertextual inversion, Burger

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51. *Id.* at 209.

52. *Id.* at 210. *See* Timothy Hall, *Religion and Civic Virtue*, 67 TUL. L. REV. 87 (1992).

53. *Yoder*, 406 U.S. at 211. For a discussion of the nature of the claim made in *Yoder*, see Williams & Williams, *supra* note 31, at 883-88.

54. Others include People v. Woody, 40 Cal. Rptr. 69 (1964) (exemption for use of peyote in an Indian religious ritual); Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (exemption from a hunting regulation for an Indian tribe); Sherbert v. Verner, 374 U.S. 398 (1962) (upholding claim for unemployment compensation by Seventh Day Adventists who refused to work on the Sabbath); Thomas v. Indiana Review Board, 450 U.S. 707 (1980) (upholding claim to unemployment benefits by a Jehovah's Witness). *See* Philip Hamburger, *A Constitutional Right to Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980).

55. *See* Philip Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 16-17 (1984). The construction of difference as sameness is called a "boomerang perception" by Elizabeth V. Spelman in her book *Inessential Woman*. Spelman cites the line, "I have assumed that slaves were merely ordinary human beings, that innately Negroes are, after all, only white men with black skins, nothing more, nothing less," from Kenneth Stampp's book on U.S. slavery. ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 12 (1988) (quoting KENNETH STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH vii-viii (1956)). As Spelman argues, the boomerang perception which enables us to look at you, but sees only ourselves,

appeals to Thomas Jefferson to turn the Amish from unrecognizable strangers into icons of Americana, just as Waite used Jefferson in *Reynolds* to dramatize the threat of Mormon polygamy. "[T]he Amish communities," Burger contends, "singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of democratic society."[56] Unlike Waite's rendering of the Mormons as the savage other, Burger situates the Amish as an established part of "us"—representatives of a vanishing, but still recognizable, American landscape.

By the time Burger is done describing the Amish, their difference is assimilated and therefore denied. In this gesture, Burger does the kind of linguistic violence that Todorov attributes to Christian missionaries who rationalized the colonial ambitions of the Spanish conquest of the Aztecs. Todorov argues that such violence is done by asserting identities and equivalencies as a way of justifying allegedly humane treatment. He presents Las Casas's description of the Aztecs as a characteristic act of erasure in which the other is recognized only in and through an asserted essential identity. "According to Las Casas," Todorov writes,

> the Indians' most characteristic feature is their resemblance to Christians. . . . The Indians are provided with Christian virtues, they are obedient and peaceful. . . . 'These people, considered in general, are by their nature all gentleness, humility and poverty, without weapons or defenses nor the least ingenuity, patient and enduring as none other in the world.' . . . Here then is an incontestable generosity on the part of Las Casas who refuses to despise others simply because they are different. But he goes one step further and adds: moreover, they are not . . . different.[57]

Burger's violence, like that of Las Casas, turns an asserted difference into a comforting and recognizable similarity. What appears initially strange is really, on second glance, quite familiar. What appears outside is already inside. What appears a challenging other is really a nostalgia-inducing remnant of a past we have regrettably left behind. In contrast to Waite's Mormons who were presented as anarchic and thus savage, Burger's Amish, like Las Casas's Aztecs, are obedient, patient, and peaceful, and thus good Americans and Christians.

Burger's opinion is replete with various reassuring gestures that take on meaning when contrasted with Waite's opinion in *Reynolds*. The first of these gestures is the suggestion that the Amish claim of difference does not pose a challenge to the system of compulsory education itself. Whereas the

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provides a model, not for recognizing difference but rather for perpetuating ethnocentrism.

56. *Yoder*, 406 U.S. at 225-26.

57. TODOROV, *supra* note 20, at 163-67.

practices of the polygamous Mormons were portrayed as incompatible with the institution of marriage, Burger notes that "[t]he Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's'. . . . They view such a basic education as acceptable because it does not expose their children to worldly values. . . ."[58] Burger insists that there is less difference in the Amish claim than would initially seem to be the case as he repeatedly notes that they already embrace the very values which the state seeks to promote through compulsory education.[59]

The reference to worldly values in the language quoted above is one of many in Burger's opinion; the Amish, Burger notes, view secondary education as an "impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs." Moreover, they seek "separation from, rather than integration with, contemporary worldly society."[60] Throughout Burger's opinion, the Amish are portrayed as innocents opposed to a modern worldliness about which Burger himself is, at best, quite ambivalent. Amish devotion to "life, family and home" (Ronald Reagan would have said "work, faith, and family"), Burger argues, "have remained constant" against the pressures of modernity.[61] Burger unabashedly sentimentalizes Amish existence, describing their life as "inherently simple and uncomplicated,"[62] and praising their "qualities of reliability, self-reliance and dedication to work."[63]

Writing at the beginning of the 1970s, Burger embraces the Amish as a living rebuke to the leftish, "hippie" values that had predominated in the previous decade. As Todorov describes the hippies:

> The . . . hippies of the sixties, in their refusal to adopt the [Jeffersonian] ideal of their country . . . tried to rediscover the life of the noble savage. A little like the Indians . . . . they tried to do without money, to forget books and writing, to show indifference to clothes and renounce the use of machines—to do their own thing. But such

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58. *Yoder*, 406 U.S. at 212.

59. Burger argues that the Amish "have carried the . . . difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." *Id.* at 235. Justice Blackmun in his dissent in Employment Division v. Smith, 494 U.S. 872, 907 (1990), makes a similar claim. There he reminds us that

> the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the state seeks to promote. . . . [T]he Church's doctrine . . . advocates self-reliance, familial responsibility, and abstinence from alcohol. . . . Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to favor.

Smith, 494 U.S. at 915-16.

60. *Yoder*, 406 U.S. at 211.

61. *Id.*

62. *Id.* at 217.

63. *Id.* at 224.

> communities were obviously doomed to failure, since they pasted these 'primitive' features on an altogether modern individualist mentality.[64]

Paradoxically, then, the hippies become mediating tropes in connecting Waite's vision of the Mormons to Burger's image of the Amish, even as the latter turns the Amish into examples of the sort of people Marilyn Quayle would evoke two decades later as those who, during the sixties, neither did drugs nor evaded the draft. Thus Burger needs both to praise the Amish for their difference and, at the same time, to deny them their difference. As he puts it, "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."[65] The problem of disorder is overcome because it, like the difference with which it is associated, is dissolved into a nostalgic identity.

The Amish, Burger writes, live a "life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare rather than competition."[66] Given this goodness, wisdom, and community, refusing to respond to the Amish desire for what Burger sees as a slight accommodation[67] would be a self-destructive act by one part of ourselves against another. As Todorov suggests, "At the same time it was tending to obliterate the strangeness of the external other, Western civilization found an interior other. . . . We no longer believe in wild men in the forests, but we have discovered the beast in man . . . ."[68]

Burger explicitly rejects Waite's aggressively colonialist response to difference even as he enacts a subtler version of the same thing. Instead of holding out the claim of difference as a mark of an irreducible otherness, he marks the difference which he confronts as a useful reminder of what America once (in his view) was, and might profitably become again. Thus Burger notes, "we must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles."[69] Waite's equation of difference with the uncivilized other is reversed; in *Yoder* the other stands in for civilization itself, for "our values" needing a place of refuge from the dark ages of our own self-made and corrupt modernity.

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64. TODOROV, *supra* note 20, at 251.
65. *Yoder*, 406 U.S. at 226.
66. *Id.* at 211.
67. Burger notes that there is a "minimal difference between what the State would require and what the Amish already accept . . . ." *Id.* at 236.
68. TODOROV, *supra* note 20, 248-49.
69. *Yoder*, 406 U.S. at 223.

Indeed much of Burger's opinion can be understood as a "ceremony of regret,"[70] a lamentation over the conditions of a modernity gone bad. Throughout, he refers to the Amish in terms of their longevity and their stability, and he praises the religious beliefs which "they and their forebears have adhered to for almost three centuries."[71] These beliefs are juxtaposed with the "values and programs of the modern secondary school."[72] "It cannot be overemphasized," Burger writes, "that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children in modern life."[73] The Amish represent a timeless difference marked by its endurance over time and its need for defense against a transient version of progress.

Moreover, unlike Waite who figured difference as a threat to the state, Burger notes that no such threat is posed in this case. The Amish are docile, weak, and powerless in the face of the state. "There is no doubt," Burger confidently claims, "as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education."[74] It is significant that Burger uses the term *power* rather than *authority*. What Burger wants to say is that the difference which the Amish allegedly represent is neither so disorderly a difference nor so potent a difference as to represent a threat to order itself.[75]

In fact, in what initially seem like extraneous passages, Burger states first in one place that the Amish "have an excellent record as law-abiding . . . members of society,"[76] and then in another that "its members are productive . . . members of society . . . [who] reject public welfare in any of its usual modern forms."[77] Their law-abidingness is again a powerful imagistic rejection of the riotous, rebellious violence of the sixties. Unlike the dope-smoking, draft-card-burning students of the 1960s, Amish youth, in Burger's account, capably fulfill the "social and political responsibilities of citizenship."[78]

But Burger's images and allusions reach further back than the immediately preceding decade. Burger conjures the image of Henry David Thoreau to mark the contrast between the Amish way of life and those who, as modern-day Thoreaus, would self-indulgently and self-righteously

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70. *See* David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC'Y REV. 551, 580 (1984).
71. *Yoder*, 406 U.S. at 215.
72. *Id.* at 217.
73. *Id.* at 235.
74. *Id.* at 213.
75. *See* Tushnet, *supra* note 31. Tushnet suggests that an alternate explanation for the accommodation of the Amish's claim is its marginality and impotence.
76. *Yoder*, 406 U.S. at 213.
77. *Id.* at 222.
78. *Id.* at 225.

put themselves above the law. While Thoreau "rejected the social values of his time," the Amish, Burger notes, do not want to allow "every person to make his own standards on matters of conduct in which society as a whole has important interests."[79] Unlike Waite, who understands differences as matters of personal preference, Burger differentiates "deep religious conviction" in a community in which "religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community,"[80] from what he calls mere "personal preference."[81] The Amish are, in Burger's eyes, doubly regulated by a regime of state law to which they almost religiously adhere just as they adhere to the "strictly enforced rules" of their religion. The disorderliness of difference is tamed; difference is subject to an ordering regime of disciplining regulation.

In *Yoder*, the distinction between members and strangers which so vividly marked Waite's construction of the disorderliness of difference dissolves into sameness and identity. The Amish are already reassuringly orderly members. Their law-abidingness, while of little technical or formal relevance in a First Amendment case, marks their "difference" as orderly in its commitment to, and respect for, a law beyond themselves.[82] It invites an inquiry, which Justice Douglas readily provides, while himself disclaiming its relevance, not into the nature of the Amish religion but into the "misdemeanor or felony records of its members."[83] While Douglas tries to deny Amish the status of heroic bulwarks against the chaos and decay of the counterculture, Burger insists, all the while enacting a rhetorical denial, that the Amish are "odd," "even erratic" and "different."[84] They are odd precisely because they are different from the selves we have regrettably become; they are, in fact, what we once were and what Burger believes we should aspire to become once again. The Amish serve as carriers of values whose place and power we will once again recognize at the end of our own "Middle Ages." Their values are a constant reminder that "today's majority" may not be a true embodiment of the character and way of life that Burger believes provide a recognizably American identity.

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79. *Id.* at 216.
80. *Id.*
81. *Id.*
82. Michael McConnell suggests that the First Amendment was intended to provide for exemptions for such groups. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).
83. *Yoder*, 406 U.S. at 246. Burger's portrait of what he calls the "virtuous and admirable" way of life of the Amish, *id.* at 215, is challenged by Douglas who cites testimony to the effect that drinking among Amish youth is quite common, that the "rate of suicide is just as high, if not higher than for the nation," and that the Amish have an unfortunate "preoccupation with filthy stories." *Id.* at 247 n.5. All of this, Douglas somewhat ironically notes, indicates that the Amish are "not people set apart and different." *Id.* They have, in Douglas's view, neither escaped nor transcended the decadence of the sixties; they have merely covered it in a charade of difference.
84. *Id.* at 224.

The opinions of Waite and Burger provide examples of two different ways American law deals with difference.[85] The former exaggerates the disordering potential of difference as well as the orderly potential of sameness and identity in order to justify an overtly colonial response. Disorderly difference must be obliterated by the civilizing hand of a coherent and stable state legality; the savage potential in difference must be recognized so that the priority of an ordered civilization can be asserted against the disordering difference. The latter denies difference while seeming to embrace it. The problem of order is displaced through a process of identification. If there is a disordering recognition in the confrontation with the difference of the Amish lifestyle, it is, in Burger's view, the recognition of a society in decline, a society called back to its true self through the strange confrontation with the living representatives of its abandoned way of life. The disorderliness of difference disappears as difference itself is rendered invisible.

Despite their rhetorical dissimilarity, the opinions of Waite and Burger share an essential commonality in that "neither engages the enigma of otherness."[86] As Connolly argues, these two types of responses to disorderly difference, one imperial, the other assimilationist, both

> operate as contending and complementary strategies that enable a superior people to maintain its self-assurance by bringing an inferior people under its domination and tutelage. These two modes function together as premises and signs of superiority; each supports the other in the effort to erase the threat that difference presents . . . .[87]

In contrast to the imperial and assimilationist approaches, we believe that a new language for speaking about difference, one that does not construct difference as a threat, needs to be developed. In other words, what is needed is not only a reconceptualization of difference, but also a re-construction of how we speak about order. Before difference can be recognized and accommodated, we must stop seeing difference as the prelude to disorder. And, we must stop seeing order as exclusive of all difference. At present, our prevailing public philosophies do not provide us with a vocabulary that adequately accomplishes either of these goals. Before identifying a perspective that does lay the groundwork for a richer account of difference and order, we discuss in the next section the

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85. Our choice of *Reynolds* and *Yoder* as cases with which to write about difference may be surprising. Both involve claims for tolerance by religious groups who are themselves often intolerant of certain of their members. But we believe that by using these cases to present our thesis that difference needs to theorize order, we can more easily illustrate the claim that difference and order are compatible. One should not assume, however, that the same treatment of claims for the recognition and accommodation of difference is absent when those claims are made by nonreligious groups.

86. CONNOLLY, *supra* note 16, at 43.

87. *Id.*

shortcomings of the two dominant vocabularies—liberalism and civic republicanism.

III. VOCABULARIES OF DIFFERENCE

To be an American, as *Reynolds* and *Yoder* illustrate, is to live an ambivalent relationship to difference.[88] It is to be a neighbor to difference and, at the same time, to harbor suspicions that difference may be our national undoing. This ambivalence is conveyed by the metaphor of the melting pot, which acknowledges and celebrates our differences, but also insists on the painful process of melting down those differences and molding a new and homogenized society.[89]

In spite of our nation's proclivity toward homogeneity, difference is an integral part of American culture. Difference and the conflict difference generates have been a part of the cultural life of Americans since the nation's founding. As Tocqueville observed at the start of the nineteenth century:

> The human beings who are scattered over this space do not form, as in Europe, so many branches of the same stock. Three races, naturally distinct, and, I might almost say, hostile to each other are discoverable amongst them at the first glance. Almost insurmountable barriers had been raised between them by education and law, as well as by their origin and outward characteristics; but fortune has brought them together on the same soil, where, although they are mixed, they do not amalgamate. . . .[90]

Regardless of the extent to which the now many races, religions, and nationalities that compose the United States have or have not amalgamated, the perception and fear that America would be a nation of many peoples who would not unify has prompted a strong desire for sameness and

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88. *See* Milton M. Gordon, *Models of Pluralism: The New American Dilemma*, 454 ANNALS 178 (1981). *See also* Robert Post, *Cultural Heterogeneity and the Law: Pornography, Blasphemy and the First Amendment*, 76 CAL. L. REV. 297 (1988).

89. While we sympathize with those who have recently tried to challenge the melting pot metaphor as assimilationist and racist and sought to replace it with alternatives like the American mosaic or the American Kaleidoscope (*see* LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE (1990), *cited in* Andrew Delbanco, *Pluralism and its Discontents*, 55 TRANSITION 83 (1992), the melting pot remains a powerful metaphor for many Americans' conceptions about difference and order. Opponents of multiculturalism and ethnic plurality, for example, often frame the debate in these terms. *See, e.g.*, SCHLESINGER, *supra* note 14.

90. TOCQUEVILLE, *supra* note 40, at 425. While the continuing appeals to difference and pluralism suggest that the now numerous American races and ethnicities have not fully amalgamated, they are no longer naturally distinct. Both genetically and culturally, America's many racial groups have interacted with and molded into one another to the point where it is often difficult if not impossible to distinguish black from white, Caribbean from North American, Muslim from Jew, etc. *See, e.g.*, Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4 (1993). Piper acknowledges that both genetically and culturally the differences between Blacks and whites are diminishing; at the same time, however, she argues that our collective unwillingness to give up our stable racial identities—our refusal to "reinternalize the external scapegoat"—is the "last outpost of racism." *Id.* at 20-21.

community. This desire is evident in such disparate sources as John Jay's quite un-Tocquevillian celebration of our unity and in the aspirations of contemporary communitarians.[91] It creates what Michael Kammen calls "a dialectic of pluralism and conformity [which lies] at the core of American life."[92] While embracing freedom and diversity, Americans value connection; we strive to remain individuals, but we also wish to be a people.[93]

For a nation with such a rich (if inconsistent) historical, literary, and artistic tradition of celebrating difference, Americans typically speak about difference in one or another cramped vocabulary. We have few ways to label and speak of difference except to mark it as a threat to order or to wish for its end. This observation is not obvious; on the contrary, one could argue that tolerance provides a powerful and proven vocabulary for speaking about difference. Indeed, many Americans pride themselves on being tolerant of difference, even of those who are themselves intolerant. Ideally, this means that differences are not merely accepted, but that they are sought out and celebrated.

However, tolerance is at best a minimal vocabulary of difference.[94] Tolerance receives its substantive understanding and its resulting inadequacies from the two theories that dominate American political discourse: liberalism[95] and civic republicanism.[96] For liberals, tolerance is the

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91. Communitarianism, which has gained popularity of late as a response to liberalism's inability to account for the human need for community, does not avoid the fear of disorder we have attributed to both liberalism and republicanism. Simply transferring the problem of order to small, largely self-sufficient communities cannot solve the problem of plurality. As Roberto Unger puts it, "Once plurality is granted, all the problems of liberal thought seem to spring up again with the difference that they apply to the relations among members of different communities rather than to every encounter among individuals." ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 282 (1984).

92. *See* MICHAEL KAMMEN, PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION 128 (1972).

93. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

94. We agree with Kirstie McClure that it is high time for a critical look at the practice of tolerance as adequate for recognizing and accommodating difference. *See* McClure, *supra* note 31, at 362. Yet, we do not seek to abandon tolerance as a fruitful concept simply because it often has been and is used in ways inconsistent with the fullest meaning of respect and accommodation of others. It may very well be that tolerance *is*, according to its ideal usage, respect for and accommodation of difference, and simultaneously *is*, substantively, a gross reformism in the service of power. While these appear to be contradictory definitions, they need not be. In this we follow the suggestion of Hannah Pitkin; Pitkin argues that a large class of words, like justice, can often mean two very different things, both of which are true. The two meanings correspond not to different words, but to a distinction between form and substance depending upon the context in which the word is used. *See* HANNAH FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE 186-92 (1973). *See also* HERBERT MARCUSE, ONE-DIMENSIONAL MAN 214-15 (1964).

95. The classic texts are THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., Penguin Books 1968) (1651) and JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988) (1690). Although there are many varieties of liberalism, we emphasize common themes that reveal liberalism's problematic relationship to difference.

96. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1992). *See also* H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703 (1988).

bastion protecting individual freedom from government interference.[97] For civic republicans, tolerance frequently becomes a substantive conception of the civic good, a form of civic virtue, to which the republic can aspire.[98] In this way, then, liberals and civic republicans—at least in contemporary debates—are nearly indistinguishable.[99] Both imagine tolerance as necessary in a democracy to allow participation and innovation in the collective pursuit of truth.[100] Yet, although liberalism and civic republicanism purport to balance the competing imperatives of freedom and order, both are ultimately deeply hostile to difference because they construct difference as disorderly. In this section we argue that liberalism and civic republicanism are each committed to understanding difference as the antithesis of order; neither, therefore, can support a substantive conception of tolerance that approaches the ideal of respecting and accommodating differences.

A. *Liberalism*

Liberalism, as has often been noted, advances an individualistic conception of human nature in which the individual is primary within modern states.[101] This individualism is rights-based and interest-oriented.[102] For a liberal, individual personality is defined outside of groups or communities, which are seen as the locus of a threatening pressure to conform.[103] Furthermore, all values are subjective; indeed, in liberal thought, they are virtually indistinguishable from preferences.[104] Thus the

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97. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1972).

98. *See* Michelman, *supra* note 96.

99. While we portray, for analytical reasons, liberal and civic republican theories as the two dominant political theories in American thought, we believe it to be more accurate to understand the liberalism/republicanism debate as representing similar arguments justifying the maintenance of centralized state power. For examples of other arguments concerning the convergence of liberalism and civic republicanism, see Naomi Stolzenberg, *'He Drew a Circle that Shut Me Out': Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 582, 655-60 (1993); DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT 3-8 (1992).

100. *See* MILL, *supra* note 37; Michelman, *supra* note 96, at 1526-27, 1528-32.

101. This point is made vividly by GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE (1992).

102. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: FROM HOBBES TO LOCKE (1962). Interest-oriented behavior is legitimated and protected through the recognition of negative rights. For a liberal, life at its best consists in being left alone to identify and strive to attain one's own interest. In such a life, what any individual wants represents the full measure of his capacity to know the good. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1988); *see also* Stephen Lukes, *Making Sense of Moral Conflict*, *in* LIBERALISM AND THE MORAL LIFE 127 (Nancy Rosenblum ed., 1989). As a result, no one, in the pre-political world as imagined by liberalism, can be justified in prescribing the good for others.

103. *See* MILL, *supra* note 37.

104. Few liberal thinkers go so far as to equate value and preference. Liberal and analytic jurisprudence have, as Drucilla Cornell argues, long since abandoned an insistence on purely subjective legitimation of values. When liberals propose standards such as tolerance (Rawls), civility (Selznick) or partiality (Nagel) to distinguish values from preferences, they begin to sound like contemporary civic republicans. *See* CORNELL, *supra* note 99, at 3-8. However, when, as liberals frequently do, they deny the existence of objective moral criteria, whatever restraints are imposed on individual freedom appear

good is inevitably different for different people, and any sharing of values is merely the coincidental overlapping of preferences. Liberalism can offer no conception of the good except that individuals should be allowed to identify and pursue their own particular visions of it with minimal outside interference.[105] As a result, tolerance of those who hold opposing views is considered the "fixed star of American Jurisprudence"[106] and the bulwark of liberalism's notions of freedom and fairness.[107]

Liberal tolerance, as described here, shares a positive feature with all vocabularies of difference: it is a relativizing perspective. Relativization, or perspectivism, acknowledges that people can be different from oneself and yet not be inferior.[108] Without perspectivism, those who do not speak your language or worship your gods must be viewed as barbarians.[109] With perspectivism, others can be understood to worship gods and speak a language true for them. As a concept that, at least in theory, seeks to allow others to live according to their own moral and religious truths, tolerance fosters co-existence and moderation instead of an imposed virtue.[110]

However, although tolerance is relativistic, it is also hierarchical. Tolerance is "permission granted by authority" and an "allowance, with or without limitations, by the ruling power," and the allowing of "that which is not actually approved; forbearance; sufferance."[111] Tolerance presupposes a hierarchical relationship between someone who requests tolerance, and the authority that tolerates at will. Tolerance presupposes one powerful actor—namely the liberal state—that can decide whether or not to tolerate

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arbitrary and unnatural. While liberalism frees the individual moral agent from the teleology of objective or shared moral judgments, it fails to provide a new justification for any individual moral judgments. Without some sort of justification for the status of subjective moral judgments, those judgments will be seen as nothing more than assertions of individual will without any moral validity. Thus, values can be seen to be equivalent to preferences.

105. *See* SANDEL, *supra* note 102.

106. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

107. *See* RAWLS, *supra* note 97, at 206-07. Rawls argues that

> equal liberty of conscience is the only principle that the persons in the original position can acknowledge. . . . The question of equal liberty of conscience is settled. It is one of the fixed points in our considered judgments of justice. But precisely because of this fact it illustrates the nature of the argument for the principle of equal liberty. The reasoning in this case [religious liberty] can be generalized to apply to other freedoms.

Id.

108. *See* TODOROV, *supra* note 20, at 189-91; *see also*, TZVETAN TODOROV, ON HUMAN DIVERSITY: NATIONALISM, RACISM, AND EXOTICISM IN FRENCH THOUGHT 32-90 (1993) [hereinafter TODOROV, ON HUMAN DIGNITY].

109. Todorov illustrates the workings of perspectivism by quoting Las Casas quoting Saint Paul:

> 'There are, it may be, so many kinds of voices in the world, and none of them is without signification. Therefore if I know not the meaning of the voice, I shall be unto him that speaketh a barbarian, and he that speaketh shall be a barbarian unto me.' Thus, just as we consider the peoples of the Indies barbarians, they judge us to be the same, because they do not understand us.

TODOROV, *supra* note 20, at 191.

110. Todorov links tolerance to Montesquieu's concept of moderation. *See* TODOROV, ON HUMAN DIGNITY, *supra* note 108, at 359.

111. OXFORD ENGLISH DICTIONARY, *cited in* McClure, *supra* note 31, at 362.

the activities of other, less powerful subjects. Tolerance is thus less a vocabulary of difference than an apology for order.[112]

The transformation of "tolerance as a celebration of difference" into "tolerance as a language of order" is a corollary of liberalism's individualist and interest-oriented conception of human personality: this conception can provide no assurance that difference will not be destructive and disorderly. Thus, liberalism both advocates tolerance—because it is essential to guarantee the freedoms necessary for the full realization of the human character—and circumscribes the scope of tolerance for fear of aggravating conflict and disorder.[113] Liberals, therefore, describe societies as comprised of free individuals whose pursuit of their own vision of the good is inevitably dangerous to society as a whole. However, through collective appeal to a rationally governed civic realm, liberals imagine that disorderly differences can be made orderly.[114]

For liberals, the state is the only source of that rational governance and thus the only guarantor of order. The primary responsibility of the liberal state is to do the job that cannot be done elsewhere: policing the behavior of self-interested, utility-maximizing citizens to insure that each remains free to pursue his own good in his own way.[115] For this reason, liberal social institutions, such as the law, are intended to protect us from one another rather than improve human character. Thus, the existence of these institutions signify both our differences and our inability to live harmoniously with difference. Difference is inevitable and inevitably an invitation to disorder. This is to be expected: if freedom is understood as the pursuit of individual desires, as it is in liberal political thought, then order requires that limits be imposed on individuals whose claims to freedom may give rise to mutual antagonism.

Because order requires that the liberal state adjudicate differences by constraining individual freedom, a request for exemption from state law in

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112. The complicity between tolerance and power has led some to question its desirability as a vocabulary for organizing difference. Despite its rhetorical association with respect for difference, liberal tolerance, say its critics, has itself become a guarantor of order. For example, Herbert Marcuse argues that tolerance stifles nonconformist attitudes and protects the authority of those who get to choose which differences are tolerated. Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 82 (Robert P. Wolff ed., 1965). Audre Lorde eloquently writes of how "[a]dvocating the mere tolerance of difference between women is the grossest reformism." Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 111 (1984). And Tzvetan Todorov suggests that tolerance is often nothing more than a forbearance of a despised or hated people whom one hopes to assimilate. TODOROV, *supra* note 20. These views suggest that tolerance, as a vocabulary of difference, may not be as rich a vocabulary as its liberal supporters claim. Marcuse, Lorde, and Todorov share the recognition that despite liberal rhetoric, tolerance presupposes and accepts the legitimacy and authority of the state.

113. As Roberto Unger puts it, liberal "individuals seek to achieve their particular objectives and to satisfy their needs. . . . Both hostility and dependence are based on the nature of human ends and the scarcity of means to satisfy them." UNGER, *supra* note 91, at 65.

114. *See* LOCKE, *supra* note 95; HOBBES, *supra* note 95.

115. *See* MILL, *supra* note 37; *see also* Michael Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984).

the name of difference must be seen as an invitation to the very disorderliness that the liberal state is established to prevent. Moreover, because in liberal political thought the ultimate justificatory statement is "I want," there is no vocabulary with which it might be possible to engage in common reflection about questions of values raised by claims of difference. As Roberto Unger and others have suggested,[116] liberalism denigrates attachments among persons through which our collective life is constituted. Liberals need and fear others—but are always more fearful than needy.[117]

For liberals, the recognition of difference is thus inevitably a recognition of danger.[118] Differences proliferate as persons pursue their visions of the good; differences always threaten to give rise to disorderly conflicts of interest. Any apparent sharing of values and commitments is fleeting or illusory, because lurking just beneath the surface is the reality of interests in conflict.

B. Civic Republicanism

Unlike liberalism, civic republicanism does not begin with the isolated individual struggling to realize his interests in a world where others are similarly engaged in the pursuit of their own interests.[119] For the civic republican, the primary condition of social life is life with others in pursuit of the "common good." If liberalism elevates individual difference, civic republicanism seeks to overcome difference in the name of a communal civic virtue.[120]

Central to the republicans' attempt to define civic virtue for a community is their belief that subjectivity itself is discursively constructed within communities. For the republican, the individual is inseparable from and unknowable outside of her community.[121] As Paul Kahn maintains:

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116. *See* UNGER, *supra* note 91; SANDEL, *supra* note 102.

117. This theme is most powerfully developed by Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 221 (1979). As Kennedy argues, "the categories of individual and collective . . . represent an insuperable contradiction within our experience." For a different evaluation of the same tension see Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984).

118. *See* Craft, *supra* note 10.

119. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice*, 72 VA. L. REV. 543 (1986); *see also* MARK TUSHNET, RED, WHITE AND BLUE: CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 10 (1988).

120. *See* SELZNICK, *supra* note 96, at 406-27; Michelman, *supra* note 96; Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

121. Political life is a life with others forging commonality through the shared search for virtue. Life together is just that; it is life where the "personhood, and character gain substance from the experience of belonging to a specific moral community." SELZNICK, *supra* note 96, at 228. Unlike the liberal ideal of isolated, free persons each pursuing their own good, the civic republican believes individual identity to be inseparable from the life of the community. SANDEL, *supra* note 102. *See also* Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE, *supra* note 102, at 159. Difference is a barrier, but not an insurmountable one, to an integrated, harmonious community life. And community is more thickly constituted than a temporary association of persons in suspicious and temporary alliances for similar goals. To say that people are members of

> Instead of the problematic relationship of part (citizen) to whole (state), in which either the part or the whole threatens to subsume the other, the new communitarians understand the relationship of the individual to the political order as that of the microcosm to the macrocosm. . . . There is no self to understand apart from the community just as there is no community apart from the members.[122]

For civic republicans, both individual citizens and their communities are constituted through a dialogue about justice.[123] Thus, dialogue is also the mechanism by which difference is overcome; difference is something to be subordinated in the search for shared understandings.[124] The threat of disorder that plagues liberalism is ostensibly overcome as difference itself is overcome. Thus while contemporary civic republicans often claim to honor dialogue, plurality, and tolerance—concepts that imply accommodation of difference—they simultaneously affirm the possibility of reaching a consensus regarding the normative presuppositions of society.[125] The normative basis of this common good is created through the processes that forge and sustain community. In particular, civic republicans argue that through the process of founding and creating laws diverse individuals are integrated into a coherent and unified community.

In this process, law plays a critical role in maintaining a dialogue geared to defining civic virtue within the community. Law is more than a structure of restraint, setting the boundaries within which individuals pursue their self-interest. It is a vehicle for, and an expression of, the shared values of the community.[126] Law becomes a "true foundation of the social order. . . . The problems of order and freedom would be cast in a different light if we could think of these norms of conduct as ends whose fulfillment would bring our worthiest capacities to their richest development rather than as constraints imposed by an external will."[127]

Civic republicanism is deeply hostile to difference.[128] It posits values, or the pursuit of values, that can bring unity out of apparent diversity and, in this way, denies the desirability of maintaining and supporting meaning-

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a community is to say that their very personalities, their characters, values, and interests, are constituted in and through the community of which they are a part.

122. Paul Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 5 (1989).

123. *See* Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5 (1989).

124. *See* Michelman, *supra* note 96, at 1513; Sunstein, *supra* note 120, at 1552.

125. *See* Michelman, *supra* note 96, at 1510-15. *See also* Stolzenberg, *supra* note 99.

126. *See* Robert Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); SELZNICK, *supra* note 96, at 452-55; Michelman, *supra* note 96, at 1513-15.

127. UNGER, *supra* note 91, at 76-77.

128. Iris Young, *Polity and Group Differences: A Critique of Universal Citizenship*, 99 ETHICS 250 (1989). Yet some argue that modern versions of civic republicanism merely reinscribe a liberal desire to confine difference to the private sphere. *See* Stolzenberg, *supra* note 99, at 634-67. Stolzenberg argues that because civic republicanism usually selects liberal tolerance as the universal civic virtue for which it seeks a consensus, it shares liberalism's inability to seriously consider the debate over the assimilation and tolerance of right-wing religious groups.

ful difference. Because individual freedom is subordinated to the community's prescriptive demands, civic republicanism can only accomplish its goal of establishing communal criteria for moral judgments at the expense of diversity. Civic republicans assert that a national community can and should be forged out of a diversity of interests.[129] Disorderly differences are overcome if dialogue succeeds in forging a societal consensus concerning civic virtue.

While liberalism anxiously acknowledges and seeks to make the best of difference, civic republicanism seeks to overcome and quiet it. While the former treats difference as the irreducible fact of political life, the latter sees difference as epiphenomenal. Yet both liberalism and civic republicanism confront difference as a problem of disorder, and neither appreciates the way difference may already contain the seeds of its own orderliness.[130] Neither uses the fact of difference to reevaluate and revalue order itself, to ask what it means to demand or to search for order among diverse and overlapping perspectives, cultures, and values. Neither provides a vocabulary that both welcomes difference and responds to legitimate demands for order.

As *Reynolds* and *Yoder* suggest, American law sees difference in the cramped vocabularies of liberalism and civic republicanism. Our law knows no way to celebrate difference as a site of alternative visions of orderliness or to recognize the potential within differences to instruct others about useful realignments in existing practices.[131] For this reason, social theory must do more than condemn law for its fantastic imagination of difference as disaster or for its repressive, homogenizing preoccupations. Social theorists should instead provide a richer, more complicated vision of difference and develop a richer, more complicated vision of order.

IV. CONCLUSION

"[T]he other," Todorov claims, "remains to be discovered."[132]

> [H]uman life is confined between . . . two extremes, one where the I invades the world, and one where the world ultimately absorbs the I. . . . And just as the discovery of the other knows several degrees, from the other-as-object, identified with the surrounding world, to the

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129. Larry G. Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV. 83, 91 (1987).

130. This argument is made by Stanley Fish in his essay, *Force*, *in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

131. For a discussion of the way difference invites reconsideration of institutional practices see Minow, *supra* note 7.

132. TODOROV, *supra* note 20, at 247.

> other-as-subject, equal to the I but different from it . . . we can indeed live our lives without ever achieving a full discovery of the other.[133]

We cannot, at this point, identify a vocabulary of difference that speaks about order in a fully responsible way and, in so doing, makes it possible to "discover the other" in the sense that Todorov advocates. We can, however, conclude by pointing to a fruitful body of scholarship from which such a vocabulary might be drawn. This body of scholarship reconfigures the problem of difference by reconceiving both the liberal and civic republican hierarchies of state and society. This is the scholarship of legal pluralism, a burgeoning interdisciplinary field that draws upon anthropology, political science, economics, and law.[134]

While the advocates of legal pluralism represent a wide range of concerns and opinions, they share the conviction that power, order, and meaning are not the exclusive province of hierarchical command-obedience relationships.[135] Power, and the concomitant capacity for ordered social and political institutions, can and do exist outside and separate from relations of coercion and hierarchy. Legal pluralists, consequently, paint a picture of order and difference in stark contrast to that suggested by liberal and civic republican theorists. Instead of fearing difference as disorderly and as a threat to central authority, legal pluralists take the possibility of difference seriously and intend to honor it. A legally pluralist society is not limited to one civil realm dominated by a neutral state. Instead, the task of maintaining order is decentralized and dispersed throughout society among different groups.

Some versions of legal pluralism argue, using anthropological research, that different groups can exist without a central conglomeration of power and without the formation of hierarchical relations privileging a central bureaucracy over those diverse groups. Claustres, for example, maintains that among the Tupi societies in Brazil autonomous social groups existed without any central concentration of power and violence.[136] These distinct groups interacted, traded, and "unified" in what Claustres calls a multicommunity social organization, yet no centralized and hierarchical arrangement arose among them. On the contrary, Claustres argues that the emergence of any such centripetal force caused a symmetrical strengthening

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133. *Id.*

134. *See* Cover, *supra* note 126; PIERRE CLAUSTRES, SOCIETY AGAINST THE STATE (1987); JOHN COMAROFF & JEAN COMAROFF, ETHNOGRAPHY AND THE HISTORICAL IMAGINATION 54-56 (1992); ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Peter Fitzpatrick, *Marxism and Legal Pluralism*, 1 J. L. & SOC'Y 45 (1983); Stewart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCES 445 (Leo Lipson & Stanton Wheeler eds., 1986); Sally E. Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988); Sally F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719 (1973).

135. We borrow the phrase "command-obedience relationships" from CLAUSTRES, *supra* note 134, at 11.

136. *Id.* at 71.

of centrifugal forces among the various Tupi communities. In other words, the dynamic Claustres describes is *dialectical*: as the social system gradually constructs and defines itself, its component parts react to this change by accentuating their concrete and special nature, their individuality.

Though some might wish to try, it is hard to imagine how Claustres's model could be transposed onto contemporary societies such as the United States.[137] While liberal theory may underestimate the order inherent in difference, one should not merely make the opposite claim that conversation and negotiation can adequately resolve all conflicts that arise. As the story of Tina Isa demonstrates, there remain differences in our society that can be "ordered" only by violent imposition. Unless legal pluralists are content to let competing autonomous groups resolve these extreme differences outside the scope of institutional power, they must continue to depend on a hierarchical structure—e.g., the state—that is authorized by its constituent groups to resolve disputes among them.

Robert Cover's model of legal pluralism confirms this fact.[138] While Cover takes difference seriously, he recognizes that pluralism does not, and need not, unconditionally honor all forms of difference. His brand of legal pluralism recognizes and accommodates difference when two conditions are met.

First, difference must arise out of and express the normative aspirations of an integrated and ordered community—it must exemplify and express a "*nomos*."[139] In this sense, Cover's legal pluralism embraces the liberal celebration of multiplicity, but in a way that insists that the claims of difference be linked to the requisites of a richly constituted, normatively engaged orderliness.[140]

Second, claims of difference should be honored only when they themselves honor the principle of difference they assert. This condition for recognizing and accommodating difference also puts order at the fore. Under this condition, legal pluralism insists on the reality of plurality as itself providing a constraint on those versions of difference that would press themselves upon us.[141] Legal pluralism does not require that those of us sympathetic to the claims of cultural difference stand by as all manner of horrors are committed in its name. We can, and should, insist that

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137. Similar studies of other nonindustrial societies, as well as communities within industrial and bureaucratized states like the United States, confirm Claustres's argument that order can be maintained in society where the state provides wide latitude for group differences. *See id.* at 150; ELLICKSON, *supra* note 134; FITZPATRICK, *supra* note 43; Macaulay, *supra* note 134.

138. *See* Cover, *supra* note 126.

139. *Id.*

140. For further discussion of Cover's vision of legal pluralism, see Austin Sarat and Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, in LAW'S VIOLENCE, (Austin Sarat and Thomas R. Kearns eds.,1992).

141. *See* McClure, *supra* note 31, at 361. *See also* Martha Minow, *Putting Up, Putting Down: Tolerance Reconsidered*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77 (Mark Tushnet ed., 1990).

difference be orderly, even as we invite questions about what order entails. And we can, and should, insist that the claims of "equal but different" honor principles of equality and of difference.[142]

From this perspective, what is sought in both *Reynolds* and *Yoder* is the right of a discrete community to live according to its own *nomos*. Recognition of that claim does not entail agreement or even sympathy. It is possible to accommodate the Mormon rule requiring polygamy or the Amish attitude toward schooling without advocating those positions. In our terms, Cover's legal pluralism may make such differences orderly by recognizing and accommodating them as differences that arise out of the shared activities of communities united in their pursuit of a particular conception of the good. Cover calls this pursuit law; and he counsels against assertions of authority that claim the right to annihilate another's law.[143]

Like liberalism, legal pluralism is sensitive to the subjectivity of values; like civic republicanism, legal pluralism aspires to shared moral engagement. It is in the interstices of these traditions, however, that legal pluralism departs from entrenched discourse and lays the groundwork for a much needed reconciliation of difference and order.[144] However, resisting the trend of established jurisprudence and political theory to carve a space for orderly difference is no small task. As a result, legal pluralism may not provide the ultimate answer to the vexing problems posed by difference. As the Western nation-states are increasingly populated by individuals with heterodox social affiliations—including those from Diaspora cultures—legal pluralism's contribution is especially valuable in its encouragement of orderly difference. Each non-separate order must recognize and respect the other as "other," but not wholly alien. Of course, as long as there exist groups for whom someone else's gods are not God, there will be the need for some mechanism to intervene and assert its authority. The task of social theory is to provide a vocabulary for

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142. As Cover's critics have pointed out, he makes his argument for tolerance easier by selecting examples that are "easy." These critics look to the cases like those of Tina Isa and Salman Rushdie and ask if Cover intends to recognize the authority of the Palestinian and Islamic communities to enforce their laws on their people around the world. The case of Salman Rushdie is especially difficult because Rushdie's decision to retain his Islamic identity eclipses the answer that a community's law must recognize the possibility of exit. *See* Jeremy Waldron, *Rushdie and Religion*, *in* JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 134 (1993). It is unlikely that Cover or the vast majority of Western individuals are willing to accept the justness of the fatwa; yet to reject it requires an assertion of our authority to judge Islamic law.

143. Cover, *supra* note 126.

144. We have concentrated at length on the *Reynolds* and *Yoder* opinions not to register our agreement or disagreement with the decisions. Polygamy is a complicated issue that involves the consideration of gender, oppression, and slavery as opposed to, in this case, Reynolds's claim against the state for the freedom to practice the dictates and lifestyles of his religion. But even if the ban on polygamy is to be sustained, the fear of disorder cannot be the rationale. The Mormons practiced polygamy as part of their law. Their claim for the right to continue that practice is a claim not of freedom and license, but a claim to live according to a different law.

reconciling claims of difference with legitimate demands for order so that occasions for such intervention and assertion are minimized and respect for difference encouraged.