REHABILITATIVE REPARATIONS FOR THE JUDICIAL PROCESS

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INTRODUCTION

One of the most important issues in the debate on black reparations concerns the precise form such reparations should assume. Should they be in the form of a check from the federal government or culpable corporation made payable to individuals or families of slave descendants? If so, how does one calculate such payments? Should reparations be in the form of a trust fund held for the benefit of poor blacks or their children? Or should reparations be in the form of social, economic, educational, or political reforms that benefit the African American community as a whole rather than specific individuals or families?

This discussion of the forms of reparations should incorporate analytical categories created in the global arena.[1] When one looks at the ways in which governments have responded to atrocities committed under their authority—such as South Africa's response to apartheid, Germany's acknowledgment of the Holocaust, and even the United States' acceptance of responsibility for the internment of Japanese Americans during World War II—the following conceptual scheme begins to emerge. A distinction is made between *compensatory* and *rehabilitative* reparations. Compensatory reparations are directed toward the individual victim or the victim's family. They are intended to be compensatory, but only in a symbolic sense; for nothing can truly return the victim to the status quo

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1. For a more detailed discussion of the international reparations movement, see ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 101-17 (1998); DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999); Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT'L L. J. 177, 178-82 (2002). *See generally* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999). For further discussion of other reparation movements within the United States, see ARNOLD KRAMMER, UNDUE PROCESS: THE UNTOLD STORY OF AMERICA'S GERMAN ALIEN INTERNEES (1997); RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (Eric K. Yamamoto et al. eds., 2001).

ante.[2] In contrast, rehabilitative reparations are directed toward the victim's community. They are designed to benefit the victim's group, to nurture the group's self-empowerment and, thus, aid in the nation's social and cultural transformation. At a minimum, rehabilitative reparations can improve the conditions under which the victims live.[3] In addition, compensatory or rehabilitative reparations can take the shape of monetary or non-monetary relief. Cash payments to victims are monetary compensatory reparations.[4] Scholarship funds to members of the victim's family are non-monetary compensatory reparations.[5] An *Atonement Trust Fund* for certain members of the victim's community is a monetary rehabilitative reparation;[6] while affirmative action, a National Slave Memorial,

2. *See* Roy L. Brooks, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE, *supra* note 1, at 9 [hereinafter Brooks, *The Age of Apology*].

3. *Id.*

4. There are several ways to determine the appropriate amount to be awarded. Boris Bittker suggests what might be called the earnings approach, in which each black would receive for a period of time an annual earnings boost equaled to the gap between the average earnings for whites and blacks. *See* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 131 (1973). Another approach, what might be called the capitalization approach, takes the racial earnings gap calculated under the earnings approach and capitalizes that value to determine the amount of investment required to generate the income necessary to close the gap. "For example, assume an average income gap of $5,000 a year and an average market rate of return of 10 percent. Under the capitalization approach, it would take $50,000 of investment capital per eligible worker to close the gap (5,000 /.10 = 50,000)." Darrell L. Pugh, *Collective Rehabilitation*, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE, *supra* note 1, at 372.

5. In January of 2002, West Georgia College, which is a small college located in Georgia, apologized for rejecting every black applicant from the town's all-black high school in 1955 and 1956. To solidify that apology, the college established through an anonymous donor a scholarship fund for the descendants of the 60 or 70 students who were denied admissions some 50 years ago. *See Scholarship is Apology for Bias*, SAN DIEGO UNION-TRIB., Jan. 18, 2002, at A20.

6. At a conference on reparations held in Copenhagen in 2001, I proposed an Atonement Trust Fund that worked as follows:

> [T]he U.S. government should finance and administer a trust fund for every newborn African American child born within a particular period of time, say with a five- or ten-year period. The purpose of the trust fund is to give a core generation of African Americans one of the things slavery has denied them – family resources handed down generation to generation. At the age of 21, each African American within this group would receive the proceeds of the trust fund. He or she will now have the financial wherewithal to take a meaningful step toward a successful future. Money accumulated in the trust fund can only be used for certain purposes; namely, for education (e.g., to pay off undergraduate student loans or to attend graduate school); to start a new

and a National Museum of American Slavery are non-monetary rehabilitative reparations.[7] Thus, black reparations, like reparations in the global context, need not be directed toward the victims themselves nor involve cash payments.

In this article, I should like to focus on a type of rehabilitative reparation that has received very little attention in the debate over slave reparations—namely, the internalization of black values or perspectives in judicial reasoning.[8] Except in the context of civil rights cases,[9] judges rarely give deference to or even recognize relevant black values when deciding cases.[10] This can be seen in the *levels* of judicial decision-making judges traditionally employ.[11]

Judicial reasoning can be conceptualized at three different levels: Level 1 or *judicial positivism*, Level 2 or *judicial pragmatism*, and Level 3 or *judicial nominalism*. Level 1 in its weaker form can be described as the passion for justice (what Aristotle articulated as the

business, or as venture capital (business investment). These are the sorts of activities that build family resources that can be built upon from one generation to the next.

Roy L. Brooks, Address at the Danish Centre for Human Rights, Copenhagen, Denmark (Apr. 27, 2001). During that address, I made the following caveat which, in my judgment, should apply to all reparation proposals:

> It is important to understand, however, that the Atonement Trust Fund is not intended to be a substitute for on-going civil rights reforms. The U.S. government still has an obligation to do what governments are supposed to do—namely, resolve problems (including problems of racial discrimination) in education, housing, employment, and politics. The Atonement Trust Fund should be viewed as a special addendum to the struggle for racial justice in the United States.

Id.

7. *See* Brooks, *The Age of Apology, supra* note 2, at 9.

8. African Americans are not monolithic—not in the way they think, behave, or worship. *See generally,* ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990) (developing a model of socio-economic stratification applicable to African American society) [hereinafter BROOKS, RETHINKING THE AMERICAN RACE PROBLEM]. The reparations proposal put forth in this article attempts to capture as much of this diversity as possible.

9. There is still a good deal of what I call *juridical subordination* in civil rights cases as well. For a detailed discussion of the juridical subordination concept, see ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 187–91 (2002) [hereinafter BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING].

10. Of the many books written about black values, one of the most comprehensive is THE AFRICAN AMERICAN BOOK OF VALUES (Steven Barboza ed., 1998). *See also* BROOKS, RETHINKING THE AMERICAN RACE PROBLEM, *supra* note 8, at 144–49.

11. *See* BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 169–84.

proper aim of all legal systems[12]) disciplined by past rules,[13] or, in the stronger form (i.e., H.L.A. Hart's notion of judicial reasoning), simply as judicial decision-making disciplined by past rules.[14] Level 2 can be described as the passion for justice disciplined by what goes on before (rules and policies) and after the case (consequences, including consequences to legal institutions).[15] Finally, Level 3 can be defined as the passion for justice disciplined solely by the facts of the case—in other words, the judge's personal sense of justice.[16] Level 3 can result in the imposition of values—those favored by the judge—on a community before it is prepared to accept them. This constitutes the highest form of judicial activism,[17] but it is not necessarily illegitimate judicial action.[18]

None of these judicial models necessarily incorporates black values. In fact, several subordinating structures—*juridical subordination*—can be observed at each level. The subordinating mechanism in Level 1 analysis primarily consists of the preference for a minimalist—shrinking, impotent, non-interventionist—government combined, in the case of Justice Scalia's textualism, with originalism.[19] Constrained by "the dominant opinions of the community," Level 2 leaves little room for the vindication of black values that cut against the grain of white, majoritarian values. This can lead to a democratic process, effectively a tyranny of the majority, that devalues the needs and dignity of African Americans.[20] Level 3 is not much better than Level 2. As the Supreme Court's nominalistic

12. *See id.* at 5.

13. *See id.* at 169–71.

14. *See id.* at 164–67.

15. *See id.* at 172–74.

16. *See id.* at 174–83.

17. *See id.* at 15–19.

18. For example, see *Brown v. Board of Education*, 347 U.S. 483 (1954) in which the democratic ideal and the collective sense of humanity justifies such judicial activism. *See* Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After* Bush v. Gore,13 STAN. L. & POL'Y. REV. 33, 51 (2002).

19. Originalism is the act of freezing textual interpretation at the time of the text's origination. For example, Justice Scalia's constitutional textualism freezes the Constitution at 1791, a time when African Americans, held in chattel slavery, and women, celebrated but quasi-enslaved, had no voice in their own governance. *See* BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 71–74, 188–89. However, the term itself lacks an original meaning. That is, legal theorists give the term "originalism" or "textualism" multiple interpretations. *See id.* at 62 n.5.

20. *See id.* at 189–90. *Brown v. Board of Education*, 347 U.S. 483 (1954), arguably the most important civil rights decision in the history of this nation, could never have been sustained under this judicial model in 1954.

reasoning in *Bush v. Gore* well illustrates,[21] the judge reasoning at Level 3 is given almost unbridled power to decide cases. The judge is disciplined only by the facts of the case *sub judice*.[22] He is concerned about doing what he thinks is fair and just in the case under consideration. The judge is not constrained by prior rules, dominant community norms or policies, or institutional practices that get in the way of his sense of justice. Such unbridled judicial discretion is especially problematic for African Americans because it can provide a pretext for the judge's conscious or unconscious racial bias. Furthermore, there is no *institutional* requirement for judicial validation of relevant black norms.[23]

Juridical subordination is one of the lingering effects of slavery. It is rooted in the deficiency of social capital that blacks have inherited from slavery, especially from the rhetoric of racial inferiority used to justify slavery.[24] The concept of social capital was introduced by Glenn Loury in the 1970s as a modification of traditional human capital theory, which holds that factors like individual ability and human capital investment play an important role in creating or maintaining conditions of racial inequality.[25] Social capital theory posits that family and community backgrounds are also important determinants in the racial-equality equation.[26] How others in society regard one's racial group can inhibit the development of one's full human potential.[27]

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21. 531 U.S. 98 (2000) (terminating the voting process in Florida during the 2000 Presidential Election).

22. *See, e.g.*, BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 176–80 (sources cited therein). For a more positive view of the case, see, for example, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

23. *See* BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 190–91.

24. As the Supreme Court noted in summarizing the status of blacks since the inception of slavery in North America, blacks were regarded as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).

25. *See* Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, *in* WOMEN, MINORITIES, AND EMPLOYMENT DISCRIMINATION 153 (Phyllis A. Wallace & Annette M. LaMond eds., 1977).

26. *See id.*

27. An oft-stated joke speaks volumes about the level of deficiency in the social capital of blacks today. Essentially, the joke is as follows: If the Pope's hat flew off his head while he and Jesse Jackson were sitting in a canoe in the middle of a lake on a blustery day, and if Jackson walked on the water to retrieve the Pope's hat, you can rest assured that the newspaper headlines the next day would read: "Jesse Can't Swim."

The concept of juridical subordination adds to Loury's social capital theory by suggesting that the vindication of cultural values within the judicial process can affect the social capital of blacks. When judges invalidate black values at critical junctures in our culture, they perpetuate the invisible-man syndrome—the age-old notion that blacks are not to be taken seriously[28]—and, thus, continue one of the greatest harms the peculiar institution has visited upon blacks. But when judges support black values in routine decision-making, they add to the social status of blacks. When judges vindicate black values they increase the capital of blacks in the larger American culture and thereby repair much of the negative social capital slavery has bequeathed to the descendants of slaves. There is no greater reparation for the social capital deficiency of blacks resulting from slavery than the internalization of black values by mainstream American institutions beyond sports and entertainment.

The purpose of this article is to suggest how the judiciary might begin to think about internalizing black norms. This discussion is part of a larger effort on which I have embarked to open a dialogue regarding juridical subordination.[29] Hence, this article is not intended to be a final statement on the question of juridical subordination.

Part I of the article provides an overview of a judicial process that facilitates the institutionalization of black values in routine judicial deliberations. This discussion, in other words, summarizes *critical process*, an outsider-oriented judicial process.[30] Part II, which contains the bulk of the article, applies critical process to a case outside the civil rights context. With this illustration, I hope to demonstrate the means by which rehabilitative reparations in the form of judicial imbibition of black values can be effectuated.

I.
SUMMARY OF CRITICAL PROCESS

Critical process combines elements of critical theory with traditional judicial methodology to create a process of judicial decision-making driven by outsider values, primarily meaning the values of persons of color, women, and homosexuals.[31] Criticalist judges vin-

28. This concept alludes to Ralph Ellison's classic book, INVISIBLE MAN (1952).

29. *See* BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9.

30. For a more detailed discussion, see *id.* at 185–293.

31. *See id.* at 187–91 (sources collected therein). In contrast, insiders are primarily elite, straight white males.

dicate, discover, or impose norms on the larger community that empower outsider communities. Some of these values, like the value of quality education, may resonate with insiders as well, while others, such as the belief that the equality value should trump the color-blind value in college admissions, may not. Critical theorists are first and foremost concerned about the life experiences of outsiders. The mission of critical theory—its struggle against permanent racism, or *anti-objectivism*[32]—necessitates this strong emphasis on outsider norms.

Given its commitment to outsider norms, critical process does not fit neatly within traditional judicial decision-making. Clearly, it does not operate at Levels 1 or 2, for, it is more likely to work against prior rules or majoritarian values than in favor of them. Nor does critical process proceed at Level 3. The criticalist judge is constrained by external values—the values of the relevant outsider community. She may not impose another set of values, including her own, on the community affected by her decision. This leaves critical process somewhere between Levels 2 and 3.[33]

Under critical process, judicial analysis consists of two steps. Step 1 asks the *subordination question*, and Step 2 applies the *internal critique* to each *reconstructive measure* carefully crafted to redress identified subordination. Focusing on African Americans as the relevant outsider group for the purposes of this article, a summary of this two-step process follows.

A. Step 1: The Subordination Question

The subordination question presents a two-fold inquiry. It asks, does the socio-legal arrangement, such as a case or specific legal doctrine *sub judice*, subordinate African Americans (the *deconstruction* concern) and, if so, how can such subordination be redressed (the *reconstruction* concern)?[34] Reflecting the diversity of values and viewpoints within the African American community, the deconstructive/reconstructive inquiry is applied in three ways: *symmetrical*, *asymmetrical*, and *hybrid*.

Under the symmetrical model, the judge finds subordination if the socio-legal arrangement she is considering is not facially neutral as to matters of race or color. Racial subordination exists if a legal matter involves an explicit racial classification or otherwise fails to validate or enforce the value of racial neutrality that inheres in the

32. For a more detailed discussion of anti-objectivism, see *id.* at 199–214.
33. *See id.* at 243–44.
34. *See id.* at 248.

African American community.[35] If such deconstructive analysis reveals subordination, the judge then prescribes a facially neutral law to remedy it. In other words, the remedy, or reconstructive measure, must itself be race-neutral.[36]

Proceeding under the more complex asymmetrical model, the judge deconstructs by asking whether the law or legal problem under consideration adversely affects African Americans in such a way as to suggest *insiderism*—unconscious bias or insider privilege.[37] The crucial determination of insiderism (or, *racism*, since we are dealing with African Americans) can be made in several ways. One way is by applying Charles Lawrence's *cultural meaning test*. This test asks, for example, what does it mean to the African American community when a politician running for office uses the Willie Horton TV ad (a picture of a young African American man depicted as the face of crime in America) or airs an ad featuring a white woman who says she pulled her son out of public school because of drugs, violence, and a "bit more diversity than he could handle"?[38] And finally, what does it mean to African Americans when a white college student says he plans to attend the University of California at Santa Barbara "because it's the UC with the most white kids."[39] The cultural meaning test probes unconscious personal bias. A similar test, developed by Ian F. Haney Lopez, Beverly Moran, Karen Brown, and Mary Louis Fellows, probes institutional bias.[40]

Insiderism can also be established through the application of another test developed by scholars such as Peggy McIntosh, Stephanie Wildman, and Cherly Harris. This test explores the phenomenon of *privilege* or *property*. The criticalist judge primarily asks the following question: does the matter under consideration enhance white privilege or, conversely, harm African American status? Does it, in other words, support an implicit sense of group position?[41]

The insiderism standard can sometimes be met by simply determining whether the matter under consideration validates rele-

35. The color-blind value was at one time a majority value within the black community. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE (First Vintage Books 1976) (1975). Today, however, it is something of a minority position. *See, e.g.,* WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES (2000); THOMAS SOWELL, THE QUEST FOR COSMIC JUSTICE (1999).

36. *See* BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 248.

37. *See id.* at 249–50.

38. *See id.* at 249 (sources cited therein).

39. *See id.* (sources cited therein).

40. *See id.* at 206–08.

41. *See id.*

vant African American values. For example, if the matter involves an institutional practice, like a corporation's hiring process, or a prior judicial ruling, insiderism would be established if important African American norms were unconsciously ignored or consciously devalued. This, of course, would suggest unconscious bias or insider privilege. Old-fashioned racism, in terms of malevolent intent or racial antipathy, is quite beside the point.[42]

To establish subordination in the various ways mentioned, the plaintiff may have to produce evidence in a pretrial hearing probative of relevant outsider norms. The judge could, for example, ask the plaintiff to submit testimony or affidavits from community leaders, such as ministers, educators, politicians, and community activists. The defendant would, of course, be permitted to submit countervailing evidence.

If the plaintiff is successful in proving insiderism, the case moves to reconstruction. Here, the asymmetricalist judge typically prescribes rules that grant preferences to African Americans adversely affected by insiderism. Affirmative action is a favorite remedy of most asymmetrical critical race theorists.[43]

The hybrid model is the final equality model. Proceeding under this model, a criticalist judge begins by applying the asymmetrical rule of deconstruction, looking for insiderism.[44] Finding such subordination, the judge then fashions a rule of reconstruction that is equally accessible to whites. Notice that while the hybrid equality model mimics asymmetrical deconstruction, it does not repeat symmetrical reconstruction. Unlike the latter, hybrid equality rules can be race-conscious, such as proportional representation rules, or culturally coded to favor African Americans in practice, such as an income-sensitive rule, which, because African Americans are disproportionately poorer than whites, would favor the former. What makes the hybrid model symmetrical is the fact that it gives whites equal access to reconstructive measures.[45]

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42. *See id.* at 208–11.

43. *See generally* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (4th ed. 2000). First published in the early 1970s, this pioneering book is perhaps the "bible" of critical race theory. *See also* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

44. *See* BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 250.

45. *See id.*

B. Step 2: The Internal Critique

To further contextualize judicial analysis in African American culture, the criticalist judge, whether proceeding under the symmetrical, asymmetrical, or hybrid model, runs the reconstructive measure, or, the *preferred equality rule*, through several criticalist epistemologies. Specifically, the judge asks herself the following series of questions: does the rule make sense because it is logical or empirically valid (*rational/empirical*)?;[46] does the rule make sense because it validates the experiences of the relevant essential, or "typical," African American, whomever that might be *(standpoint*)?;[47] does the rule make sense because it validates relevant intersectional experiences or identities of African Americans (*postmodernism*)?;[48] and does the rule make sense because it validates a "hypertruth," a value which arises from our collective sense of humanity so as to enjoy cross-racial support (*positionality*)?[49]

There is much more to say about the internal critique.[50] However, for the purposes of this article, there is no need to delve any deeper into that discussion. To illustrate the possibilities of critical process as rehabilitative reparations, it is necessary to only apply Step 1, the subordination question. Extensive applications of both the subordination question and the internal critique are provided elsewhere,[51] to which the reader can turn if interested.

II.
ILLUSTRATION

Let us consider a case outside the civil rights context, the birthplace of critical theory.[52] This is especially appropriate to illustrating the potential of critical process, because the reparative strength of this outsider-oriented judicial process—its ability to culturally transform traditional judicial decision-making—depends to a large extent on its potential beyond civil rights cases. Furthermore, to sharpen the distinction between critical process and traditional process, both processes will be applied together. After examining the Court's reasoning from an applicable level of judicial analysis—Levels 1, 2 or 3—we shall then proceed to a criticalist critique of

46. *See id.* at 250; *see also id.* at 232–33.
47. *See id.* at 250; *see also id.* at 233–38.
48. *See id.* at 250-51; *see also id.* at 238–40.
49. *See id.* at 251; *see also id.* at 240–42.
50. *See id.* at 231–42.
51. *See id.* at 257–93.
52. *See id.* at 193–98.

the legal problem under consideration. The case we shall consider is *Printz v. United States*,[53] one of the most controversial opinions of the Supreme Court in recent years.[54]

A. Facts

In 1993, Congress enacted the Brady Handgun Violence Prevention Act, popularly known as the "Brady Act."[55] The Brady Act amended a larger statute, the Gun Control Act of 1968,[56] by mandating the establishment of a national system for instant criminal background checks of proposed handgun transfers. The background-checking system was scheduled to go into effect by November 30, 1998. Until such system was operative, interim provisions of the Brady Act required that a firearms dealer who proposed to transfer a handgun obtain a form from the transferee containing certain personal information. In addition, the dealer had to obtain a sworn statement from the transferee, and provide the chief law enforcement officer of the transferee's area of residence with notice of the form's contents plus a copy of the form itself. With a few exceptions, the dealer then had to wait 5 business days before transferring the handgun. In states that did not provide for either state handgun permits or instant background checks, the chief law enforcement officer was given 5 business days in which to make a reasonable effort to ascertain whether the transferee's receipt or possession of a handgun would be in violation of the law. Where it was determined that the transferee was ineligible to receive a handgun, the chief law enforcement officer, if requested, was required to provide a written statement setting forth the reasons for such determination. Where it was determined that the transferee was eligible, the chief law enforcement officer was required to destroy all records relating to the transfer.[57]

Two sheriffs, who served as chief law enforcement officers in their respective counties, filed separate actions in the United States District Courts for the Districts of Montana and Arizona against the United States, claiming that the interim provisions of the Brady Act violated the United States Constitution. Both district courts agreed, and additionally ruled that the interim provisions were severable

53. 521 U.S. 898 (1997).

54. *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998).

55. Pub. L. 103-159, 107 Stat. 1536, note following 18 U.S.C. § 922 (2000).

56. Pub. L. 90-351, tit. IV, 82 Stat. 225 (codified as amended at 18 U.S.C. §§ 921-928 (2000)).

57. *See Printz*, 521 U.S. at 902–04.

from the remainder of the Brady Act.[58] In ruling that the Brady Act was unconstitutional, these courts in effect left in place a voluntary system for background checks. On consolidated appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the Brady Act's interim provisions were constitutional.[59] An appeal was then taken to the Supreme Court.

B. Traditional Process

The Supreme Court granted certiorari in *Printz v. United States* on the question of whether the Brady Act's interim provisions requiring local chief law enforcement officers to conduct background checks on proposed handgun transferees were unconstitutional.[60] In a 5-4 decision, the Justices held that the background-check requirement was unconstitutional, reversing the Ninth Circuit. Writing for the majority, Justice Scalia, in an opinion joined by Chief Justice Rehnquist and by Justices O'Connor, Kennedy, and Thomas, used Level 1 reasoning.[61] According to Justice Scalia, the Constitution prohibits Congress from passing laws that require local officials to enforce federal statutes. Justice Scalia did not, however, derive this prohibition against federal "commandeering" of local officials expressly from the constitutional text. As he wrote: "There is no constitutional text speaking to this precise question."[62] Instead, Scalia looked to "historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court."[63] These authoritative bases suggested a constitutional sphere of state power. Given this power, which extended to political subdivisions as well, it is logical to infer a constitutional prohibition against Congress' interfering with the exercise of such power. Thus, the majority relied on an interpretation of authoritative text, the Constitution, for its decision. This is Level 1 reasoning.

Concurring opinions were filed separately by Justices O'Connor and Thomas, each attempting to provide additional Level 1 support for the holding. O'Connor expressly agreed with Scalia's view that the Brady Act failed to conform to the nation's constitutional scheme. She went on, however, to find additional textual support for the holding under the Tenth Amendment,

58. *See* Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994).

59. *See* Mack v. United States, 66 F.3d 1025 (9th Cir. 1995).

60. *Printz*, 521 U.S. at 904.

61. *See supra* text accompanying notes 10-14.

62. *Printz*, 521 U.S. at 905.

63. *Id.*

which reserves for the states "powers not delegated to the United States by the Constitution, nor prohibited by it."[64] O'Connor also made the point that states could continue to participate in the background-check program under the Brady Act on a voluntary basis or, if the Act was amended by Congress, on a contractual basis.[65] Like O'Connor, Thomas found additional Level 1 support for the Court's holding in the Tenth Amendment.[66] Continuing at Level 1, Thomas also questioned whether Congress had authority under the Commerce Clause to regulate the intrastate transfer of firearms even if one assumed, *arguendo*, that Congress's authority to regulate interstate commerce encompassed intrastate transactions that substantially affected interstate commerce.[67]

Filing a dissenting opinion, Justice Stevens also wrote at Level 1, joined by Justices Souter, Ginsburg, and Breyer. He argued that the Commerce Clause gave Congress the constitutional authority to regulate handgun commerce in a way envisioned by the Brady Act.[68] According to Stevens, additional authority could also be found under the Constitution's Necessary and Proper Clause, which reads that Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[69] This provision, Stevens wrote, gave Congress the power to temporarily enlist local police officers in the process of identifying persons who should not be entrusted with the possession of handguns.[70]

Justice Souter wrote a separate dissenting opinion in which he essentially made two points. The first was a Level 1 argument based on *The Federalist Papers*. Souter argued that this source of constitutional intent supported the view that when Congress exercises an otherwise legitimate power, here requiring handgun registration, it has the additional power to require state officials to take appropriate action in furtherance of that initiating power.[71] Moving beyond the text to Level 2,[72] Souter's second point was that the case should

64. U.S. CONST. amend. X (cited in *Printz*, 521 U.S. at 935-36 (O'Connor, J., concurring)).

65. *Printz*, 521 U.S. at 936 (O'Connor, J., concurring).

66. *Id.* at 936–37 (Thomas, J., concurring).

67. *Id.* at 937 (Thomas, J., concurring).

68. *Id.* at 941 (Stevens, J., dissenting).

69. U.S. CONST. art. I, §8, cl. 18.

70. *Printz*, 521 U.S. at 941 (Stevens, J., dissenting).

71. *Id.* at 971–75 (Souter, J., dissenting).

72. *See supra* text accompanying note 15.

have been remanded to consider the arguments that the chief law enforcement officers were not budgeted for the specific tasks required under the Brady Act and were liable for unauthorized expenditures. Souter believed that the Court should not ignore these important consequences of the Act.[73]

Finally, Justice Breyer filed an additional dissenting opinion, in which Justice Stevens joined. Breyer's reasoning seemed to go beyond both text and community culture; in other words, it seemed to embrace Level 3 reasoning.[74] Breyer asserted that if the Court looked at the experiences of federal systems beyond our borders, such as Switzerland, Germany, and the European Union, it would see that "there is no need to interpret the Constitution as containing an absolute principle . . . forbidding the assignment of virtually any federal duty to any state official."[75] Breyer appeared inclined to impose foreign values on the American people even though those values may be at odds with the American federalist notion that our federal government is a government of limited powers.[76]

Let us now apply critical process to *Printz*. Here, it will be seen that none of the *Printz* opinions engages the issues or values that arise from an application of the equality models to the case. To this extent, criticalists see little difference between liberal and conservative judicial thought.[77]

C. Critical Process

1. Preview

Like the liberal dissenting Justices in *Printz*, criticalists would certainly sustain the Brady Act's background-check requirement. But, unlike these Justices, criticalists would rest their reasoning in large part on the equality value. They would not engage the traditional constitutional issues that consumed both liberals and con-

73. *Printz*, 521 U.S. at 976 (Souter, J., dissenting). "I do not read any of The Federalist material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it." *Id.* at 975–96.

74. *See supra* text accompanying notes 16–18.

75. 521 U.S. at 976–77 (Breyer, J., dissenting).

76. *See, e.g.,* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996). For a critique of the Supreme Court's recent expression of the Federalism norm, see Vicki C. Jackson, Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495 (1997); Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REF. 49, 58–67 (1998).

77. *See, e.g.,* BROOKS, RETHINKING THE AMERICAN RACE PROBLEM, *supra* note 8 (arguing that liberal judges, such as Marshall and Brennan, have written opinions that have the effect of subordinating African Americans).

servatives laboring under traditional process. The equality value is well-established in the African American community.[78] The Greek word *nomos* comes close to describing the nature of this value, and, indeed, all African American values tendered for judicial validation. *Nomos* refers to "minority communities that create comprehensive alternative world views where law and cultural narratives are inseparable."[79] Equality is such an important value in the African American community that if it were not already constitutionalized, African Americans would push for its immediate constitutionalization.

The equality *nomos* has, of course, been constitutionalized in several provisions of the federal Constitution and in state constitutions as well. Most important is the Equal Protection Clause of the Fourteenth Amendment, which reads in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[80] Likewise, the Due Process Component of the Fifth Amendment reads in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."[81] Both provisions facilitate close judicial review of "suspicious" legislative enactments. The former provision protects against state actions, and the latter, which directly implicates the Brady Act, against federal action.[82]

Thus, the equality models can be seen as advancing a constitutional claim as well as a cultural one—the equality *nomos*. Accordingly, African Americans have a constitutional *and* cultural stake in the Brady Act's background-check requirement. Ultimately, the constitutional and cultural claim is a claim for justice, and justice in a multicultural society requires the recognition of traditions or ways of life in nondominant cultures.[83]

78. *See, e.g.,* BELL, *supra* note 43, at 21–80; ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND MATERIALS 9–13 (2d ed. 2000); THE AMERICAN CIVIL RIGHTS MOVEMENT (Raymond D'Angelo ed., 2001); CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE (Jonathan Birnbaum & Clarence Taylor eds., 2000); KLUGER, *supra* note 35.

79. Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 386 n.6 (2000); *see also* Robert M. Cover, *The Supreme Court 1982 Term, Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1984).

80. U.S. CONST. amend. XIV, §1.

81. U.S. CONST. amend. V.

82. *See* BROOKS, RETHINKING THE AMERICAN RACE PROBLEM, *supra* note 8, at 51.

83. *See* Shachar, *supra* note 79.

Although the equality *nomos* regarding the Brady Act proceeds in part under the Fifth Amendment's Due Process Component, constitutional analysis under critical process, at least in this case, is quite different from constitutional analysis under traditional process. None of the equality models, as we shall see, apply the "levels of scrutiny"[84] or the "intent test"[85] doctrines with which courts traditionally grapple in applying the Due Process Component or the Fourteenth Amendment's Equal Protection Clause. Furthermore, these legal doctrines are nowhere to be found in the Constitution or its legislative history. They were invented entirely by judges,[86] which may be why the Supreme Court has on at least one recent occasion ignored them entirely.[87] More to the point, these traditional doctrines do not facilitate the type of culturally relevant analysis that critical process demands of judges, the type of analysis that can empower African Americans in combating the lingering effects of slavery.

2. Symmetrical Equality Model

Analyzing the constitutional issue under the symmetrical equality model, a criticalist justice would raise the subordination question and then answer it in the negative. That is, the symmetricalist defines equality as color-blindness.[88] *Ergo*, color-consciousness subordinates. Even a superficial review of the Brady Act clearly shows that the background-check requirement is race-neutral and, hence, does not undercut the African American value of racial neutrality. Indeed, the Brady Act does not call for race-conscious treatment of anyone. Consequently, it is culturally and constitutionally permissible under the symmetrical equality model. Because the Brady Act is sustained, there is no need for reconstruction and, hence, the internal critique.[89]

84. *See, e.g.,* BROOKS, RETHINKING THE AMERICAN RACE PROBLEM, *supra* note 8, at 51–54 (sources cited therein).

85. *See id.* at 84–87 (sources cited therein).

86. *See id.* at 51–54.

87. *See* Bush v. Gore, 531 U.S. 98 (2000). For a more detailed discussion of this point, see BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 176–80.

88. *See supra* text accompanying notes 34–36.

89. As I mentioned earlier, the reparative potential of critical process can be illustrated without engaging the internal critique. For a more detailed discussion and application of the internal critique, see BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING, *supra* note 9, at 231–42.

3. Asymmetrical and Hybrid Equality Models

Proceeding under the asymmetrical and hybrid equality models, both of which have identical deconstructive modes,[90] the criticalist justice would also uphold the constitutionality of the Brady Act's background-check requirement. And, like the symmetricalist justice, she would do so under the equality norm. But, unlike the symmetricalist justice, the decision of the asymmetricalist or hybrid justice would rest on race-conscious cultural and constitutional grounds. The relevant inquiry under an "equality-as-difference" subordination question focuses on the establishment or perpetuation of insiderism, or, for present purposes, racism: Does the Brady Act promote racism in any way? Does it protect or enhance unconscious racial bias or white privilege?[91]

Far from giving effect to unconscious racial bias or to white privilege, the Brady Act enhances African American status. It does so by validating the experiences that African Americans have had and continue to have with guns in American society. These experiences give important content and context to the equality *nomos* in this case. They define equality for purposes of this case as the maintenance of safe and secure African American communities, which includes personal safety. Gun control laws have an unmistakable impact on this form of equality, simply because African Americans are the most likely victims of gun violence in American society.

The African American experience with gun violence is long and complex. At first glance, such experience would seem to argue *against* the Brady Act. During slavery, southern states passed various laws controlling the use of guns not only by slaves but also by free blacks.[92] Guns in the hands of the latter posed a double threat to whites. There was, of course, the direct and constant threat that free blacks might use gun violence against the system of apartheid under which they were forced to live. An indirect and more dangerous threat to whites was created by the fact that the mere presence of free blacks, especially gun-toting free blacks, offered slaves visions of an alternative life. As Robert Cottrol and Raymond Diamond explain: "A slave with horizons limited only to a continued existence in slavery was a slave who did not threaten the system, whereas a slave with visions of freedom threatened rebellion."[93]

90. *See supra* text accompanying notes 37–45.

91. *See id.*

92. Robert J. Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 145 (Richard Delgado ed., 1995).

93. *Id.*

During the Reconstruction and Jim Crow eras, African Americans relied on guns for their own security. They could not count on local law enforcement for protection against white violence, whether directed toward persons or property. Many of these officials were themselves members of the Ku Klux Klan and other hate groups that lynched, burned, murdered, and assaulted law-abiding African Americans. Illustrating the importance of guns for African American safety, Ida B. Wells-Barnett, an African American anti-lynching activist, wrote of her need to carry a gun:

> I had been warned repeatedly by my own people that something would happen if I did not cease harping on the lynching of three months before. . . . I had bought a pistol the first thing after [the lynching], because I expected some cowardly retaliation from the lynchers. I felt that one had better die fighting against injustice than to die like a dog or a rat in a trap. I had already determined to sell my life as dearly as possible if attacked. I felt if I could take one lyncher with me, this would even up the score a little bit.[94]

For all the nonviolence advocated by Martin Luther King and other civil rights leaders during the civil rights movement, guns were still needed to protect civil rights workers and the African American community. As Cottrol and Diamond explain:

> During the 1960s, while many blacks and white civil rights workers were threatened and even murdered by whites with guns, firearms in the hands of blacks served a useful purpose, to protect civil rights workers and blacks from white mob and terrorist activity . . . . It struck many, then, as the height of blindness, confidence, courage, or moral certainty for the civil rights movement to adopt nonviolence as its credo, and to thus leave its adherents open to attack by terrorist elements within the white South. Yet, while nonviolence had its adherents among the mainstream civil rights organizations, many ordinary black people in the South believed in resistance and in the necessity of maintaining firearms for personal protection, and these people lent their assistance and their protection to the civil rights movement.[95]

Despite the historical significance of guns in aiding African American security, guns no longer play a beneficial role in the African American community. The post-civil rights era has witnessed

94. *Id.* at 147 (quoting IDA B. WELLS-BARNETT, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 62 (Alfreda M. Duster ed., 1970)).

95. *Id.* at 149.

an epidemic of youth gun violence that has ravaged inner-city communities. A federal study shows that "young black males are the most vulnerable to handgun crime" and that, among 16-to-19-year-olds, the most victimized age group, the rate for black males was four times higher than the rate for white males.[96] In a study of inner-city high school students, more than 40% of the students "reported having been shot at or threatened with a gun; nearly half knew schoolmates who had actually been fired on."[97] Otherwise law-abiding high school students "sometimes arm themselves as a means of self-defense. . . . In such an environment, the 'senseless' shootings that have become an urban commonplace should come as no surprise."[98]

African American children are frequent victims of gun violence. Consider the story of 10-year-old DeAntoine Trammell:

> Regina Trammell loved to sing rhythm and blues and gospel tunes with her 10-year-old son DeAntoine while driving him to school. But the radio is silent now.
>
> DeAntoine became the 12th child age 16 or younger to be slain in Detroit so far this year—the ninth by gunfire. A man fired two shots through a wall into his bedroom June 3, hitting him in the back.[99]

There is no question that African Americans encounter a great deal of hate crime, a fertile ground for gun violence. The Federal Bureau of Investigation defines a hate crime as "a criminal offense committed against a person, property, or society which is motivated, in whole or in part, by the offender's bias against a race, religion, disability, sexual orientation or ethnicity/national origin."[100] Congress enacted the Hate Crimes Statistics Act of 1990, which requires the Attorney General to establish guidelines and collect informa-

96. Press Release, U.S. Dep't of Justice, Record Number of Handgun Crimes (May 15, 1994).

97. David M. Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 LAW & CONTEMP. PROBS. 147, 153–54 (1996).

98. *Id.* at 153. *See generally*, Symposium, *Kids, Guns, and Public Policy*, 59 LAW & CONTEMP. PROBS. 1 (1996).

99. Geralda Miller, *Detroit's Child-Homicide Rate Reverses a Decade of Decline*, SAN DIEGO UNION-TRIB., June 11, 2002, at A8.

100. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 1998 UNIFORM CRIME REPORTS 57 (2000) [hereinafter FBI UNIFORM CRIME REPORTS].

tion about hate crimes in the United States. The Attorney General delegated the collection responsibility to the FBI.[101]

Even with the introduction of the Hate Crime Statistics Act, hate crimes are under-reported, for several reasons. First, hate crimes, as defined, are difficult to report. There must be substantive proof of the perpetrator's bias before law enforcement agencies can conclusively label an incident as a hate crime. Also, proving bias is difficult for victims who must often wage a "my word against your word" battle with the perpetrator. Moreover, the anonymous nature of many hate crimes—the perpetrator often operates away from public view—seldom provides information to report.

The FBI's statistics on victims and "known" offenders of hate crime—meaning not that the identity of the offender is known, but "only that an attribute of the suspect is identified which distinguishes him/her from an unknown offender"—clearly reveals that hate crime is a safety issue for African Americans. For 1998, just one year after the *Printz* decision, the FBI reported 2999 anti-black hate crime offenses, more than any other category of hate crimes.[102] Unfortunately, the FBI does not link statistics of hate crimes with information on the weapons used by specific offenders, but we can reasonably assume that a fair number of these crimes involved gun violence.

Thus, history is an integral part of the asymmetricalist and hybridist justice's reasoning. It gives crucial context to his reasoning, enabling him to validate important outsider values, in this case the African American value of community security. Given this norm, a justice proceeding under the asymmetrical or hybrid equality model would likely conclude that the Brady Act's background-check requirement does not subordinate African Americans and, hence, is constitutionally sound. The Brady Act vindicates the equality norm found, first and foremost, in the African American community and in the relevant constitutional provision, the Fifth Amendment. The Act, in short, effectuates both equality norms. Finding no subordination, there is nothing to reconstruct or internally critique.[103]

101. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION (1996).

102. FBI UNIFORM CRIME REPORTS, *supra* note 100, at 58.

103. *See supra* note 89.

CONCLUSION

There is no greater harm, no greater lingering effect of slavery than the discounting or disregard of the black perspective in mainstream American institutions. African Americans cannot truly be first-class citizens until African American values are accorded first-class treatment in American society. Providing rehabilitative reparations consisting of the internalization of African American norms in judicial and other American institutions is arguably the most effective way to bring about such an important social transformation. When institutions incorporate black values, African Americans move closer to the status quo ante—the way our society would be had African Americans been made full partners, rather than slaves and objects of disrespect, in our democratic society.

Although an important rehabilitative reparation, critical process is not the final answer to the problem of juridical subordination. Faithful to the "victim's perspective," critical process, like its parent, critical theory, has no mechanisms for seriously accommodating arguments that seek to justify in some fashion juridical subordination. Critical process assumes that no such legitimate argument exists. This may be a sound assumption, but it should, nonetheless, be examined. Opposing arguments can potentially strengthen one's position, and, if nothing else, they help us see truth more clearly. Also, if juridical subordination is legitimate in at least some cases, critical process is, to that extent, as incomplete and noninclusive as traditional process. It just may be that traditional process and critical process need each other if we are to fully democratize the judicial process. Thus, rehabilitative reparations for the judicial process can be of potential benefit to whites and others as well as to African Americans. As so often happens in the struggle for racial equality, civil rights reforms yield large dividends for the entire society.[104]

104. For example, Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d) (1994 & Supp. 2000), which proscribes discrimination on the basis of race in any program that receives federal funding, was a catalyst for legislation prohibiting discrimination in various other forms such as: sex (Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–83, 1685–86 (2000)); disability (Rehabilitation Act of 1973, 29 U.S.C. §§ 790–95 (1994 & Supp. 2000)); and age (Age Discrimination in Employment Act of 1975, 29 U.S.C. §§ 621–34 (1994 & Supp. 2000)).