EURAMERICA Vol. 33, No. 2 (June 2003), 235-290

Nation Building and American Criminal Justice

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Abstract

Criminal justice is often overlooked by researchers in political science as a site of nation building and national imagination. At the same time, researchers in criminal justice generally ignore the role that national identity has played in criminal justice. This paper looks into several important events and issues in the history of American criminal justice, including penal reform in the early Republic, anti-radicalism campaigns in the twentieth century, race issues, and today's American war on terrorism, with the aim of uncovering the entanglement of national identity with American criminal justice. By providing an alternative angle from mainstream scholarship, I wish to show how thinking about identity in terms of the self and other is not only highly useful, but also crucial in understanding American criminal justice.

Key Words: national identity, penal reform, Red Scare, race issue, American war on terrorism

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Received July 2, 2002; accepted February 11, 2003; last revised March 12, 2003
Proofreader: Chin-Hsiang Huang, Chia-Shen Su

Issues of how identity politics challenges national identity are among the most vexing questions that are perplexing American society. Historically subordinated groups are now demanding recognition of their distinctive identities and promoting cultural pluralism in American society. Facing this demand, conservatives object to the proliferation of cultures and identities on the grounds that acknowledgment of cultural pluralism would undermine national unity and national identity. In this context, issues of cultural defenses have emerged in American criminal justice. While proponents of cultural defenses argue that defendants' cultural differences should be respected, and hence, cultural defenses based on defendants' cultural differences should be accepted in criminal cases, opponents contend that there should be one standard of justice, not one that depends on the cultural background of defendants.

The controversies surrounding cultural defenses have placed national identity in American criminal justice in the spotlight. It is generally thought that the involvement of national identity with crime and punishment is a fairly recent phenomenon. People tend to believe, were it not for the challenges posed by subordinated groups, national identity would never be an issue in the field of crime and justice. Regardless of the positions people might take on issues of cultural defenses, national identity in American criminal justice is treated as a contemporary variation from the long-established norm. But even a cursory examination of the history of American criminal justice proves this observation wrong.

In the late eighteenth century and early nineteenth century, for example, American penal reformers advocated the elimination of public executions and the adoption of a more enlightened criminal justice system for this new country, arguing that the new Republic should not be like the old European monarchy. In 1870, San Francisco enacted a "Cubic Air Ordinance"[1] to compel Chinese immigrants to live more like Americans, hoping to change

[1] San Francisco Bd. of Supervisors, S.F. Mun. Rep. 233 (1870). (Cited from Chiu 1994: footnote 161).

the living arrangements of the Chinese so that their depravity could be curbed (Chiu, 1994: 1076-1077). In *Cleveland v. United States*,[2] the U.S. Supreme Court outlawed polygamy as practiced by Mormons on the grounds that this practice was "almost exclusively a feature of the life of Asiatic and of African people" (1946: 18), and was "a return to barbarism," contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world" (1946: 19). In 1938, "the House Un-American Activities Committee" (HUAC) was established by the U.S. Congress to seek out subversives, leftists and communists. After the 1950s, liberal Justices of the U.S. Supreme Court repeatedly ruled against the states on the grounds that some kinds of overreaching state action can only exist in totalitarian regimes, not in America. These instances clearly suggest that the concern about national identity is not just a recent and exceptional phenomenon. It has already existed in different aspects of American criminal justice. Nevertheless, its role and impact on American criminal justice remains to be explored and evaluated.

This paper is intended to explore the role and impact of national identity in American criminal justice. But instead of going over every stage and looking into every aspect in the history of American criminal justice, I intend to examine three events and one issue in this institution. They are (1) the penal reforms in the late eighteenth and early nineteenth centuries; (2) the sacred mission of defending America against communists and other radicals in the twentieth century; (3) the race issue in American criminal justice; and (4) today's American war on terrorism. Each case has its own particular position in American criminal justice, and each case reflects important aspects of American national identity. The penal reform in the nation's early days set up the basic track for American criminal justice. It also showed how American national identity was objectified in law, and became ethno-heritage of this country. The anti-radicalism campaign has

[2] 329 U.S. 14 (1946).

made totalitarian regimes an important metaphor for today's American legal discourse, especially for liberals. The campaign also exposed the inherent fragility of using political ideas to define national identity. Race has always been a troublesome issue throughout American history. It also shows the ambiguous power of American national identity, in that it can be used to support racism as well as to fight against it. The American war on terrorism provides a good opportunity to examine the entanglement of American national identity and American criminal justice today. By looking into these critical issues and events in the history of American criminal justice, I wish to show how American national identity has shaped the contour of American criminal justice, and how American criminal justice has involved with the (re-)construction of American national identity.

National identity, as used in this paper, is based on theorist Anthony D. Smith's definition in his latest article, but with some dialogic modifications: *The maintenance and continuous reproduction of the pattern of values, symbols, memories, myths and traditions that the members imagine to compose the heritage of their nation distinct from other nations, and the identifications of individuals with that distinctive heritage and those values, symbols, memories, myths and traditions* (Smith, 2001: 30). Compared to other definitions, this definition attaches a great importance to the reconstituted character of national identity: national identities are continually reconstituted through processes of selection of symbolic elements from that ethno-heritage and re-identifications with the reconstituted ethno-heritage. Processes of reconstruction, reinterpretation, and re-identification of ethno-symbolic components are central to the durability and flexibility of so many national identities, especially in the modern epoch.

The epistemological position this paper takes is based on dialogism developed by Russian linguist Mikhail Bakhtin: Meaning is not created within a single, sovereign consciousness, but is always produced in-between, with reference to the "other." Without the other, the subject actually cannot know either itself or

the world.[3] In addition, Anthony D. Smith's earlier discussions about the normative function of national identity, his emphasis on national identity's ambiguous power (Smith, 1991: 15-18),[4] and the psycho-social approach's elaboration of intergroup boundaries as producing group stereotypical and normative perceptions and actions (Hogg, 1996: 66-67), are also utilized in the relevant discussions.[5]

I. A Forward-Looking Project for the New Republic

The post-Revolutionary age was an age of penal reform. After the American Revolution, the first republic based on democratic principles distinct from monarchic England was established. Nevertheless, the basic structure, methods, and procedure of America's criminal justice system, adopted from England since the colonial era, remained fairly intact. Old penal strategies, such as public corporal punishments and royal pardons, which used to demonstrate the naked power of the monarchy, were still utilized by this new Republic. In the eyes of American leaders, however, influenced by the ideas of the Enlightenment, parts of this system seemed chaotic and barbaric, and thus incompatible with this newly founded democratic Republic. The young nation, with its self-governing people, needed a more rational, more modern, more just, and more humane system.

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[3] For more explanations about this epistemological position and its implications in studying national identity or collective identities, s*ee* Neumann (1999). In fact, Said (1979) and Hall (1991) have taken the same epistemological position.

[4] Smith's discussions on the functions and criticisms of national identity are important to the understanding of national identity, and crucial to his ultimate goal of going beyond national identity, even though strictly speaking, they are not the central parts in his study on national identity.

[5] Epistemologically, Smith and the psycho-social approach's discussions are actually not based on dialogism. But conceptually their observations and analyses are not fundamentally inconsistent with dialogism. Through modifying the way meanings are generated, Smith and the psycho-social approach's discussions still provide precious insights into the study of national identity, and to my discussions here.

In order to rationalize, civilize, and humanize the American criminal justice system, American penal reformers advocated improving or abolishing any penal measure that could be associated with the defeated monarchy (Friedman, 1993: 63). Previously, for example, the English criminal code contained more than two hundred capital crimes. Such harsh punishments encouraged systematic mitigation through devices such as the benefit of clergy or royal pardons. American reformers regarded such devices as capricious and irrational, and tied together with the tyrannical and unenlightened monarchy (Walker, 1998: 39). As a result, they sought to reduce the severity of punishments by limiting the death penalty, proportioning punishment to crimes, and eliminating the use of pardons and benefits of clergy.

American reformers also worried about the moral contamination and degradation brought by public punishments (Meranze, 1996: 6). Therefore, a previously marginalized method of punishment—incarceration—was selected to substitute for corporal and capital punishments.[6]

In addition, in order to reduce the irrationality of criminal justice and avoid uncontrolled discretion, codification was advocated and the judiciary's power to invent new crimes—the concept of common-law crimes—was eliminated (Friedman, 1993: 63-65).[7] Another important aspect of penal reform was the limitation of porsecutions for treason. In order to conform to the principles of a democratic republic, Congress changed the scope of the old law of treason and put restrictions on both its definition and its procedures (Friedman, 1993: 65-66).

These penal reforms, especially the change in emphasis from

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[6] Before the invention of the modern prison around the 1820s, incarceration (House of Correction) had already existed in the American colonies, but played a relatively minor role in the penal system (Walker, 1998: 35-36). With regard to the privatization of punishments and the rise of penitentiaries, researchers have different explanations. This issue will be discussed later.

[7] "Common-law crime" has two meanings. One refers to traditional crimes, such as murder. The other refers to the power to invent crimes by the courts. The second one is used here (Friedman, 1993: 64).

corporal punishments to incarceration, had far-reaching impacts on the practices of crime and punishment. Prisons subsequently became the dominant form of modern punishment. Nevertheless, many researchers and thinkers have speculated about the reasons why, in de Tocqueville's words, the *"society in the United States,"* which displayed "*the most extended liberty,*" invented prisons with "*the spectacle of the most complete despotism"* as the basic method of punishment (Beaumont & Tocqueville, 1979: 79). How could liberal thinking, with its emphasis on individualism, self-expression, and expansive opportunities, spread simultaneously with disciplinary practices that rely on concealment, hierarchy, emphasis on submission, and reliance on the coercive (Meranze, 1996: 14)? Early American penal reformers might have been aware of this contradiction. But it did not really bother them, because they believed that these new forms of social discipline, and especially the penitentiary, were actually signs of enlightenment and humanity (Meranze, 1996: 12-16). This paradox does not bother most of today's legal scholars, either. To them, the penal reform in the early Republic, demanded by the liberal American Constitution, was largely liberal and progressive. Compared to brutal and cruel public, physical punishments, modern penitentiaries were seen as a humane and progressive invention.

Researchers in other fields are less attracted to the rosy picture that "humanitarians" have painted. Historian David J. Rothman (1971), for example, argues that the rise of the prison and other forms of asylum was a separate, almost opposing movement to the rampant spread of American liberal ideals. Therefore, the contradiction between the liberal society and the totalitarian institution of prison must have been an expression of social nostalgia for social stability in a time of liberal capitalist change. For political theorist Michael Ignatieff (1978), the contradiction reflected an increasing intolerance towards deviant minorities with the advent of democracy. For the French thinker Michel Foucault, this contradiction, if any, was an expression of

power. According to Foucault (1995), in the transition from seizing the body to reforming the soul, the modern bourgeois society replaced the monarchy as the source of authority and extended its reach by moving away from the naked exercise of power. Historian Michael Meranze (1996), combining Foucault's theory about power and Freud's theory of psychological negation and misrecognition, argues that the spread of discipline transformed the contradictions and limits of liberal values and societies into a source of continually expanding power. But this disciplinary transformation was made possible only by a series of misrecognitions. The penal reformers had to struggle to contain or eliminate contradictions, in which a forward-looking project for the newly founded liberal Republic was forged (1996: 16).

Rothman, Ignatieff, and Foucault all provide very important insights for understanding the origins, as well as the implications, of disciplinary techniques beyond the rosy rhetoric promoted by penal reformers. However, it is exactly this "going beyond" the rhetoric that causes their arguments to lose sight of the particularity of the American context. In their discussions, America serves as merely an example of a liberal and democratic country. The disciplinary methods adopted in America could be—and in fact have been—modularized, proliferated, and used by other subsequently modernized countries. For Rothman, Ignatieff, and Foucault, the reason that the modern prison originated in the United States was simply that it was the first modern democratic regime on earth.

Although it is undoubtedly true that America's disciplinary methods have been modularized and adopted by all modern democratic countries, the contexts and the backgrounds for the adoption of these disciplinary methods were not necessarily the same. The discussions of Rothman, Ignatieff, and Foucault do not give us all of the relevant factors about why the new form of punishment, which started in Pennsylvania and then gradually spread out to other states, was so easily and widely accepted at that particular historical moment. In addition, without looking

further into the national identity issue that lies behind the rise of the penitentiary, these authors ignore one particular function that the penitentiary served in American society.

Compared to the deficiencies in the analyses of Rothman, Ignatieff, and Foucault, Meranze's main argument—about forging a forward-looking project for the newly founded country—provides a better understanding of the particular historical context of the penal reforms of the late eighteenth and early nineteenth centuries, and makes more sense of the rhetoric used by the penal reformers. Nevertheless, Meranze's explanation cannot provide any deeper understanding about why monarchical England and the unenlightened colonial past are so prevalent in the rhetoric of the penal reformers, except for the assertion that both of them are undesired elements to be purged (Walker, 1998: 37-44; Friedman, 1993: 61-82).

While recognizing the insights provided by these prominent researchers, I believe the question of national identity provides a new, but needed, perspective on (1) the apparent contradiction of the coexistence of the liberal American society and the totalitarian institution, (2) the whole picture of penal reform at that particular historical moment and context, and (3) the prevalence of monarchical England and the unenlightened colonial past in the rhetoric of the penal reformers. In fact, researchers such as Meranze, Friedman and Walker have already provided rich evidence of the American national identity in the early penal reforms, even though they fail to see its importance and never explicitly use such national identity in their analyses. Their descriptions clearly show how the reformers advocated purging the relics of the unenlightened past, as well as any practices tied with monarchical England, and making the new American criminal justice system conform with republican ideals. There is no doubt that these reformers were not only forging a forward-looking project for this young country, but also making significant claims about what they were as a nation and thus about what this nation should do. In promoting their reform plans, these reformers were

essentially engaging in constructing/reassuring the American national identity. Both the content of the rhetoric of the penal reformers and the utterances themselves were engaging in constructing America as a liberal democratic republic.

The political independence succeeded, but the desire to be distinguished from the old mother country still strongly held on after the American Revolution, particularly when the two countries were still culturally connected. This sentiment was clearly expressed by the reformers to inspire a comprehensive penal reformation. For example, Benjamin Rush, one of the leading figures in the penal reform movement in Pennsylvania and also a signer of the Declaration of Independence, emphasized that "[c]apital punishments are the natural offspring of monarchical governments …[t]he principles of republican government speaks a very different language [from monarchy]…."(Rothman, 1995: 102). Similarly, Thomas Eddy, the leader of New York's penal reform, insisted that the New York criminal code should be revised, because the state should no longer tolerate laws of barbarous usages, corrupt society, and monarchical principles … that were so imperfectly adopted to a new country, simply matters, and a popular form of government" (Rothman, 1995: 103). Moreover, Thomas Jefferson, one of the Founding Fathers and the leading penal reformer in Virginia, proposed to revise Virginia's laws on the grounds that "our whole code must be reviewed, adapted to our republican form of government" (Pestritto, 2000: 49-50). A shared view to conform American criminal justice to the new republican ideals was unequivocally an important factor in the penal reform in the late eighteenth and the early nineteenth centuries.

Out of the desire to assert this newly defined Americanness, the American criminal justice system was comprehensively examined—parts of which were adjusted or even eliminated. Enlightenment rationalism was promoted, not only because the reformers believed that rationalism could solve problems the Republic was facing, such as juries deliberately exculpating

criminals in order to avoid sending defendants to the gallows under the British laws, but also they believed that adopting the Enlightenment philosophy would glorify the moral superiority of the new Republic in contrast to other governmental forms (Rothman, 1995: 103). The monarchic corporal infliction of punishment was replaced with the republican soul reformation. Basic legal rights were recognized and codified in the Constitution, in which the governmental power in crime and punishment was restricted in accordance with the ideals of a democratic republic. Through redefining crime and justice, a new social order was correspondingly redefined. All of the changes were made in the direction of building a truly enlightened, liberal and democratic republic, different from old monarchies.

With no intent to deny that the penal reformers might have other motives in promoting penal reform, I believe that establishing national identity provided the reformers with the most efficient and legitimate claim to promote it. Similarly, with no intent to reject other interpretations about this penal reform, such as that the penal reform should be viewed as part of the emergence of bourgeois power in the human history, the development of the industrial revolution in the eighteenth century, or a dictate by the liberal Constitution, I am convinced that at this particular historical moment, national identity provided the requisite legitimacy needed to trim off elements in conflict with the imagined national self—a self that is different from the monarchic Europe and the unenlightened colonial past. By creating normative perceptions and actions for reformers, and by dictating the path and the content of this post-Revolutionary penal reform, national identity essentially performed a normative power both on reformers and the system, as identified by the psycho-social researchers (Hogg, 1996: 66-67), and the nationalist researcher Anthony D. Smith (Smith, 1991: 16).

Finally, the theory of national identity can help to locate the role of monarchical England and the unenlightened colonial past in the reformation of the American criminal justice system.

According to Bakhtin's theory of dialogism, the subject actually cannot know either itself or the world without the other. In the context of penal reform, the discussion of the undesired other was not mere rhetoric intended to give the people a better sense about why the reforms were necessary. Instead, in order to define the context of the new system, the interpretation, demarcation, and rejection of the undesired other were a must. The omnipresence of the barbaric, monarchical, and unenlightened other in the discussions of the civilized, republican, and enlightened criminal justice system suggests that the national self and the alien other are actually in symbiosis. The contours of the enlightened, modern, humane, and republican version of the American criminal justice system could not be drawn without referring to the unenlightened, barbaric, cruel, and monarchical others.

The other that was essential in defining the American national identity in the American criminal justice system was not limited to the monarchy (England or Europe) or the colonial past. The imprisoned and the enslaved actually performed a similar function. They helped to define the contours of freedom—another important national characteristic of America.

Whereas it is widely known that slavery was used as a metaphor to symbolize the horror of losing freedom before the American Revolution, it is comparatively less recognized that the idea of slavery itself is actually necessary for understanding freedom itself. Historian Edmund S. Morgan is one of the few people who sees the relevance of the contrast between liberty and slavery. According to Morgan, the rise of liberty and equality in American was accompanied by the rise of slavery (1975: 4). American liberty and American slavery should be understood as phenomena intrinsically related to each other. As a matter of fact, American settlers could literally afford to nurture their liberal ideology only on the basis of slavery. Practically speaking, slavery defines the state of freedom.

To some extent, the imprisoned perform a very similar function, and its importance increased gradually when more and

more Americans realized the hypocrisy of slavery, and devoted themselves to abolishing it. The rise of liberty in America was accompanied by the rise of the penitentiary. Imprisonment had provided "the spectacle of the most complete despotism" to delineate the contours of "the most extended liberty." The coexistence of the liberal society, slavery, and the totalitarian institution helped to demarcate the boundaries of freedom, through which America was self-defined as a liberal state. As a result, the contradiction of the coexistence of the liberal society and the totalitarian institution is in essence a contradiction within identity politics, rather than a psychological negation or misrecognition as Meranze suggests. Succinctly speaking, the external other (monarchy) and internal other (unenlightened past, the imprisoned, and the enslaved) functioned together in American criminal justice to sketch the boundaries of this new country (enlightened, republican, and liberal).

The opportunity to draft constitutions and criminal codes especially allowed Americans to think about how their new country was distinct from the old colonial past and evil King George III's England, as well as how their country was connected to Europe and the colonial past. Although Americans were eager to reinforce their own uniqueness, in fact they did not and could not disassociate themselves completely from monarchical England. Americans had rather ambivalent feelings toward their formal colonial power. On the one hand, England was an evil, imperialist exploiter. But on the other hand, it was a representative of a superior civilization (Lipset, 1963: 62). Further more, Americans could not deny that most of the ideals that they cherished were derived from the old country. It was this ambivalence that led the Americans to engage in selective reforms. They kept the basic structure of the criminal justice system, but based on ideas of the Enlightenment chose to reform some parts that illustrated the barbarity of the monarchy. Hence, the reformed parts gave America uniqueness and moral superiority over the old monarchy, whereas the unreformed part gave this nation a feature of Western

civilization.

The opportunity to draft constitutions and criminal codes also allowed Americans to objectify and legalize several basic features of the national identity. The objectification and legalization during this time had a far-reaching impact on subsequent interpretations of the American national identity. These objectified and legalized features thus became the "ethno-heritage" (Smith, 2001: 30) that could not only serve as a source for continual modifications and reinterpretations, but also, and most of all, had a binding effect on these subsequent interpretations. Over time, the implications of this national identity might not always be the same, and the content of the American national identity remains subject to continual, subtle modifications and reinterpretations. But these modifications and reinterpretations nonetheless follow a specific track that was set up in the early years of the nation.

II. Defending the Democracy

After entering the twentieth century, America was no longer a brand new country that was eager to search for its uniqueness. Although it was still comparatively young, it had an established (though somewhat unstable) identity, inscribed in its Constitution and its penal codes. During this period of time, new ideologies—Marxism and Communism—emerged and began to spread throughout the world, which brought new challenges to American society as well as its criminal justice system. While old monarchies faded away from the center of the platform of international politics, new regimes—totalitarian countries-emerged and soon replaced the monarchy as the "other" for the United States. In order to defend American values and national identity, the American criminal justice system, serving as an internal "national defense," took on the mission of protecting the nation against these enemies. Equipped with historical heritages and confronted by new challenges, American national identity

demonstrated its ambiguous power, which nourished both liberals and conservatives in the American criminal justice system.

Facing the threat from perceived internal enemies, the American criminal justice system zealously responded to these challenges. Congress and the state legislatures passed harsh legislation to deal with subversives, such as the Espionage Act of 1917, the Idaho anti-criminal syndicalism laws of 1917, and the Smith Act of 1940. The Red Scare was so intense that displaying any flag other than the Stars and Stripes or the flag of a state was legally suspect of disloyalty to America.[8] At the same time when the Reds were making the American nation nervous, the Executive Branch as well as Congress launched various campaigns against radicals, the "Wobblies," and the members of the Industrial Workers of the World or the Bolsheviks, and made raids on dangerous, alien Reds—including members of Communist and Communist Labor parties.[9] In 1938, the House established an House Un-American Activities Committee (HUAC) to investigate any un-American propaganda, targeting communists and even the American Civil Liberties Union (ACLU). Senator Joseph McCarthy and his blacklist worked to keep Hollywood from contaminating the American public with Communism. Sharing the fear of the threat from subversives, the judiciary generally sided with the government, at least until the Warren Court in the 1950s and 1960s. The whole nation was engaged in a sacred mission to defend American democracy from subversion by totalitarian enemies.

Despite this fever to keep enemies out, the "subversives," and

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[8] Many states even passed the flag laws to prohibit displaying publicly any "red or black flag, or banner, with or without letters, inscription or design thereon." Under the law, any other flag was legally suspect. Only the Stars and Stripes, and flags of the state, could be carried in a parade or publicly displayed (Friedman, 1993: 367).

[9] In 1920, agents of the U.S. Department of Justice, under orders from Attorney General A Mitchell Palmer, arrested thousands of members of the Communist and Communist Labor parties in raids across the country (Friedman, 1993: 371).

some liberals as well, were not ready or willing to submit. In *Schenck v. United States*,[10] a case in which some Socialists were prosecuted for mailing circulars against the draft for the First World War, the defense relied heavily on the Constitution, a collection of basic American values and repository of the national identity. The defense argued that the draft violated the Constitution, and that the war was a conspiracy of capitalists and politicians. Supreme Court Justice Oliver Wendell Holmes responded by reinterpreting the meaning of freedom of speech, an important feature of the American national identity, claiming that freedom of speech does not encompass words that create a clear and present danger (1919: 52).

Freedom of speech was also an issue in *Whitney v. California*,[11] a case in which a Communist Party spokeswoman was convicted for acquiescing in a militant party platform. The Supreme Court denounced the defendant for abusing the right of free speech by joining and furthering an organization that menaced the peace and welfare of the State.

Yet by the 1950s and the 1960s, the Supreme Court was composed of mostly liberal Justices and the public's attention turned from the communist infiltration to the Civil Rights movement. By this time, the government's cases did not always prevail in the court. In *Yates v. United States*,[12] the Court reversed the Smith Act convictions of leaders of the Communist Party of California. In *Brandenburg v. Ohio*,[13] the Court declared that the state anti-syndicalism laws were unconstitutional, because the laws punished "mere advocacy," which impermissibly reached speech protected by the U.S. Constitution.

When looking back at the history of defending American democracy against potential subversion by totalitarian enemies, researchers generally focus on two dimensions. The first

[10] 249 U.S. 47 (1919).
[11] 274 U.S. 357 (1927).
[12] 355 U.S. 66 (1957).
[13] 395 U.S. 444 (1969).

dimension highlights national crises and civil rights. Under this analysis, during the various Red Scares, the country went into a state of hysteria, displaying "ultra-Americanism" (Friedman, 1993: 367). At a time when almost the whole country was haunted by the "Red Menace" (Steinberg, 1984), all of this unreasonableness, overzealousness, and even paranoia may have been understandable, but it was not excusable. When Americans became frustrated by the "loss" of China to Communism and the loss of the nuclear monopoly to the Soviet Union, it was understandable, but still despicable, for Americans to search for scapegoats in the person of suspected Soviet spies (Steinberg, 1984: 372). What was wrong with the implementation of America's sacred mission was the overreaction and irrationality, which caused false prosecutions and infringements upon civil rights, especially the freedom of speech. As a result, almost all researchers applaud the U.S. Supreme Court of the 1950s and 1960s, which made several important decisions rejecting the constitutionality of the relevant legislation and governmental actions.

The second dimension looks behind the surface irrationality, arguing that these witch-hunting activities were actually motivated by rational political calculations. This accusation is largely based on the fact that one of the main targets for HUAC was the American Civil Liberties Union, which then was accused of supporting and protecting subversive movements that would destroy civil liberties (Davis, 1971: 279-280). Under this analysis, the anti-Communist movement was actually an anti-civil rights movement. The Alger Hiss case (1949–1950) provides another piece of evidence. Hiss was accused by the HUAC as a Soviet spy. Some researchers believe that the trail was actually politically motivated, in that the Republican right tried to use Whittaker Chambers's allegations against Alger Hiss to discredit the entire New Deal (Navasky, 1996). Similarly, researchers welcome the U.S. Supreme Court's decisions rejecting the constitutionality of the relevant legislation and governmental actions, for the American criminal justice system would not be abused for personal

or partisan political fortunes.

While these studies have undoubtedly made important contributions to our understanding of that era, they fail to explain several issues surrounding the sacred mission of defending American democracy. First, they seem to take for granted that the term "un-American" was limited to Communism or other radicalisms. As I will argue later, it is exactly this "taking-for-granted" that makes them lose sight of the deeper meaning of this term and the context that generated it.

In addition, in their discussions, the totalitarian regimes and communists are always viewed in a negative light. I intend to show that by doing so, they not only fail to explain why the image of the totalitarian regime is so frequently used by liberals to make their arguments, but also are unable to appreciate the positive effect that such images actually have had on American criminal justice.

Finally, in their discussions, Americans at that time were either too irrational or too rational, and rationality and irrationality were generated for distinctive reasons. Under this view, the only intersection of these two positions is that the irrational fear of most Americans was exploited by some over-rational politicians for personal interests. From the angle of national identity, however, I intend to show that rationality and irrationality were actually generated from the same concern, and satisfied the same desire for people from different positions.

First, to most researchers, being foreign is what being un-American is all about. Because of the HUAC, the term "un-American" was also closely associated with Communism or other radicalisms. The HUAC was established in an era when the totalitarian regimes rose and aggressively expanded, when the United States felt the threat, and when foreigners were targets to be frightened and exclude. As Walter Goodman points out, the HUAC could not prosper without threats abroad and fears at home (Goodman, 1968: 482). The meaning of being un-American is so plain to most researchers, in fact, that they tend to care much

more about "the real issues"—such as what problems this sacred mission has caused and what was really behind the anti-communist movements. Un-Americanness either serves as an expression of irrational ultra-Americanism or provides just another cheap excuse for oppression of political opponents.

What is relatively ignored is the self-legitimation of the House Un-American Activities Committee. The HUAC in fact had provided a sophisticated explanation as to why Communism was un-American. It claimed the legitimation of its mission against subversive and un-American propaganda and activities was based on an American conviction that man's inherent and fundamental rights came from God. Therefore, the Committee believed the chief sin of totalitarianism was its denial of the divine origin of man, which opened the way for the state to obliterate individual rights (Davis, 1971: 279). In the words of the Committee, "[a] scheme or philosophy of government or a teaching which embraces all or any essential part of principles of Communism is un-American" (Davis, 1971: 279-280). What might be equally illuminating is a telegram sent by the Ku Klux Klan to Martin Dies on the formation of the House Un-American Activities Committee in 1937. It said, "[e]very true American, and that includes every Klansman, is behind you and your committee in its effort to turn the country back to the honest, freedom-loving, God-fearing American to whom it belongs." (Spartacus Education)

What most researchers also ignore is the prevalence of un-Americanness as a justification to punish in contexts other than anti-Communism.[14] For example, in *Loewe v. Lawlor*,[15] a case about labor disputes, the capitalists accused union leaders of engaging in persistent, unfair, and un-American strategies to make union labor militant and antagonistic to the capitalists (1908: 308). Similarly, in the 1930s, some anti-New Deal politicians,

[14] But *see* Davis, 1971. Unlike most researchers, Historian David B. Davis treats all subversive activities throughout the American history as un-American, even though for him, being un-American means being foreign.

[15] 208 U.S. 274 (1908).

such as Republican Herbert Hoover, criticized FDR's New Deal proposals as radical, socialistic, and un-American (Garry, 1992: 26). But in *Carter v. Carter Coal Co.*,[16] the American government argued that the competition methods used by certain private mining companies were un-American. Apparently, both sides of the economic disputes consciously resorted to national identity through the term "un-American" to legitimize their positions. Whatever interests they possessed and whatever economic system they stood for, to them, the issue of national identity was also deeply involved.

In other words, when the House Committee on Un-American Activities was established, it was not named out of the blue. Even after the HUAC was renamed to the Committee on Internal Security in 1969, and abolished in 1975, the term "un-American" remained in American society as a justification for punishment, even though perhaps not as popular as it once was. For example, in the Vietnam War, the behavior of draft-dodgers was attacked by some as un-American.[17] In 1996, the dissenting Justice Scalia supported the right of Coloradans to define homosexuality as un-American.[18] This prevalence of un-Americanness as a justification to punish clearly suggests that its meaning is not limited to communism or other radicalisms.

While the term "un-American" itself has already suggested its connection with the question of national identity, the HUAC's definition and the Klan's telegram provide further evidence that punishing for being un-American is related to the creation and preservation of national identity. Even though the religious quality of Americanness in the HUAC's definition and the Klan's telegram might contradict one objectified feature of American national identity in the Constitution—the separation of church and state—both of them undoubtedly advocate using un-Americanness as a reason to punish. Once again, American national identity

[16] 298 U.S. 238 (1936).
[17] Ehlert v. United States, 402 U.S. 99 (1971).
[18] Romer v. Evans, 517 U.S. 620 (1996).

demonstrated the normative power that had already exhibited itself in the penal reform in the late eighteenth century and early nineteenth century. Propelled by the fear that American national identity would be tainted and twisted, social order and solidarity were enforced through the criminal justice system.

The prevalence and the durability of the term "un-American" clearly show that its role in crime and justice involves more than the sacred mission of defending America against Communism. More importantly, it reflects a basic characteristic about this country: America is a country that is usually self-identified as the living fulfillment of a political doctrine that enshrines a utopian conception of men's egalitarian and fraternal relations with one another; and the American people, regardless of their diverse origins, are held together by a common commitment to certain ideals and values (Lipset, 1963: 75). Nevertheless, behind this seemingly idealistic self-definition, there is always the fear that America will collapse and become just a common address, rather than a nation, if these shared ideals and values are denied (Schmookler, 1998: 11). It is in this context that the term un-American is generated to describe the betrayal of these shared ideals and values, and any attempt to twist American values and ideas has to be punished to prevent this nation of ideas from disintegration.

To some extent then, punishing un-Americanness reflects the inherent fragility of using ideals to define American national identity. Although some ideas had already been objectified and legalized, which makes some features of American national identity harder to change, they are still theoretically changeable in this democratic country. In addition, abstract beliefs have their own internal tensions and incongruities (Karst, 2000: 1144). The degree of fragility of American national identity is further increased by the diverse composition as well as opinions in this country. Different groups have their own versions of Americanness/un-Americanness. When arguing against each other, each group pictures itself as upholding authentic American values

and protecting the American national identity against un-American conspiracies. It was exactly the fragility of Americanness that made un-Americanness particularly punishable in this country. It also explains why the discourse of national identity was still needed at the time America had an established national identity. Radicalisms and Communism in the twentieth century presented this kind of challenge to this nation of ideas.

Second, for most researchers, the role of totalitarian regimes and communists are always limited to that of being the enemies of the American state. Externally, the totalitarian regimes are the targets of military actions, whereas internally their agents, be they the Nazis, the Fascists or the Communists, are the targets of loyalty investigations or criminal trails. It is thus unthinkable that the totalitarian regimes could have any other role in the criminal justice system of a democratic country like America. Nonetheless, many U.S. Supreme Court decisions suggest a different story—actually, that the image of the totalitarian regime helps the liberals to exemplify the horrors of the abuse of governmental power.

As Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*,[19] pointed out, "[c]ontinental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian" (1952: 641). After the twentieth century, the totalitarian regimes became America's most important other, performing the function which used to be provided by the European monarchy. Refusing to be anything similar to the totalitarian regime was not limited to the opposition to saluting the American flag in the public schools on the grounds that the salute was "too much like Hitler's."[20] This sentiment also expressed in other dimensions of American criminal justice, and became an important feature in the liberals' opinions after the Second World War.

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[19] 343 U.S. 579 (1952).
[20] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 627 (1943).

For example, in *Barenblatt v. United States*,[21] Justice Black in his dissenting opinion attacked the HUAC's investigation method. After deliberating the meaning of First Amendment in the instant case, Justice Black quoted Thomas E. Dewey, then a candidate for the presidency of the United States, to make his point more explicit. He agreed with Dewey that "[t]here is an American way to do this job, a perfectly simple American way…outlawing every conceivable act of subversion against the United States" (1959: 149). He concluded in the end that, "[u]ltimately all the questions in this case really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free" (1959: 162). While the conspiracies of totalitarian states to subvert the United States were under investigation of the HUAC, the image of such totalitarian states was used at the same time to oppose this kind of investigation.

The image of totalitarian regimes is not just resorted to by dissenting Justices. It also appears in the court's decisions, and thus has contributed to the rules in American criminal justice. For example, in *Terminiello v. Chicago*,[22] one of the most important First Amendment cases, the Court, per Justice Douglas, supported Terminiello's freedom of speech. Before going into the constitutional analysis about why Terminiello's speech was protected under U.S. Constitution, Justice Douglas explicitly claimed that "[t]he right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes" (1949: 4). Through emphasizing the distinction between the democratic America and the totalitarian states, the negative image of totalitarian regimes helped liberal Justice Douglas to elucidate to the American public what should not be allowed in America as a democratic country.

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[21] 360 U.S. 109 (1959).
[22] 337 U.S. 1 (1949).

By mingling two discussions—one about how to defend the constitution, and the other about how the instant issue matters to the issue of what kind of country America is, to Justice Douglas, defending the constitution and defending national identity was inseparable, despite of the fact that the American Constitution itself was the symbol of American political identity.[23]

Even after the Cold War was over, totalitarian regimes still played a significant role for liberals who wanted to oppose overreaching state actions in the name of preserving the national identity. For example, in *Florida v. Bostick*,[24] a case involving the war on drugs, Justice Marshall in his dissenting opinion expressly put national identity at the center of the issue. Citing lower court's opinion, Justice Marshall claimed, "[i]t seems rather incongruous at this point in the world's history that we find totalitarian states

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[23] In most countries, such as in Japan, defending the constitution and defending national identity are two separate issues. Those who advocate defending the universal values, which have always been inscribed in the constitution, do not need national identity as legitimation to defend the constitution. Liberal ideology has its own legitimacy from its universalistic claim. National identity is usually the subsidiary consequence in protecting human rights demanded by a liberal constitution in a democratic country. While this conventional interpretation is accurate in most countries, it is doubtfully applicable to the situation in the United States. In the context of the United States, it is very difficult to disassociate these two issues. First, since the beginning of this country, the American Constitution was rooted in American national identity. American Constitution is a symbol of the American political identity. It is also a repository of many liberal values that are generally thought of as important components in American political identity. Many debates about American national identity end up with the debates about what the real or the most appropriate interpretation of the American Constitution is. In this social context, defending the constitution and defending national identity are generally the same. Second, some terms, such as "un-American," "American values," or "American tradition," are frequently used along with universalistic constitutional arguments. Therefore, even though there are still some cases in which constitutional arguments are deliberately made solely on universal values, the frequent minglement of the two discussions—one is about how to protect the constitutional values, and the other is about how the instant issue matters to the question of what country and society America is — suggests the inseparability of these two issues in this country.

[24] 501 U.S. 429 (1991).

becoming more like our free society while we in this nation are taking on their former trappings of suppressed liberties and freedoms" (1991: 443). He repeatedly connected the issue of national identity to American criminal justice by evoking the image of the totalitarian regimes: "[t]he spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a raison d'etre—is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa.… In this "anything goes" (*sic*) war on drugs, random knocks on the doors of our citizens' homes seeking "consent" (*sic*) to search for drugs cannot be far away. This is not America" (1991: 443-444).[25]

In fact, the desire to distinguish American democratic self from the totalitarian other is not limited to liberal Justices. In a law-journal debate between Professors Ingraham and O'Reilly on the issue of the right to remain silent (Ingraham, 1996; O'Reilly, 1994 & 1997), O'Reilly, on the liberal side, repeatedly emphasizes that the presumption of innocence and its ancillary doctrines are "the bedrock of American democracy" (O'Reilly, 1997: 521). For O'Reilly, the fear of being confused with the alien way is evident. He warns that eliminating the right to remain silent would reduce America's superior criminal justice system to an alien inquisitorial system (O'Reilly, 1994: 421).

Intriguingly, the image of totalitarian regimes also helps the conservatives to undermine the right of free choice in issues about abortion. For example, in *Hill v. Colorado*,[26] Justice Scalia in his

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[25] Also see in Oregon v. Elstad, 470 U.S. 265 (1985), Justice Stevens, arguing against the State in his dissenting opinions, said "…it denigrates the importance of one of the core constitutional rights that *protects every American citizen from the kind of tyranny that has flourished in other societies*"(1985: 298). Dissenting again in California v. Acevedo, 500 U.S. 565 (1991), Justice Stevens claimed that "the Court has recognized the importance of this restraint as a bulwark against police practices that prevail *in totalitarian regimes*" (1991: 586).

[26] 530 U.S. 703 (2000).

dissenting opinion, citing *Terminiello v. Chicago*[27], wrote that "[t]he right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes" (Hill, 2000: 788). Scalia therefore objected to the constitutionality of a state statute that creates a bubble zone in which free speech is restricted around persons approaching health care facilities, such as abortion clinics.

As a result of the eagerness of most researchers to determine whether each case involving an alleged totalitarian enemy is actually a false prosecution, and whether civil liberties are therefore being unjustly infringed, they unfortunately lose sight of the prevalence of images of totalitarian regimes, and the positive effect that such images actually have on American criminal justice. More important, they fail to see the ambiguous power of national identity in the American criminal justice. People from any position on the political spectrum can resort to the power of American national identity. It could be used to justify witch-hunting investigations by the HUAC as well as the subsequent movement to abolish the HUAC. As we can see here, the courts play an incomparable role in defining American national identity, because they provide a site for negotiating, and ultimately proclaiming, shared ideals in a country that has always been united primarily by such shared ideals.

Finally, for most researchers, Americans at that time were either too irrational or too rational. While it was true that some rational politicians encouraged and exploited the irrational fear of the general American public for their own political fortunes, it was also done for the sake of protecting the national self. In other words, the rationality and the irrationality of the sacred mission to defend America were not generated for different purposes. From the angle of national identity, both were propelled by the same desire to maintain American national identity. In fact, it is exactly the power of national identity that is able to conjure up

[27] 337 U.S. 1 (1949).

irrationality and rationality at the same time, and this ambiguity allows it to serve as a justification of punishment for people from different political positions.

After entering the twentieth century, America was still the same democratic republic, but in a different sense. With the fall of old monarchies and the rise of totalitarian regimes, the American national self, following a specific track that had been set up at an earlier time, evolved into a subtly different interpretation that corresponded to a new alien other. The focus of American national identity also shifted from the republic to democracy and freedom, because these two features were what distinguished America from the totalitarian regimes.

With new emphases responding to the rise of the new other, American national identity continued to perform its normative function, but in a rather ambiguous fashion—on the one hand, fighting against un-American ideology and thus defending American values, was the rationale for the witch-hunting investigations by the HUAC; on the other hand, the desire to be distinguishable from totalitarian states and thus defend national identity dictated the liberals to oppose this kind of investigation. The issue of national identity was at the center of the sacred mission against radicals or subversives in the twentieth century, even though it played an ambiguous role. As we will see later, even though the era of rabid anti-Communism ended a long time ago, a similar pattern can still be seen in the context of today's American criminal justice system, including the American war on terrorism.

III. Excluding and Including Minorities in the Name of National Identity

As an immigrant country that is generally thought to be held together by a common commitment to certain ideals and values, America has an idealistic but somehow fragile national identity. In addition to the physically diverse composition of this nation, the degree of this fragility is further increased by the diversities in

opinions and ideas. Different groups have their different versions of Americanness/un-Americanness. When arguing against each other, each group pictures itself as upholding authentic American values and protecting the American national identity against un-American conspiracies.[28]

Nevertheless, ideas do not compete in a timeless/spaceless/sexless/classless vacuum. Instead, all such competitions take place in a hierarchical world where the dominant group has more power and resources to promote its version of truth, even though the minority groups are not completely powerless. Even in the American society where aristocracy was rejected and equality was built into its national identity in contrast to monarchic Europe, some other hierarchies (racial, class or sexual) lingered and continuingly developed in this country after the American Revolution. Perhaps as a historical irony, the criminal justice system, [29] once used by the English before the American Revolution to enforce Englishness onto the colonists, was used by the dominant group—the Protestant Anglo-ethnic in the beginning and eventually whites in general—to promote and enforce its version of Americanness onto the racial, religious, sexual or class minority groups. But the arbitrariness of the state power was greatly restricted, and the dominant group sometimes was not able to completely control the results.

At least before the rise of multiculturalism, the identity of the Protestant Anglo-ethnic, and later expanded to whites, was taken

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[28] According to historian David Davis, American crusades against subversion that are discussed in the last section "have never been the monopoly of a single social class or ideology, but have been readily appropriated by highly diverse groups" (Davis, 1971: xvi). While agreeing with Davis' argument about the diverse ideas or ideologies compete with one another within the United States, I do not accept the liberal assumption that different ideas compete with equal opportunity in a free market. The majority groups always have more resources to promote their version of truth.

[29] The criminal justice system is not the only method that the dominant group can use to enforce its version of national identity onto the minority groups. Immigration policy, which is partly involved with the criminal justice system, also plays a significant role.

for granted as the content of the American national identity. As a dominant group, the Protestant Anglo-ethnic imagined their new country largely based on their life style and values, and defined this new country as a civilized Western country, despite the fact that people of different cultures and traditions had existed on the same land.[30] Racial, sexual or religious minorities whose moralities or life styles were distinct from the dominant version were sometimes corrected, punished or excluded for being un-(Western)civilized, and thus un-American. For example, in 1870, San Francisco enacted a "Cubic Air Ordinance" to compel the Chinese immigrants, a racial and cultural minority group, to change their living arrangements, hoping that the Chinese depravity could be curbed. The ordinance jailed and fined those who did not provide each adult lodger five hundred cubic feet of air space in every lodging, which was the general American life style (Chiu, 1994: 1076-1077).[31]

In *Cleveland v. United States,*[32] the U.S. Supreme Court denounced polygamy practiced by the Mormons, a religious minority group, as "odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." In the court's opinion, the underlying

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[30] In fact, in the beginning of this country, it was not a secret desire for some leading figures to build a white America. Benjamin Franklin once said, "[w]hy increase the Sons of Africa, by planting them in America, where we have so fair an Opportunity, by excluding all Blacks and Tawneys [Asians], of increasing the lovely White ..." (Franklin, 1970: 62, 72-73)?

[31] In fact, instead of granting full citizenship to the minority groups, exclusion, punishment and correction were the basic strategies to manage the differences of minority groups. For example, in Johnson v. M'Intosh, 21 U.S. 543 (1823), the Court excluded Native Americans from the polity, reasoning that they were "savages" who could not be recognized as holding civilized notions of property (1823: 590). In Chae Chan Ping v. United States, 130 U.S. 581 (1889), the Court's construction of Chinese as a "menace to our civilization" (1989: 595) and as aliens that were incapable of assimilation led the Court to exclude Chinese-Americans from any constitutional protections under the Fourteenth Amendment.

[32] 329 U.S. 14 (1946).

assumption was beyond question that the Western civilization, which the Protestant Anglo-ethnic was attached to, was within American national identity. Obviously, what needed to be distinguished here was barbaric Asia and Africa. While the Mormons were physically punished for practicing polygamy, what was simultaneously punished, although symbolically, was the barbaric Asia and Africa. The implicit logic was that by demarcating (Asian and African) barbarism, (Western) civilization could be conceived and saved. The Oriental in general and Asia and Africa in particular, serve as the others for the American (Western) national self.

Intriguingly, while minority groups are punished for the sake of maintaining American national identity, national identity is resorted to by liberals and minorities themselves to protest against discriminatory practices towards minorities in the American criminal justice system, such as anti-miscegenation laws[33] and racial profiling. For example, in *Loving v. Virginia*,[34] the U.S. Supreme Court ruled against the constitutionality of Virginia's anti-miscegenation law on the grounds that such race-based anti-miscegenation statutes violated the Equal Protection Clause, which objectified one important feature of the American national identity.

The same feature is also relied on by the opponents of racial profiling. Critics strongly condemn the practice as "antithetical to modern American ideals of fairness and equality" (Trende, 2000). From the angle of maintaining the American national identity, minorities, radicals and liberals surely see why discriminatory practices against minorities should not be allowed.

Once again, national identity demonstrates its normative but ambiguous power in the American criminal justice system. Just as

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[33] For example, California's anti-miscegenation statute declared that "all marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void." Cal. Civ. Code 60 (Deering Supp. 1905) (Cited from Chiu 1994: footnote 66). California did not repeal this provision until 1948.

[34] 388 U.S. 1 (1967).

the sacred mission of defending America could be used equally by patriots and subversives, it could similarly be relied upon by both the oppressor and the oppressed as a justification for punishment and a source of justice in cases of racism. The ambiguous power of the American national identity is certainly fueled by its multidimensionality: [35] America is not just a democratic republic. It is also a part of Western civilization, a fact taken for granted by the dominant Anglo-ethnic group. At the same time, America was created to be an equal land, where all men are created equal and enjoy equal rights, which was proclaimed in the Declaration of Independence and was recognized as part of the American ethno-heritage.

Nevertheless, in America, which is composed of peoples of diverse origins and hierarchies other than the aristocracy, the feature of equality was generally overshadowed by the Anglo-ethnic version of Americanness in issues related to race before the Civil Rights Era.[36] Ironically, it was not until after World War II, when the master race ideology of German Aryan supremacy disgusted Americans but reminded the U.S. of its own racial hypocrisy, that the feature of equality was taken more seriously. In order to make the distinction between America (the national self) and Nazi Germany (the racist other), and to proclaim its moral superiority to Hitler and fascist Europe, America began to deal with the inconsistency between its claims of equality, freedom and democracy**,** and its own institutionalized racism in reality, including widespread racial segregation and the

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[35] The power is only fueled, not made possible, because the same feature of national identity can be used in various ways, and thus makes the effect of national identity ambiguous**.**

[36] Before the Second World War, the feature of equality did play an important role in the Abolition movement and the Civil War. But it was not until the Second World War that the general public was more aware the race issues in the American society, and the feature of equality began to have more impacts. According to historian John W. Dower, World War II brought about a revolution in racial consciousness (Dower, 1986).

exclusion of minorities from full citizenship (Chiu, 1994: 1068).[37] However, it was not until the Civil Rights Era that the naked expressions of racism were outlawed and gradually faded out of sight.

The civil rights movement certainly changed the mechanism of racial politics as well as identity politics in the American criminal justice system. On the one hand, it barred naked expressions of racism, and undermined the power of whites to monopolize the definition of Americanness. On the other hand, it made the feature of equality a more powerful weapon to fight against racism, and especially outright forms of racism, in the American criminal justice system. In addition, it encouraged minority groups to claim their respective ethnic identities. Paradoxically, as the power of the dominant group to monopolize the definition of Americanness was reduced, national identity became a more necessary and favorable means than before for the dominant group to maintain its supremacy.

Before the Civil Rights Era, racism and other conservative ideologies were self-justifiable. They had the power to punish without any disguise or excuse. In other words, they could punish for their own sake. At this time when racism and other conservative ideologies were seen as legitimate, and the content of Americanness was monopolized by the dominant group, punishing minorities for being inferior or for being un-American did not make much difference; with the exception, perhaps, of some honest members within the dominant group, the majority saw such punishment as justified or moral for the sake of maintaining national identity.

As a result, when after the Civil Rights Era racism and other conservative ideologies could no longer be self-justifiable and punish for their own sake, the outwardly neutral claim of national identity—which was still based largely on dominant majoritarian

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[37] According to Chiu, the intent to claim moral supremacy over racist Germany was one of the reasons that led the U.S. Government to alter its exclusionary policies with respect to Asian Americans (Chiu, 1994: 1068-1069).

values—became a favorable tactic for the dominant group[38] to maintain its supremacy, performing a similar function as other ostensibly neutral legal rules.[39] Through various "neutral" claims and rules, explicit expressions of racism and other conservative ideologies were thus transformed into implicit ones.

But this tactic became problematic after the rise of multiculturalism. With the rise of multiculturalism, minority groups began to demand respect for their distinctive cultures and recognition of their respective identities, and promoted cultural pluralism in American society. They argued that America, as an immigrant country, can be defined as a pluralist society. The metaphor of the "melting pot" for American society was no longer desirable. The metaphor of the "salad bowl," or even the "kaleidoscope," was generally thought to be a better description of American society (Schaefer, 2000: 474). The image of America began to be redefined.

The backlash against the proliferation of cultures and identities has been vehement. Hundreds of papers and books now anxiously discuss whether American identity ended with the rise of multiculturalism (Renshon, 2001; Schmidt, 1997).[40] Politicians have declared "culture wars" and contended that acknowledgment of cultural pluralism would undermine national unity and national identity. Facing the threats of decanonizing the "sacred" Western

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[38] With no intent to ignore the diversities within different groups, I use the dominant group to refer to the racist and the conservative just for convenience.

[39] The reasonable man standard is one of the ostensibly neutral legal rules. Many feminists have already pointed out that the so-called reasonable man is actually based on the image of a middle-class White Christian man. As a result, it is oppression if this rule is used to judge people of different gender, race, class and sexual orientation. Similarly, the prima facie American national identity is largely based on values and the image of the Anglo-ethnic. Thus it is apparently unfair to punish other ethnic groups for being un-American (un-Anglo-ethnic.)

[40] Schmidt: "During the last 200 years, the United States not only developed impressive national symbols, but its citizens have also deeply internalized their meanings. These symbols are being attacked by multiculturalists directly and indirectly in ways that the public often does not recognize" (Schmidt, 1997: 180).

texts, conservatives worry that national unity, national purpose, and the meaning of being "American" will be altogether undermined (Sarat & Simon, 2001: 4). Presidential candidate Pat Buchanan even expressly and angrily attacked multiculturalism as "an across-the-board assault on our Anglo-American heritage."[41]

It is in this context that cultural defense issues have emerged in the American criminal justice system. The cultural defense is a legal strategy used by some defendants to excuse criminal behavior or to mitigate culpability, by introducing expert testimony on the defendant's cultural background to prove the lack of requisite *mens rea* when committing the state-defined crime. Proponents of this kind of cultural defense argue that the defense should be accepted because cultural diversity should be respected and honored. The number of cases in which defendants have raised a "cultural defense" has increased tremendously in recent years, and many have involved Asian immigrants.[42]

For example, in *People v. Chen*,[43] a Chinese immigrant man

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41 In a September 1993 speech to the Christian Coalition, Buchanan described multiculturalism as "an across-the-board assault on our Anglo-American heritage" (Buchanan, 1993).

42 Cases in which that the defendants raise the cultural defense are usually involved with Asian immigrants. For example, People v. Tou Moua, No. 315972 (Super. Ct. Fresno County 1985) (Cited from Chiu 1994: footnote 272) (the defendant, a Laotian-American, was accused of rape and kidnapping when he allegedly followed the Hmong courtship practice of zij poj niam (marriage-by-capture) and took his bride-to-be to his family home over her protests and then consummated their union); People v. Kimura, Record of Court Proceedings, No. A-091133 (Super. Ct. L.A. County November 21, 1985) (Cited from Coleman 1996 footnote 45) (the defendant, a female Japanese immigrant, upon learning of her husband's infidelity, proceeded to follow the Japanese ritual of oya-ko-shinju (parent-child suicide). But a Somali immigrant in Georgia allegedly cuts off her two-year old niece's clitoris, partially botching the job. The child was cut in accordance with the time-honored tradition of female circumcision; this custom attempts to ensure that girls and women remain chaste for their husbands. The State charges the woman with child abuse, but is unable to convict her (Coleman, 1996: 1093, footnote 4 citing Hansen & Scroggins [1992]).

43 No. 87-7774 (Sup. Ct. N.Y. County December 2, 1988) (Cited from Coleman 1996 footnote 69).

killed his wife after learning of her infidelity. The defense explained that traditional Chinese notions that infidelity casts shame upon a husband and his ancestors, as well as the defendant's resulting behavior was prescribed by his culture. This defense was obviously accepted, because the jury ultimately convicted the defendant of the lesser charge of second-degree manslaughter, and the judge imposed on him the lightest possible sentence for the crime of conviction (Chiu, 1994: 1053).

This decision brought various criticisms, some from conservatives who resent politics of differences, some from liberals who wish to give due respect to these historically subordinated minorities, but face the dilemma that the universalistic assumption of the criminal justice system will be undermined and destroyed, if individualized justice is realized,[44] and some from minorities themselves who strive for multiculturalism but see sexism actually reappearing in a new guise.[45] The concern that American national identity will be undermined is undoubtedly among these concerns. It is exactly this concern that makes the cultural defense cases particularly important, even though the total number of these cases are small. The concern of national identity was concisely exemplified in the statement after the conviction by Elizabeth Holtzman, the prosecutor in Chen's case.

The result of the Chen case obviously infuriated Holtzman. She claimed, "[t]here may be *barbaric customs in various parts of the world*—that cannot excuse criminal conduct here [in the United States]. Anyone who comes to this country must be prepared to live by and obey our laws."[46] Apparently, the

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[44] *See e.g.* Coleman, 1996. These liberal scholars wish to find a compromise between cultural identities and universalistic national identity.

[45] *See, e.g.* Volpp, 1994; Chiu, 1994. In fact, in the eyes of these critical commentators, the cultural defense involves many important issues, such as cultural essentialism, sexism or colonialism. National identity is merely one of them.

[46] Cited from Koptiuch, 1996: 79-80. Koptiuch's article provides a very good analysis of the cultural defense from the angle of post-colonialism and feminist critics.

appropriate response of the American criminal justice system to barbaric customs from various parts of the world—customs brought to America by immigrants—was one of her big concerns, if not the only one. What she was really saying was that in order to maintain the integrity of the American national identity and demarcate the civilized (Western) self from the barbaric (Asian) other, the American criminal justice system could not treat an Asian immigrant defendant differently.[47]

Intriguingly, in responding to the accusation by the dominant majority that they are disrupting national unity and endangering national identity, the multiculturalists in fact resort to national identity as well. They try to re-interpret American democracy as a radical one in which cultural differences should be respected. They argue, "the respect of pluralism and differences must be at the core of a radical democratic conception of citizenship" (Mouffe, 1995: 33-45). In other words, the multiculturalists do not really object to the concept of national identity, as the anti-multiculturalists accuse them of doing. Instead, the multi-culturalists challenge the particular version of American national identity that has been dominating American society for a long time. In this new way of imagining/defining America, some aspects of American national identity are rejected and redefined, while others are reconfirmed. Multiculturalists believe that diverse ethnic identities can co-exist with American national identity in a truly pluralist society.

Here we see again, in the era of multiculturalism, in which minority groups have begun to celebrate their respective group identities, national identity still retains its normative power in American criminal justice, and still operates in an ambiguous

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[47] However, according to Koptiuch, in fact, the American criminal justice system is not tainted or twisted when accepting the cultural defense, because the cultural defense is only accepted as a separate legal defenses or standards of reasonableness applied to other population groups with distinctive experiences. They have been incorporated by the courts under the established legal defenses of provocation, diminished capacity, insanity, or justification (e.g. self-defense), without requiring substantive-law redefinitions providing a separate standard that truly reifies the defendants' special experiences (Koptiuch, 1996: 233).

fashion. Despite the challenge of group identities, the concept of national identity still remains a significant explanatory framework for understanding American criminal justice. It becomes important when racism or other conservative ideologies cannot explicitly justify themselves. It is equally important for those who wish to celebrate their diversities within the national boundary. Even though national identity might not always be the real issue in cases related to minorities, the concept of national identity undoubtedly provides a site for struggles and negotiations, through which the American state is always being remade.

As we have seen, the distinctiveness of America has always been interpreted with reference to an other, internal or external. For penal reformers in the late eighteenth century and early nineteenth century, penal reform was promoted chiefly through the purge of barbaric and unenlightened relics that were connected to a monarchical other. For both the liberals and the conservatives, the excluded factor was the totalitarian regimes. In the quest to build a civilized Western country, a non-Western other had been made both the overt and the implicit target of expulsion. In addition, with the fall of the old other and the rise of a new other, the American national self, although still following a specific track that had been set up at an earlier time, evolved into a subtly different interpretation, and changed the dynamics of American criminal justice.

But, when national identity is always constituted through defining the boundary of an American self and the alien other, what will happen when the targeted other becomes an imminent threat to America? When American criminal justice is all about demarcating the American self from the alien other, how will the system respond when the criminals are actually aliens? Will the dynamics of the American criminal justice be changed completely? If not, to what extent will the old politics of national identity in American criminal justice still affect the new situation? The recent American war on terrorism, prompted by the real and terrible tragedies of September 11, 2001, provides us with the opportunity to explore these issues.

IV. Defending American Freedom in the American War on Terrorism

On September 11, 2001, four U.S. commercial airliners were hijacked, and crashed into the World Trade Center in New York City, the Pentagon in Northern Virginia, and the Pennsylvania countryside, respectively causing one of the greatest casualties in a single day in the United States. The incidents were promptly identified by the American government as terrorist attacks, and nineteen persons of Middle Eastern descent on board as terrorists executing these suicide hijackings.

At the same time when tears were being shed for the enormous loss of life, and when the red, white, and blue were waving in the wind to encourage the country to stand firm, the U.S. government quickly responded to the national crisis, using resources including the American criminal justice system. Many people of Middle Eastern descent were investigated and detained by the Justice Department as suspected accomplices in the terrorist attacks. In order to enhance law enforcement capabilities for investigating and prosecuting these "enemies of freedom," the Bush administration quickly initiated anti-terrorism bills, which made it easier for the law enforcement agencies to electronically eavesdrop and wiretap on suspected terrorists, or to get access to unopened e-mails. The administration also proposed to change immigration laws to allow detaining aliens for a longer or indefinite time if the aliens are believed to pose a threat to national security. In less than seven weeks' time after the initial terrorist attacks, the Congress passed a symbolically denominated legislation—the "USA Patriot Act." [48]

More than passively defending itself from further attacks, the U.S. government aggressively launched attacks on the foreign regime that sheltered the terrorists but refused to turn over them

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[48] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

to the United States. After some preliminary military successes, President Bush issued a military order allowing special U.S. military tribunals to try foreigners charged with terrorism. In order to protect the country, the administration subsequently initiated several proposals to change some practices in the American criminal justice system and immigration policies, such as monitoring the conversations between suspected terrorists and their lawyers, issuing national identification cards, having local and state police departments track down illegal immigrants, monitoring foreign students, tightening airport and border securities, and activating the National Neighborhood Watch Program which asks neighborhood groups to report on people who are "unfamiliar" or who act in ways that are "suspicious" or "not normal."

While supportive of the administration's resolution to combat terrorism, liberals and civil liberties groups were not willing to blindly accept whatever the government proposed. For example, when the administration sent its anti-terrorism bill to Congress, several Congresspersons expressed concern over the government's expanded powers on eavesdropping, wiretapping, and getting access to unopened e-mails, arguing that these might infringe civil liberties, especially the right of privacy. Senator Patrick J. Leahy of Vermont, the Democratic Chairman of the Senate Judiciary Committee, unequivocally claimed, "[w]e do not want the terrorists to win by having basic protections taken away from us" (Lewis & Shenon, 2001). Only after a "sunset" provision was added to that bill, so that the newly expanded governmental powers will expire within a few years unless Congress votes to extend them, did the liberal Congresspersons compromise and support the USA Patriot Act.

President Bush's potentially secret anti-terrorism military tribunals aroused even bigger concerns. Liberals generally complained that the military tribunals overlook the rights to a jury trial, a speedy trial, and the protection against unreasonable searches and seizures (Bumiller & Seelye, 2001). Jim Zogby, the

President of the Arab-American Institute, objected to the order to use military trials in America and abroad for international terrorists and their collaborators. He explicitly claimed that by doing so, the U.S. will make itself look like "a third world country" (Lardner, 2001a). William Safire, a conservatively inclined *New York Times* columnist, even denounced military tribunals as "Stalinist" (Lane, 2001).

The ACLU has described what the administration has done as an "ongoing pattern of erosion" of basic civil liberties in America in the name of unproven security measures. For the ACLU, measures such as the secrecy surrounding the hundreds of Arabs and Muslims still being detained in the investigation, the plan to monitor confidential attorney-client conversations, the selective enforcement of immigration laws based on race, ethnicity, and country of origin, and the passage of the USA Patriot Act and the often-unchecked powers it gave law enforcement agencies, are all examples of serious cutbacks against civil liberties (ACLU, 2002). Consistent with its long-standing position on racial profiling in the American criminal justice system, the ACLU also strongly decries racial profiling by law enforcement against Muslims and Arab Americans (ACLU, 2001a).

For most commentators and researchers, the debates and controversies surrounding the American war on terrorism represent a standard opposition/dilemma between national security and civil liberties in a time of national crisis. While no one can really deny the importance of national security and civil liberties, liberals and conservatives have different emphases. Liberals might still trust the government less and thus hold onto the constitutional protections, arguing that the government's proposals are not necessarily effective, whereas conservatives emphasize the imminent danger posed by the enemy and point out that if democracy is destroyed by the enemy, the benefits of democracy will be gone (Lane, 2001).

Some commentators look further into American history, arguing that during the Civil War, President Abraham Lincoln,

widely recognized as a civil rights fighter, suspended the right to seek habeas corpus, and authorized military trials for alleged draft resisters or Southern sympathizers (Lane, 2001). Others, however, remind the American public of the errors this country made during World War II: following Japan's attack on Pearl Harbor, Franklin D. Roosevelt ordered the internment of 120,000 people of Japanese ancestry, most of them U.S. citizens.

As a practical matter, some compromises on civil liberties seem to be inevitable in a time of national crisis. The only question is to what degree should Americans compromise their freedom and democracy in order to defend their country. However, when the casualties the terrorist attacks have already caused are so great, and the threats this country still faces are so imminent and persistent, many commentators sense or worry that the long-standing balance of national security and civil liberties might be challenged fundamentally, not just temporarily. Out of the recognition that America is facing an unprecedented national crisis, many commentators opine that America has changed after the attacks of September 11th.

Just like the debates between liberals and conservatives in the previous sacred mission against communists, today debates between national security and civil liberties help people to comprehend the difficult situation that Americans are now facing. But the rhetoric used in the debates suggests something more than national security and civil liberties: American national identity again demonstrates its normative power in the American war on terrorism. For example, when learning that the U.S. Justice Department plans to propose that local and state police departments have the power to track down illegal immigrants as a new tactics in the global war on terror, John R. Robertson, chief of police in Newark, California resolutely opposed questioning people based on their appearance. For him, the reason was obvious: "[t]his [country] is a democracy, based on freedom, and people have a right to basic human dignity" (Schmitt, 2002). In other words, for this police chief, conducting racial profiling

contradicts his idea about what his country is. National identity undoubtedly provides him a guidance of appropriate action, like the psycho-social researchers argue, and appropriate law enforcement.

The normative power of American national identity in the American war on terrorism is actually demonstrated in various fashions. The dispute of Americanness/un-Americanness is one of the common forms. For example, U.S. Attorney General John Ashcroft blamed liberal critics as "un-American and unpatriotic" (Eggen, 2001). Even though Ashcroft un-Americanness is different from the HUAC version, his rhetoric recalls the long-standing tradition in the history of American criminal justice of punishing others for being un-American, and reflects the inherent fragility of using ideals to define Americanness. On the other hand, Ralph G. Neas, the President of People for the American Way, responded to Ashcroft accusation angrily, claiming that "[s]mothering dissent is not the American way" (Lewis, 2001). The liberals also pointed out that what administration officials have suggested was an unquestioned trust. But in the minds of the liberals, giving the administration an unquestioned trust "is not the way Americans do things" (Lardner, 2001b). With the help of the multi-dimensionality of the American national identity, the power that American national identity has on American criminal justice is no less ambiguous in the time when America is engaging in the war against terrorism.

Yet even with the same feature, the application of national identity is still ambiguous. For example, on the one side, liberals unequivocally claimed that the congressional oversight was not "as some have mistakenly described it, to protect terrorists. It is to protect ourselves as Americans and protect our American freedoms" (Lewis, 2001). On the other side, U.S. Attorney General Ashcroft, with an alleged training manual for the terrorist organization Al Qaeda in his hand, emphasized that "terrorists are taught how to use America's freedoms as a weapon against us" (Lewis, 2001). What both sides did not dispute is that the feature

of freedom is in the American national identity. However, they have very opposite views about the applications that American freedom should have in the American war on terrorism.

Nevertheless, when the freedom is defined as "our American freedom," can a foreign suspect enjoy the protection of American freedom to the same degree? The answer is equally ambiguous. On the one hand, liberals are opposed to the military tribunals on the grounds that the rights to a jury trial, a speedy trial and protection against unreasonable searches and seizures will be overlooked. They obviously do not distinguish terrorist suspects and other American suspects, and focus on what America should do in this situation. On the other hand, Senator Charles E. Schumer, the New York Democrat, claimed, terrorists "don't deserve the same panoply of due process" that is available to American suspects (Bumiller & Seelye, 2001). The fact that almost four hundreds war criminals/terrorism suspects are still detained indefinitely outside the national boundary, while American Taliban John Walker Lindh was removed from the remote prison camp in Guantánamo Bay, Cuba to Virginia for a regular trial (Mintz & Masters, 2002), suggests that the idea of "our American freedom" does have a role in the American war on terrorism, even though the administration has made some concessions, and is willing to give more rights to suspected terrorists in the military tribunals (Mintz, 2002).

That foreign terrorist suspects cannot enjoy full American freedoms might not be simply because freedom is characterized as American. It is also because the terrorists are "enemies of (American) freedom." In his September 20 address to the US Congress, President Bush called these terrorists "enemies of freedom." When explaining why these terrorists hate Americans, President Bush said, "[t]hey hate *our* freedoms—*our* freedom of religion, *our* freedom of speech, *our* freedom to vote and assemble and disagree with each other"(G. W. Bush, 2001). [49]

[49] When promoting a proposal to create an independent bipartisan commission to investigate the September 11 attacks, Senator McCain said, "[n]either the

Consequently, it is beyond question that these "enemies of our American freedom" do not deserve to enjoy Americans' freedom.

When explaining why the terrorists attack America, what President Bush also engaged in, consciously or unconsciously, was the demarcation of the American national self from the alien other. The message might be implicit but the line was unambiguous: We Americans stand for freedom, democracy and justice, whereas the terrorists (and later the Axis of Evil) represent repression, totalitarianism and evilness. Such a distinction is crucial in justifying the military actions against the Taliban regimes, as an extension of the internal criminal justice system. For example, after the U.S. attacked Afghanistan, American first lady Laura Bush blasted the Taliban treatment of women, explaining in detail that life under the Taliban regime is "so hard and repressive, even small displays of joy are outlawed, children aren't allowed to fly kites, their mothers face beatings for laughing out loud. Women cannot work outside the home, or even leave their homes by themselves" (L. Bush, 2001). Although "we Americans" was invisible in her statement, the implicit contrast between the American self and the Taliban other and Americans' moral superiority, not just military superiority, is made to justify the self-appointing mission to save Afghanistan women and children from the oppressive regime.

While the administration eagerly emphasized the distinction between the American self from the alien other to justify the military invasion as a tactic of counter-terrorism, Jim Zogby, the president of the Arab-American Institute, objected to the military tribunals by making a similar distinction. He claimed, using military tribunals to try foreign terrorists will make America look like a third world country, a new other when the communist regimes have collapsed one by one. While the image of traditional

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administration nor Congress is capable of conducting a thorough, nonpartisan, independent inquiry into what happened on September 11th, or to propose far-reaching reforms needed to protect our people and institutions against the enemies of freedom" (Lancaster, 2001).

totalitarian regimes still lingers in the liberals' arguments in American criminal justice—such as the denunciation of military tribunals as "Stalinist"—the fact that the Soviet Union fell apart, the superpower confrontation was over, and unstable third world countries arose in the post-colonial time began to affect the self-imagination of Americanness. But it was made ironically by a person who actually immigrated from a third world country. In the post-cold war era, America is still a democratic republic, but the exact meaning, however subtle, is undoubtedly different from how it was imagined in the beginning of this country.

Finally, national identity plays an ambiguous and somewhat ironic role in racial profiling, which is now prevalent in the American criminal justice system and in immigration policy. At the time when the terrorists were identified as Middle-Easterners, immigrants of Arabic ancestry or Muslims immediately were seen as the potential terrorists or suspected accomplices of terrorists in this country. Despite President Bush's symbolic acts, such as his inviting Muslim leaders to the White House and visiting the Islamic Center located on Washington's Embassy Row (Dean, 2001), immigrants of Middle Eastern ancestry or Muslims suffer from hate crimes as well as overzealous law enforcement. Several hundred people of Middle Eastern descent have been arrested, investigated, and detained indefinitely. The Justice Department refuses to release the information of the detaineess to Muslim advocates and immigration attorneys on the grounds that the privacy of detainee needs to be protected. Moreover, immigration laws are enforced selectively based on race, ethnicity and country of origin. Foreign students, especially those who come from Middle Eastern or some militant Muslim countries, are carefully monitored, or even questioned by law enforcement agencies.

Consistent with its previous position on the racial profiling against African Americans, the ACLU strongly opposes to the racial profiling against Middle Easterners and Muslims in the current war on terrorism. It claims, while recognizing the importance of investigating terrorist activities, and the responsibility of the FBI to gather relevant information for that

purpose, it is important that "Americans not lose sight of the values our nation is seeking to defend" (ACLU, 2001b). What the ACLU stands for is the balance between safe and free, not any unreasonable law enforcement based upon ethnic and religious discrimination. Obviously, various features in the American national identity, such as freedom or equality, provide it strong legitimacy to object to racial profiling.

Ironically, on the other hand, the self-identification that America is an open and free country and the desire to remain so are probably two of the factors that encourage the American public to lean toward racial profiling. In order to track potential terrorist activities and identifying potential terrorists, the administration has proposed various methods, including issuing a national ID, electronically eavesdropping, wiretapping, and getting access to unopened e-mails. If these measures are enforced comprehensively and indiscriminately, there is no doubt that terrorist activities can be monitored more effectively. Nevertheless, by doing so, American freedom that Americans generally can enjoy is largely limited and the basic character of the American society will be changed. Perhaps it is out of the fear that America might be changed fundamentally that the selective law enforcement depending on racial profiling is preferred. When more and more Americans claim to be willing to give up certain freedoms to gain security from terrorism (Gallup Poll, 2002), it remains to be observed how this ironic implication of national identity could affect American criminal justice.

With no intention to disregard the importance of various debates between national security and civil liberties, I aim to provide a new angle to observe the current American war on terrorism. As I have discussed above, national identity so far has played a critical, although generally neglected, role in the American war on terrorism. The threat this country faces might be unprecedented, but the frame to comprehend the threat and the languages to respond to it are still similar to what has already been used in American criminal justice. National identity still has a normative but ambiguous power, which is reflected in both liberal

and conservative arguments. Even though new anti-terrorism strategies, such as the military action, are employed to deal with the unprecedented threat, national identity still plays an important role in these new responses. It not only endows the requisite legitimacy for the military action, but it also provides a compelling ground for the deprivation as well as the protection of foreign terrorists' rights. But when the war on terrorism is expanded beyond the national boundary, the extent to which national identity can still affect the American war on terrorism remains to be observed in the future.

V. Conclusion

While most researchers and commentators tend to go beyond the rhetoric that is used to promote various claims and directly look to "material" or "real" issues, I place the rhetoric of penal reformers, scholars, judges, politicians and news reporters in the center of the study of American criminal justice, and contend that the rhetoric provides a useful avenue to understand the society and culture on which the system is grounded. Rejecting the general view that the rhetoric is either redundancies or decorations in each claim, I argue that the rhetoric, which resorts to the basic values or beliefs in one particular society, in fact plays a central role in various legal arguments. It is usually these values and beliefs that convince people to accept the arguments. As a result, the rhetoric is always the best starting point to explore the cultural dimensions of the legal system.

In this research, popular rhetoric employing such terms as "un-American" or "American way" and the frequent discussions about how to be distinguishable from undesired others in legal opinions reflects the inherent concern about American national identity, and invites people to look into the often-overlooked role of national identity in American criminal justice.

In this paper, I have examined the role that national identity has played in different important issues in American criminal justice: (1) the penal reforms and the rise of the penitentiary in the

late eighteenth and early nineteenth centuries, which not only set up the basic track for the American criminal justice system, but also made the basic features of American national identity objectified as ethno-heritages for re-interpretations in the future; (2) the sacred mission of defending America against communists or other radicals in the twentieth century, in which national identity ambiguously nourished both conservatives and liberals in American criminal justice, and totalitarian regimes were made an important metaphor for American legal discourse; (3) the controversial issue of race throughout American history and the recent controversies of multiculturalism, in which national identity explicitly became a battle site for people from opposite positions; and (4) the current American war on terrorism, which national identity ambiguously affects the rights individuals, native and foreign, can enjoy. Each case has illustrated, although in different fashions and degrees, that American national identity has been deeply entangled with American criminal justice throughout the history of the American criminal justice system. Moreover, they have demonstrated how the American national identity is continually reconstituted through defining crime and justice.

There are still some issues that are not covered in this paper, but are worth asking in the future. For example, I have explored how the American criminal justice system responds when the targeted other becomes an imminent threat to America and when the criminals are aliens. But what will happen when the other declines in international politics, such as when a monarch is overthrown or totalitarian state collapses, before the national imagination responds to a new other? Will it result in an identity crisis, or will another country be deliberately promoted to fill in the vacancy? What impact will the decline of other have on the discourse that is generally constructed around the distinction of the national self and alien other?

Besides, cosmopolitan identities began to challenge the integrity of national identity. Nation states often find themselves caught up in a process of globalization. With the help of modern

communication and transportation, international trade, and other forces, connections as well as identities are forged beyond national boundaries. In these circumstances, Americans are forced to ask what their distinct national identity is, and whether it is endangered by the forces of globalization. In light of these challenges, are the dynamics of identity politics in American criminal justice changed? To what extent is national identity still a significant explanatory framework for understanding American criminal justice in the era of globalization? Is the impact of globalization diluted after the attacks of September 11? When the war on terrorism extends beyond the national boundary, to what extent can national identity still affect the American war on terrorism?

Most of all, in light of the ambiguous power of national identity, can we avoid the "dark" side—the suppression of civil rights—and keep the "bright" side—the protection of civil rights and the humanization of the American criminal justice system—of national identity in American criminal justice? Is going beyond national identity as well as nationalism the only solution, as theorist Anthony D. Smith has suggested? Is promoting a cosmopolitan identity the only way out? It is difficult to answer these questions right now. But perhaps to understand the long-neglected role of American national identity and its ambiguous power in American criminal justice will be the first step to a solution, if there is one.

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論國族建構與美國刑事正義

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摘　要

本文以美國刑事司法領域裡經常出現的國家論述為對象，探討國家認同如何影響美國刑事司法，以及美國刑事司法如何成為塑造國家想像的重要場域。本文分別討論美國建國初期時，國家認同如何為司法改革者所用，催生現代監獄；二十世紀後，國家認同一方面提供保守派掃蕩激進份子的正當性，另一方面成為美國自由派革新刑事程序的最佳辯詞；國家認同更在美國歷史上同時為種族壓迫者與反抗者所用。於今日的反恐戰爭裡，國家認同議題亦不曾缺席。本研究意圖藉由不同面向的探討，鋪陳出國家認同於美國的刑事司法持續、綿密卻歧異的影響。

關鍵詞： 國家認同、司法改革、恐共、種族問題、美國反恐戰爭