The Institutions of Higher Education and Judiciary Within the National Security State
January 12, 2012

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Abstract:
The institutions of higher education and the judiciary perform crucial functions in a democratic state, including the use of critical thinking and the fair and independent resolution of disputes. In ordinary circumstances, institutional roles and practices may stray from the legitimations on which institutions are grounded. Normally, institutions function by non-violently resolving conflicts through open fact-finding, compromise and cooperation. As we show below, these practices have been deliberately corrupted by methods of the NSS, which rely upon insincere legitimations and abnormal practices such as force, coercion and secrecy. We analyze the developments of institutional discourse, roles, and practices and show ways in which the NSS has colonized the institutions of higher education and the judiciary, but not hopelessly so. We conclude by suggesting how the practices of higher education and the judiciary can be decolonized so that they can better perform their fundamental democratic functions.

1. Introduction

The NSS represents a serious institutional pathology - that of a subordinate segment of society hijacking the governmental apparatus and undermining our government’s responsibility to the society as a whole. This paper focuses on a particular type of capitalist institutional imperialism called “militarism” that has resulted in the NSS which is premised on the ideology that peace and security can only be achieved through the threat and use of greater force and which requires the allocation of large amounts of the nation’s resources to weapons. Within this framework, the NSS represents an extreme instance of militaristic imperialism in which the state is oriented toward unlimited war based on the presumption of a constant threat against which we must be ever vigilant to preserve the ideal state. Crucially, this vigilance calls for the adoption of antidemocratic steps such as the suspension of basic rights and the resort to secrecy to preserve the democracy we claim to cherish.

1.1 What is the Ideal State? We recognize the legitimate function of the democratic state apparatus, consisting of a collection of governmental institutions, as one of serving and protecting its citizens equally and fairly. In practice, few states ever live up to all these expectations, however all practical democratic states use a “legitimating discourse” to appeal to this ideal characterization to legitimate their existence.

Leman-Langlois (2001: 81) states that

Legitimating discourse refers to the institution’s internal logic or rationale, where its goals, methods, and principles are articulated in harmony with prevalent norms and may be presented as “right” (or lesser evils) or “good” (or the best possible) to the concerned social groups. It serves to justify to its members and others who are expected to support the institution’s existence and activities. Legitimations appeal to a variety of justifications: moral (this institution is good…); theological (this institution is ordained by god); practical (this institution is the best, fairest way to govern); etc. Without this understanding, that is, the consent of society, the institution has no social imperative.
Central to this statement is the normal functioning of institutions through the voluntary, and not forced, participation of its members. Thus, the threat and the use of violence to maintain institutional discipline characterizes an abnormal situation, as in the case of the NSS.

Problematic to abnormal institutions is the disconnect between practices and legitimations, for when this happens, as Leman-Langlois suggests, the institution loses its social imperative and requires corrective measures. Such measures include adjusting its institutional practices to make them consistent with their legitimations, suppressing awareness of the gap (secrecy and lying), changing the legitimation (to fighting terrorism) and resorting to physical force (the police state). Democratic states need to build into their institutions procedures and mechanisms to prevent slippage and to provide remediation when necessary.

Changing the legitimation introduces the concept of an insincere legitimation (propaganda). Sincere legitimations derive from principles of fairness and equal treatment, whereas insincere legitimations contain a privileging ideological component (2.4) as in the use of a constant threat to justify the antidemocratic practices of the NSS. Insincere legitimations attempt to associate themselves with sincere ones. For example, University of California administrator, Bolton (1968) suggested that the CIA legitimize its status by claiming that the “agency is really a university without students and not a training school for spies,” something the CIA now takes for granted. Not all insincere legitimations are this transparent, for people can honestly offer as they can honestly accept insincere legitimations. Insincere legitimations are proffered to justify an institutional practice whose real purpose may be otherwise unappealing to participants. This is why, when the inconsistency between legitimation and practice becomes apparent proponents of the practice offer a new legitimation in its place. For example, when the insincere claim that Iraq had WMDs (to justify a war) failed, the need to depose a tyrant quickly replaced it.

The legitimacy of a democratic government depends on three important concepts. First, the government is accountable to its citizens for its actions. Second, mechanisms (the capacity to select and change practices and principles (laws) of government and its governmental agents) exist for citizens to redress governmental actions they find at odds with their expectations. Third, its citizens are capable, both intellectually and physically to make such decisions. Here we stress the fundamental importance of the institutions of the law (to ensure the principle of accountability and the capacity to redress) and education (to ensure that citizens are intellectually capable of making such decisions).

1.2 Pathologies of the State. Nevertheless, democracies vary in their success in achieving these desired practices. Any failure of this sort constitutes a coup. In an overt coup, its perpetrators make no pretense of
maintaining democracy in its seizure of the governmental apparatus, even though they may attempt insincerely to legitimize the coup by claiming that the termination of democratic processes is in the best interest of the citizenry and perhaps promising that when order is restored, democracy will return.

The covert coup rests on the pretense that the institutions are still living up to their legitimating discourse despite the erosion of governmental responsibilities. This type of coup is much less obvious, for the government continues to proclaim its legitimacy as a democracy, and in fact, many of the operations of the democracy do continue including an appearance of accountability and lawful procedures. Such coups typically involve the commandeering of aspects of the governmental apparatus by the commercial sector through such practices as of campaign financing (thereby selecting candidates), lobbying, or influencing the society’s commonsense understanding of the world. In addition, we find the inclusion of normally subordinate governmental institutions, such as the military, in the decision-making process through membership on government (national security) councils, and the development of secret societies (the CIA) and the control of information (secrecy). Crucial to the covert coup is the degree to which individuals, be they judges or professors, who are not really part of the inside group willingly participate in the process of maintaining the NSS.

1.3 The National Security State. Clearly then, the US NSS exemplifies a covert coup in a “democratic,” capitalist society in which the institutions of the military (with an annual commitment of over $400 billion - half of the planetary military expenditure) and the associated defense industry have come to dominate the governmental apparatus and have diverted national resources to privileging (some of) the members of those institutions. Other states, though on a smaller scale (e.g., Indonesia), possess many of the same characteristics of the US NSS, namely the manufactured threat of enemies to justify a large, relatively speaking, military. A comparative study of such NSSs would be instructive both in understanding the workings of our own and in understanding its influence on other such states.

The NSS arose with the establishment of a persistent threat that justifies a high level of military preparedness and expenditure, beginning with the cold war threat of nuclear attack. Following the collapse of the USSR, terrorism and other weapons and tactics of mass destruction (re)joined nuclear weapons as perpetual threats. Both WMDs and terrorists are aptly suited to the NSS for in addition to legitimizing the necessity for force they instill fear in the general public, thus encouraging them to “voluntarily” support high levels of military expenditure. Ironically, 9/11 demonstrated that our massive military might fails to provide any practical security. Yet, the US has used this incident to move beyond a state of permanent threat to a state of permanent war and with it the suspension of constitutional rights and treaty obligations.
However, the threat must be such that it can be addressed with military force - through the threat or use of violence. For this reason, ecological threats like global warming and toxic waste, including nuclear waste fail, while the “War on Drugs” succeeds. In fact, because of the NSS’s dependency on oil, environmental threats like global warming are antithetical to its interests and helps to explain why “in mid-June [2003], the Bush administration edited out passages in an E.P.A. report that described scientific concerns about the potential risks from global warming (Thompson 2003). It also illustrates the NSS’s selective use and control of knowledge to benefit its own agenda and its opposition to open scientific research. This has also led to using the budget to marginalize academic research, other than that benefiting the military, and has, Thompson argues, increasingly alienated the scientific community.

Frequently associated with the NSS, and certainly true of the US NSS, because of the huge military expenditures, is the complicity of the commercial sector, a “syndical fascist system,…. a series of partnerships between business, labor, the university, the military, … [which is] an attempt to replace the social contract in terms of a corporative system of agreements between leaderships” (Raskin 1971:168), or “the military/industrial complex” of Eisenhower.

1.4 The institution. Anthropologists (e.g., Bourdieu 1977) increasingly advocate an institutional analysis that views a society as a collection of interconnected institutions, particularly with respect to the study of large-scale societies. Key elements include: legitimations; a playing field with players or assigned roles; goals; resources or capital to accomplish them; and prescribed and proscribed role assignments and procedures. We consider, following Fairclough (1989), orders of discourse to be a part of institutional practices, consisting of what can (and can’t) be said, how it is to be said and what knowledge is needed to say it. The learning of any order of discourse (e.g., academic or legal) empowers the members to act, but at the same time constrains what and how members may do and say. This power - the capacity to enable and constrain may be either legitimate or illegitimate, characterized by Foucault (1994b) as “domination.” Following Foucault, power is inseparable from knowledge because the control of knowledge, including secrecy and the classification of documents is empowering. Given that different representations of the same situation have the capacity to privilege some (at the expense of others), access to and control of knowledge is also a form of power. This is why the analysis of legitimations, especially separating sincere and insincere legitimations, is so important. Also, as we show in section 2.4, background knowledge, essential to reading and the acquisition of new knowledge, is a form of power.

Institutional practices, especially proscribed elements, often reflect impositions from the interests of other institutions that may not be consistent with existing role assignments and can lead to role conflicts.
which can in turn lead to new practices. The analysis of inter-institutional linkages can help to explain why institutional practices deviate from their legitimations.  

**Praxis and the Individual.** In addition to examining institutions as social structures, Bourdieu (1977) and others propose that we look at social events from the perspective of the individual agent. From this perspective, institutional structures appear as resources. Bourdieu also notes that institutional structures arise and are reproduced by the activities of these individual agents who may not fully comprehend the functions of the institution. This suggests the possibility that no one is in charge, for it is possible with everyone operating within assigned roles and under the guidance of the *habitus* that no one has a sense of that what the institution is actually doing. Thus, an institution can end up performing unintended and unwanted practices. This possibility raises the important need for institutional members to be aware of the actual functions of their institution and to possess and exercise social responsibility.  

**Habitus.** Bourdieu and Foucault ask us to look at the individual, not as fully autonomous and freethinking, but as someone whose orientation has been shaped by his/her culture (or rather the collection of institutions). Bourdieu uses the term *habitus* to describe this orientation, not as a set of mastered rules or structures, but rather as an inculcated set of dispositions that incline the individual to respond to events in certain ways. This should not be taken to mean that the individual is not free to act according to his/her own will but rather the individual will be inclined to operate within the parameters of one’s roles. Habitus is important to our argument because it imposes a form of control including self-discipline or censorship.  

### 2. Higher Education and the National Security State

Today we recognize the responsibility for both practical (preparing an individual for securing a livelihood) and general (or liberal) educational (GenEd) goals (preparing the individual for life, and especially the preparation of the individual for political participation in society). Yet, historically, universal education arose because of its potential to provide discipline, cultural uniformity and loyalty to the state (Ramirez and Boli 1987). Rudolph (1977) notes a counter-rationale for founding universities in this country - providing moral guidance for the future ruling elites. While initially, this morality was equated with biblical teaching, today it has broadened into what we now call GenEd.  

#### 2.1 The Relationship between Education and the State.  
The institution of education appears to be insulated from external influence, being the financial and political responsibility of state and local government. Yet, this institution has been colonized by external forces, including various institutions of the

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1 We concentrate on higher education because of our greater familiarity with this area, this is where inner and extra institutional influences are most transparent, and much of what is said here also applies to K-12 education.
NSS through mandates and incentives. Many mandates require these institutions to meet their civic responsibilities (instruction in civics and history; insuring equal opportunity, and access to low interest student loans). One such mandate, whose origin can be traced back to Nuremberg, requires Institutional Review Boards (IRBs) at research institutions to protect the rights of human research subjects. Other mandates like the Patriot and Homeland Security acts require universities to report changes in foreign student status. Institutions failing to comply become ineligible for federal funding.

The federal government provides about 10% of the budget for education at all levels 6% of which (2.9% of the federal budget) funds the US Department of Education (ED) whose mission is “to ensure equal access to education and to promote educational excellence throughout the Nation” (ED 2003b). In 1999, according to the National Science Foundation, the U.S. government spent slightly over $40 billion on research and development of which a little over half was characterized as defense related and of which $1.8 billion went to universities. Of this amount, 40% goes to 10 universities with Johns Hopkins receiving 15% of the total. Way down the list, Michigan State University (MSU)\(^2\) received $2.5 million from the DOD, approximately 0.2% of MSU’s total budget. Sciences and technology receive substantially more funding; with the engineering disciplines receiving 42% of their funding from the DOD (US Government 1997). In addition, some of the 2003 Department of Homeland Security DHS research and development $1 billion budget will find its way to the universities in the form of graduate and undergraduate fellowships.

The social sciences accept defense grants at a much lower level. The National Defense Education Act, now known as the Title VI of the National Education Act, calls for the funding ($27 million dollars in 2002) of 118 university-based National Resource Centers for language and world area studies (USDE 2003a). The original legitimation of this act had been to develop expertise in the languages and cultures of the world in the event of war. Subsequent legitimations involve developing an awareness of the world in which we live, by training teachers for and offering area studies and language courses. Other academic global studies units arose from defense-related activities. Columbia University’s School of International Affairs, the nation’s first international center, grew out of its wartime Naval School of Military Government and Administration (Horowitz 1969).

The limits to what sort of defense-related research a university may accept are at best inexplicit, though most consider MSU to have crossed the line in 1954 when it became involved in a project to train and install a government in Vietnam. This program, which began as a seemingly innocent training

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\(^2\) We chose MSU as an example because we are familiar with it (D. Dwyer teaches there) and not because it is at all exceptional in the example it provides.
program, turned into a military operation supplying guns and ammunition to the US supported Diem puppet regime, and in the words of its coordinator, Stanley Sheinbaum (1966), “our Project had become a CIA front.” Soon, MSU found itself supporting an undemocratic regime with serious human rights abuses. Yet, until exposed, Sheinbaum’s notes, the faculty and university administrators were generally “untroubled” by the project. Were this an isolated event, then perhaps we could understand it as the result of an overzealous college president wanting to put his university on the map, but there are too many similar examples at other universities to justify this interpretation.

2.2 Extra Institutional Influences on the University.

The public often questions the “ivory tower” autonomy of the university without realizing how essential this is to the University’s GenEd mission and that this autonomy has been substantially compromised by external influences.

The Political Filter. The university and the academic disciplines have developed a set of orthodox practices that insulate them from extramural criticism such as steering clear of partisan viewpoints, while professing at the same time that the academy is a place where such discussion should take place freely and openly. In popular terms, this practice means avoiding “political” positions and discourse. This use of the term “political” departs from its literal sense of “discourse pertaining to how decisions are made in society” but refers to discourse that challenges the prevailing orthodoxy.

Since the 1960s, universities have increasingly depended on tuition, grants and gifts to supplement state support. In this context, the cost to the university of being “political” is estrangement from these sources. Consequently, these potential costs often lead to self-censorship and the avoidance of “political” discourse in the classrooms, political research and public service. Joas (2003), citing Bahrdt, observed “that a scrutiny of school textbooks on social studies or introductions to sociology must give the impression that the societies we live in have neither armed forces nor police.” Wolf (1982) noted the skewed subject matter of the social sciences (in the US) and that they rarely address the needs of the working people, with political science being preoccupied with orthodox policy, and economics focusing on the needs of corporations.

Ravitch (2003) reports that “bias panels”, such as the National Assessment Government Board censor controversial (political) words and topics from the nation’s textbooks thus lessening student exposure to anything but the orthodox. Bias panels, legitimize this practice by citing the need to avoid stereotypes and situations not common to all so that tests will be fairer to all. Such legitimations pose a
danger to the state for they legitimate the avoidance of the examination of controversial issues, so necessary to the democratic state.

The avoidance of political topics that might jeopardize either the individual or the institution narrows the academic discourse and helps to explain why, academics find it difficult to teach and write about problems associated with the NSS with the result that the NSS gains legitimacy from the absence of this critical circumspection.

The Research Filter. In 2002, Universities received research and development contracts for over $37 billion (AAAS 2001a). Because today only 40% of MSU’s annual expenditure of $1.4 billion in 2001-2 comes from the state-supplied general fund, increased emphasis has been placed research revenue which has risen to 20% of the operating budget (MSU Budget 2003). In contrast to the US system, Dutch faculty obtain internal (rather than external) funding for research projects, by submitting their proposals to a university committee, much in the same way individuals are reviewed for tenure in U.S. universities. In the US, most grants come from outside funding agencies, be they government (MSU = 47% federal, 15% state), foundation (MSU= 2.4%) or industry (MSU=3.5%). Given that these funding agencies also evaluate each proposal with respect to their own agenda, they help to define the domain of legitimate research in a way far different from the Dutch example.

Because some disciplines (agriculture, engineering, business, medicine, the “hard” sciences and economics) receive more support than others, they are more influenced externally. Furthermore, the ability to garner grants is now understood as a means of acquiring academic capital, almost on a par with publication. Thus, faculty in the more heavily endowed areas find it easier to obtain academic capital than those in other areas like literature, languages, history and philosophy. This availability of specific types of research money helps to explain the skewing of the social science research agenda, described by Wolf (1982) above, and the skewing of the level of prestige of members of different disciplines. This effect also reaches into the curriculum and the classroom, for professors teach what they know and what they know comes from their research. This practice contrasts sharply with the legitimation of the university as a free and open place to investigate and explore ideas.

2.4 Internal Influences on the University

The educational process involves socialization, discipline and the acquisition of orthodox knowledge. Students quickly learn the consequences of compliance and non-compliance. Good grades depend as much on following procedures as they do on mastering knowledge. Faculty undergo several filtering
processes, first, as students at the primary, secondary and collegiate level, then as graduate students (and apprentice teachers), the job interview, and the tenure process.

**The Scholarship Role.** Above all, faculty are expected to be reliable scholars by conducting research, publishing its results in journals using appropriate scholarly discourse, and behaving in a dignified, scholarly manner. The *Faculty Handbook* (MSU 2003) describes both faculty rights and responsibilities.

<table>
<thead>
<tr>
<th>MSU endorses academic freedom and responsibility as essential to attainment of the University's goal of the unfettered search for knowledge and its free exposition. Academic freedom and responsibility are fundamental characteristics of the University environment</th>
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<tbody>
<tr>
<td><strong>Responsibilities:</strong></td>
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<tr>
<td>• pursue excellence and intellectual honesty in teaching, research, … and public service activities; and in publishing …;</td>
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<tr>
<td>• encourage students and colleagues to engage in free discussion and inquiry; … evaluate student and colleague performance on a scholarly basis;</td>
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<tr>
<td>• work in a collegial manner … encourage the free search for knowledge … ;</td>
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<tr>
<td>• refrain from introducing matters which are not consistent with their teaching duties and professional competence …;</td>
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<tr>
<td>• differentiate carefully their official activities as faculty members from their personal activities as citizens.</td>
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<tr>
<td><strong>Rights:</strong></td>
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<tr>
<td>• seek changes in institutional policy through established University procedures and by lawful and peaceful means;</td>
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<tr>
<td>• discuss in the classroom any material which has a significant relationship to the subject matter as defined in the approved course description;</td>
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<tr>
<td>• determine course content, grading, and classroom procedures in the courses they teach;</td>
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<tr>
<td>• conduct research and to engage in creative endeavors … publish or present research findings and creative works … engage in public service activities.</td>
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The statement shows a concern for the rights of the students as well, but at the same time, it protects the university from legal challenges. It also contains considerable vagueness: “pursue excellence”; “work in a collegial manner”; “in a professional manner.” This is quite typical of documents that also serve as institutional legitimations, allowing for multiple interpretations with the advantage that more people can subscribe to it and the disadvantage that nobody knows what they really mean (Rappaport 1979). This vagueness also makes it difficult to test whether our legitimations actually match our practices and facilitates the opportunistic hijacking of these terms by the NSS for its own purposes. For example, Bolton (1968) suggested that the term “academic freedom” could be used to justify the participation of scholars in CIA projects.

The importance accorded scholarship derives in part from its ability to legitimatize the institution. But absent from this discourse are questions of the relationship of this process to the state, such as will the subject matter of this scholarship be beneficial to citizens? Also absent from this discourse is a discussion of whether our students are rewarding for scholarship or for obedience - do we award degrees to just the brilliant students or to the ones who have the discipline to do it?

**The Tenure Filter.** Originally conceived to protect the academic freedom, tenure has become a major instrument of academic control. The university argues this process enables academic units to
maintain, and improve, its stock of faculty. To achieve tenure new faculty have to perform at a high level especially in the areas of grant getting and publication. These requirements impose heavy burdens on individual faculty including twelve-hour days and missing out on social and family life, even postponing the decision to have children. Young faculty also need to watch what they say. Several years ago, a friend of ours, at another university, distributed a factual leaflet concerning the similarity in practices by the apartheid government of South Africa and the state of Israel. He received a “friendly” warning to postpone such activities until after tenure, which he did not receive.

The redefinition of tenure also illustrates that institutions are viewed and used by its users as resources that can be put to their own uses. This example exposes the tenure process as an important mechanism for controlling deviance. It renders the faculty more cautious, less “political”, and less likely to take on issues such as the NSS either in their teaching, research, and in conducting university business. Any institution has the potential to change its practices and consequently its purpose, thus distancing itself from its original legitimation.

The Knowledge Filter. An acute sense of orthodoxy concerning what constitutes permissible knowledge pervades the academic field. This sense of orthodoxy often takes the form of self-discipline (even habitus), the avoidance of unorthodox and political positions, despite the presence of tenure and academic freedom and derives in part from the awareness of what might happen were one to go against the prevailing orthodoxy. One of the most celebrated examples of this comes from the field of geography. Not so long ago, the concept, then called “continental drift,” but now theorized as “plate tectonics,” was considered as wrong as Lamarkianism is today. Alfred Wegener (1880-1930) espoused the concept of continental drift and was so shunned that he the only academic job he could find was teaching high school. However, not all heretics are correct and even fewer, like Wegener, vindicated. As faculty, we learn the limits of acceptable knowledge and undertake extreme caution whenever we venture outside its bounds, academic freedom not withstanding. This helps to explain why the academy does not embrace research into “political” areas such as militarism and popular economics.

2.5 General Education and its Role in a Democratic Society.

Very few books show up in a library search using “General Education” as a key word. At the university, we give little attention and discussion to what it is and how to achieve it. We unanimously accept the capacity for critical thought as the cornerstone of education and a democratic state, even though we rarely make an effort to explain what this means. Ironically, we honor Socrates for his ability to teach critical thinking, but we often forget that his success proved fatal. Critical thinking has come to mean
something “smart” people avoid, i.e., “political.” This situation is symptomatic of overlooking the disconnect between our legitimations and our practices.

Eco speaks of the importance of the “intellectual function” which he considers as “theoretical” as opposed to “moral.” It “consists of identifying critically what one considers a satisfactory approximation of truth” and involves “delving for ambiguities and bringing them to light.” Furthermore, “the first duty of the intellectual is to criticize his own traveling companions (‘to think’ means to play the voice of conscience).” But the intellectual function differs from and must be kept separate from “the moral function” of the citizen, which “requires the elimination of nuances and ambiguities.” Finally, the intellectual function is not limited to intellectuals. We see the intellectual and moral functions operating dialectically for all citizens in the sense that each informs the other. The task of deciding when to use either poses an important challenge to all.

For us, ‘critical’ entails the ability to identify the workings of ideology. Following Fairclough (1989), we take ideology to be the use of knowledge, regardless of its truth-value, in the service of inequality (privilege). Ideology is not always overt as in a statement like “The poor will always be with us” – a statement that suggests that no matter how hard we work to eradicate poverty, we have to accept the fact that this inequality will always remain. Covert ideology exists in the form of background knowledge, something we draw on to interpret overt texts. For example, the statement that “we must be ever vigilant against terrorism” requires that we know the meaning of terrorism. In popular usage, terrorism is something used by our enemies and not by us. This background knowledge causes us to interpret the text to mean that we must be vigilant against others who wish us ill and not against members of our own society who might perpetrate violence to maintain the NSS.

Ideological knowledge often exists as part of our commonsense understanding of the world - it is so ubiquitous and natural that we do not even notice of it. For example, we understand the word “security” as having to do with ways of making us safe; yet, the meaning of the word has narrowed to issues of law enforcement and the military. In the NSS, “health” is not a security issue and the term “food security” does not mean preventing hunger, but rather the need to insure that there is enough food in time of war. This narrowing exudes from discourse crucial topics pertaining to the security of the nation. Homeland security, for example has nothing to do with social security. Uncovering ideological knowledge requires exposure to a wide variety of opinions on the same topic, especially those which are “political” so that they challenge standard or orthodox understanding, for it is here that clash of background assumptions can come to the fore and hence lead to critical analysis.
The academy itself is not immune from such ideology. Both Giroux (1987) and Bourdieu (1982) point out that academy maintains and legitimates as standard English, a genre that privileges academics and the university-trained at the expense of the (relatively) uneducated. Critical thinking requires self-reflection and critical examination of one’s own practices, especially with respect to one’s own legitimations. In this matter, Fairclough (1995) calls for the teaching of critical language awareness – the teaching about the role of language in creating inequality.

2.6 Towards a More Socially Responsible Educational Institution.

Contrary to the expectations of the enlightenment, many postmodernists argue the concept of an enlightened electorate is impossible and consequently that democracies in the postmodern era are destined to fail as in the case of the current NSS. In contrast, we believe education can produce an enlightened electorate and can assist in providing remedial measures for restoring our democracy to its legitimacy. However, this requires that we respond to the calls of Freire (1987) and Giroux (1987) that we take a more critical view of how we are preparing our children as citizens in a legitimate democracy.

External Influences severely compromise the university’s ability to fulfill its civic mission and the effects of political and research filters increase with the loss of financial and political autonomy so that universities find it more difficult to carry out the academic function. We need to find a way for the university to be politically and financially autonomous, perhaps like the Dutch example, while at the same time be responsible to its mission (legitimation) especially in the area of GenEd. This depoliticizing of the university poses a challenge to the state governments, for there are political forces that are likely to oppose this solution.

We also need to address the task of distinguishing between legitimate and illegitimate research. In retrospect, the illegitimacy of the Vietnam Project is clear, but no one at the time questioned it. Furthermore, without constraints, the university is free to do the bidding of the NSS, thus being a contributor to its strength rather than a source of opposition to it.

Existing Mechanisms. MSU’s publicly elected Board of Trustees is responsible for the running of the university, approving budgets, selecting the president and senior administrative officers and granting faculty tenure and promotions, though in practice they delegate the actual activities to their appointees, except when problems arise. For example, in the 1970s, The Board chose to divest its holdings of stocks in corporations doing business in apartheid South Africa, because they concluded that MSU should not profit from a system based on inequality. However, this ad hoc decision never moved beyond the South African question to the broader question of the how it should invest its holdings, or of the limits of university’s
involvement in the outside world with regard to research. Furthermore, the trustees would not have
decided to divest had not the community inside and outside the University energetically and persuasively
brought it to their attention.

MSU’s Faculty Handbook recognizes that the university’s responsibility to provide “a research
environment for free and unfettered pursuit of knowledge” is “clearly essential to the protection of
individuals and the public at large” and that “there exist federal or state laws, regulations and guidelines in
several areas which are designed for this purpose.” It delegates responsibility to the University’s “advisory
committees and academic governance bodies to insure that individual research and scholarly projects
incorporate appropriate safeguards.” Accordingly, before submission to a granting agency the proposal
undergoes several screenings, at the departmental and administrative level. Each unit reviews the project
and examines it with respect to its purview and interests including the treatment of human subjects (see
1.1), protecting the researchers right of first publication and with classified research.

The advisory committee to the MSU Dean of International Studies and Programs (ISP), consisting
of scholars representing each of the university’s colleges, advises the dean on a variety of topics including
the appropriateness of international projects. Had this committee existed at the time it would probably have
concluded that the Vietnam Project was not in the best interests of the University. Another safeguard is the
proviso that “the University should retain for its scholars the right of first publication.” The imposition of
restrictions on publication of research results is incompatible with the basic concept of an educational
institution. However, it is doubtful that this important proviso would have prevented the Vietnam project,
nor would it prevent NSS projects in which secrecy is not involved and rights of first publication remain with
the researcher.

Even more problematic are projects like National Security Educational Program (NSEP), enacted in
1991 and currently funded through the Department of Defense. NSEP (2003) calls for the strengthening of
“national security” through training in international studies and language and requires its fellowship
recipients to subsequently work for government agencies (mainly associated with the NSS) following their
studies. Several academic organizations, including the African Studies Association, the African National
Resource Centers, and the Association of African Studies Programs have criticized this program, because
of its connection to the NSS and its advocacy of secrecy and clandestine activity and runs counter to a
commitment to open research. A more appropriate way, critics of NSEP argue, would be to transfer the
money to the Department of Education as an incentive program to increase area and language studies
without the service requirement.
Within MSU, the faculties of MSU African Studies Center and the Center for the Study of Latin America and the Caribbean have also opposed the NSEP fellowship program because of its potential to interfere with research. After reviewing this program, MSU's ISP Advisory Committee resolved to write a letter to students interested in an NSEP fellowship stating the centers' concerns. These actions have aroused the ire of NSS sympathizers like Stanley Kurtz (2003) of the Hoover Institute who suggests “Congress needs to pass an amendment that would take funding out of the hands of any Title VI center that engages in or abets a boycott of national security related scholarships.” In addition, MSU president Peter McPherson, who is currently in Iraq “reconstructing” its economic system, has publicly criticized the rejection of NSEP awards, seeing nothing wrong with accepting funds from institutions advocating violence and secrecy. This is why the Handbook's caveat that “exigencies of national defense may at times make exceptions to this policy on publication necessary” is so troubling, for the university can invoke “national defense” to justify the acceptance of NSS funding.

The university’s research guidelines also suggest that research projects must be consistent with a discipline’s principles and practices. For example, the American Anthropological Association’s (AAA) Statement of ethics (AAA 1971) suggests further guidance on the appropriateness of research (see website for full text):

- The anthropologists' paramount responsibility is to those they study.
- In relation with their own government and with host governments, research anthropologists should be honest and candid.
- They should demand assurance that they will not be required to compromise their professional responsibilities and ethics as a condition of their permission to pursue research.
- Specifically, no secret research, no secret reports or debriefings of any kind should be agreed to.
- Anthropologists must retain the right to make all ethical decisions in their research.

The more explicit and more demanding nature of these guidelines appear to be sufficient to challenge, if not prevent, something like the Vietnam project though they probably would not prevent the university or individuals from participating in programs like NSEP.

These guidelines did not arise without struggle. Nothing of the sort was in place to protect its founder, Franz Boas of Columbia University from censure by the AAA’s governing council in December of 1919. Stocking’s (1968) account of this somewhat complicated event states that Boas was censured in large part because he wrote a letter to the Nation publicly condemning four individuals who used their position as scholars to spy for the US Government during WWI.

Neither the university guidelines nor those of the AAA appear to be sufficient to resist the colonialization of the university by the NSS through the medium of research. What is missing is a
condemnation of the use of violence and force, something antithetical to the institution of education and indeed to normal institutions as a whole. We suggest that universities and professional organizations add to their research guidelines a proviso to exclude the acceptance of any funding from institutions that espouse secrecy and/or violence. We are aware that what constitutes violence will inspire a good deal of “political” discussion and welcome the debate as essential for a healthy university and society. No doubt, this debate will address abortion and gun rights. It will also draw in the nature of the NSS and the question of the legitimacy of violence as a procedure to resolve problems.

The Handbook also states “no publication, statement, or activity, either on behalf of the University or by an individual in their official capacity, shall endorse any commercial product, or advocate any specific commercial method or device, either directly or by implication.” This proviso requires reexamination both in the athletic arena, where it is shamelessly overlooked, and in the acceptance of grants and gifts. Isn’t the acceptance of a grant from a major corporation an endorsement of some sort? Were this proviso taken seriously, it could serve as a means of insulating the university from undesirable outside interests.

Internal Considerations. We also need to review the practices of the institution to make sure that they are consistent with its legitimations and especially the teaching of critical thought and providing an atmosphere of openness. This should not, writes Leman-Langlois (2001) following Foucault, “entail the eradication of any competing discourse… Rather, it is sufficient that a context arise where a critical mass of individuals (1) perceive a discrepancy between current practices and the dominant conceptualization of the social context and (2) adopt a sufficiently unified way to define the “problem” and the new solution it appears to demand.” Umberto Eco (2001) argues for much the same approach, that the university be a place of openness and exploration and not a position of advocacy, a challenge for an institution constantly assaulted by the NSS. This position of openness is essential not only to the critical exploration of ideas, but for the protection of the institution, for academics (rightly or wrongly) are being accused of a closedness and bias (Kurtz 2003), as opposed to the openness advocated here. Importantly, we propose, not the political filter described above, but a discipline that enables critical thought or as Leman-Langlois puts it, “an adjustment of the intellectual tools we use to understand reality, in order to repair the broken consistency between the world and our actions.”

Placing the university in a non-advocacy position raises the question of where resistance to the NSS and progressive change is to arise. Again Leman-Langlois, following (Foucault 1984, 388) suggests that “the original moment of “problematization” may be instigated by social, economic, or political processes that make the conventional at odds with new empirical realities –
and the abandonment of apartheid is certainly an extreme example of such change.”

In addition to critical thought, we need to establish a new perspective more appropriate for the global community in which we live. For example, Nussbaum (1997) calls for developing

“the ability to think of oneself as what Stoic philosophers called a citizen of the world, … [to explore] issues from agriculture to human rights to the relief of famine [to] require our minds to venture beyond local affiliations and consider the reality of distant lives. To attain this ability, however, students need to learn a great deal more than students in previous generations typically did about the history and culture of non-Western people, and of ethnic and racial minorities within their own culture; about the achievements and experience of woman; and about the variety of human sexuality.

We see the tremendous potential that the actual experience of living abroad through overseas study and volunteerism offers to individuals, an experience which the vast majority of those with an international experience report a new perspective in which they no longer see the world exclusively through American eyes. Nussbaum also calls for the development “of a “narrative imagination; the ability to try to understand what it might be like to experience life from a position other than one’s own, to be an intelligent reader of other life stories-and also to understand how difficult it is to be an intelligent reader.

Each of these suggestions deserves much deeper exploration and discussion than we are able to offer here, but are offered with the understanding that institutions are not static but evolve and that we can help them evolve, but only if we take education seriously and that means by insisting that our practices live up to our legitimations.

3. The Legal Community and the US National Security State
3.1 Nuclear Weapons and International Legal Discourse. The signing of the UN Charter (6/26/1945) and the London Charter (8/8/1945) demonstrated that the US recognized that the rule of law is essential to end “the scourge of war” and that the customary rules and principles of humanitarian law were universally binding. Conversely, with the atomic bombings of Hiroshima and Nagasaki (8/6&9/1945), the US asserted war powers unlimited by law. We continue to struggle with these two views of reality, whether non-violent resolutions and agreements or greater threat or use of force provides the basis for security.

Nuclear weapons as a key component of the NSS. The development of nuclear weapons marked the emergence of the US NSS. The secrecy and the massive scale of the Manhattan Project institutionalized a reality of a constant threat of use and proliferation. These were justified as deterrence (Schell:2003) and glorification of things nuclear, both militarily (the bombings of Hiroshima and Nagasaki saved [our] lives and ended the war) and civilian (“atoms for peace” and “power too cheap to meter”) and required denial of the deadly short and long-term effects of the nuclear system: the mining, refining, production testing, and use...
of nuclear weapons. With the Manhattan Project, Congress abdicated its public fiduciary responsibility (“the black budget”) and both congress and the executive ignored positive customary and conventional international laws of war. Unchecked concentration of power permitted the Truman, Groves and Stimson decision to drop the bombs without debate and despite the opposition of 80% of the Manhattan project scientists (Lanouette in Bird and Lipschultz 1998:109).

Nuclear Weapons as Antithetical to the Rule of Law. The legality and dysfunctional nature of nuclear weapons has been challenged over the past 57 years both formally or directly (the ICJ Opinion (ICJ-OP), UNGA Resolutions, the Shimoda case, resistance cases, compensation claims, etc.) and informally (demonstrations, protests). The antiwar movement has long understood that “the new empirical realities” (Leman-Langlois 2002) were at odds with the conventional wisdom that nuclearism or war could provide security or freedom. Eco (2001:7), for example, concludes “the discovery of atomic energy, television, air transport and the birth of various forms of multinational capitalism have resulted in some conditions that make war impossible.” Together, the civil rights, the antiwar, the anti-nuclear, environmental, and economic justice/corporate responsibility movements all address pieces of the problem and the new solution it appears to demand (Leman-Langlois 2002:81). While by 1970, the US formally recognized that nuclear disarmament and general and complete disarmament were essential (Nuclear Non-Proliferation Treaty, Art. VI), the US NSS institutional practices remained unaltered.

3.2 The 1996 International Court of Justice (ICJ) Opinion.

These two views of reality, that complete nuclear disarmament is a universal obligation and that US deterrence provides security, are articulated in the dissenting opinions of ICJ Judges Weeramantry and Schwebel, regarding the United Nations General Assembly advisory opinion question, “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” Nuclear weapons went “on trial” before the most authoritative court in the world with written and/or oral submissions by thirty-two states including full participation of the US and all other permanent members of the Security Council except China.

The ICJ found unanimously that “a threat or use of force by means of nuclear weapons that is contrary to Article 2.4 of the United Nations Charter and fails to meet all the requirements of Article 51 is unlawful” (105(2)D); and that “a threat or use of nuclear weapons should [§ 42, “must”] also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the [§79, “intransgressible,” “fundamental”] principles and rules of international humanitarian law as well as with
specific obligations under treaties and other undertakings which expressly deal with nuclear weapons “(105(2)E).

Importantly, the unanimous court also concluded that “there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. (ICJ-Op/1996:36-105(2)F). But, having found general illegality of any threat or use, the ICJ hedged saying, “the court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake” (105(2) E/ICJ-Op/1996:34) to avoid challenging the bald mischaracterizations made by the US and UK, that “modern nuclear weapon delivery systems are indeed capable of precisely engaging discrete military objectives” (ICJ-Verbatim Record/CR05/35/15Nov1995:88) and are “an essential element of national security” (ibid: 84).

Judge Schwebel, dissenting from the court’s general finding of illegality, proffers a view that NSS practice of deterrence justifies the legality of these weapons.

There is on the record remarkable evidence indicating that an aggressor [Iraq] was or may have been deterred from using outlawed weapons of mass destruction...by what the aggressor perceived to be a threat to use nuclear weapons against it [by the US James Baker to Tariq Aziz] should it first use weapons of mass destruction against it (ICJ-Op/1996:88).

With the US’s unilateral invasion of Iraq (2003) the justification of “deterrence” is further unmasked as a US NSS commitment to proliferation of nuclear weapons.

Judge Weeramantry’s dissent, arguably the most important and complete modern legal opinion on this topic, challenges the court’s hedge by saying “The use or threat of use of nuclear weapons is illegal in any circumstances whatsoever. It violates the fundamental principles of international law and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law.” (ICJ-Op/1996:170).

He reasons that “all postulates of law presuppose that they contribute to and function within the premise of the continued existence of the community served by that law. Without the assumption of that continued existence, no rule of law and no legal system can have any claim to validity, however attractive the juristic reasoning on which it is based. The taint of invalidity affects not merely the particular rule. The legal system which accommodates that rule, itself collapses upon its foundations, for legal systems are postulated upon the continued existence of society” (ICJ-Op 1996:237 ). This is because the de jure ungirding of the international legal system, sovereign equality of states, cannot tolerate de facto inequality in which some country’s “security” depends on threat or use of nuclear weapons or other weapons or
tactics of mass destruction. “A legal rule would be inconceivable that some nations alone have the right to use chemical or bacteriological weapons in self defense, and others do not. The principle involved, in the claim of some nations to be able to use nuclear weapons in self-defense, rests on no different juristic basis” (ICJ-Op/1996:242).

These dissents reflect the same contrasting views on the legality of nuclear weapons: Weeramantry, that they are fundamentally antithetical to the rule of law; and Schwebel, that they can be accommodated. And while these dissents are informative, the ICJ’s hedge leaves the question of illegality of a particular threat or use to be decided by courts in countries relying on nuclear weapons and war for “security.’

3.3 Sacred Earth and Space Plowshares II, 2002 (SESPII).³

The Plowshares Movement, led by Philip and Daniel Berigan and Elizabeth McAlister, combines Isaiah 2:4, “they shall turn they swords into plowshares...and study war no more” with what Foucault (1993:33) calls “that great conquest of Greek democracy, that right to bear witness,...that right to set a powerless truth against a truthless power” and to fairly, equitably and independently seek truth through exercise of a non-violent “relation of struggle, domination, servitude and settlement” (Foucault 1991:9). Acts of non-violent resistance to illegal and criminal threat or use of a particular nuclear weapon complement acts of civil disobedience that protest unjust laws. From 1983 - 2003, there were more than 55,000 arrests in the US and Canada for anti-nuclear acts of civil resistance and civil disobedience (Nuclear Resister 2001, 2003).

Plowshares resisters refuse complicity with the NSS and its violence and instead insist on legitimate open, accountable and non-violent mechanisms for problem resolution and agreement. The Plowshares movement’s emphasis on prison-witness and non-cooperation with illegitimate courts are undertaken in solidarity with those (the Hibakusha⁴, African-Americans, Native-Americans) involuntarily subjected to the clear civil, political, economic and social injustices of the NSS. These two groups, the oppressed and the resisters and disobedients, or as Marcus Raskin puts it, those “with a surplus of pain and surplus of consciousness,” acting in solidarity, expose empirical realities and participate in solutions framed by a good-faith rule of law view of normalcy.

This struggle between human and inhuman (violent) responses to nuclear weapons also plays itself out in conflicting translations of the inscription on the cenotaph at the Hiroshima Peace Memorial. The English translation reads variously, “May their souls rest in peace. May the mistake or evil never be repeated?” The Japanese word translated as “evil” implies something natural and unchangeable. But the

³US v Gilbert, Hudson and Platte, US District Court Colorado, Crim No. 02-CR-509-RB.
⁴Victims of nuclear bombings (narrowly defined) or of the nuclear enterprise (widely)
accurate translation, “mistake/error” connotes a common human problem that, however serious, can be
resolved, or as a child at the Hiroshima Peace Memorial Ceremony in 1999 put it, “Men made the bomb.
Men can unmake it” or as Foucault (1994:7) says, “knowledge was invented...it has no origin.” Accordingly,
despite experiencing the unspeakable horrors of the atomic bombs, “we must never lose sight of the
extraordinary humanity of the people of Hiroshima” (Oe 1998:413) who have concluded that nuclear
weapons have made retribution unthinkable and unjustifiable and that security and justice can only be
practically achieved through negotiation and non-violent disarmament.

Critical Analysis of the SESPII Case. Three elderly Dominican Sisters resolved to illustrate that the illegal
and criminal threat and use of weapons and tactics of mass destruction can be ended by non-violent
declaration, inspection and disarmament of one weapon at a time. Calling themselves “Sacred Earth and
Space Plowshares 2002,” Ardeth Platte, 67, Carol Gilbert, 55 and Jackie Hudson, 68, donned hazardous
materials suits with “Disarmament Specialists” on the front and CWIT (Citizens Weapons Inspection Team)
on the back. In the early morning of October 6, 2002, the first anniversary of the US bombing of
Afghanistan, they cut one link in two chains to inspect a Minuteman III, N-8 nuclear missile silo site in
northern Colorado. They found, as their research had indicated, a 335-kiloton, first-strike intercontinental
ballistic missile on high alert, ready to unleash within 15 minutes, vast and uncontrollable heat, blast and
radiation 20 times greater than the Hiroshima bomb. They placed on the silo cover slab a copy of Francis
Boyle’s, The Criminality of Nuclear Deterrence and other evidence of their understanding of the law that
prohibits any threat or use of this weapon. In an act of symbolic disarmament, they poured their own blood
in the form of six crosses on the silo cover and tracks. They then carefully lowered 32 feet of perimeter
fence to symbolically expose the ongoing crimes this weapon threatens. They prayed and sang until some
very young and heavily armed Air Force personnel arrived, arrested them and took them to jail.

The Case showed how a judicial system that is beholden or subservient to the NSS, loses its independence
and competence and subverts constitutional guarantees of fair trials. When faced with open, good-faith,
non-violent and symbolic resistance to the ongoing threat of use one nuclear weapon, the trial court
awkwardly justified the legality of nuclear weapons and used the essentially non-violent arena of the
courtroom to reify its violent view of order and security. The court openly acted in cahoots with rather
vicious prosecutors backed by heavily armed guards.

In the SESPII case, the prosecutor brought two felony charges against the nuns: one from the
Sabotage chapter entitled “Destruction of national-defense materials, national defense premises or national
defense utilities” (Count I 18-USC-2155) and the other “Depredation of Property” over $1000 (18-USC-1361).

The prosecution and the court, in tandem, used two strategies. First, they excluded any international and domestic law concerning the illegality of the MMII because of its direct clash with NSS, even though the laws of war were directly relevant to all elements of the crimes charged. Second, they eliminated elements of the crimes relieving the prosecutor of his burden to prove each and every element beyond a reasonable doubt. The result was that both crimes became strict liability destruction of any property crimes without substantiation of alleged damages required. Both strategies ignore well-understood foundations for a fair trial.

Pretrial Motions. The Nuns began their defense with several motions to dismiss, arguing that the government lacked discovery to prove beyond a reasonable doubt each and every element of the offenses charged and that the government failed to apply or misapplied the intransgressible laws of war directly relevant to all elements of the crimes charged. The Prosecutor filed a motion in limine to prohibit defenses of choice of evils, justification or international law calling the defense arguments “convoluted.” At the Motions hearing international law Professors Francis Boyle and Ved Nanda testified, to no avail that the binding law applied to uncontested facts positively prohibits any threat or use of even the one Minuteman III at issue and that under current law the Nuns’ measured, symbolic, public acts were reasonable especially in light of current new and expanded threats to use nuclear weapons (Nuclear Posture Review, 1/02, National Security Strategy, 9/02).

The legality of US NW, the court contended, had already been decided:

I find and conclude, that in enacting 18 USC 2155, Congress did not intend to require debate about the quintessential character of our weaponry in a criminal trial. To conclude otherwise, deconstructively would create two unintended and untenable consequences: 1) inconsistent verdicts; and 2) unworkable national security policies...Twelve citizens acting as jurors, but without political responsibility and accountability would have authority to determine which people could vandalize or destroy which weapons systems.” (Judge Robert Blackburn, Pre-trial Orders in Limine (PTO) 2003:25-26); “the will of the majority, legitimately expressed, had prevailed” (PTO 2003:13).

In fact, the court concluded that it was not competent to deal with this situation for judgments “regarding the course of action chosen by elected representatives... are not the province of the judge (or jury) under the separation of powers established by the Constitution” (PTO 2003:13). With this conclusion, the court should have dismissed the criminal charges against the nuns. Instead, it wrongly concluded that all defense evidence was irrelevant.
Denial of the dangers of the Minuteman III. Having denied admission of all the nuns’ proffered fact and law evidence regarding actual and intended effects and uses of the MM III, Judge Blackburn indulged in unfounded speculation about nuclear weapons. The court found that deterrence is a “nebulous contingency plan” that involves “no credible threat of the imminent use of the Minuteman III” (PTO:2003:8) and that the Nuns were “seeing ghosts under every bed” (PTO-2003:9). Along the same lines, the prosecutor charged the nuns as saboteurs, while at the same time claiming that they engaged in a “typical protest.” Because US “national defense” could not have legal limits the court found that the MMIII poses no “imminent harm,” not “a real emergency” and that the nuns were “devoid of fears of an immediate US first strike.” (PTO (2003:8). The jury was instructed not to consider any of the nuns’ testimony regarding the realities of the Minuteman III.

The question of jurisdiction to consider the laws of war ironically, echoed the attempted defenses offered by Germans judges at Nuremberg (cf. The Justice Case, 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951) at 1086). The court inverted its and the nuns responsibilities by pronouncing that “an individual cannot assert a privilege to disregard domestic law in order to escape liability under international law unless domestic law forces (as opposed to authorizes) that person to violate international law (PTO:2003:18). Furthermore, Blackburn ignored the positive limits to US war powers as expressed in numerous treaties, the US criminal code [war crimes, 18 USC 2441; genocide, 18 USC 1091-1093] and the intransgressible rules and principles of humanitarian law, finding that international law in general is “not grounded in the framework of positive domestic law.” (PTO:3/18/03:21).

This position leaves the court with the conclusion that while citizens have the right to decide to use NW, they are not responsible for the consequences of their decision. “To hold that the criminal statutes here are supplanted by continually evolving customary international law would be to substitute the wisdom and judgment of democratic political branches of government for that of an independent academic community” (PTO:2003:21). This view ignores the principle of the separation of powers, that any law passed by congress or applied by the executive is subject to review for constitutionality.

For the court to hold as it did that war crimes don’t apply because they aren’t jus cogens prohibitions like slavery, torture or genocide, “none of which are implicated here” (PTO 2003:19) is not only factually and legally wrong, but delusional. Judge Blackburn reasoned, based on stare decisis, that “we will apply international law when it suits us” (PTO 2003:21) following incorrect federal appeals court holdings that the laws of war don’t apply, because protection of property statutes are “wholly independent” (US v
Allen, 760 F 2d 447, 453 (1985) and “would be equally valid if there were no Trident [or MMIII] system” (US v May, 622 F 2d 1000, 1009-10 (1980).

The ICJ Opinion is directly relevant because it summarizes, most authoritatively, the fundamental rules and principles of humanitarian law that the US formally recognizes and that absolutely prohibit any threat or use of any weapon, such as the MM III that “is incapable of distinguishing between combatants and noncombatants.” Judge Blackburn further showed his incompetence by denying the relevance of the ICJ’s findings and holding that “judgments of the ICJ do not fall within the definition of jus cogens or peremptory norms of international law” (PTO 2003: ). Further, not having understood the sources and application of law as described in Article 38 of the Statute of the ICJ (an integral part of the UN Charter, a US treaty), the court claimed that “The ostensible jurisprudential puissance of the Paquette Habana, 175 US 677 (1900) has evanesced” (PTO-2003:20).

As Judge Weeramantry predicted deductively, the trial court’s holdings in the SESPII case demonstrates how a legal system that accommodates a rule of legality of weapons of mass extermination “collapses upon its [ substantive] foundations.” In addition to lack of both independence and competence related to the directly relevant laws of war, Judge Blackburn went further denying the nuns numerous constitutional guarantees essential for fair criminal trials.

Including the Elements of the Charge. Felony depredation of property (18 USC 1361) requires proof of damage of over $1000, which the prosecution could not substantiate. Consequently, the prosecution brought a sabotage charge as a greater included felony that does not require the establishment of damage costs, only that defense materials, were damaged. This method required the court to eliminate necessary proof of willful injury, damage or interference with the national defense elements of the sabotage charge. The national defense element of 18 USC 2155 became anything/everything or nothing, “a generic concept of broad connotations, referring to the military and naval establishments and related activities of national preparedness.” (Gorin v US, 312 US 19 (1941). Thus, 32 feet of fence became the national defense.

Specific intent crimes were turned into strict liability crimes. The nuns were denied any evidence to show reasonable doubt that they had any intent to injure or interfere with the national defense no matter how broadly it may be defined. The MM III was presumed innocent and the nuns presumed guilty. The court instructed the jury, under penalty of perjury, that no defense evidence could be considered because it was an irrelevant “motivational theme.” (PTO:2003:24). .

The Nuns 6th Amendment Right to a Defense was denied by the court’s denial of the relevance of the laws of war and by reducing specific intent crimes to strict liability crimes. The court permitted no defense
evidence neither in the context of casting reasonable doubt that the prosecutor had proved each and every element of the crimes charged beyond a reasonable doubt nor in the context of an affirmative justification defense. After all defense evidence was deemed irrelevant, the court tried to cover its tracks, “I do not gainsay the right of criminal defendants to present defenses...but that does not include the right to present irrelevant evidence” (PTO:2003:28). In prohibiting even a good faith defense the court resorted to ad hominem attacks saying “the gravamen of their defense is that they in good faith (subjectively) reasonably relied (objectively) on their understanding of international law as espoused by scholars and publicists of international law such as their principal maven, Francis A Boyle, in concluding that their remonstrative actions were both necessary and justified” (PTO:2003:22).

In addition, no justification defenses were permitted because, the Court argued they had no reason to expect that they would be successful, “defendants anticipation of effecting change in this country’s or this administration’s policies concerning nuclear weapons is pure conjecture;” (PTO 2003:.9). They could have sought other ways to address their concerns for legal alternatives are available by “the thousands” and “the fact that the defendants are unlikely to effect the changes they desire through legal alternatives does not mean, ipso facto, that those alternatives are nonexistent.” (PTO:2003:11).

Denial of 6th amendment right to be Informed of nature and cause of the accusation was accomplished by the prosecutor’s frequent refrain that 18 USC 2155 was not sabotage. The indictment read “willful injuring, damage, interference with the national defense” but sabotage was “proved” as “injury to national defense materials.” In addition, the court based its rulings on cases involving “trespass, vandalism and protest.”(PTO:2003: 3, 7, 8, 9, 10,11, 23) . Astoundingly, the court found that this wasn’t a criminal case at all for “the defendants lack standing to argue that the Minuteman III missile system was developed and deployed in violation of international law.” (PTO:2003:14). The nuns exposure of the US’s grossly illegal high alert threat to use a weapon of mass extermination was irrelevant because “they cannot skirt the standing requirement by factitiously creating circumstances to cast themselves as defendants rather than plaintiffs” (PTO 2003:15). This finding alone, of course, required the Court to dismiss the criminal charges brought against the Nuns.

Outcome. The logic of the court, along with the predetermined guilty verdict, led the press and the public to label this a kangaroo court defined as “A mock court in which dominant prisoners tyrannize the defenseless, trying them on trivial or merely fanciful charges, as loitering with intent to breathe someone else’s air”” (Ciardi 1980: 216-17). The court’s orders justify the trap as if we are all prisoners who can do nothing about the demonic doom of nuclear weapons. The court sentenced the nuns to 30,33,41 months in
prison and 3 years of supervised release during which time they are prohibiting from entering any defense
or military establishment. The court returned to the sabotage conviction, rather than depredation, as a
sentencing base again apparently understanding that the national defense does not have to be injured.
Then the court departed downward because the nuns did not injure the national defense. The court held
that if the nuns had “prevented an imminent nuclear launch by terrorists” their acts would have been an
excusable lesser harm. The thousands of letters that came to the judge in support of the nuns from people
all over the world made it clear that terrorists include the US who threatens to use a WMD like the MM III
and that the nuns inspired them to take action for nuclear disarmament.

3.4 How will change happen?
The African National Congress (ANC), the major organ of resistance to apartheid, accomplished elimination
of apartheid without the commission of parallel *jus cogens* crimes, without the predicted retaliatory “blood
bath.” Following the end of apartheid, the South African Truth and Reconciliation Commission (TRC)
examined the complicity of both individuals and institutions in plainly illegal system of apartheid that had
been “justified” as the “democratic” law of the land. The TRC examined the processes of colonization and
the necessary presumptions and elements for transformation. We expect that the abolition of WMDs and
war will follow a similar process and have accordingly rephrased the TRC’s institutional analysis of the
Legal Community under apartheid to reflect an institutional analysis of the US legal community under the
NSS:

1. Human rights are rights of all, not rights of Americans or a privileged few.
2. Enormously principled and courageous action by a small minority of lawyers from all branches of the
profession assist in establishing a climate in which a constitutional and negotiated dispensation of the
problem of WMDs and war was possible. In addition to “resting on the twin foundations of a bill of rights
and the power of judicial review,” the Courts must take forthright cognizance of the primacy of treaties
(US Constitution Article 6) and of the fundamental rules and principles of humanitarian law.
3. Because Congress and Executive in the US “represent” the military/industrial complex, attempts by
federal judges to act independently are discouraged. For example, judges’ amelioration of harsh effects
of mandatory sentencing guidelines have resulted at best in further legislative steps to curtail judicial
independence and at worst to the overt subversion of the formal independence of the courts and the
‘packing of the Bench.’
4. The record of judicial impartiality and pursuit of justice in many US state courts, with regard to cases of
non-violent civil resistance to nuclear weapons and war, is generally better than federal courts. But there
is enormous variation and many court’s understanding of “certainty” in national defense or security
matters leads Courts to refuse to look at the reality of the effects of nuclear weapons and to find no legal
limits to US war powers. Such political views of the courts results in manifest injustice both substantively
and procedurally. Since the NSS legitimations of nuclear weapons and unlimited war were thoroughly
embedded in the federal judiciary, corrective recourse through the appeal process were futile and only
reinforced “bad law” of federal appeals courts cited by trial courts.
5. Legal education in the US neglects or does not generally include study of human rights or humanitarian law and even the latest most distinguished US Human Rights (Henkin, et al 1999) omits any discussion of nuclear weapons or the seminal ICJ-Op.

6. The administration of justice and a legal order must preserve impartiality and independence. The judge often acted as prosecutor and jury. Non-violent resisters to nuclear weapons and others oppressed are stripped of basic rights in criminal cases including: notice of actual charges, presumption of innocence, right to bring witnesses in their defense directly relevant to elements of the offense(s) charged, holding the government to its burden to prove each and every element of a criminal offense charged beyond a reasonable doubt, the right of a jury to decide relevant facts and be properly instructed on existing law. The courts abrogate, ignore or misapply the fundamental rules and principles of humanitarian law and reversed and confused issues of standing and relation of laws problems that prohibit use of domestic law to override these basic rules of law.

7. All participants in the legal process including judges, prosecutors, defense lawyers, juries as well as litigants or defendants such as nuclear resisters have responsibilities to articulate, and argue in a truthful manner and with integrity.

Most importantly, the TRC concluded, “There needs to be substance to the notion of judicial independence, otherwise the courts will be seen as the mere obedient servants of the other branches of government…to preserve the basic equity and decency in a legal system” (TRC/LC 1998:#28). The NSS characterized in its current extreme state by bankrupt policies of nuclear imperialism and concomitant economic and social injustices both at home and abroad is bolstered by the legitimations of plainly illegitimate nuclearism. “It is useful to government and legislatures pursuing obvious injustice to have superficial and sanctimonious justifications by courts.” (TRC/LC 1998:#28).

Abandonment of illegal and criminal threat or use of nuclear weapons. As Mayor Takashi Hiraoka of Hiroshima said in his August 6, 1997 Hiroshima Peace Declaration, “Nuclear weapons stand at the very apex of all the violence that war represents.” Thus, it is highly alarming that “counter-proliferation” has replaced “non-proliferation” in the current U.S. administration and that non-violent disarmament, the only real and possible solution, is off the table as an obligation of the US (Keller 2003). Already with Martin Luther King's assassination, the most coherent articulation of the problem and the new solution died too and the so-called “real politque” of perpetual violence surged to an even uglier phase. The seeds of a coherent mass movement raising alternatives to war and militarism are again sprouting precisely because the divergence between justifications for war and militarism are ever more plainly divorced from unjust economic, social, civil and political realities. The central justification for attack on Iraq, “Iraq’s threat of use of weapons of mass destruction” was an outright lie and even had it not been a lie, use or threat or weapons or tactics of mass destruction cannot stop threat or use of weapons or tactics of mass destruction
nor make such threat or use legal. Required changes may derive from more massive and concerted national and international grassroots non-violent resistance and protest actions such as those that hundreds of people engaged in at all 49 of the MM III sites in Colorado the day after the nuns sentencing. Because the threat or use of “legal” nuclear weapons is thoroughly institutionalized, resolving the problems of their illegality and criminality, requires full institutional analysis and systemic corrective measures beyond insisting on fair trials in resistance cases. The UN must again be persuaded to take a role. For example, the UNGA clearly has the responsibility to draft a Uniting for Peace Resolution reaffirming the rules and principles of the Charter, requiring US withdrawal from Iraq and beginning, with or without the US, negotiations for “nuclear disarmament in all its aspects” according to a step by step process of declaration, de-alerting, disassembling, inspections and disarmament. A Truth and Reconciliation Commission leading the way to nuclear disarmament and general and complete disarmament could be convened in the US and authorized by resolutions from municipalities, counties, states and NGOs.

The truth that nuclear weapons and thus also war, must and can be abandoned will continue to come forth and the seeds of reconciliation of this central problem of our day plainly sprout when citizens and lawyers act non-violently and consistently with the new formation of the problem of security and continuance requiring not ever greater use of force but care for each other and our common environment.

4. Closing remarks
The NSS, due in part to its WMD, represents a very dangerous state, threatening both ordinary society and life itself. Yet, there is reason for hope, event though the NSS has colonized many crucial democratic institutions, including education and the judiciary, because the potential for institutional change depends on the awareness, commitment, energy and knowledge of participants. We hail acts of nonviolent and symbolic civil resistance as essential for positive institutional change, for unveiling plainly illegitimate threat or use of nuclear weapons and urging non-violent participation. We also recognize the need for those assigned institutional roles charged with the protection of the democratic state fulfill their roles responsibly by endeavoring to safeguard the legitimate functions of their institutions including guaranteeing an open space for the critical exploration of ideas and knowledge and the fair and equitable hearing of grievances including redress for ultra vires acts of state. But we also need 1) to understand the functioning of and purpose of normal institutions as the foundation of human societies and especially the necessity for institutional practices to be consistent with their legitimations within an egalitarian society, 2) to recognize the distinction between sincere and insincere legitimations (propaganda), and to emphasize the importance
of internal and external protective and corrective mechanisms, to protect the state and its institutions from erosion of its democratic protections and against the hijacking of the state. Change is possible, though, daunting, but on the other hand, the alternative is unworkable.

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