

# FOREWORD: McCARTHYISM, THE INTERNMENT AND THE CONTRADICTIONS OF POWER†

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## INTRODUCTION

There is naked power, which grabs and smashes without need for denial or justification. There is legitimized power, which justifies without denying. There is masked power, which never justifies, because the denial of its own existence is complete. The articles in this symposium call to mind all three kinds of power. The internment, falling in the middle of the twentieth century, is a marker for the modern age's struggle over these forms of power. This foreword will suggest some ideas about power that are derived from looking at our Constitutional order through the lens of the World War II internment of Japanese Americans.

This symposium is part of a radical tradition in scholarly inquiry that looks to the experience of outsiders as a lens for understanding our history, our culture, and our laws. Using the internment as a locus of analysis expands our understanding of the history of power. That understanding is critical in confronting a significant violation of civil liberties that occurred immediately in the wake of the internment. The massive repression known as McCarthyism, like the internment, was a repudiation of Constitutional values in the name of preserving the republic. This was at once an old story and a new one, for the repression of the McCarthy period occurred while a newly acknowledged commitment to racial equality was gaining ascendancy. The internment was becoming a wrong in the normative Constitutional mind at the moment when a huge, enforced silence made condemnation of red-baiting a normative impossibility. The internment story both pre-sages and diverges from the Cold War story, making way for our contemporary map of power: racism and class privilege dancing unscathed behind the curtains marked "formal equality" and "free mar-

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ket.” Understanding the changing rhetorical response to the internment is part of understanding how the present state of masked power came about.

In addition to analyzing the operation of repressive power in both the internment and McCarthyism, I make an explicit, value-laden claim: There is a Constitutional promise of liberty and equality, violated in both instances, which we have yet to uphold. Like the authors in this volume who pursue understanding of reparations, I ask for repair of the damage of McCarthyism and call for both reparations to the domestic Cold War victims and an end to continued red-baiting. The closing prescription of this introduction asks what our inquiry and our activism might look like without the legacy of red-baiting. What could we say about class, distributive fairness, illegitimate power, and the need for revolutionary change, if our voices were not stilled by a collective memory of people dragged from their beds at night because they believed in economic justice?

## I. THE POWER THAT JUSTIFIES: A STORY

### A. *Who Is A Threat to National Security?*

She was tiny and erect, with her graying hair pulled back in a bun at the nape of her neck. She spoke slowly, elegantly, and modestly. Her English was flawless, but the ethos of her tone was Japanese: a language in which the speaker apologizes periodically for taking up space in the universe; a language of passive, self-denying voice. As a preteen, I went to the symphony with her because she had season tickets and perceived, not accurately, that I had a talent for classical music. I went out of respect for the woman, the small-boned schoolteacher who had all her life supported young people of possible talent and who had once been notorious and demonized in the Territory of Hawaii. I wanted to sit proudly by her side in the concert hall, among patrons who were mostly wealthy and conservative, as she said with her presence: I am not ashamed to be here, and you were not successful in destroying my spirit.

Aiko Tokimasa Reinecke<sup>1</sup> was a lifelong activist for social change: for labor rights, for peace, for an end to poverty. As a young schoolteacher, she championed these causes along with her husband, the pioneering linguist and schoolteacher John Reinecke. The Reineckes'

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<sup>1</sup> For a general background on the Reinecke affair, see SANFORD ZALBURG, A SPARK IS STRUCK! JACK HALL AND THE ILWU IN HAWAII 218-23 (1979).

progressive activism led to suspicions that they were members of the dreaded Communist Party. They were both suspended from their jobs and ultimately dismissed because of the allegations.<sup>2</sup> In addition, John Reinecke was arrested and tried for treason in 1951, along with six other progressive Hawaiian organizers.<sup>3</sup> The Hawaii Seven, as they were known, were convicted under the Smith Act<sup>4</sup> for conspiring to organize the Communist Party and advocating the overthrow of the government. The defendants were each sentenced to five-year prison terms and ordered to pay a \$5000.00 fine.<sup>5</sup>

At the time of these persecutions, the Big Five—the interlocking corporations that ran Hawaii's economy and controlled its courts and legislature—was experiencing its first real challenge. The International Longshoremen's and Warehousemen's Union (ILWU) was organizing the plantations and challenging the oligarchic rule of the Big Five.<sup>6</sup> It was a war of epic proportions.<sup>7</sup>

The sugar and pineapple plantations controlled the lives of immigrant workers, who were dependent on the plantation for housing, medical care, and food and supplies from the company store.<sup>8</sup> The workers—Chinese, Japanese, Portuguese, Filipino, Korean, Okinawan,

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<sup>2</sup> See *id.*

<sup>3</sup> See *Fujimoto v. United States*, 251 F.2d 342 (9th Cir. 1958).

<sup>4</sup> See 18 U.S.C. § 2385 (1994). The Smith Act was passed by Congress as part of the Alien Registration Act of 1940. Suspected members of the Communist Party were usually prosecuted under the provision which made it illegal "to organize or help to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow or destruction of [any Government in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such group, society or assembly of persons, knowing the purposes thereof." Cabell Phillips, *Communist Case to Provide Test of Smith Act*, N.Y. TIMES, Oct. 16, 1949, reprinted in LOYALTY AND SECURITY IN A DEMOCRATIC STATE 153 (Gene Brown ed., 1977). See, e.g., *Scales v. United States*, 367 U.S. 203 (1961) (using the Smith Act to sustain conviction and imprisonment of a person for six years for being a member of the Communist Party with knowledge of its purposes); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (upholding the Constitutionality of the registration and disclosure provisions of the Internal Security Act of 1950 as applied to the Communist Party, and the Smith Act membership clause making punishable active and purposive membership in the Communist Party).

<sup>5</sup> See T. MICHAEL HOLMES, *THE SPECTER OF COMMUNISM IN HAWAII* 210 (1994). The only female defendant received a three-year sentence and a \$2000.00 fine. See *id.* All of the convictions were appealed and overturned five years later. See *id.*; see also *Fujimoto*, 251 F.2d at 342.

<sup>6</sup> See ZALBURG, *supra* note 1, at 324.

<sup>7</sup> Indeed, when I wrote a biography of one of the lawyers who represented the workers in that war, a request for the film rights arrived in the mail. See Mari J. Matsuda, *Harriet Bouslog*, in CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAII 148 (Mari J. Matsuda ed., 1992).

<sup>8</sup> For general history of Hawaii's plantations, see EDWARD D. BEECHERT, *WORKING IN HAWAII: A LABOR HISTORY* (1985); GARY Y. OKIHIRO, *CANE FIRES: THE ANTI-JAPANESE MOVEMENT IN HAWAII, 1865-1942* (1991); RONALD TAKAKI, *PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII, 1835-1920* (2d prtg. 1984) (1983).

and Puerto Rican—were kept in racially segregated camps, with a racially stratified pecking order. The plantation owners shrewdly manipulated racial divisions to keep the workers from demanding better conditions. The ILWU, inheritors of the radical Industrial Workers of the World tradition of strict enforcement of racial equality, organized the first multiracial sugar strikes. There were massive arrests, and the plantation owners expected to keep strikers in jail indefinitely under their traditional system of trumped-up charges and no due process for workers.<sup>9</sup> This time, however, the workers were able to mount a legal challenge. The ILWU imported talented and spunky union lawyers to challenge, for the first time, the Big Five's virtual ownership of the courts. The strikers were freed, and a revolution was in the making. For the first time, workers had rights, representation, and the ability to extract concessions from the plantations.

The press, like all organs of power in the state, was controlled by the Big Five. A propaganda campaign attributed workers' newly vibrant agitation for fair treatment to outside Bolshevik influences. A news reporter published a book called *A Plot to Sovietize Hawaii*, alleging that the ILWU office housed "the blueprints for the political conquest and economic overthrow of these rich Pacific Islands."<sup>10</sup> The morning paper ran a front page "Letters to Joe" feature, parodying Stalin's alleged relationship with the ILWU, and Congressional investigators published a report labeling union leader Harry Bridges the "unseen Communist dictator of the Territory of Hawaii."<sup>11</sup> Hawaii's oligarchy cultivated its own version of a red-baiting campaign against labor unions that was raging in full-force on the continent.

Ellen Schrecker, in her comprehensive history of McCarthyism, argues that the Communist Party contributed to its own undoing by its secretive behavior.<sup>12</sup> Communists were involved in militant trade unionism, and they did not always reveal themselves as Party members. As Schrecker herself documents, however, the secretiveness followed the repression: In the red scares that preceded McCarthyism, Communists and Socialists were persecuted, arrested, physically attacked, deported, fired from their jobs, and otherwise silenced from effective political participation. Open membership in the Communist Party was

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<sup>9</sup> See Matsuda, *supra* note 7, at 154.

<sup>10</sup> THOMAS LAWRENCE O'BRIEN, *THE PLOT TO SOVIETIZE HAWAII* 4 (1948).

<sup>11</sup> Matsuda, *supra* note 7, at 162.

<sup>12</sup> See ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 24–26, 140 (1998). This view is shared by Eric Bentley. See ERIC BENTLEY, *THIRTY YEARS OF TREASON: EXCERPTS FROM HEARINGS BEFORE THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1938–1968*, at 940 (1971).

unthinkable for many in this context. Precisely because of this repression we will never know exactly who among progressives of this period were Party members. We do not need to know.

I do not know whether Aiko Reinecke was a member of the Communist Party. The most principled progressives of this period refused to ever answer the question, "Are you now or have you ever been a member?" I honor that refusal. What I do know is that Aiko Reinecke cared about the least advantaged members of the human family, and she worked on their behalf without secrecy, without malice, and certainly without the need to conspire in the violent overthrow of the government of the United States. She was targeted not because of any conspiracy, but because she challenged existing power structures and took the side of the powerless.

Like Aiko Reinecke, the Hawaii Seven defendants suffered deeply from the false charges that were brought against them and eventually dismissed.<sup>13</sup> They lost jobs and livelihoods, and were made public spectacles in sensationalized trials. Hawaii was then, and is now, a culturally premodern state. Social and kinship relations are intense, and who you know, what family you are from, your good name and connections to others are, in many ways, more essential to forming a sense of self than modern, liberal markers like occupation, property, or contracts. As the trial splashed across the front page of the daily papers, the Smith Act defendants and their supporters faced social ostracism in an island community in which social connections were the meaning of life itself. A lawyer from the firm that represented some of the defendants described seeing his lifelong friends cross to the other side of the street when they saw him coming.<sup>14</sup> Ashamed not to acknowledge him, but scared to admit knowing anyone connected with the Smith Act defendants, they avoided him altogether. The Hawaii Seven defendants who were "local"—who were part of Hawaii socially—carried the burden of exposing themselves and their families to this kind of social death, and a generation of school children lost one of the most dedicated teachers the Territory of Hawaii ever had. For her alleged associations with Communists, Aiko Reinecke was forced out of the classroom.

Within this story is the legacy of McCarthyism: social critics and dreamers transformed into demons; labor unions weakened by purges; the legal system conscripted for show trials featuring paranoid visions

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<sup>13</sup> See *Fujimoto v. United States*, 251 F.2d 342 (9th Cir. 1958).

<sup>14</sup> Based on author's conversations with Hawaii Seven Smith Act defense attorneys.

of conspiracy; and a generation deprived of interaction with the most vibrant minds of the time.

Why did I think of Aiko Reinecke and the Hawaii Seven when I read the articles that make up this symposium? The justification for their persecution was the danger of a monolithic, secret, evil threat of worldwide Communism. Here is where McCarthyism links clearly with the internment. It admits of no complexity and leaves no room for individual determination. There is a group among us, that is not us, that is out to destroy us, that must be cabined, contained, and removed. Our very survival is at stake, making talk of civil liberties and due process a luxury. Let's survive first, then we can start talking about human rights. As a form of argument, it is both patriarchal and implicitly homophobic: A tough father, a real man, will smash this looming threat. Don't think you don't need him, and don't give in to soft talk about complexity, democracy, and common humanity. These are some of the thoughts stirred by connecting McCarthyism with the internment.

## II. THE INTERNMENT AS A LENS THROUGH WHICH WE SEE POWER

This symposium looks at American history, law, politics, and culture through the lens of the internment. It uses the method of positioned perspective that marks feminism and critical race theory. It asks what we learn by standing at Poston, at Manzanar, at Heart Mountain, at Gila River, at the horse stalls of Santa Anita.

As a Sansei, I recite these names as my catechism. I think of the people I know who were there and of their stories: of a woman biting down on sticks so as not to cry out in childbirth, lest the neighbors in the next stall think she is weak; of the grand lady humiliated by having to defecate in gang toilets without partitions; of the old man shot in the back when he walked, confused, too close to the barbed wire fencing. I have stood at candle lighting ceremonies memorializing each geographic place where these assaults on Japanese-American humanity occurred.

Using the internment as our departure point is a way to make the camp names more than a private JA<sup>15</sup> catechism. It makes the recitation American, taking the center to the margin to ask: What do we know about our nation when we consider what it did in imprisoning its own? Some see this methodology, like the move to multiculturalism, as balkanizing. The introduction of ethnic studies was violently opposed by

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<sup>15</sup> "JA" or "AJA" are commonly used, self-identifying monikers in the Japanese-American community.

those who felt American knowledge should remain centered on European culture. This resistance to the integration of knowledge is driven by a need to keep power where it is, but it also represents a confusion that one could have in good faith: By parceling out knowledge into discrete identity packages, don't we end up knowing less rather than more?<sup>16</sup> This question suggests that separating women's history, Black history, indigenous history, working class history, and gay/lesbian history destroys the ability to know and understand history as a synthesized and overarching thing of importance.

The articles in this symposium demonstrate that the opposite is true. The lens of the internment is exactly what we need to illuminate grand themes, connections, and a deep understanding of American consciousness. How do we understand the modern conception of the state if we leave out one of the key instances of a democratic government trampling on citizens' rights in order to protect something called the state? Gil Gott's article takes on this question.<sup>17</sup> How do we understand the role of nativism and racism in distribution of land ownership if we fail to connect the internment to its precursor, the Alien Land Laws? Keith Aoki's article asks this question.<sup>18</sup> What does the treatment of interned Japanese Peruvians tell us about the ability of international human rights law to constrain states as dominant as the United States? Natsu Saito's article raises that question.<sup>19</sup> How are we to understand the great Chief Justice Earl Warren's legacy if we do not push hard on the question of how his support for the internment was consistent with his worldview? Sumi Cho's article interjects that question.<sup>20</sup> And, perhaps most important, where do we go from here—what does the internment and reparations for Japanese Americans suggest about the path to justice for all? Among others, the articles by Chris Iijima, Robert Westley, and Eric Yamamoto ask that question.<sup>21</sup>

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<sup>16</sup> For this author's longer response to this query, see MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* (1996). See generally LAWRENCE W. LEVINE, *THE OPENING OF THE AMERICAN MIND: CANONS, CULTURE AND HISTORY* (1996) (responding to the attack on multiculturalism in the academy).

<sup>17</sup> See Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, in this issue, at 179.

<sup>18</sup> See Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As a Prelude to Internment*, in this issue, at 37.

<sup>19</sup> See Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, in this issue, at 275.

<sup>20</sup> See Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, in this issue, at 73.

<sup>21</sup> See Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, in this issue, at 385; Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, in this issue, at 429; Eric K.

These writers challenge traditional interpretations. They challenge the emerging view that the internment was an aberrational and tragic failure of Constitutionalism under duress of war, rather than business as usual in a country where racism and capitalism have always proved the unbeatable pair in a doubles match against individual rights and equality.

To use the internment as a lens is to take the denial of human rights directed against Japanese Americans as a starting point for understanding the bigger picture of repression in America. This goes beyond retrieval of the facts of the internment and condemnation of the Constitutional wrong. Fortunately for the writers in this symposium, they are able to go beyond because of a significant and ongoing body of work documenting the facts and condemning the outrage of the internment.<sup>22</sup> This symposium is stage two, the interpretive work, taking what we know about the internment to the inside of American jurisprudence, and turning the inside out. It is challenging work.

It was challenging for one who went to law school with the Warren Court leading the way—championing penniless defendants, couples who wanted to use birth control, women who wanted to work on construction sites, citizens seeking privacy in their own homes, protestors seeking to end war—to read Sumi Cho's piece and have to revise my view of Warren as a man who overcame the racism of his formative years. It was challenging for one who holds onto the redress movement as a shining moment in the history of Asian-American participation in the justice cause to read Chris Iijima and Eric Yamamoto, each in their own way, warning that redress for Japanese Americans is potentially part of a disempowering story of a beneficent America, a story used to dull our drive for full realization of equality. It was a challenge for a current student of the McCarthy period to ask: What does the internment have to do with the persecution of Communists? As Keith Aoki argues, the internment is not an isolated point in time, but part of an ongoing process. This quite naturally leads to the question that I ask here: How is McCarthyism part of that process, and how does connect-

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Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, in this issue, at 477.

<sup>22</sup> See, e.g., ROGER DANIELS, *CONCENTRATION CAMPS: NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WWII* (Robert E. Krieger Publ'g Co., Inc. 1981) (1971); PETER IRONS, *JUSTICE AT WAR* (1983); MICHU NISHIURA WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS* (1996); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).



ing McCarthyism to the internment help to explain the operation of repressive power?

### III. UNJUSTIFIED POWER AND JUSTIFIED POWER

When the Europeans first swept over the world in what they came to call the Age of Discovery, or the Age of First Contact, known to native people as the Age of Genocide,<sup>23</sup> they felt no particular compunction to justify. There was reference to divine will, but not an elaborate structure of justification for doing what seemed an obvious thing to do: to take what they were entitled to by reason of their inherently superior status. As native people resisted the assaults on their persons and their lands, a contradiction arose. How would title come to pass to the Europeans when someone else clearly did not want to give it up?<sup>24</sup> Justifications began. Words like "conquest," "treaty," "purchase," "*terra nullius* (no one was there, so we claimed it first)" were used, but this was still in the time of kings, and the notion that anyone on the losing end of a power grab was entitled to explanation was not well-entrenched in the worldview of elites.

The legacy of the Enlightenment, as codified in the American legal system, is the need for power to justify itself. A naked grab, justified only by superior force, posed a problem for a nation founded on the revolutionary idea of the inherent rights of human beings to autonomy and self-governance. I speak of these ideas without irony. They deserve respect, even as they are disregarded in practice. I also recognize that the consent of the governed is not necessarily the exclusive claim of Enlightenment thought. In many premodern societies, chiefs held power precariously and held onto it best when all were treated fairly, with rights of criticism, participation, and exit. Power, justified, is sold to the people as in their interest, rather than taken from the people because it is takable.

As discussed throughout this symposium, the internment was justified by widely believed lies. First was the lie of inherent racial being, part of the lie of race. The Japanese Americans were a distinct species, marked by the inability to Americanize. Second was the lie of military necessity. The Japanese Americans were part of a secret fifth column situated to destroy America from within, such that there was neither time nor ability to discern individual loyalty. As with the threat of

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<sup>23</sup> See DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD 55-146 (1992).

<sup>24</sup> See, e.g., HENRY REYNOLDS, THE LAW OF THE LAND 31-54 (1987) (discussing legal illegitimacy of land transfer from Australian aborigines to European settlers).

terrorism today, as with the mysterious Communists that McCarthy searched for, the lack of evidence against the accused Japanese Americans became an additional, solipsistic reason to violate their rights: there was no other way to fight such a hidden threat. Third was the lie concealing true purpose. Military necessity masked the real impetus of lust for Japanese-American land holdings and fear of Japanese-American competition in the highly profitable West Coast farming industry.

The justification for internment, as weak on the evidence then as it is now, was not believed by many of the people who implemented it. Nonetheless, it was offered as a rationale both at the time of the internment and in subsequent court challenges to the internment. A few lonely voices rose up to challenge the justification, but their challenge was repudiated by a perceived threat to survival that required suspension of rights. Pearl Harbor had been bombed and the nation faced a real war, not the imagined and anticipated war that had spring-loaded the national psyche for several years. This was different. Martial law was declared in Hawaii, with habeas corpus suspended and rights of citizens wildly disregarded in the islands.<sup>25</sup>

Japanese Americans were rhetorically transformed into a monolithic, fearsome, inhuman enemy. Japanese Americans were called "mad dogs," "yellow vermin," "treacherous," "warlike," "fifth column," and the ubiquitous "J\_p."<sup>26</sup> Like the Communists, who were frequently prosecuted on laughable evidence, the fact that Japanese Americans were never found to participate in espionage was used as evidence against them:

[M]any of our people in other parts of the country are of the opinion that because we have had no sabotage and no fifth column activities in this State [California] since the beginning of the war, that means that none have been planned for us. But I take the view that that is the most ominous sign in our whole situation. It convinces me more than perhaps any other factor that the sabotage that we are to get, the fifth

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<sup>25</sup> Martial law in Hawaii was an analog to the internment, not much discussed among Constitutional scholars. For an exception, see Harry N. Scheiber and Jane L. Scheiber, *Constitutional Liberty in WWII: Army Rule and Martial Law in Hawaii, 1941-1946*, 3 W. LEGAL HIST. 341 (1990). A handful of rule of law stalwarts opposed martial law, but there was a remarkable silence among civil libertarians and good liberals in response to the internment. See, e.g., J. GARNER ANTHONY, *HAWAII UNDER ARMY RULE* (1955) (describing and criticizing martial law as unconstitutional).

<sup>26</sup> Geoffrey S. Smith, *Racial Nativism and Origins of Japanese American Relocation*, in *JAPANESE AMERICANS: FROM RELOCATION TO REDRESS* 79, 80 (Roger Daniels et al. eds., University of Washington Press rev. ed. 1991) (1986).

column activities that we are to get, are timed just like Pearl Harbor was timed . . . .<sup>27</sup>

Similarly, General John DeWitt called Japanese Americans “112,000 potential enemies,” and agreed that “[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.”<sup>28</sup>

Red-baiting was justified with the same dehumanizing, paranoid language. In testimony before the House Committee on Un-American Activities (HUAC), Communists were referred to as part of a “world-wide organization of gangsters,”<sup>29</sup> “disease spreading,”<sup>30</sup> and “a world-wide conspiratorial movement.”<sup>31</sup> Schrecker cites references to Communists as “poisonous germs,” “snakes,” “tigers,” “rats,” “termites,” and “slime.”<sup>32</sup> Professional red-baiters described a hidden, inhuman threat that would destroy America from within,<sup>33</sup> even though the Communist Party Constitution specifically denounced overthrowing the government.<sup>34</sup>

Even relatively sympathetic historians sometimes use the words of red-baiting. When describing the widespread practice of Communists joining non-Communist organizations, Schrecker claims they “infiltrated”<sup>35</sup> the groups—as though it is somehow sinister that young idealists poured their energy into a wide range of activities, attempting to interject their politics into the organizations they joined. This is

<sup>27</sup> *Select Committee Investigating National Defense Migration*, 77th Cong. 11014–15 (Feb. 21, 1942) (testimony of Earl Warren).

<sup>28</sup> John L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942*, at 33–34, reprinted in *PERSONAL JUSTICE DENIED: REPORT OF THE UNITED STATES COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* 82 (University of Washington Press 1997) (1982).

<sup>29</sup> BENTLEY, *supra* note 12, at 195.

<sup>30</sup> *Id.* at 256.

<sup>31</sup> *Id.* at 274.

<sup>32</sup> SCHRECKER, *supra* note 12, at 48.

<sup>33</sup> See, e.g., WILLIAM C. SULLIVAN, “. . . FREEDOM IS THE EXCEPTION”: THREE LECTURES ON THE VALUES OF THE OPEN SOCIETY 42 (1965) (“In the United States . . . the Communist Party, USA, is engaged in a continuous campaign of subversion designed to weaken our Nation from within. Communist propaganda continually strives to instigate political, economic, and social unrest in an effort to divide, confuse, and undermine non-communist opposition.”).

<sup>34</sup> The Communist Party Constitution stated, “Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine the destinies in any degree, shall be punished by immediate expulsion.” *Reds Here Return to Socialist Aims: New Constitution Liquidates Policies Browder Advocated in Recent Times*, N.Y. TIMES, Aug. 8, 1945, reprinted in *LOYALTY AND SECURITY IN A DEMOCRATIC STATE*, *supra* note 4, at 118.

<sup>35</sup> SCHRECKER, *supra* note 12, at 142.

exactly the kind of civic participation we lament the absence of in the age of alienation.

Additionally, any organization that advocated progressive causes was quickly labeled a “Communist front” and targeted by HUAC. In 1961, Congress spent two days of hearings to conclude that the National Assembly for Democratic Rights and the Citizens Committee for Constitutional Liberties were “[c]reated, dominated, and controlled by members and officials of the Communist Party . . . as propaganda devices for the conduct of ‘mass activity’ . . . .”<sup>36</sup> The organizations in question made the grave error of voicing disapproval of the Supreme Court’s decision to uphold the Constitutionality of the Smith Act and the Internal Security Act of 1950.<sup>37</sup> Both Acts were used as tools of HUAC in their Communist witchhunt, and both ignored the freedom of association.

Just as Congress in the 1950s exposed progressive organizations as Communist fronts, the California state legislature, in 1943, branded as “subversive” organizations that advocated for the rights of Japanese Americans during the war. For example, the Japanese-American Citizens’ League was described as a hotbed of subversive activity due to its “patriotic” emphasis.<sup>38</sup>

In the case of both HUAC and the internment, class interests were at once obvious and denied. Evicting Japanese Americans from their communities and denying Japanese Americans equal participation in California’s economy advantaged white growers and land speculators. Fueling racial hatred kept working class whites pitted against Japanese Americans, continuing a nineteenth century anti-Asian populist tradition that had long made a coalition of white and Asian workers against ruling economic elites unthinkable. A multiracial coalition of workers demanding state concessions to their class interests was a real possibility in the wake of Depression-era worker militancy. Asian Americans marched on Washington with Black and white and Latino unemployed at the height of this period, and the implementation of the New Deal was, in part, a concession to this militancy. To keep the coalition in check, it was useful to keep the myth of the Yellow Peril alive.

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<sup>36</sup> MANIPULATION OF PUBLIC OPINION BY ORGANIZATIONS UNDER CONCEALED CONTROL OF THE COMMUNIST PARTY, H.R. REP. No. 1282-1, at 137 (1961).

<sup>37</sup> See *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

<sup>38</sup> See UN-AMERICAN ACTIVITIES IN CALIFORNIA, REPORT OF THE JOINT FACT-FINDING COMMITTEE TO THE FIFTY-FIFTH CALIFORNIA LEGISLATURE 337-38 (1943).

Similarly, the lasting legacy of McCarthyism was the purging of Communists, who were often tireless and effective organizers, from factory and field, from intellectual life and cultural production, from government and education; in short, from every place where incisive criticism of capitalism could prove effective. This gift to the capitalist class—the emaciation of the labor movement and the chilling of public criticism, accompanied by the legitimization of greed and of the income gap—was not a mere by-product of anti-Communist witch-hunting. It was the goal, albeit never the acknowledged one.<sup>39</sup>

In addition to this legitimization of capitalism, the domestic Cold War was part of the justification for the actual Cold War and the military/industrial complex that went along with it. If there was a Communist under every bed, eager to betray us to the powerful Soviet Union, then the largest peacetime military expenditure in world history, and the fortunes made therefrom, were justified. The threat of the outside invader was used to mask class interests in the cases of McCarthyism and the internment. In both of these instances, thin rhetorical tricks trumped Constitutional values, and few spoke up to challenge the weakness of the rhetorical structure.

A key question of legitimacy for the Constitutional order is why its champions are historically so selective in their timing. The silence of good liberals during the internment silently echoed a decade later when the McCarthy purges began. This time, however, race played a different role.

#### IV. THE CHANGING FACE OF POWER: HOW WE BECAME MEMBERS OF THE HUMAN RACE IN EXCHANGE FOR SILENCE ON THE QUESTION OF CLASS

The internment created a contradiction between the democratic commitment to racial equality and the racist doctrine of military necessity that would not go away. As Mary Dudziak has argued, Americans needed to jettison the vocabulary of white supremacy as they were

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<sup>39</sup>The government employed multiple strategies to achieve this goal. The government claimed the role of good guy, protecting labor from the Communists who were only interested in exploiting unions as part of their worldwide conspiracy. William Sullivan, the former Assistant Director of the FBI, alleged that the Communists' demands on industry and government for worker's rights were "tactics, not goals." SULLIVAN, *supra* note 33, at 25. Sullivan further argued, "They [the demands] are made ostensibly to improve the economic status of workers, but they are actually calculated primarily to promote communism and to pave the way for the eventual establishment of a communist society." *Id.* at 25-26. The emaciation of organized labor, post-McCarthyism is discussed, *inter alia*, in SCHRECKER, *supra* note 12, at 379-83.

leaving the war against fascism and entering the Cold War as the good guys.<sup>40</sup>

The civil rights movement exploited this need. A deliberate practice of leaders from A. Philip Randolph during the war, and Dr. King after it, was to leverage the contradiction by heightening it and embarrassing the nation. The leaders of the free world were hard-pressed to claim moral superiority when they upheld Jim Crow laws, sent attack dogs after school children, or sent ministers to jail for seeking voting rights.

Just at the moment when overt racism—and anti-Semitism—was becoming publicly illegitimate, anti-Communism was becoming patriotic.<sup>41</sup> McCarthyism's contradictions were not delegitimizing in the way that white supremacy's contradictions were, as the following newspaper's editorial policy illustrates: "As is well known, this newspaper prints letters whether or not we agree with the letter-writers, so long as the letters do not libel anybody, are not obscene and are not written by Communists. This is what we believe freedom of the press means."<sup>42</sup>

Certainly it was a contradiction to violate free speech and association rights in the name of stopping totalitarianism, but those, like Paul Robeson, who sought to expose this contradiction in public oratory, could not find an audience.<sup>43</sup> Justice Black was unable to force his colleagues to acknowledge the contradiction. In his dissent in a famous Smith Act case, Black stated, "Now, when this country is trying to spread the high ideals of democracy all over the world—ideals that are revolutionary in many countries—seems to be a particularly inappropriate time to stifle First Amendment freedoms in this country."<sup>44</sup> Justice Black's voice filled a lonely dissent.

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<sup>40</sup> See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 117–20 (1988).

<sup>41</sup> For a general background, see WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES* (Farrar, Straus and Giroux, Inc. 1968) (1964).

<sup>42</sup> MANCHESTER UNION LEADER (New Hampshire), reprinted in CEDRIC BELFRAGE, *THE AMERICAN INQUISITION, 1945–1960*, at 262 (1973).

<sup>43</sup> When HUAC tried to force Robeson to impugn the character of Communist Party member Ben Davis, he replied, "[H]e is as patriotic an American as there can be, and you gentlemen belong with Alien and Sedition Acts, and you are the nonpatriots, and you are the un-Americans, and you ought to be ashamed of yourselves." Paul Robeson (Jun. 12, 1956) (testimony before HUAC), in BENTLEY, *supra* note 12, at 789. The chair promptly adjourned the hearing.

*See id.*

<sup>44</sup> *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 148 (1961) (Black, J., dissenting) (Chief Justice Warren dissented on other grounds).

Robeson and others like him were ridiculed and labeled manipulative when they claimed their rights were being violated. J. Edgar Hoover claimed, "If . . . [Communists] were not permitted to speak . . . , they suddenly became 'martyrs,' crying crocodile tears about the denial of the rights of free speech."<sup>45</sup>

We had fought a war against Hitler and denounced the master race theory. This was clear in the public consciousness. We could not uphold racial supremacy after going to war to end it. It was less clear why Communists should have the right to speak and organize, given effective propaganda teaching that Communists *were* Hitler, intent on world domination and military destruction of the United States.<sup>46</sup> Hoover claimed, "The Fascist-minded tyrant whom we conquered on the battlefields is no different from the American Communistic corruptionist who now uses the tricks of the confidence man until his forces are sufficiently strong to rise with arms in revolt."<sup>47</sup> He continued, "The Fifth Column victories of the Nazis have been surpassed by the Fifth Column victories of the Communists. The blueprints and objectives of these Red Fascists have been proclaimed to the world with far more clarity than those of Hitler and his cohorts."<sup>48</sup>

Public racism and anti-Semitism were replaced with public anti-Communism, putting the old fear and hatred in a new, more comfortable place. Indeed, I submit that many of the actual locations at which this switch took place—pulpits, VFW halls, American Legion posts, newsrooms and Congressional offices—could be mapped out, with dates and snippets of quotations showing where, when, and in what form anti-Communist rhetoric replaced race-baiting and overt anti-Semitism. One would find overlap and backsliding, as in repeated reference to the N\_\_gg\_\_r loving, Communist Jew, but in polite company and in public representation explicit racism/anti-Semitism largely ceased at the moment when open anti-Communism became the more effective, post-World War II language of power.

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<sup>45</sup>J. EDGAR HOOVER, ON COMMUNISM 17 (1969).

<sup>46</sup>See, e.g., J. Edgar Hoover, *Message from the Director to All Law Enforcement Officials*, FBI LAW ENFORCEMENT BULLETIN, Mar. 1, 1960, in HOOVER, *supra* note 45, at 69 ("It is an incontestable [sic] fact that our country, the symbol of the free world, is the ultimate, priceless goal of international communism. The leaders of international communism have vowed to achieve world domination. This cannot be until the Red flag is flown over the United States.").

<sup>47</sup>J. Edgar Hoover, Address at the International Association of Chiefs of Police Annual Meeting (Dec. 10, 1945), *reprinted in* HOOVER, *supra* note 45, at 67–68.

<sup>48</sup>J. Edgar Hoover, Address at the 1954 Homecoming Banquet of Catholic University (Nov. 13, 1954), *reprinted in* HOOVER, *supra* note 45, at 68–69.

In a remarkable feat of inversion, Hoover further alleged that Communists were propagating the racism and anti-Semitism that the nation now condemned. He claimed that, "Historically, the [Communist] party has exploited minority groups. It hypocritically clamors for an end to discrimination while, at the very same time, it shamelessly practices racial discrimination within its own ranks."<sup>49</sup> In contravention of the fact that Communists espoused racial equality, the state asserted itself as the protector of minorities in comparison with alleged Communist exploitation and discrimination.

This conversion from race-baiting to red-baiting explains in part why President Reagan, at the height of Reaganomics and in contravention of his promise of less government and fewer social programs, signed the Redress bill into law. We were the country of anti-racism, the one that recognized and redressed its human rights errors. The story of our gradual progress toward racial equality was part of our greatness, part of the justification for our military adventurism abroad and for the continuation of the Cold War.

This is the broad outline of a story that needs further exploration. The role of working class populism in both stories, for example, needs telling. The hysteria that allowed both the internment and the McCarthy repression found an audience in the same working class theater that had staged two preceding waves of Ku Klux Klan terror. The most significant outcome, however, was at the elite level. The end result of red-baiting replacing race-baiting in elite discourse was the elimination of a progressive social agenda with economic justice at its core. Eric Foner describes this effect in the immediate postwar period.<sup>50</sup> President Truman's proposals for national health insurance and construction of public housing were rejected as "socialized."<sup>51</sup> Civil rights organizations that pushed to end poverty and empower workers were destroyed by red-baiting, and, in Foner's assessment, "[t]heir demise left a gaping hole that the NAACP, with its narrowly legalistic strategy, was ill-prepared to fill."<sup>52</sup>

For critical race theorists, the jurisprudential legacy of this period is one that we have spent our intellectual lives describing, deconstructing, and struggling against. Once the demand for jobs, housing, healthcare, and workplace dignity were excised from the civil rights

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<sup>49</sup> J. Edgar Hoover, *The Communist Party Line* (Sept. 23, 1961), excerpted in HOOVER, *supra* note 45, at 131.

<sup>50</sup> See ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 249-62 (1998).

<sup>51</sup> *Id.* at 257.

<sup>52</sup> *Id.* at 258.



movement, the quest for formal, legal equality was the paltry remains. The great leaders of the civil rights movement, and the legions who participated in it, never separated the quest for economic parity from the fight to end segregation. No one who listened to A. Philip Randolph, to Dr. King, to Fanny Lou Hamer, to Septima Clark understood them to separate the need for a decent standard of living from the need for racial equality. Their words were edited through the politics of the red scare, and the most radical elements of their claims were repressed. The war on poverty started and stopped, leaving us with the inadequate modern-day civil rights acts, which are narrowly directed at ending explicit, formal, and intentional instances of racial discrimination. Formal racial discrimination, perpetuated by a few bad actors, became the social ill that good Americans would condemn. Indeed, the ascendancy of formal equality is so complete that in a recent presidential address, a historic first was achieved. President Clinton asked for formal equality in employment for gays and lesbians.<sup>53</sup> That it was considered politically safe to make this plea on behalf of a group still subject to open and widespread hatred shows how entrenched the idea of formal equality is in our consciousness.

Defining equality narrowly, as critical race theorists have explained, is exactly what was needed to deny responsibility for institutional racism, unconscious racism, and continuing racist social practices.<sup>54</sup> Thus, we ended "whites only" public schools, but we deny responsibility for widespread educational segregation that occurs because of white flight to the suburbs, or because of economic privilege that gives preference in college admissions to children of alumni and big donors. We ended "help wanted, male" ads in the newspapers, but we allow extreme gender segregation in the highest paying jobs because the market, rather than any identifiable sexist bigot, created that situation. The struggle over affirmative action reveals this result most clearly. If racism is personified in the self-aware bigot who deliberately denies access to education or jobs, then affirmative action makes no sense. We should simply find the bigot and make him stop discriminating. We do not need to institutionalize inclusion based on race or gender. In the worldview of formal equality, affirmative action results in undeserved preferences for individuals who have suffered no proven

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<sup>53</sup> See President William Jefferson Clinton, State of the Union Address (Jan. 19, 1999), in WASH. POST, Jan. 20, 1999, at A12.

<sup>54</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (describing unconscious racism and explaining why the legal "intent" requirement allows continuation of American racism).

harm. Affirmative action only makes sense if a history of institutional discrimination, promoted by unconscious acts and normalized white/male preferring social practices, constructs present opportunity.<sup>55</sup>

The social criticism and activist practice required to keep a structural analysis of privilege at the forefront became unthinkable in the wake of McCarthyism. I do not fault the civil rights movement for the loss of its most radical insights. It is not that people stopped seeing or saying that a narrow elite was using race and class privilege to run this country in an oligarchic, anti-democratic way. Indeed, the HUAC transcripts themselves are full of moments of high drama in which the accused Communists and alleged fellow travelers attempted to make that critique in a public forum. They were literally dragged away as they spoke. During the Hollywood Ten<sup>56</sup> hearings, John Howard Lawson attempted to read a statement condemning HUAC with, *inter alia*, these words:

They're afraid of the American people. . . . They want to muzzle the great Voice [sic] of democracy. Because they're conspiring against the American way of life. They want to cut living standards, introduce an economy of poverty, wipe out labor's rights, attack Negroes, Jews, and other minorities, drive us into a disastrous and unnecessary war.<sup>57</sup>

He was not allowed to read his statement, and he was forcibly evicted from the hearing room following this exchange:

The Chairman (*pounding gavel*): We are going to get the answer to that question if we have to stay here for a week. Are you a member of the Communist Party, or have you ever been a member of the Communist Party?

Mr. Lawson: It is unfortunate and tragic that I have to teach this Committee the basic principles of American—

The Chairman (*pounding gavel*): That is not the question . . . . Have you ever been a member of the Communist Party?

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<sup>55</sup> See CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 27–29, 76 (1997).

<sup>56</sup> The Hollywood Ten were a group of ten screenwriters and directors who were called before HUAC in October, 1947 as part of its investigation into Communist infiltration of the entertainment industry. See WILLIAM K. KLINGAMAN, *ENCYCLOPEDIA OF THE MCCARTHY ERA*, 178–80 (1996). They were convicted and imprisoned “for their refusal to answer questions about their political beliefs before the HUAC.” *Id.* at 178.

<sup>57</sup> John Howard Lawson (Oct. 27, 1947) (testimony before HUAC), in BENTLEY, *supra* note 12, at 164.

Mr. Lawson: I am framing my answer in the only way in which any American citizen can frame his answer to a question which absolutely invades his rights.

The Chairman: Then you refuse to answer that question; is that correct?

Mr. Lawson: I have told you that I will offer my beliefs, affiliations, and everything else to the American public, and they will know where I stand.

The Chairman (*pounding gavel*): Excuse the witness—

Mr. Lawson: As they do from what I have written.

The Chairman (*pounding gavel*): Stand away from the stand—

Mr. Lawson: I have written Americanism for many years, and I shall continue to fight for the Bill of Rights, which you are trying to destroy.

The Chairman: Officers, take this man away from the stand.<sup>58</sup>

For his failure to answer the red-baiting question, Lawson was indicted and served a one-year federal prison term for contempt of Congress. Following his release, he was blacklisted from the entertainment industry and forced to write screenplays under an assumed name.<sup>59</sup>

Barbara Sherwood, whose husband committed suicide after rounding by HUAC ruined his brilliant career as a Stanford scientist, was also thrown out of the hearing room when she attempted to read a statement, which read in part:

Throughout his lifetime, my husband had but one goal: to ease the suffering of mankind. It was this goal that drew him to support the Loyalists in the Spanish Civil War, that inspired his youthful identification with radical causes. It was this goal that led him, when greater maturity had mellowed and deepened his understanding, to abandon politics completely and devote himself single-mindedly to science. Is it a crime for a young man in his twenties to dream of a bright new world? Must the children of our country leave their idealism in the cradle so that their future careers will not be blighted by the Un-American Activities Committee? . . . Members of the Com-

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<sup>58</sup> *Id.* at 158–59.

<sup>59</sup> See KLINGAMAN, *supra* note 56, at 236. As a result of the HUAC inquisition, Lawson, the former president of the Screen Writers' Guild, never wrote another successful motion picture screenplay. *See id.*

mittee, what you have done and what you are doing is an evil thing. Do not persist in it. Go away, go home, bow your heads in prayer and ask forgiveness of your God.<sup>60</sup>

Paul Robeson was taunted by the Committee as he invoked the Fifth Amendment.<sup>61</sup> He told them:

I am being tried for fighting for the rights of my people, who are still second-class citizens in this United States of America. My mother was born in your state, Mr. Walter [Walter chaired the Committee proceedings], and my mother was a Quaker, and my ancestors in the time of Washington baked bread for George Washington's troops when they crossed the Delaware, and my own father was a slave. I stand here struggling for the rights of my people to be full citizens in this country. And they are not. They are not in Mississippi. And they are not in Montgomery, Alabama. And they are not in Washington. They are nowhere, and that is why I am here today. You want to shut up every Negro who has the courage to stand up and fight for the rights of his people, for the rights of workers, and I have been on many a picket line for the steelworkers too. And that is why I am here today.<sup>62</sup>

Later in his testimony, when the HUAC alleged Robeson's support for Stalin, he pointed the finger of responsibility for atrocity back at the Committee:

I would not argue with a representative of the people who, in building America, wasted sixty to a hundred million lives of my people, black people drawn from Africa on the plantations. You are responsible, and your forebears, for sixty million to one hundred million black people dying in the slave ships and on the plantations, and don't you ask me about anybody, please.<sup>63</sup>

After sparring with the Committee with a force and dignity that is a highlight of the HUAC transcripts, Robeson manages to maintain the upper hand even as he is silenced:

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<sup>60</sup> BENTLEY, *supra* note 12, at xx.

<sup>61</sup> See Paul Robeson (Jun. 12, 1956) (testimony before HUAC), in BENTLEY, *supra* note 12, at 778-79.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 785-86.

The Chairman: I have endured all of this that I can.

Mr. Robeson: Can I read my statement?

The Chairman: No, you cannot read it. The meeting is adjourned.

Mr. Robeson: I think it should be, and you should adjourn this forever, that is what I would say.

The Chairman: We will convene at two o'clock this afternoon.

Mr. Freidman: Will the statement be accepted for the record without being read?

The Chairman: No, it will not.<sup>64</sup>

There, in the HUAC transcripts, lies the record of the state's suppression of the voice linking racial justice to workers' rights.

#### V. WHERE IS THE PAUL ROBESON STAMP?: FIGHTING THE POWER THAT DENIES ITS POWER

The recent issuance of a Malcolm X postage stamp highlights the refusal to issue a Paul Robeson stamp. Apparently, one can say white people are the devil<sup>65</sup> before one can say the rich do not deserve their wealth.

A question, sometimes implicit, sometimes explicit, is asked by the papers in this symposium. How do we understand the internment as part of a larger struggle between the forces of repression and the forces of liberty, and how do we prevent the victory of redress for the internment from being another part of the late twentieth century form of power denial?<sup>66</sup>

While some have seen the internment as part of the larger picture of repression in the United States, the linkages have never been as clear as this symposium makes them. Lisa Iglesias asks in her comment to the Gott and Saito articles: Why is the critical race theory discussion of domestic civil rights detached from international human rights analysis?<sup>67</sup> The answer begins with Paul Robeson's HUAC testimony. I

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<sup>64</sup> *Id.* at 789.

<sup>65</sup> See MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 159-68, 266 (13th prtg. 1966). Malcolm X was known and feared for such nationalist statements. Less well-known is the story of his journey to Mecca, and the love for good people of all races he experienced toward the end of his life.

<sup>66</sup> Cf. STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED, HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) (describing white, male, heterosexual privilege and its relation to the legal system).

<sup>67</sup> See Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, in this issue, at 349.

claim him as an analytical forebear of critical race theory. He linked labor rights, domestic civil rights, and international liberation struggles in every public appearance he made. HUAC was no exception. As he maneuvered to insert his views before the hostile Committee, he included references to the history of slavery, the struggles of steel workers, and his allegiance to independence movements in Africa, India, and Indonesia. "We are dealing not with fifteen million colored people, we are dealing with hundreds of millions," Robeson warned, as he gave his roll call of the worldwide anti-colonial movement of which he felt a part.<sup>68</sup> Indeed, the self-chosen name of many left activists of Robeson's time was "internationalist," part of a vision that saw the struggle for civil rights and worker rights as international in scope.<sup>69</sup>

As Robeson and W.E.B. DuBois<sup>70</sup> were sent into exile, so was their analysis linking racism to political economy and colonialism. This is precisely the analysis that Lisa Iglesias calls for. Asking her question reveals how the repression that patriots<sup>71</sup> like Robeson faced was a precursor to covert war, torture schools, and military government, all supported in the name of anti-Communism. It is a challenge for both critical race theorists and students of international human rights to unpack this intellectual legacy.

Liberating ourselves from HUAC is part of the challenge we face, so we can once again link all struggles for human dignity, everywhere on this planet. Why hasn't critical race theory done this? We started as an intellectual movement on the playing field left after the Cold War, that of late twentieth century civil rights law.<sup>72</sup> Trying to explain and struggle against that law was our work. It was largely the work of un-masking, to show power and repression operating behind modern legal structure. From there we move outward, expanding our analysis, and that is where this symposium brings us.

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<sup>68</sup> Paul Robeson (Jun. 12, 1956) (testimony before HUAC), in BENTLEY, *supra* note 12, at 782.

<sup>69</sup> See, e.g., PAUL S. KOCHI, *IMIN NO AIWA: AN IMMIGRANT'S SORROWFUL TALE* (1978) (self-published autobiography of Okinawan immigrant socialist and internationalist) (on file with author).

<sup>70</sup> W.E.B. DuBois, a radical Black leader of the progressive movement, was indicted in 1950 under the Smith Act for his participation in the Peace Information Center. See KLINGAMAN, *supra* note 56, at 117. The charges were dismissed after the government "failed to produce any witnesses or firm evidence proving that DuBois was an agent of the Soviet Union." *Id.* at 118.

<sup>71</sup> "Patriot" was a favorite word of Robeson's, used to subvert the claim that red-baiters stood for American values.

<sup>72</sup> For an intellectual history of critical race theory, see the Introduction to MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

It forces us to look backward. The internment gave us the beginning of modern equal protection doctrine. In the *Korematsu* case, the court declared racism an illegitimate reason for government action and simultaneously refused to acknowledge that racial vilification of the Japanese Americans permeated government decision-making at the time.<sup>73</sup> This stance—"Racism is bad, and if it is proven to motivate government action to our satisfaction, we will declare a Constitutional violation"—leaves significant space for continued, legally sanctioned racial subordination. It also leaves room for anti-racist struggle, because the proof is sometimes available to force public condemnation of racist government action. Thus, subsequent criticism of *Korematsu*, and the putative discovery that it was based on erroneous assumptions, led to redress and reparations for Japanese Americans. We are not a country that officially tolerates government racism. In the meantime, McCarthyism erased the linkage between racism and class oppression and stifled structural critiques of power distributions.

Seeing the internment and McCarthyism as the intellectual funnel through which contemporary equal protection doctrine squeezes, illuminates the ongoing project of critical race theory. It is that funnel that reduces, for example, the feminization of poverty to a bad hair day: If she is living on the street and has no place to shower, that is about individual choices, not about collective responsibilities. There is nothing in contemporary equal protection doctrine that says otherwise.

This foreword begins to ask how McCarthyism coalesces with the internment to make this so, and it offers only the briefest outline. In reading the HUAC transcripts the connections jump off the page. The insulation of private choices is evident, for example, in the fascinating testimony by one national leader of the American Civil Liberties Union (ACLU). After boldly challenging the Committee on the Constitutionality of its persecution of Communists, ACLU board member Arthur Garfield Hays defended his own organization's decision to discharge Communist Elizabeth Gurley Flynn from its board.

Richard Nixon asked Hays, "[Y]ou did not feel that the American Civil Liberties Union could do a proper job with the Communists [on the board], so you passed a rule against them, but you wouldn't want us to do that on a national level?"<sup>74</sup>

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<sup>73</sup> Professor Charles Lawrence's classroom lectures on *Korematsu*, given at Georgetown University Law Center, inform this analysis considerably.

<sup>74</sup> Arthur Garfield Hays (Feb. 10, 1948) (testimony before HUAC), in BENTLEY, *supra* note 12, at 265.

Hays answered, “No, because the United States is prohibited from doing that by a Constitution adopted one hundred fifty years ago.”<sup>75</sup> This is a simple dichotomy, insulating the private choice of the ACLU to select its own board and distinguishing the state’s Constitutional obligation to respect First Amendment rights of citizens. It suggests another way in which Constitutional claims are narrowed. Using the state action doctrine to focus on the government ignores the role of private actors in denying rights of liberty and equality. It ignores the linkage between public and private repression, exemplified by the blacklist, without which McCarthyism could never have succeeded.

Unlike the Communist sympathizers who were pulled from the hearing room when they challenged the Committee’s views, Hays was allowed to make a stinging rebuke of the HUAC. He says, for example:

I was in Germany in 1933 when it came under Hitler in the days of the Reichstag fire. He had two scapegoats—the Communists and the Jews. . . . He was saving the people from the Reds and they passed a law barring all Communists from the Reichstag and as a result the anti-Communists had the authority and they repealed the German constitution. He did exactly what you are doing here.<sup>76</sup>

Even after comparing the Congressmen to Hitler, Hays is allowed to continue in this vein for several pages, with the Committee members engaging him in debate. His condemnation of Communists became the discursive point of access for his civil libertarianism. I believe Hays held his views honestly. Raising his testimony is intended not to discredit him. Rather, it is to understand the effect of HUAC. The liberal stance—the Communists are wrong, but the state may not outlaw them—became the outermost tenable position in public discourse. It was the most one could say and still be allowed to speak. Indeed, the Committee seemed to sense that it gained credibility by allowing Hays to criticize McCarthyism on the record.

Hays’ recourse to the public/private distinction foreshadows the use of that distinction to deny the role of the private social world, corporations, the market, the media, or any powerful subordinating force that is not an official state actor, in infringing upon human rights. This distinction completely misapprehends the key tactic of McCarthyism: government humiliation followed by private punishment, job loss, and social shunning. Separating government power from private

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 259.



power is what allows both sides to assert innocence. The state is innocent because it is not responsible for the acts of private parties. The private parties are innocent because their free choice is Constitutionally protected from government intrusion. What happens to the victims of state/private collective action—from the Hollywood Ten to today's homeless children—then becomes nobody's problem and certainly not a problem that implicates the Bill of Rights.

At the end of the day, or at the end of the century, if there are still those for whom the Bill of Rights is an illusion, and if there is no specific moment at which an official government actor decided to deny that individual's rights, then there is no claim. Harm, maybe, but no foul. No one need even say, "sometimes the people at the bottom just belong there." The beauty of the state action requirement combined with the formal equality requirement is that those in power can remain agnostic about whether the degradation of any particular group or individual is a good thing. Whether it is or not, no one in power is responsible for correcting it. Each relatively privileged citizen is then left to private, lonely conscience in deciding whether or not to undertake a rescue mission.

This is not where we were, conceptually or morally, before McCarthyism. When Roosevelt spoke of freedom from want, he spoke a language of substantive equality and can-do optimism that resonated with Americans. His policies called for worker empowerment and restraints on the excesses of corporate greed. For this, his administration became the first target of McCarthyism. The goal of the original HUAC was to discredit the New Deal by exposing so-called Communist infiltrators.<sup>77</sup>

While programs such as social security maintain great citizen loyalty, the New Deal notions of citizen entitlement and collective responsibility are largely dormant. To raise them once again means learning to talk like New Deal democrats and their Communist allies, to demand that all who work share fairly in the benefit of their toil, and that all who are unable to care for themselves find a place of care. This is the kind of talk that will make the story of the internment a progressive story, revealing the cause of the incarceration of Japanese Americans as both racism and class oppression, and making the promise of redress part of an ongoing obligation to confront and repair all injustice.

In summary, *Korematsu* plus HUAC equals an impoverished liberalism that destroys any visionary notion of substantive justice. The

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<sup>77</sup> See SCHRECKER, *supra* note 12, at 90–91, 108–11.

longing for the Constitution to mean more than that is alive in the history of abolition and of the civil rights and labor movements. A challenge for the Japanese-American community is to make the victory of redress part of a progressive Constitutional vision.<sup>78</sup> This is our obligation, for the courage to stand up for redress was inspired by our brothers and sisters in the African-American civil rights movement. They sought a Constitution that would feed the children, and so should we.

#### CONCLUSION: REPARATION IS A PROCESS

The HUAC tried to teach that there are things we cannot say or think. Things such as “the rich did not earn their wealth” or “all citizens are entitled to, and the state must provide, a job, a house, health care, quality education, and leisure.” The HUAC tried to teach that there are things we cannot do, such as organizing the poorest workers or traveling to assist anti-colonial struggles abroad. A recent panel at the Association for American Studies asked why academics have failed to produce an outpouring of social criticism and analysis of the unprecedented drive to imprison all able-bodied Black men in America.<sup>79</sup> With one in three Black men captured by the law enforcement/prison/industrial complex,<sup>80</sup> they would have called it genocide, and certainly called it capitalism, in the time of Robeson and DuBois. Their words were unlearned in the crucible of the Cold War.

This spring, the Japanese-American community honors the *Korematsu coram nobis* team, the then-young lawyers who brought the last

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<sup>78</sup> See, e.g., ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994) (arguing for a humane Constitution that transcends limitations of traditional liberalism).

<sup>79</sup> Cf. M.H. Washington, *Prison Studies as Part of American Studies*, AM. STUD. ASS'N NEWSL. Mar. 1999, at 1 (discussing the crisis of criminalization of young, African-American men and the responsibility of scholars to respond to that crisis).

<sup>80</sup> One-third of African-American men between the ages of 18 and 30 are under some type of court supervision, and by the turn of the century one-half of all Black men will be in prison or jail, or on probation or parole. See Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 413 (1997) (citing MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (The Sentencing Project 1995)). Black men constitute only 6% of the nation's population, yet comprise 47% of the U.S. prison population and 40% of the total death row inmates. See MARC MAUER, *THE SENTENCING PROJECT, BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 3 (1990); see also BUREAU OF JUSTICE STATISTICS: *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 705, tbl. 6.142 (Timothy J. Flanagan and Kathleen Maguire eds., 1991). See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (arguing that the administration of our criminal justice system depends upon the exploitation of racial and class inequalities).

legal challenge to the internment, achieving the extraordinary result of setting aside the convictions of those who violated the internment order. Judge Marilyn Hall Patel's decision<sup>81</sup> agreed with the team's position that a grave Constitutional wrong had occurred based on error in the court—the wrong facts, the wrong reasons. We can now call them lies, with judicial imprimatur. Eric Yamamoto was one of the volunteer attorneys on the team, and his journey from calling out the lie to calling for expanded visions of justice, as he does in his article here, is representative of the heart of this symposium. Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui finally got their day in court, and through their dignity, the nation stood briefly in the light of the possible. We can acknowledge wrongs and live the most aspirational interpretation of the Bill of Rights.

Aiko Reinecke was dismissed by the Hawaii school board for her alleged Communist affiliations. Years later, the elderly former school-teacher came before the legislature of the State of Hawaii to receive an apology and official retraction of McCarthyism. By that time, the children of plantation workers had come to occupy seats in the legislature, the judiciary, and executive offices of the State of Hawaii. Jack Hall, the ILWU leader and Hawaii Seven defendant, said again and again at the time of his trial that Communism had nothing to do with his persecution. It was the labor movement that the McCarthyites were after. The bosses feared that the legions of disenfranchised workers of Hawaii would recognize their latent political power and exercise it. If this is what the Big Five feared the ILWU would do, their fears were justified. Some three decades after the Hawaii Seven trials, a multiracial, union-influenced legislature granted reparations to Aiko Reinecke for the wages that she lost as a result of McCarthyism.

Apologies are not clear victories, as the writers in this volume warn. Whether they are isolated moments of sweet victory or parts of broader movements for human rights is determined by larger forces. One such force lies in the realm of consciousness—the interpretation and rhetorical structuring that writers, such as those herein, provide. Another, and more significant, force is the path of activism and human endeavor in the world of struggle. As Jack Hall warned, the arrest of union leaders will not end the desire of workers for living wages and decent working conditions. No act of political repression will make that go away.

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<sup>81</sup> See *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984).

Aiko Reinecke lived to see her good name restored and the results of her commitment to worker rights memorialized in Hawaii. Paul Robeson never received the recognition he deserved from his fellow citizens, and even after his death, red-baiting keeps his sweet visage from gracing our postage stamps. The internment is defended by no current Constitutional theorist, and the last of the reparations for the internment were paid—excluding, as Natsu Saito notes, many deserving individuals.

No one received what they deserved: the redress check that paid for a used car and a trip to Las Vegas, Aiko Reinecke's formal proclamation, the Peruvian internees' empty envelopes—all of it is inadequate. No one has called for a national apology and redress for those who went to jail for refusing to name names, for refusing to abandon their dreams of a workers' paradise. I will do it here in honor of this symposium. Justice requires apology and monetary payment to all victims of red-baiting. And even if we do apologize, and do pay, it will not be enough.

Reparation is a process, not an end. It is how you get there that counts. We will achieve greatness, indeed, if we do everything we need to do before reparations for Native Americans or Black Americans or HUAC targets are politically possible. The history we will know, the sense of shared responsibility we will acquire, the commitment to common destiny we will make, the grief that will tear at us, the freedom of the soul we will come to desire—all of this will come before we can say "a terrible thing happened on the way to becoming a nation, and our worth is measured by our willingness to confront it."

There is no neat ending to this story. What I learned from this symposium is that we are still writing the story. Warren, Roosevelt, DeWitt, and others were the architects of the internment, but we are its authors. We write of it and hope to find meaning in it, honoring those who lived it. We honor the families who gathered what they could carry in their hands, to head for the railroad tracks at dawn. We honor the quiet dignity of those who left on the trains for the desert. We honor the maverick rebellion of those who refused to go. We honor the Issei, who came with nothing, who wanted nothing more than to see future generations flourish, whose survival was their response to those who would deny their humanity. Here we are, writing as their heirs, writing the meaning of the internment.