

# COLLECTIVE MEMORY, HISTORY, AND SOCIAL JUSTICE

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*This Article is part of a larger project, entitled Re-Forming Civil Rights in Uncivil Times, that will be published as a special 2001 issue of the UCLA Amerasia Journal, guest edited by Professors Hom and Yamamoto. The Article describes first the larger project, an interrogation of rights in the context of the U.S. civil rights legacy and the development of international human rights in the twentieth century. It then focuses critical discussion on two case studies, one current and one historical (Rice v. Cayetano and the Civil Rights Congress), and develops two theoretical and strategic aspects of the project: (1) an analysis of the dynamics of collective memory in framing present-day justice grievances and claims, and (2) a critique of the complex intersection of international and domestic rights discourse and practice.*

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Asking yourself a question,  
that's how resistance begins—  
and then asking another that question

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Someone resists  
And then someone else,  
And then someone,  
And then<sup>1</sup>

### INTRODUCTION

We live in sobering times. The dawning of the new century unveils familiar and persistent global and local inequalities, conflict and violence, human suffering and environmental destruction. As the first United Nations High Commissioner for Human Rights recognized, “the world picture of human rights violations continues to display the same disturbing patterns and trends that it did prior to the establishment of the United Nations.”<sup>2</sup> Indeed, despite the current rhetoric in foundation, government, and policy circles about the rise of civil society and the rule of law, we live in violent—uncivil—times.

Hundreds of thousands of civilian men, women, and children have been butchered in “internal” ethnic and religious conflicts throughout the world; and the killing continues.<sup>3</sup> More than six million people are exploited in some form of bonded labor or human servitude, including the forced prostitution of children and women, the forced recruitment of child soldiers, and the exploitation of child labor.<sup>4</sup>

Within the United States, the level of violence against people of color, women, and gays and lesbians also signals the uncivility of the times. White supremacists dragged James Byrd behind a truck until his body parts tore off. Gay-bashers beat Matthew Shepard and left him to die on a fencepost.<sup>5</sup> The U.S. Supreme Court invalidated the Violence Against Women Act.<sup>6</sup> Random

1. REMCO CAMPERT, *THIS HAPPENED EVERYWHERE: SELECTED POEMS OF REMCO CAMPERT* 65–66 (Manfred Wolf trans., 1997). We thank Molly Graver for sharing this poem with us.

2. Jose Ayala-Lasso, *Making Human Rights a Reality in the Twenty-First Century*, 10 EMORY INT'L L. REV. 497, 498–99 (1996).

3. See MÉDICINS SANS FRONTIÈRES, *POPULATIONS IN DANGER* (François Jean ed. & Nora Fitzsimmons et al. trans., 1992).

4. See Stephanie Fariior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential*, 10 HARV. HUM. RTS. J. 213 (1997).

5. See Rene Sanchez, ‘America’s Largest Problem’ Is Hate, *President Tells Gay Group*, WASH. POST, Oct. 3, 1999, at A6 (describing the Byrd and Shepard killings as part of America’s “hate problem”).

6. See *United States v. Morrison*, 120 S. Ct. 1740 (2000).

racial shootings occur with alarming frequency. In New York, Newark, Los Angeles, and other cities, police not only admit to racial profiling of blacks and other dark-skinned minorities, they participate in numerous racial shootings and false prosecutions of innocent people.<sup>7</sup> And while death penalty supporters advocate for more executions more quickly, some judges and politicians are acknowledging not only the racial disparity in death sentencing, but also the startlingly high percentage of death penalty mistakes.<sup>8</sup>

These realities of domestic and international violence are related to the economic violence of a global (dis)order that relegates the majority of humans on the planet to poverty and destroys local communities and cultures. Despite demands by developing countries for a more equitable share of the world's resources, such as those made in the New International Economic Order (NIEO) plan advocated by Third World countries and adopted by the United Nations General Assembly in 1974,<sup>9</sup> the gap between poor and rich countries continues to widen. "The *problem* of the problem of inequality lies not in poverty, but in excess. 'The problem of the world's poor,' defined more accurately, turns out to be 'the problem of the world's rich.'"<sup>10</sup> Today, perhaps humbled by the colossal failure of structural-adjustment approaches and short-term stabilization measures that surfaced in the Asian financial crisis of 1998, even the International Monetary Fund is deploying the language of poverty reduction.<sup>11</sup>

Consider statistics from the 1999 United Nations Development Programme (UNDP) Human Development Report<sup>12</sup> concerning the concentration of wealth worldwide.

1. By the late 1990s, the top one-fifth of the world's people lived in the highest income countries and had 86 percent of the world's Gross Domestic Product (the bottom fifth just 1 percent );

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7. See Lynne Duke, *Giuliani Hit by Barrage of Criticism: Reaction to Latest Shooting Draws Fire from All Sides*, WASH. POST, Mar. 25, 2000, at A6 (describing the shooting of Patrick Dorismond by New York police).

8. See Raja Mishra, *A Death Row Case that Begs Scrutiny; National Concern Heightens Interest in Md. Man's Appeal*, WASH. POST, Mar. 17, 2000, at B1.

9. These demands included fairer trade, greater access to emergency funds, increased aid, debt alleviation, and the stabilization of commodity prices. See THE DICTIONARY OF 20TH-CENTURY WORLD POLITICS 478 (Jay M. Shafritz et al. eds., 1993).

10. C. Douglas Lummis, *Equality*, in THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 38, 50 (Wolfgang Sachs ed., 1992).

11. See Walden Bello, *Rethinking the Asia: Reform the Jurassic IMF*, FAR E. ECON. REV., Dec. 9, 1999, at 44.

12. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT at 2-6, U.N. Sales No. 99.III.B.43 (1999).

2. Although only 10 percent of people worldwide speak English, 80 percent of internet websites appear in English;<sup>13</sup> and
3. The assets of the top three billionaires total more than the combined Gross National Product of all the least-developed countries and their 600 million people.

In the United States, where a “rising tide” was supposed to lift all the boats, a recent study by the Center on Budget and Policy Priorities suggests that despite two decades of economic growth, only a small segment has benefited. Economic inequality may now be at its most extreme since the Second World War.<sup>14</sup> This is particularly so at the intersection of race and poverty. Statistics tell part of the story. For instance, 46.3 percent of black children live below the poverty line, compared to 12.3 percent of white children;<sup>15</sup> blacks with Bachelors degrees earn 76 percent of the salary of similarly qualified whites.<sup>16</sup> Disparities such as these are explained in part by the persistence of racism against people of color, particularly African Americans, at all levels of employment. Indeed, a massive study in 1999 by the Russell Sage Foundation, covering four major cities, 10,000 workers, and 3000 businesses, found significant racial discrimination in favor of whites in institutional hiring and promotion practices.<sup>17</sup>

Other parts to this uncivil story lie beyond statistics. Despite entrenched group economic disparities, strident and sometimes virulent political campaigns have succeeded in legally banning affirmative action, cutting off the rights of immigrants and their children, barring bilingual education, prohibiting gay marriage, and paring down welfare benefits.<sup>18</sup> The current Supreme Court also has sharply limited the reach of civil rights laws, except in cases in which whites claim “reverse discrimination,” dissociating law from many communities’ sense of justice.<sup>19</sup> That a Republican presidential candidate could turn his flailing campaign around in South Carolina, while the state was fighting to

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13. See *id.* at 2–5. The highest income countries also had 74 percent of the world’s telephone lines (the bottom fifth just 1.5 percent), constituted 93.3 percent of the world’s internet users, and consumed 84 percent of the world’s paper.

14. See *Cutting the Cookie*, *ECONOMIST*, Sept. 11, 1999, at 26 (showing that the wealthiest 1 percent of households own 39 percent of the nation’s wealth).

15. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 104–05 (2d ed. 1995).

16. See *id.* at 101–02.

17. See Russell Sage Foundation, *Multi-City Study of Urban Inequality* (visited Apr. 23, 2000) <[http://www.russellsage.org/programs/proj\\_reviews/multicity.htm](http://www.russellsage.org/programs/proj_reviews/multicity.htm)>.

18. See generally William Booth, *In California, Gay Marriage Battle Is a Family Feud*, *WASH. POST*, Oct. 22, 1999, at A2 (linking political attacks on gays to attacks on affirmative action, immigration, and bilingual education).

19. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 *MICH. L. REV.* 821, 845 n.117 (1997).

continue government flying of the Confederate flag, and at the Bob Jones University, which banned interracial dating as a sin,<sup>20</sup> speaks volumes about what Steven Steinberg calls America's "retreat from racial justice."<sup>21</sup>

These uncivil times present urgent challenges for activists, scholars, and everyone called to social justice. What should critical scholars, activists and teachers do when faced with this picture of human suffering and inequitable distribution of the world's resources and wealth? And what is the role of law in progressive change? Certainly, law as legal theory, as an academic formation, as a field of practice, and as competing discourses and metadiscourses, is constitutive of and is constituted by multiple social and economic spheres. Through immigration and citizenship narratives, a system of state sanctioned death, and an impoverished and partial vision of welfare and social security, dominant U.S. law and legal discourses define community and belonging, dignity and survival, and life and death.<sup>22</sup>

As our contribution to the Symposium's theme of race and the law, we develop here part of our larger on-going collaborative project—Re-Forming Civil Rights in Uncivil Times. For that project we focus on law as read through its primary code word, rights, and on race as an analytical category that is intricately embedded within the shifting matrix of U.S. and global demographics.<sup>23</sup> Like culture for anthropology and time for archeology, the idea of rights constitutes one of the key foundational categories of analysis for western liberal law traditions. Our larger project interrogates rights in the context of the U.S. civil rights legacy and the development of international human rights in the twentieth century, and it examines the cross moves to both domesticate international law enforcement and to internationalize civil rights strategies.

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20. See Dan Baltz, *Gore Seals Nomination, Bush Wins Big*, WASH. POST, Mar. 8, 2000, at A1.

21. See generally STEPHEN STEINBERG, *TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY* (1995).

22. See Sharon K. Hom, *Cross-Discipline Trafficking: What's Justice Got to Do with It?*, in *ORIENTATIONS: MAPPING STUDIES IN THE ASIAN DIASPORA* (Kandice Chuh & Karen Shimakawa eds., forthcoming 2000).

23. The U.S. Census Bureau projects that by the year 2050, the U.S. population is expected to grow nearly 50 percent to 394 million. The Hispanic population is expected to grow threefold to 97 million, accounting for one in four Americans, and the black population to nearly double to 61 million. Asian Americans are expected to grow in population to 34 million. The Native American population is expected to nearly double to 4.4 million. The white population will increase but will constitute only 75 percent of the population, a drop from its 83 percent in 1995. One in seven (13.8 percent) persons five years and older in the United States use a language other than English at home. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 9, 14, 56 (1998).

## I. DOMESTIC CIVIL RIGHTS AND INTERNATIONAL HUMAN RIGHTS: CHALLENGES AND POSSIBILITIES

The once potent U.S. civil rights movement of the sixties sought transformation of the spirit, mind, and most of all, the daily material conditions of peoples' lives. From Civil War abolitionists to the Montgomery Boycott to the March on Washington, civil rights mobilized African Americans and communities of all colors, including liberal whites, men and women, to break down racial barriers that created and supported the inequities of existing social and economic hierarchies.<sup>24</sup> Civil rights as a call to action tapped into diverse peoples' moral and ethical cores; "civil rights" meant rectifying deep injustices.<sup>25</sup> Someone remained awake, someone pointed the question, someone resisted, then another and another.

As U.S. society moves into the next century, this progressive civil rights legacy has been undermined by conservative political backlash and rhetorical appropriation of rights language and its moral claims.<sup>26</sup> The equality and affirmative action social transformation goals of the fifties and sixties have been challenged by the rhetoric of color blindness, racial preferences, and reverse discrimination of the late eighties and nineties.<sup>27</sup> Yet, this conservative civil rights rhetoric clearly legitimates continuing inequities—witness California's Proposition 209, the anti-affirmative action "Civil Rights Initiative."<sup>28</sup> Narrow civil rights laws have been largely ineffective against entrenched institutional forms of discrimination.<sup>29</sup> Intraracial conflict and tensions emerge as blacks,

24. See generally THE EYES ON THE PRIZE: CIVIL RIGHTS READER (Clayborne Carson et al. eds., 1991); see also JACK GREENBURG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).

25. See generally GREENBURG, *supra* note 24.

26. See STEINBERG, *supra* note 21, at 137–75.

27. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the U.S. Supreme Court held that the city's plan requiring nonminority contractors to subcontract a specified quota of minority subcontractors violated the Fourteenth Amendment because it "denie[d] certain citizens [namely, nonminority subcontractors] the opportunity to compete for a fixed percentage of public contracts based solely upon their race." *Id.* at 493 (emphasis added). The Court also held that the city failed to identify specific past discrimination against minority subcontractors that would satisfy the "narrowly tailored" prong of the strict scrutiny test. See *id.* at 499; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny"). In his concurrence, Justice Antonin Scalia noted that to pursue "the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." *Id.* at 239 (Scalia, J., concurring).

28. See Yamamoto, *supra* note 19, at 827 n.30.

29. See Alan Freeman, *Antidiscrimination Law: The View from 1989*, TUL. L. REV. 1407, 1422–41 (1990); see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.3 (1988) (setting forth

Asian Americans, and Latinos charge each other with civil rights violations in disputes over education and government contracting. Amid the emerging demographic and economic fault lines, immigrants, migrant workers, women, gays and lesbians, and the poor are claiming space at the crowded “rights” table.<sup>30</sup>

Beyond the increasingly blurred domestic boundaries of the nation-state, geopolitical shifts and transnational capital redefine meanings of “citizenship,” “work,” and “fair treatment,”<sup>31</sup> and international genocide, ethnic conflict throughout the world, indigenous peoples’ claims, and truth commissions reframe understandings of “accountability,” “reparation,” and “justice.”<sup>32</sup> The foundational notion of rights itself is destabilizing. Buffeted by these international and domestic crosscurrents, “civil rights” in these “uncivil” times has not only lost much of its transformative power, it can no longer meaningfully do the progressive theoretical and strategic work it needs to do. The domestic evidence—the movement’s inability to coalesce and mobilize diverse groups despite the persistence of vast social and economic inequalities, violence, and widespread, if subtle, discrimination.<sup>33</sup> “Stirring the [a]shes,” is how one observer describes recent minority civil rights efforts.<sup>34</sup> A “post-civil rights era” has emerged—whether as epitaph or hope remains to be seen.

Given this complex material, discursive and theoretical landscape, what is to be done? Do we abandon civil rights altogether and search for something fresh? We think not. Despite its limitations, civil rights still carries enormous purchase. Its rhetoric connects historically to reconstruction and transformation. Its past practices link to mass protests, civil disobedience, and public education.<sup>35</sup> Its roots are embedded in established, although ideologically limited and limiting, antidiscrimination law. And civil rights still

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statistics showing that “[c]ontinuing disparities exist between African-Americans and whites in virtually every measurable category”). See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994).

30. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

31. See Sharon K. Hom, *Playing by Whose Rules and for What Ends?: Global Trade and Human Rights*, CHINA RTS. F., Spring 2000, at 22.

32. See generally WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999).

33. See Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989).

34. *Id.* at 993.

35. See generally GERALD HORNE, *THE COMMUNIST FRONT? THE CIVIL RIGHTS CONGRESS, 1946–1956* (1988) (describing the Civil Rights Congress’s multifaceted civil rights program aimed at social and economic transformations in U.S. society); see also *infra* Part IV. (addressing the struggles of the Civil Rights Congress and lessons for today’s civil rights and international human rights strategies).

signals the moral and ethical power of African Americans' struggles for freedom and equality—for a better and fairer life for all.<sup>36</sup>

## II. RE-FORMING CIVIL RIGHTS

What discursive and material strategies can we develop to both critically build upon and move beyond this legacy? How do we envision in practical terms the kind of personal and group transformation that (1) fires imaginations and actions of broad constituencies for peaceably breaking down entrenched social and economic barriers that impoverish many peoples' daily lives, and (2) fosters the building of enduring relationships and the healing of conflicts among diverse groups and communities?

The current academic literature about rights reflects several dominant approaches.<sup>37</sup> Most legal writing about U.S. civil rights either describes the movement's history or focuses on technical reforms to antidiscrimination law.<sup>38</sup> Broader efforts tend to examine "justice" in abstract moral philosophical terms without addressing the political challenges of translating theory for frontline practice.<sup>39</sup> In terms of organizational strategies, political rights work tends toward top-down approaches—organizations and institutions crafting policy solutions and lobbying at high political levels without significant participation by or support of affected constituencies.<sup>40</sup> In addition, critical theory critiques of rights discourse and practice reveal hidden ideology and power in law; yet, many of those critiques do not correspondingly offer workable reconstructive strategies for healing wounds, building relationships, distributing resources, and reordering institutions.<sup>41</sup>

The relationship between international and domestic rights discourse and its implications for legal and political social justice strategies has also been under-theorized. That theorizing is hampered by the limits of existing human rights law and practice that marginalize economic and social rights. How can domestic

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36. See generally RICHARD KLUGER, *SIMPLE JUSTICE* (1977) (documenting the history, context, and meaning of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

37. See *THE POLITICS OF LAW* (David Kairys ed., 3d ed. 1998) (critiquing the dominant liberal legal approach to rights).

38. See generally *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (critiquing traditional civil rights approaches to legal justice). See also Yamamoto, *supra* note 19 (critiquing limits of established civil rights approaches).

39. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

40. See Henry J. Steiner, *Diverse Partners: Non-Governmental Organizations in the Human Rights Movement* (visited July 15, 2000) <<http://www.law.harvard.edu/programs/HRP/Publications/diverse1.html>> (summarizing some critiques directed at mainstream human rights nongovernmental organizations (NGOs), based in developed countries).

41. See generally BRUCE ACKERMAN & ANN ALSTOTT, *STAKEHOLDER SOCIETY* (1999); Yamamoto, *supra* note 19.



rights strategies of the United States draw more effectively upon international human rights developments and at the same time inform global debates and policies with local experience and strategies?<sup>42</sup> International politics and economics influence domestic conditions. Civil and human rights in the United States are touted as models worldwide while U.S. and northern-based mainstream human rights organizations dominate international nongovernmental organizations (NGO) strategies. Yet, like the contemporary civil rights movement, the top-down, law-focused human rights approach of mainstream traditional international human rights organizations have also been criticized for their lack of broad-based constituency support and their tendency to focus strategically on the first generation of civil and political rights.<sup>43</sup>

Moving across several interconnected realms—the theoretical, structural, and relational (individual and group) and spiritual—our broader project seeks to explore these questions to re-form civil rights.<sup>44</sup> The project is aimed at reenvisioning rights rhetoric and practice in concrete settings to give renewed strategic currency to a redeployment of “civil rights.” Its immediate goal is to help generate practical political and legal strategies for dismantling group barriers to full and fair participation in the U.S. polity. Its long-range reconstructive goal is the expansion and development of concepts, discourses, and critical methods that engender transformative institutional and social processes. In short, the project aims to contribute to the generation of a “culture of social justice” in an often conflicted, multifaceted, diverse U.S. society. It endeavors to reconnect civil rights and law to redistributive ethics, a broader social justice vision and the building not only of temporary alliances but also lasting, productive group relationships—in Pedro Casaldáliga’s phrase, “a committed struggle toward human flourishing.”<sup>45</sup>

To move toward this, the project reenvisioning civil rights within and across interrelated theoretical, structural, relational, and spiritual realms. The theoretical work calls for critical social, economic, and legal analyses. This means generating theoretical frameworks for examining the particular and contextual, and the structural and discursive, aspects of rights controversies. The structural work addresses individual and collective strategies that seek to transform

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42. See *infra* Part IV.

43. See *id.*

44. The project seeks to reach broad, distinct, and related audiences of activists, lawyers, teachers, and community persons interested in civil and human rights and social justice in the United States and other countries. An initial volume will be published in part as a special “2001 Civil Rights” issue of the *UCLA Amerasia Journal*. An expanded trade version will include additional visual, narrative, and legal materials, including photographs, poetry, stories, and examples of strategic uses of the “re-formed” civil rights we propose.

45. Molly Graver, *Resisting Disappearance, Constructing the World: The Spirituality of a Salvadoran Women’s Collective*, in 34 *LISTENING: J. RELIGION & CULTURE* 48, 51 (1999) (quoting Pedro Casaldáliga).

structural and material conditions. This includes generating concrete ways to act upon accepted responsibility for remedying specific group-based injuries and also for rebuilding damaged social relationships. The relational and spiritual realm explores individual and collective transformation in the context of material realities. This aspect of our project attempts to respond to the overarching question, "So what?" How will reenvisioned civil rights make a difference, and for whom? What group and societal interests are at stake, and what roles will intellectuals, activists, and other concerned citizens play?

The following parts develop two of the many aspects of our larger project. The discussion in Part III engages the first realm—generating critical theoretical frameworks for examining the particular and contextual, and the structural and discursive, aspects of rights controversies.<sup>46</sup> More particularly, it explores the dynamics of collective memory and the significance of that group memory to how injustice is framed, rights are asserted and justice is achieved. Those dynamics are then illuminated by an in-depth inquiry into the battle of collective memory in the litigation of and recent Supreme Court decision in *Rice v. Cayetano*.<sup>47</sup>

The discussion in Part IV builds upon the collective memory and framing of justice discussion of Part III, and engages both the first and second realms, with an emphasis on the latter—individual and collective strategies that seek to transform structural and material conditions.<sup>48</sup> More specifically, it critically references current domestic moves to internationalize legal strategies and suggests that looking back to the marginalized history of the pre-1960s civil rights movement is a powerful and empowering theoretical and strategic exercise, with insights for more effective deployment of international human rights law. In focusing on questions of accountability and constituency, it urges the exploration of multiple simultaneous approaches.

In developing these ideas as a part of our larger collaborative project, we also retain our individual authorial voices and perspectives.

### III. RIGHTS, JUSTICE, AND THE STRUGGLE OVER COLLECTIVE MEMORY (ERIC K. YAMAMOTO)

Who frames injustice in the law's eye and the public's mind? How and with what societal effects? As these questions imply, in important ways, framing injustice is about social memory.

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46. See *infra* Part III.

47. 120 S. Ct. 1044 (2000).

48. See *infra* Part IV.

In an era characterized by a conservative “retreat from justice,”<sup>49</sup> many progressive lawyers and activists seeking legal justice define injustice narrowly. They focus on legal doctrine and its definition of a civil rights claim. They then frame the injustice in language that satisfies the requirements of anti-discrimination law—for instance, the disparate impact on racial minorities of discriminatory practices of an Alaskan salmon cannery.<sup>50</sup> That framing, while legally apt, narrows public imagination and debate. In its search for “relevant facts” and crisp argument, it relegates history and community agitation to back-up roles in civil rights struggles.<sup>51</sup>

By contrast, groups seeking social justice tend to define injustice more broadly. To fuel political movements, they expand the law’s narrow framing of injustice and focus on historical facts to more fully portray what happened and why it was wrong. In this way, history becomes a catalyst for mass mobilization and collective action aimed at policymakers, bureaucrats, and the American conscience.

Both of these approaches to framing injustice have contributed to ground level justice efforts. But both, in their handling of history, miss something of considerable strategic import. They miss what the 1950s’ Civil Rights Congress (CRC) incorporated strategically into its action plans,<sup>52</sup> and what today’s conservative think tanks hold as a lynchpin: Social understandings of historical injustice are largely constructed in the present. Those understandings are rooted less in backward-looking searches for “what happened” than in the present-day dynamics of collective memory.

#### A. Collective Memory

As I described in an earlier work,<sup>53</sup> group identities, social suffering and collective accounts of historical events evade easy description. How are historical memories of group pain and loss formed by group experiences and continually re-formed by changing ideology and social circumstances? How, for instance, do group memories of racial grievances inform current conflicts and shape the ways in which racial wounds are aggravated or salved?

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49. See STEINBERG, *supra* note 21, at 107–36.

50. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 642 (1989) (holding that a plaintiff alleging a racially disparate impact bears the burden of establishing a prima facie case including isolating and identifying specific employment practices responsible for the disparate impact).

51. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (describing narrow legal services and civil rights “law-centered” approaches to political and community lawyering).

52. For Sharon Hom’s in-depth discussion, see *infra* Part IV.

53. See YAMAMOTO, *supra* note 30.

Recent international works identify the political dimensions of memory reconstruction by both oppressors and victims, at all levels. Individuals, social groups, institutions, and nations filter and twist, recall and forget "information" in reframing shameful past acts (thereby lessening responsibility) as well as in enhancing victim status (thereby increasing power). Collective memory not only vivifies a group's past, it also reconstructs it and thereby situates a group in relation to others in a power hierarchy.

For instance, the recent investigation of the International Commission on the Balkans (the Commission) revealed a tortuous postcommunist remaking of history integral to the justification of ethnic and religious violence in the Balkan states.<sup>54</sup> The Commission found that Balkan leaders—Serbian president Slobodan Milosevic, Croatian president Franjo Tudjman, and Bosnian Serb leader Radovan Karadzic—identified ancestral and religious strife as the main sources of recent atrocities. The Commission also found that the political leaders' specific characterizations of ancestral strife were unsupported by historical circumstances. The politicians deployed falsely constructed ancient enmities to justify the unjustifiable. According to the Commission, the politicians "have invoked the 'ancient hatreds' to pursue their respective nationalist agendas and have deliberately used their propaganda machines to justify the unjustifiable: the use of violence for territorial conquest, expulsion of 'other' peoples, and the perpetuation of authoritarian systems."<sup>55</sup>

What does this mean concretely, particularly for groups in the United States asserting civil and human rights claims and seeking both traditional legal and innovative cultural remedies? We start with three brief, more affirming accounts of collective memory dynamics and justice claims.

The public portrayal of group memory transformed the process of Japanese American redress. For Japanese Americans interned during World War II without charges or trial because of race, the deep, wounded need to tell their story (to remake history from their perspective) drove the 1980s redress movement into the courts, legislatures, schools, and newsrooms. It was only when scores of now-aging Japanese Americans spoke publicly for the first time before a congressional commission in 1982, telling their stories both of loyalty and patriotism and of loss, humiliation, and continuing hardship, did a new story emerge. That story deeply touched even conservatives on the commission. It framed United States-generated injustice in terms of the human suf-

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54. See generally LEO TINDEMANS ET AL., UNFINISHED PEACE: REPORT OF THE INTERNATIONAL COMMISSION ON THE BALKANS 13–26 (1996).

55. *Id.* at xiv.

fering of loyal U.S. citizens and thereby grounded \$1.6 billion in reparations and a presidential apology.<sup>56</sup>

Yet, that emergent group memory, which so moved mainstream policy-makers and the public, was partial. It was partial—that is, incomplete—because the dominant story of patriotic suffering focused only on unquestioning loyalty and acquiescence to governmental abuse. It was partial—that is, ideological—because it erased from history fierce Japanese American resistance to the internment's injustice, including the constitutional challenges,<sup>57</sup> opposition to the military draft, and civil disobedience in the internment prisons. This partial memory, publicly proclaimed and governmentally recognized, split open old wounds of exclusion within the Japanese American community, wounds only now beginning to heal.<sup>58</sup>

For many of the 10,000 Philippine citizens tortured and murdered for their political opposition to the former Ferdinand Marcos regime, reshaping memory became both a means to challenge injustice and a psychological end in itself.<sup>59</sup> Consider the anguish of the family of Archmedes Trajano, a college student who posed a mildly critical question to Marcos's daughter at a forum and was whisked away, tortured for days, and thrown off a building. For his family, and thousands of others, there existed the need to create a new memory beyond the excruciating story of personal loss and suffering—a memory that included a sense of social justice and government accountability. To write this new memory collectively, many families, lawyers, bureaucrats risked much in the Philippines to aid the thirteen-year human rights multi-district class action litigation in the United States.<sup>60</sup>

For Native Hawaiians spiritually, collective memory is ancestral—genealogy preserved orally over generations through chants.<sup>61</sup> For native Hawaiians seeking justice, collective memory integrates the ancestral with current

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56. See COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND THE INTERNMENT OF CIVILIANS 185–212, 245–52 (1982).

57. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (rejecting Fred Korematsu's due process challenge to internment); see also 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).

58. See Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385 (1998) (describing the model minority ideology in reparations discourse).

59. I served as a procedural specialist for plaintiffs in the federal court class action litigation in the United States. The trial resulted in about a \$1.3 billion judgment for violation of international human rights law. See *In re Estate of Marcos*, 910 F. Supp. 1470, 1470 (D. Haw. 1995) (noting that the judgment against the Marcos estate remains unpaid).

60. See *id.*

61. See Catherine Kau & Melody K. MacKenzie, *Religious Freedom*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 229, 229–31 (Melody Kapilialoha MacKenzie ed., 1991).

claims of right. Native Hawaiians are still struggling with the ramifications of the U.S. government-aided illegal overthrow of the sovereign Hawaiian nation in 1893. They lost their government and homelands and had their language and culture suppressed. Recounting “what happened” years ago is difficult. “Who we were and what happened” are integrally connected to how Hawaiians were sometimes pejoratively described by white American missionaries (savages and pagans), businessmen (incompetents), and politicians (a dying race), and later by racial immigrant groups (lazy and uneducated).<sup>62</sup> Making the task of recounting even more difficult is the present-day reality that native Hawaiians are building their own new understandings of “what happened” and “who we were” partly in order to claim “what is rightfully ours.” This linkage of events to identity and then to rights implicates contemporary notions of group and nationhood.

Thus, answering “what happened and who we were” is only partially an exercise in factual discovery. It is also an act of historical and political construction.<sup>63</sup> And in the process of construction, answers to these questions are shaped by pending sovereignty and reparations justice claims.

These brief accounts about the complexity of collective memory raise two key questions: (1) How is collective memory shaped by, and in turn how does it shape, perceptions of injustice; and (2) How can understanding collective memory dynamics help transform progressive rights strategies in a “post-civil rights” era?

Drawing upon recent works by Martha Minow,<sup>64</sup> we sketch below insights from multidisciplinary memory studies and outline implications for progressive justice strategies.

## B. Multidisciplinary Insights

The most significant general insight is that memories are not simply retrieved from a brain storehouse. They are constructed and continually reconstructed. They are not stored whole for future use but are produced by neurochemicals and by complex interactions among people and their social environments.<sup>65</sup>

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62. See TOM COFFMAN, *NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII* (1998).

63. See OMI & WINANT, *supra* note 29, at 48–50.

64. See, e.g., MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998); Martha Minow, *Remembering to Remember*, Phi Beta Kappa Address at Harvard College (June 5, 1999).

65. Biology tells us that the release of neurochemicals during trauma may physically affect cerebral tissue, and this may account for powerful recall of horrible events such as sexual abuse, wholesale evictions, and war experiences. See John H. Krystal et al., *Post Traumatic Stress Disorder: Psychobiological Mechanisms of Traumatic Remembrance*, in *MEMORY DISTORTION: HOW*

Cognitive science (drawing from biology, philosophy, and psychology) thus rejects the metaphor of the brain as computer and memory as data retrieval. It suggests that people often subconsciously choose what to remember in ways that reflect their desires, hopes, and the cultural norms of their social environment.<sup>66</sup> As those hopes and desires change, memories alter. “People change, and the meanings of their past experiences change as their ways of interpreting the world shift.”<sup>67</sup> For this reason, some historians call this kind of contemporary remembering the “historical present.”<sup>68</sup>

Moving roughly from the individual to the group, social psychology emphasizes the importance of cultural forms and institutional practices in the development of collective memory.<sup>69</sup> Memories of past events, persons, and interactions are culturally framed because they are subject to socially structured patterns of recall, they are often triggered by social stimuli and they are conveyed through communal language.<sup>70</sup>

Especially important in this sifting, transforming developmental process are narrative structures.<sup>71</sup> “Narrative possibilities and constraints frame what is remembered and . . . stories reinforce a group’s identity and compose the

MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 150, 154–55 (Daniel L. Schacter ed., 1995) [hereinafter *MEMORY DISTORTION*]; see also EDWIN M. YODER, *THE HISTORICAL PRESENT: USES AND ABUSES OF THE PAST* (1997). New studies in neurobiology “bring us closer each day to understanding the physical operation of memory—while simultaneously teaching us the crucial roles of narrative, culture and history in memory’s actual work.” MINOW, *supra* note 64, at 4.

66. See Gerald D. Fischbach & Joseph T. Coyle, *Preface* to *MEMORY DISTORTION*, *supra* note 65, at ix; see also Martin J. Conway, *Autobiographical Knowledge and Autobiographical Memories*, in *REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY* 67 (David C. Rubin ed., 1996) (suggesting that memories are “created at retrieval using components like narrative, imagery, emotion and goals.”).

67. Minow, *supra* note 64. Martha Minow also offers an important caveat: Even though collective memory is constructed, no person or even group can fully control that construction of memory—culture, politics, and economics exert external forces on the process. And even though collective memory is constructed, “some versions of the past are wrong”—“for example, the Holocaust did not occur.” *Id.*

68. Cf. YODER, *supra* note 65, at xi–xviii.

69. Michael Schudson aptly describes this social-psychological perspective.

Memory is social. It is social . . . because it is located in institutions rather than in individual human minds in the form of rules, laws, standardized procedures, and records, a whole set of cultural practices through which people recognize a debt to the past (including the notion of “debt” itself) or through which they express moral continuity with the past (tradition, identity, career, curriculum). These cultural forms store and transmit information that individuals make use of without themselves “memorizing” it.

Michael Schudson, *Dynamics of Distortion in Collective Memory*, in *MEMORY DISTORTION*, *supra* note 65, at 346, 346–47.

70. See *id.* at 347.

71. See Craig R. Barclay, *Autobiographical Remembering: Narrative Constraints on Objectified Selves*, in *REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY*, *supra* note 66, at 94.

frameworks people use to make the past meaningful.”<sup>72</sup> Influential narratives function in two ways. The first gives us the language, ideas and images—the story—we need to “comprehend” the past. The second, the grand narrative, frames the relationship of the past to the present. It shapes the past in light of how we see (or want to see) ourselves and others in the present.

Michael Schudson vivifies this latter point in describing how differing underlying historical narrative structures generate differing views of Native Americans today.

If you recall the wars between the United States government and Native Americans as part of the history of nation-building, it is one story; if you recall it as part of a history of racism it is another. If you see the skeletal remains of Native Americans from long ago as part of an impersonal history of the human species, the remains are valuable specimens for scientific research; if you understand them as the cherished property of their descendants, they deserve reverent treatment and should be reburied according to the customs of Native American groups.<sup>73</sup>

Direct experiences, cultural forms, institutional practices, and political ideology generate the underlying, or structural, narratives. They combine to form a lens through which group history is viewed and contemporaneous stories of the past are developed. Conversely, psychological dysfunction sometimes occurs when a person's or a group's culture lacks the narratives to help organize and make meaning out of harsh events and situations. These people individually or collectively lack one lens for coalescing coherent memories connecting the past to the present.<sup>74</sup>

Because this lens is constructed, “remembering” the past is neither innocent nor objective. As historian Peter Burke eloquently observes,

A way of seeing is a way of not seeing, a way of remembering is a way of forgetting, too. If memory were only a kind of registration, a “true” memory might be possible. But memory is a process of encoding information, storing information and strategically retrieving information, and there are social, psychological, and historical influences at each point.<sup>75</sup>

Historical memory is selective.

72. *Id.*

73. Schudson, *supra* note 69, at 346.

74. See generally Jerome Bruner & Carol Fleisher Feldman, *Group Narrative as a Cultural Context of Autobiography*, in REMEMBERING OUR PAST: STUDIES IN AUTOBIOGRAPHICAL MEMORY, *supra* note 66, at 291. Thus, to understand memory, let alone collective memory, we need to look at more than science and social science. We need to draw upon narrative theory, autobiography, cultural studies, and historical methodologies. See also Minow, *supra* note 64.

75. Peter Burke, *History as Social Memory*, in MEMORY: HISTORY, CULTURE AND THE MIND 97, 103 (Thomas Butler ed., 1989).



These multidisciplinary insights are brought to bear and extended in Peter Novick's recent book on collective memories of the Holocaust.<sup>76</sup> Novick examines not the Holocaust events themselves, but rather the initial postwar silence about these events and the later political struggles among different groups over Holocaust memory. Most important, Novick's book links the contemporary struggles over collective memory to present-day ideology, political goals and identity formation.

Novick starts with a clear acknowledgment of the human horror of the Holocaust. His focus, though, is on what he perceives to be America's preoccupation with the Holocaust. The centering of the Holocaust in the American consciousness has not occurred spontaneously. According to Novick, it is motivated as much by political as moral concerns. As one commentator aptly summarized, "It has come about through a confluence of sociological needs and available cultural resources, as well as through tactical calculation. The legacy of the Holocaust has been treated as a political issue and deliberately used for political ends."<sup>77</sup>

One such end is to set the record straight—to respond to gross historical distortions. Those who contend that the Nazi's and their supporters never exterminated Jews en masse are wrong. Another more complicated political end, according to Novick, is the forging of a secularized Jewish identity in the United States in part to maintain political and economic power.<sup>78</sup>

Novick's well-researched work is controversial, some say polemical.<sup>79</sup> Its broad insights about collective memory, nevertheless, are instructive. Our memories of the Holocaust in the United States have changed dramatically over the postwar years and "the Holocaust" as a symbol is often deployed in a wide range of settings. As Eva Hoffman observes, "[a]t each successive stage, the understanding of that enormous event has been shaped by contemporaneous values and ideological pressures, and at each point, the symbolism of the Holocaust has been used in the service of specific causes and interests."<sup>80</sup>

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76. See PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* (1999).

77. Eva Hoffman, *The Uses of Hell*, N.Y. REV. BOOKS, Mar. 9, 2000, at 19 (reviewing NOVICK, *supra* note 76).

78. See NOVICK, *supra* note 76, at 85.

79. Eva Hoffman notes:

Novick puts the onus for shaping and manipulating Holocaust memory mainly on Jewish organizations and leaders who . . . have been its main inheritors in the US. . . . [He] wants to ask whether the "centering" of the Holocaust in American consciousness is good for anyone, including, and especially, American Jews. He believes it is not. He is openly dismayed by the current forms and applications of Holocaust memory.

Hoffman, *supra* note 77, at 19.

80. *Id.*

### C. Implications for Justice Strategies

What do these general insights about collective memory mean for people on the justice frontlines, for people arguing for progressive deployment of civil and human rights? At bottom, these insights mean that they cannot simply assume, as many do, a nice two-step dance: first, dig historically to find out “what really happened,” and second, describe how those “facts” show a violation of established rights norms. That is a narrow, lawyerly approach.

The digging we must do is not only into the documentary archives, but also into the archives of mind, spirit, and culture—then and now. In digging, we need to acknowledge that we are not merely retrieving group memories. We are helping construct them as we go, within a context of not only rights norms but also larger societal understandings of injustice and reparation. These memories are shaped by, and in turn share, daily cultural practices as well as major events. Collective memories can therefore differ depending on locale, group experiences, and cultural norms.

The struggle over recognition of competing collective memories is therefore often a struggle over the supremacy of world views, of colliding ideologies. And through those struggles we have the potential to remake our, and society’s, understandings of justice—for good or ill.

This means that the group members, lawyers, politicians, justice workers, and scholars possess often unacknowledged power at the very foundational stages of every redress movement. The power resides in the potential for constructing collective memories of injustice as a basis for redress. It also resides in the potential for shaking (or salving) the psyche of a people. This also means that collective memory can be put to regressive and well as progressive use. The Balkans leaders’ reconstruction of history, mentioned earlier, is an example of the former; the Japanese American community’s narrative history of the internment’s human suffering, a variegated example of the latter.

How do these general insights translate into practical strategy? We can begin by distilling five strategic points for purposes of re-forming civil rights.

1. *Justice claims of “right” start with struggles over memory.* As a strategic matter, therefore, if we seek justice by claiming civil or human rights, we must at the outset critically engage the dynamics of group memory of injustice.

2. *Group memory of injustice is characterized by the active, collective construction of the past.* It is “active” because it requires present-day activity; it is not about simply recalling past events. That memory is “collective,” because it emerges from interactions among people, institutions, media, and other cultural forms. It involves “construction” because those collective memories are not found, but rather are built and continually altered.

3. *The construction of collective memory implicates power and culture.* Action on justice claims often turns on which memories are acknowledged by decisionmakers. Collective memory thus is always hotly contested by those supporting and those opposing justice claims. Indeed, struggles over memory are often struggles between colliding ideologies, or vastly differing world views. When outsiders begin to persuasively reconstruct historical injustice they usually face fierce opposition by those in power. That opposition seeks totally to discredit the developing memory proffered by outsiders. Or, alternatively, it seeks to partially transform the old memory (slavery benefited the slaves) into a new memory (freed slaves could not handle freedom) that justifies continued hierarchy (segregation).<sup>81</sup>

4. *These contests over historical memory regularly take place on the terrain of culture—of which legal process, and particularly civil rights adjudication, is one, but only one, significant aspect.* Also significant are media-driven popular cultural images as well as day-to-day cultural practices (including artistic expressions, neighborhood meetings, and elder “talk-story” sessions). Who decides determines which cultural practices, images, and narratives formally frame the memories. And those memories in turn legitimate future understanding of and action on justice claims.<sup>82</sup>

5. In light of the importance of power and culture, it is never enough for societal outsiders only to frame the injustice narrowly to satisfy legal norms. Conversely, it is *always important for those outsiders to conceive of law and legal process as contributors to—rather than as the essence of—larger social justice strategies.* This means working with legal process and rights claims with dual goals: to achieve the specific legal result and to contribute to construction of social memory as a political tool.<sup>83</sup>

The claims, litigation, and outcome in the recent Supreme Court case *Rice v. Cayetano*<sup>84</sup> illuminate several of these strategic points about the battles over collective memory of injustice and the significance of those struggles to civil and human rights and justice in the U.S. courts.

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81. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–31 (1997).

82. See Hom, *supra* note 22 (calling for the persistent practice is justice in myriad daily, or micro-social, settings).

83. See Eric K. Yamamoto, *Practically Reframing Rights: Cultural Performance and Judging*, 33 U.C. DAVIS L. REV. (forthcoming July 2000) (altering judicial perceptions by transforming through cultural performances the framework for processing “information”).

84. 120 S. Ct. 1044 (2000).

#### D. *Rice v. Cayetano*

In February 2000, the Supreme Court decided a case with far-reaching effects on civil rights, human rights, and native sovereignty—the most important Hawaiian rights case.<sup>85</sup> In *Rice*, the Court agreed with a white American rancher's racial discrimination claim and invalidated a limitation by which only Native Hawaiians were allowed to vote for trustees to the state's Office of Hawaiian Affairs (OHA).<sup>86</sup> Hawai'i's multiracial populace created OHA in 1978, recognizing that native Hawaiians share with Native Americans a "history of subjugation at the hands of colonial forces" and that a measure of Hawaiian self-governance was needed.<sup>87</sup> *Rice* puts at risk not only OHA, but all federal and state programs designed to repair continuing harms to the Hawaiian people<sup>88</sup> resulting from the now acknowledged illegal overthrow of the sovereign nation of Hawai'i in 1893.

#### E. The Office of Hawaiian Affairs

OHA represents descendants of pre-Western contact Hawaiian people concerning government control over valuable "ceded lands."<sup>89</sup> Ceded lands comprise one-third of the entire state of Hawai'i. They are former Hawaiian government lands and royal lands taken by the United States upon annexa-

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85. Who has a stake in this "Hawaiian" case? Certainly the indigenous Hawaiian communities, particularly those struggling to deal politically and socially with the consequences of U.S. colonialism—including the Hawaiians' highest rates of poverty, unemployment, incarceration, serious illness, and homelessness. Also Native Americans, who perceive that conservatives such as Robert Bork and Abigail Thernstrom supporting plaintiff Freddy Rice are endeavoring to fry even bigger fish, including all nontribal American Indians who benefit from government programs. And Latinas/os—those linking contemporary legal strategies concerning immigration, language, citizenship, and political participation with earlier anticolonial, Chicano self-determination movements in the United States. And finally, African Americans, Asian Americans, women, gays and lesbians, and the disabled who are combating America's conservative "retreat from justice" in law and politics. See Eric K. Yamamoto & Chris Iijima, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES, Summer 2000 <[http://www.arc.org/C\\_Lines/CLArchive/story3\\_2\\_01.html](http://www.arc.org/C_Lines/CLArchive/story3_2_01.html)>.

86. I have provided legal counsel to, and represented in litigation, two current Office of Hawaiian Affairs (OHA) trustees.

87. *Rice*, 120 S. Ct. at 1066 (Stevens, J., dissenting).

88. See, e.g., Native Hawaiian Education Act, Pub. L. No. 103-382, §§ 9201-9212, 108 Stat. 3518, 3794-805 (1994) (codified at 20 U.S.C. §§ 7901-7912 (1994)) (establishing programs to facilitate the education of Native Hawaiians); Craston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625, § 958, 104 Stat. 4079, 4422-23 (1990) (providing a preference for Native Hawaiians in Housing and Urban Development housing assistance programs); Native Hawaiian Health Care Improvement Act, Pub. L. No. 100-579, 102 Stat. 2916 (1988) (codified as amended at 42 U.S.C. §§ 11701-11714 (1994)) (creating programs aimed at improving health care for Native Hawaiians).

89. See HAW. CONST. art. XII, §§ 5-6 (establishing board of OHA trustees and defining their powers).

tion of Hawai'i as a territory following the 1893 overthrow.<sup>90</sup> That year, annexationists sought the help of the U.S. Minister to Hawai'i, who ordered U.S. Marines and a warship to land in Hawai'i. The invading troops and insurrectionists deposed reigning sovereign Lili'uokalani and seized all Hawaiian government and royal lands.<sup>91</sup> Upon statehood in 1959, the United States turned over to the new state most of the ceded lands to be held in trust partially to benefit "native Hawaiians."<sup>92</sup> For over twenty-five years, the state badly mishandled its land trust obligations to indigenous Hawaiians (or Kanaka Maoli).<sup>93</sup>

Partly in response to the state's mishandling, Hawai'i's diverse peoples overwhelmingly approved the 1978 state constitutional amendment creating OHA and its indigenous Hawaiians-only voting structure. OHA, whose assets from ceded lands revenues now exceed one-half billion dollars, monitors the state's use of ceded lands and spends millions annually on programs addressing social, economic, and cultural needs of Kanaka Maoli.<sup>94</sup> In addition to these functions, as the constitutionally designated "receptacle" for government reparations payments, OHA is seen by some Hawaiians as a transitional entity toward Hawaiian sovereignty.<sup>95</sup> In the past, the state negotiated with OHA to transfer lands and over 300 million dollars as reparations (and legal settlement) for the state's past misfeasance—possibly generating land and additional monetary assets, in the eyes of some, for Kanaka Maoli self-governance.<sup>96</sup>

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90. See Melody K. MacKenzie, *Historical Background* [hereinafter MacKenzie, *Historical Background*], in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 61, at 3, 12. The 13-member Committee of Safety, which engineered the coup, formed the Republic of Hawaii in 1893 and claimed control over the Hawaiian government and royal lands. The Republic ceded those lands to the United States upon annexation in 1898. See Melody K. MacKenzie, *The Ceded Lands Trust*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 61, at 26.

91. See MacKenzie, *Historical Background*, *supra* note 90, at 12.

92. See Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) (establishing in section 5(f) a public land trust on "ceded lands" (and the proceeds from those lands) granted or conveyed to the State of Hawaii by the United States under sections 5(b) and 5(e), and providing that the State of Hawaii hold the section 5(f) trust lands for five purposes, one of which is "for the betterment of the conditions of native Hawaiians").

93. See Samuel King et al., *Broken Trust*, HONOLULU STAR-BULL., Aug. 9, 1997, at A1.

94. See, e.g., 1997 Haw. Sess. Laws 240.

95. See Melody K. MacKenzie, *Self-Determination and Self-Governance*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 61, at 77, 89. *But see*; HE ALO HE ALO/FACE TO FACE: HAWAIIAN VOICES ON SOVEREIGNTY (1993); Samuel P. King, *Hawaiian Sovereignty*, HAW. B.J., July 1999, at 7, 8 (viewing the OHA as little more than a state agency beholden to prevailing political powers in the state). Some Hawaiians think the OHA is "dysfunctional." See Kevin Dayton, *Cayetano Says Court's Decision Requires Action*, HONOLULU ADVERTISER, Feb. 24, 2000, at A1.

96. See *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446 (Haw. 1987).

## F. The Challenge

In 1996, Harold “Freddy” Rice, a Caucasian rancher who traced his family’s roots in Hawai‘i back to the mid-1800s, sued Hawai‘i’s governor, Ben Cayetano, to invalidate OHA’s indigenous Hawaiians-only voting limitation. Rice claimed that the limitation was nothing more than a special privilege for a racial minority, a violation of the Fifteenth and Fourteenth Amendments of the U.S. Constitution that prohibit racial discrimination.<sup>97</sup> His suit, Rice said, presented an opportunity to end racial strife in the United States.<sup>98</sup> Rice’s high profile supporters included Robert Bork and Abigail Thernstrom and the conservative Center for Equal Opportunity.<sup>99</sup>

More specifically, Rice argued that “Native Hawaiian” is a racial category and that OHA’s Hawaiian-only voting restriction is subject to invalidation under the *Adarand Constructors, Inc. v. Peña*<sup>100</sup> strict scrutiny equal protection standard of review for racial classifications.<sup>101</sup> Rice also contended that native Hawaiians could not avail themselves to the Native American exception from strict scrutiny review, recognized by the Court in *Morton v. Mancari*,<sup>102</sup> because Hawaiians are not a formally recognized “Indian tribe.”<sup>103</sup> In 1974, *Mancari* deemed Native American to be a “political” designation (reflecting a special sovereign-to-quasi-sovereign relationship), rather than a “racial” one, even though race clearly was integral to the designation. The Court located federal authority for that special relationship in the Constitution’s enumeration of federal power over “Indian tribes.”<sup>104</sup>

The state of Hawai‘i, as respondent, OHA, virtually every major Hawaiian organization, and the federal government, as amici, countered that the voting limitation was not a racial restriction in the traditional sense. The state

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97. See *Rice v. Cayetano*, 120 S. Ct. 1044, 1053 (2000). Significantly, Rice did not challenge that validity of the OHA itself.

98. See Brief for Petitioner, *Rice*, 120 S. Ct. 1044 (2000) (No. 98-818).

99. See Brief of Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen and Abigail Thernstrom in Support of Petitioner, *Rice* (No. 98-818).

100. 515 U.S. 200 (1995).

101. See *id.* at 235-37.

102. 417 U.S. 535 (1974).

103. See *id.* at 553-55.

104. See *United States v. John*, 437 U.S. 634 (1978); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977). Neither *Adarand Constructors, Inc. v. Peña* nor the Court’s Native American cases following it held that *Adarand* overruled *Morton v. Mancari*. Cf. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 564-65 (1996) (attempting to distinguish these cases). In *Rice v. Cayetano*, the Ninth Circuit also held that the OHA’s voting limitation did not violate the Fifteenth Amendment because the limitation was analogous to the voting limitation for special district elections, in which beneficiaries of the district’s programs are the only persons allowed to vote. See *Rice v. Cayetano*, 146 F.3d 1075, 1080 (9th Cir. 1998), *aff’d* 963 F. Supp. 1547 (D. Haw. 1997), *overruled by* 120 S. Ct. 1044 (2000).

honed its arguments tightly around legal doctrinal requirements. Without clearly connecting those arguments to the larger Hawaiian justice movement, it asserted narrowly that the United States and native Hawaiians had a “special relationship” akin to ward-guardian and that, therefore, native Hawaiians, like Native Americans are “political” rather than “racial” minorities.<sup>105</sup>

In 1997, the federal district court for Hawai‘i,<sup>106</sup> and in 1998, the Ninth Circuit Court of Appeals,<sup>107</sup> upheld OHA’s Hawaiians-only vote. The courts recognized that, even without formal tribal status, indigenous Hawaiians are situated analogously to Native Americans. Both are first peoples in the United States and are the beneficiaries of a special fiduciary relationship with the government. Therefore, native Hawaiians, like Native Americans, are “political” minorities in the United States for purposes of equal protection analysis.<sup>108</sup>

105. See Brief for Respondent at 3–4, *Rice*, 120 S. Ct. 1044 (2000) (No. 98-818). The state’s brief offered a sanitized, passive, historical account:

[T]he newcomers asserted or acquired title to the land and displaced the original inhabitants from their homelands; and there eventually came an acknowledgement on the part of the new sovereign—the United States—that with the exercise of dominion over a land that others had once known as theirs came a special obligation to and relationship [guardian-ward] with those once-sovereign, indigenous people.

*Id.* OHA framed its argument as follows: “This case thus does not involve racial discrimination, but the power of Congress and the State of Hawai‘i to fashion a limited program for the aboriginal people of Hawai‘i, similar to programs established to benefit aboriginal peoples in other States.” Brief of the Office of Hawaiian Affairs et al. as Amici Curiae Supporting Respondent at 3, *Rice*, (No. 98-818).

Allowing OHA’s beneficiaries—Native Hawaiians—to elect the OHA trustees does not deny other citizens of Hawaii the right to vote “on account of race.” Laws that must recognize the special status of aboriginal people are not based on race, but the aboriginal peoples’ ownership of land and self-government before Europeans took control of their lands.

*Id.* at 14. Neither the state’s brief nor the OHA’s brief explicitly characterized the OHA’s creation as a federal and state response to colonization of Hawai‘i by the United States or addressed the OHA’s ancestry requirements as part of a political response to the “colonizer’s” standard use of race (particularly racial inferiority) to help legitimate political conquest. See ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 23–24 (1965).

The legal briefs also did not address the novel, compelling argument that the U.S. presence in Hawai‘i since 1893 constitutes one national sovereign’s “prolonged occupation” of the territory of another in violation of the international laws of war. That argument is currently before the Permanent Court of Arbitration in the Hague in *Larsen v. Hawaiian Kingdom*. See *World Court to Hear Claim to Hawaiian Kingdom*, HONOLULU ADVERTISER, Jan. 4, 2000, at A5; see also CHRISTOPHER GREENWOOD, REVISED REPORT PREPARED FOR THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE (1999) (surveying the “Laws of War”).

106. See *Rice*, 963 F. Supp. 1547.

107. See *Rice*, 146 F.3d. 1075.

108. Both the district court for the District of Hawaii and the Ninth Circuit also rejected Rice’s Fifteenth Amendment argument. As the Ninth Circuit stated:

If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to [manage affairs benefiting] exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a [Hawaiian] board of trustees . . . the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be. Put another

Native Hawaiians, like Native Americans, should be allowed to hold natives-only elections concerning native interests in government trust programs. Both courts held, pursuant to *Mancari*, that the rational basis rather than the strict scrutiny standard of review applied.

### G. The Decision

The Supreme Court reversed. Five justices held that the “race neutrality command of the Fifteenth Amendment” prevents a state from abridging “the right to vote on account of race, and [the OHA voting restriction] law does so.”<sup>109</sup> As developed later, Justice Anthony Kennedy’s majority opinion is an exercise in collective memory construction as the foundation for its prescribed outcome. The opinion emphasized the dangers of racial categories generally. Ignoring OHA’s reparatory purpose and on-going federal efforts to rectify the illegal overthrow, the opinion treated OHA’s voting limitation as a simple case of racial discrimination against non-Hawaiians.<sup>110</sup> Despite legal authority allowing voting limitations for indigenous peoples,<sup>111</sup> and numerous federal statutes specifically describing Hawaiians as indigenous people,<sup>112</sup> the majority concluded that because OHA was not a quasi-sovereign entity, it was not entitled to restricted voting. The concurring opinion of Justices Stephen Breyer and David Souter went further. It argued that “there is no ‘trust’ for native Hawaiians here, and . . . OHA’s electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.”<sup>113</sup>

In dissent, Justices John Paul Stevens and Ruth Bader Ginsburg excoriated the majority for its historical myopia:

The Court’s holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawai’i. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against

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way, the voting restriction is not primarily racial, but legal or political. Thus . . . Rice’s argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

*Id.* at 1079 (footnote omitted).

109. *Rice*, 120 S. Ct. at 1059–60.

110. *See id.* at 1057 (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”).

111. *See, e.g.*, Brief of the Office of Hawaiian Affairs et al. as Amici Curiae Supporting Respondent at 15–25, *Rice*, (No. 98-818) (arguing that Native Hawaiians are considered “aboriginal peoples” under the Constitution and thus Congress has the authority to pass legislation recognizing the special status of aboriginal peoples).

112. *See, e.g., id.* at 13.

113. *Rice*, 120 S. Ct. at 1061 (Breyer, J., concurring).



two centuries of this Court's federal Indian law, it is clear . . . that Hawai'i's election scheme should be upheld.<sup>114</sup>

Immediately following the decision, Rice's attorney announced his intent to file new suits under the Fourteenth Amendment to dismantle all federal- and state-supported Hawaiian programs, including OHA.<sup>115</sup> Adding fuel to the fire, Governor Cayetano stated that he would forthwith replace the sitting OHA trustees with political appointees, provoking charges that the state was attempting to steal OHA's assets.<sup>116</sup> Rice's political supporters on the continental United States trumpeted the Court's stand against "racial discrimination"—meaning discrimination against whites.<sup>117</sup> Native Americans worried that the Court encouraged conservatives to attack Congress' authority to deal with Native Americans not formally recognized as tribal members.<sup>118</sup> Hawaiian leaders called for civil disobedience (at airports, harbors, and the University of Hawaii): "If the law abandons you, and what you're fighting for is social justice, then your only viable option is non-violent civil disobedience."<sup>119</sup>

#### H. The Battle over Collective Memory

The *Rice* decision itself invalidated only the OHA voting limitation. Its legal and practical effects, however, extend far across the social justice landscape. The immediacy of the reactions to the decision obscured what lay at the core of the Court's decision: a fierce battle over conflicting histories.

As mentioned, justice struggles through claims of right are, first and foremost, active, present-day struggles over collective memory. How a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them. This is certainly true of the dissonant framing of the "injustice" in *Rice*. Is OHA simply about conferring racial privileges, tilting an otherwise level playing field in favor of indigenous Hawaiians? Or is OHA part of concerted, long-term

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114. *Id.* at 1062 (Stevens, J., dissenting).

115. See Christine Donnelly, *Lawyer: Rice's Win Will Mean More Suits*, HONOLULU STAR-BULL., Feb. 24, 2000, at A1.

116. See Pat Omandam & Richard Borreca, *Despite Deal, Cayetano: Civil Protests Over OHA "Irresponsible,"* HONOLULU STAR-BULL., Mar. 1, 2000, at A3.

117. See David G. Savage, *High Court Strikes Race-Exclusive Voting Privilege*, L.A. TIMES, Feb. 24, 2000, at A14.

118. See David G. Savage, *Justices Review Hawai'i Voting Restriction*, L.A. TIMES, Oct. 7, 1999, at A13; see also Linda Greenhouse, *Justices Void Hawai'i Setup that Limits a Vote by Race*, N.Y. TIMES, Feb. 24, 2000, at A16.

119. Pat Omandam, *Despite Deal, Hawaiians Plan Civil Disobedience*, HONOLULU STAR-BULL., Mar. 3, 2000, at A1.

state and federal efforts to rectify the ravages of U.S. colonialism, in which race, economics, and politics played major roles?

The Court majority entered the fray over these conflicting histories. Yet, the majority cast its historical framing as neutral, as uncontroversial. The Court was not interpreting history, Justice Kennedy said, simply “recounting” it.<sup>120</sup> Was this the reality? According to observers, the Court justified its judgment by recitation of a history so selective and euphemized that the decision stands on a one-legged edifice, readily exposed to the winds of truth telling.<sup>121</sup> Or, as Justice Stevens characterized the majority’s historical narrative—“glittering generalities that have little, if any, application to the compelling history of . . . Hawaii.”<sup>122</sup>

How did the majority treat indigenous Hawaiian history? Nowhere did its opinion mention U.S. colonialism in 1898, in Hawai‘i or contemporaneously in the Philippines and Puerto Rico. It passively described the colonization of Hawaiians as “the culture and way of life of a people . . . all but engulfed by a history beyond their control.”<sup>123</sup> Nor did the majority acknowledge specifically the destruction of Hawaiian culture through the banning of Hawaiian language or the current effects of homelands dispossession, including poverty, poor levels of education and health, and high levels of homelessness and incarceration. Nor did the main opinion recognize that colonial powers often used race to legitimate conquest, denigrating in racial terms those colonized.<sup>124</sup> The opinion even failed to mention whites or Caucasians, although white racism was central to much of recorded Hawaiian history and Rice’s claim was implicitly one of “reverse discrimination” against whites. In addition, the majority opinion completely ignored the present-day vibrant, wide-spread Hawaiian sovereignty and self-determination movement that gave birth to OHA.<sup>125</sup>

Perhaps most astonishing was the majority’s dismissive treatment of two hugely significant facts: First, there was little mention of the extraordinary Congressional Apology Resolution of 1993 in which the United States acknowledged explicitly each of the historical facts just recited and committed

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120. Rice v. Cayetano, 120 S. Ct. 1044, 1048 (2000).

121. For example, the majority described Rice, as “a Hawaiian in a well-accepted sense of the term” since he was a “citizen of Hawai‘i.” *Id.* at 1047. Practically no one residing in Hawai‘i—native Hawaiians and even non-Hawaiians—would consider Freddy Rice a “Hawaiian.” Even the *Honolulu Advertiser*, the generally conservative Honolulu daily newspaper, asked in its editorial, “Well-accepted where? Certainly not in Hawaii.” HONOLULU ADVERTISER, July 2, 2000, at A8; see also Yamamoto & Iijima, *supra* note 85, at 6.

122. Rice, 120 S. Ct. at 1062 (Stevens, J., dissenting).

123. *Id.* at 1060.

124. See MEMMI, *supra* note 105, at 23–24.

125. See MacKenzie, *supra* note 95, at 88.

the government to future acts of reconciliation;<sup>126</sup> and second, there was no mention that OHA and its voting limitation were created by the overwhelming vote of Hawai'i's multiracial populace partly to rectify the legacies of U.S. colonialism by affording Hawai'i's indigenous peoples a measure of self-determination. As Justices Stevens and Ginsburg recognized in dissent, "it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them."<sup>127</sup>

### I. *Rice Supremacy*

What collective story did the majority tell? Relying selectively on generally respected historical works written by two non-Hawaiians long before the contemporary Hawaiian sovereignty movement,<sup>128</sup> the Court majority generated a remarkable narrative reminiscent of the familiar tale of how Western culture and law, more or less naturally, "civilized" the native savage—this time in Hawai'i.<sup>129</sup>

The majority began by describing how the Hawaiian people found "beauty and pleasure in their island existence" but how life was not "idyllic" because there was internecine warfare and that kings "could order the death or sacrifice of any subject."<sup>130</sup> Moreover, Hawaiians were "polytheistic."<sup>131</sup>

The majority characterized the nineteenth century missionaries not as uninvited cultural foreigners but as civilizers who "sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings."<sup>132</sup> It blandly described often greedy Western encroachment as a "story of increasing involvement of westerners in the economic and political

126. The majority opinion also did not acknowledge the federal government's serious efforts now to reconcile with Hawaiians and to repair the harms from the United States's active participation in the illegal overthrow. See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii and to Offer Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (expressing Congress's "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people" and urging the President to support reconciliation efforts, in sections 1(4) and (5)).

127. *Rice*, 120 S. Ct. at 1066 (Stevens, J., dissenting).

128. See *id.* at 1048 (citing L. FUCHS, *HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY* (1961), RALPH S. KUYKENDALL, *THE HAWAIIAN KINGDOM* (1967)).

129. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST* (1990).

130. *Rice*, 120 S. Ct. at 1048.

131. *Id.*

132. *Id.*

affairs of the Kingdom.”<sup>133</sup> It also described the 1848 Mahele, which precipitated massive foreign private land ownership, and which most Native Hawaiians regard as a disaster, simply as a “fundamental and historic division” of land after which land “ownership became concentrated.”<sup>134</sup>

The majority also identified Western disease “no doubt” as the source of the “despair, disenchantment, and despondency” of the descendants of the early Hawaiian people.<sup>135</sup> It failed, however, also to connect despondency and despair to the loss of national sovereignty, the confiscation of homelands, and the denigration of native culture. Perhaps for this reason, the majority overlooked the significance of the stinging 1897 protest of native Hawaiians who signed a Petition to Congress condemning the impending U.S. annexation of Hawai‘i.<sup>136</sup>

The *Rice* majority also engaged in striking historical remembering when it characterized “[t]ensions” between an “anti-Western, pro-native bloc” and “Western business interests and property owners.”<sup>137</sup> Turning historical events upside-down, the Court intimated that the overthrow was justified by Queen Lili‘uokalani’s undemocratic actions. Her attempt to restore “monarchical control . . . and limit[] the franchise to Hawaiian subjects”<sup>138</sup> compelled prodemocracy Americans to seize control.<sup>139</sup> In fact, Lili‘uokalani was reacting to white businessmen’s imposition of a “bayonet constitution” in 1887, under which native voters were largely excluded by property voting requirements, and whites and foreigners achieved grossly disproportionate political power.

Finally, the majority alluded to the “Chinese, Portuguese, Japanese, and Filipino” migrations to Hawai‘i and how these immigrants faced, and overcame, discrimination.<sup>140</sup> One implicit message: The immigrant groups picked themselves up by their bootstraps, why haven’t the Hawaiians? A second and

133. *Id.*

134. *Id.* at 1049. *But see* LILIKALA KAME‘ELEHIWA, NATIVE LAND AND FOREIGN DESIRES: HOW SHALL WE LIVE IN HARMONY? (1992).

135. *Rice*, 120 S. Ct. at 1051.

136. *See MacKenzie, supra* note 95, at 79.

137. *Rice*, 120 S. Ct. at 1050.

138. *Id.*

139. *See id.* The majority recited in passive voice that the Hawaiian government was “replaced” by a provisional government and for reasons unexplained, the Queen (who was in fact imprisoned) “could not resume her former place” despite President Grover Cleveland’s displeasure with the “actions of the American Minister.” *Id.* Indeed, President Cleveland authorized an investigation and declared the overthrow illegal and called for the United States to restore the Hawaiian monarchy. *See* FOREIGN RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII 458 (1895) (also known as the “Blount Report”). President Cleveland, however, left office before restoration of the monarchy and was replaced by pro-annexationist President William McKinley.

140. *See Rice*, 120 S. Ct. at 1051. The majority failed to mention, however, the crucial differences between people made American involuntarily through colonization and those who chose U.S. citizenship via immigration.

even more troubling message: Why, when naming Hawai'i's "immigrants," did the majority cite communities of color but omit white Americans, and why did the majority fail to mention the deep history of white racism integral to the dismantling of the Hawaiian nation? Are these omissions because the majority did not see white American missionaries and businessmen as foreign settlers but rather as natural heirs of Hawai'i?

What emerges from the Court's selective, often euphemistic, historical framing is a simple story of racial discrimination against Freddy Rice. Hawaiians had a rough go of it, as did immigrant groups, but the playing field now is pretty much leveled. According to the majority's construction of Hawai'i's history, because there are no effects of U.S. colonization, "privileges" for Hawaiians are not only undemocratic, they are illegal.

This, of course, is not the story Native Hawaiians tell. Generally speaking, those supporting OHA say that race was one factor, but only one factor, in the larger political reparations process that created OHA. Race had to be a factor in the political response to the effects of colonization because the colonizing process itself deployed race to help justify the overthrow and annexation despite vehement opposition by almost all native Hawaiians.<sup>141</sup>

More specifically, the Kanaka Maoli, through entities like OHA, are not seeking privileges or handouts. Nor are they seeking racial preferences. Rather, they are asserting international human rights—not simply the right to be equal but the right to self-determination; not a right to monetary entitlements but to reparation; not a right to special treatment but to reconnect spiritually with land and culture; not a right to fuller participation in the U.S. polity but some form of governmental sovereignty.

The Court in *Rice* ignored this native Hawaiian narrative and employed the antidiscrimination rhetoric of civil rights to defeat indigenous Hawaiian

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141. See MEMMI, *supra* note 105, at 23–34 (describing the way that colonizers use race to legitimate colonial conquest and control over people, land, and institutions); see also Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994). The racialized nature of the colonization process is captured in the statement by a U.S. Senator arguing for the U.S. annexation of Hawai'i in 1894.

Side by side on their islands were two civilizations, higher and a lower civilization. On the side of the higher civilization were ranged the intelligence, the progress, the thrift, the aspirations for enlarged liberty and for the legalization of a great destiny for Hawai'i. On the other side was ranged the monarchy, with its narrow, contracted view of human rights, with its semibarbarous face turned toward the past, unwilling to greet the dawning sun. . . . From the very nature of things these two civilizations could not exist together forever. One was to survive and the other would have to perish.

*Id.* at 23–24. The clear import of this statement is that colonization is legitimated because of racial inferiority: The "semi-barbarous face" of Hawaiians, "turned to the past, unwilling to greet the dawn sun," would "have to perish." *Id.* Contrast this racialized imagery supporting annexation with the petition of Native Hawaiians protesting to Congress the impending annexation of Hawai'i. See MacKenzie, *supra* note 95, at 79.

claims, just as supporters of California's recent Civil Rights Initiative deployed the rhetoric of equality to dismantle affirmative action.<sup>142</sup> At bottom, then, the Court appears to have made not one but two key choices in framing collective memory: the first, between sharply dissonant versions of history; the second, and underlying the first, between colliding ideologies, or desired world views. That latter ideological choice pitted public acknowledgement of the United States' role as colonial power and the damage wrought against erasure of that role from public consciousness. In *Rice*, the majority chose erasure.

What is so troubling about the majority's ideological historicism—in addition to concrete consequences—is that it reflects a familiar pattern. Journalist Edwin M. Yoder warns of America's recent "amnesia" about slavery in attempting to justify, or at least live with, racial inequity while proclaiming a commitment to equality.

It is well to remember all this rather recent history when we are tempted to preen ourselves on the American record of justice, and when we feel an urge to preach on the subject of basic human rights to those elsewhere who still sit in darkness. It is among our great American susceptibilities to cherish our myths of exceptionalism and special virtue. When the history fails to fit the myths, we bend the history.<sup>143</sup>

Historian Michael Kammen similarly observes the distortion of U.S. memories: "[T]he combination of loyalty and stability under the oldest written national constitution the world has, indeed, been impressive. But stability is achieved at a price: a tendency to depoliticize the civic past by distorting the nation's memories of it—all in the name of national unity."<sup>144</sup>

In closing this part we must ask whether the Court in *Rice* depoliticized the civic past by distorting the nation's memories all in the name (rather than substance) of national unity. Did it draw on conservative historical accounts and construct a twisted memory, now inscribed in law, that comports with Justice Scalia's asserted belief that "we are just one race here. It is American?"<sup>145</sup>

Down the road, if *Rice* and his national political supporters succeed in legally dismantling native programs, the national polity will accrue huge practical and psychic costs. The United States professes fealty to both domestic civil

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142. See CAL. CONST. art. I, § 31 (added by Proposition 209, the "California Civil Rights Initiative," passed Nov. 5, 1996); see also *Washington v. Davis*, 426 U.S. 229, 246 (1976) (holding that a racially neutral qualification for employment—in this case, "Test 21"—was not racially discriminatory nor denied equal protection of the laws because a greater proportion of African American applicants failed to qualify than any other racial or ethnic groups).

143. EDWIN M. YODER, *THE HISTORICAL PRESENT: USES AND ABUSES OF THE PAST* 56 (1997).

144. MICHAEL KAMMEN, *IN THE PAST LANE: HISTORICAL PERSPECTIVES ON AMERICAN CULTURE* (1997).

145. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

rights and international human rights. It expresses a commitment to justice and, when injustice occurs, reparation.

*Rice* and the collective memory it legitimates distort progressive civil rights and erase human rights. They twist a history of white racial dominance into a justification for present-day equality for Freddy Rice. They subvert human rights principles of self-determination and cultural development and the foundational principle of democracy itself by invalidating multiracial commitments to native Hawaiian self-governance. Equally important, by narrowly framing history to legitimate its decision, the Supreme Court generated precedent for forthcoming cases that undermines the principle of justice through reparation.<sup>146</sup>

“A way of seeing is a way of not seeing. A way of remembering is a way of forgetting, too.”<sup>147</sup>

Thus, understanding the political and cultural dynamics and strategic import of collective memory for justice claims processed through the U.S. legal system is an integral part, though only one part, of the larger project of re-forming civil rights in uncivil times. Another significant part of that project, also implicated in *Rice*, is grappling with the complex intersection of international human rights and domestic civil rights. The following part critiques key aspects of that intersection and looks back to the experience of the CRC for insights about theoretical and practical strategies for scholars and activists.

#### IV. INTERNATIONALIZING U.S. CIVIL RIGHTS: HISTORICAL INSIGHTS AND CURRENT CHALLENGES (SHARON K. HOM)

Over the past fifty years, human rights discourse has emerged as the imaginative engine and moral language of international public law reconfigurations. To tell this story—in the beginning—but where to mark the “beginning”? Despite what is in fact a long history of justice concerns for protection of the weak against oppression dating back thousands of years and across different civilizations and religious traditions, the history of modern international human rights law is commonly traced to international response to the atrocities committed by the Nazi’s genocidal extermination of millions of Jews, gypsies, homosexuals, and political dissidents during World War II. The Universal Declaration of Human Rights (UDHR), adopted by the General Assembly in 1948, sets forth a comprehensive array of civil, political, economic, social, and cultural rights, including the prohibition of slavery, inhuman treatment, arbitrary arrest, and broad nondiscrimination provisions protecting the rights

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146. See YAMAMOTO, *supra* note 30, at 172.

147. Burke, *supra* note 75, at 98.

and freedoms enumerated “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>148</sup> Upon the occasion of the fiftieth year of the UDHR, numerous publications, reports, and special websites reviewed the progress made in protecting human rights throughout the world.

Through the proliferation, development, and expansion of a panoply of rights aimed at protection of groups such as women, children, refugees, and indigenous peoples, and the intersection of these developments with environmental and sustainable development movements, the international human rights regime that has evolved faces the ever more complex challenges of building a more socially just and peaceful world. Through human rights norm building, and the proliferation of multilateral and international implementation mechanisms, international public law state and nonstate obligations have been established, contested and negotiated.<sup>149</sup> At the same time, the regime of international human rights norms, multiple actors, institutions, and legal culture(s), are being negotiated across increasingly permeable and interrelated spatial and human geographies. Although “globalization” is not really new,<sup>150</sup> the current phenomenon is marked by new markets of more than \$1.5 trillion exchanged daily, new tools of technology (the internet, cellular phones, and media networks), and new actors including regional and global trade organizations and NGOs, and new rules on trade, services, and intellectual property.

The current world trading system, the General Agreement on Trade and Tariffs/World Trade Organization (GATT/WTO), is premised on acceptance of liberal economic assumptions about the “problem” facing the system—how to maximize aggregate economic welfare—as well as about the “solution”—restraining government interference in markets. The objective of the GATT/WTO system is the liberalization of trade to pursue the benefits of comparative advantage (in other words, each country specializing) through the elimination of trade restrictions to permit markets to function free of state interference.<sup>151</sup> Together with the international human rights system, this trading system is shaping not only the kind of world we live in, but also the kind of world we can imagine or aspire to work for in the future. Given the very different premises and values served by the trade regime—such as economic

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148. G.A. Res. 217A(III), U.N. Doc. A/810, art. 2 (1948).

149. However, the body of “international” public law that has emerged (including human rights law) is, upon closer examination, still culturally situated and negotiated, emanating from specific geographies. Rooted in mercantilist, Christian, and European origins, “international” human rights are not international. Furthermore, in the face of naked political power, international relations realists argue human rights do not constitute “law” at all, or as some positivists argue, human rights are not judicially enforceable rights.

150. See MALCOM WATERS, *GLOBALIZATION* (1995).

151. See Jeffery L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. (forthcoming 2000)



efficiency or aggregate wealth maximization—and those values central to the human rights regime—including human individual and collective well-being, security (beyond the absence of war), dignity, fairness, and equity—the relationship between these two global regimes, trade and human rights, is deeply controversial, contested, and ideological. The players in this ongoing drama (or tragedy, depending upon your point of view) include governments, multilateral institutions, transnational and domestic corporations, industry lobbying groups, labor unions, environmental groups, human rights groups, policy think tanks, and the media.<sup>152</sup>

These twentieth-century reconfigurations and the legacy of a worldview that continues to be dominated by state-centric assumptions present difficult questions and obstacles for the full realization of human rights and social justice. This part first briefly references two current—though not necessarily recognized as equally legitimate nor authoritative—strategic cross moves: the use of domestic law to implement international human rights, and the use of international human rights to pursue domestic rights claims—that is, the domestication of international law and the internationalization of domestic law. It then examines the history and strategies of the CRC, a civil rights organization active from 1946 to 1956, and its petition to the United Nations charging the United States with genocide,<sup>153</sup> as an example of a radical framing of a social justice claim, and suggests some theoretical and strategic insights and lessons for current U.S. civil rights efforts to invoke international human rights.

#### A. International Moves

U.S. civil rights scholars, lawyers, and activists are increasingly looking toward international human rights instruments as persuasive sources for legal strategies to address a broad range of advocacy issues presented by persistent social and economic discrimination against disadvantaged groups or minorities,<sup>154</sup> homelessness and poverty,<sup>155</sup> the relentless march of death penalty

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152. For discussion of the linkages and tensions between the trade and human rights regimes and a critical look at the trade “rules,” see Hom, *supra* note 31.

153. See CIVIL RIGHTS CONGRESS, *WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE* (William L. Patterson ed., International Publishers Co. 1970) (1951).

154. See, e.g., Elizabeth M. Iglesias, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997); Natsu Taylor Saito, *Beyond Civil Rights: Considering “Third Generation” International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1997).

155. See, e.g., Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Make a Difference?*, 2 GEO. J. ON FIGHTING POVERTY 59 (1994); Glen St. Louis, *Thinking*

executions,<sup>156</sup> and the plight of immigrants and refugees.<sup>157</sup> A number of critical U.S. scholars and activists are also increasingly looking toward international human rights law as a resource for the development of broader domestic antisubordination strategies and for responses to conservative legal, ideological, and political attacks on domestic affirmative action programs and goals.<sup>158</sup> Even Justice Ginsburg has recently suggested there are firm supports for affirmative action in the UDHR and in a number of international conventions such as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.<sup>159</sup>

With its abysmal record of ratification of international treaties, the United States has finally ratified the International Covenant on Civil and Political Rights (ICCPR),<sup>160</sup> the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention),<sup>161</sup> the International Convention on the Elimination of All Forms of Racial

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*Globally, Acting Locally: Using International Norms for Interpretative Application*, INT'L DIMENSIONS, Fall 1996, at 17.

156. See, e.g., James H. Wyman, Comment, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT'L L. & POL'Y 543 (1997).

157. See, e.g., Barbara MacGrady, Note, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT'L L. 271 (1997); Paul Meehan, Note, *Combating Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389 (1997).

158. See, e.g., F. Deale, *Affirmative Action and Human Rights*, 6 INT'L POL'Y REV. 76 (1997); Iglesias, *supra* note 154; Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659 (1997); Saito, *supra* note 154; Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15 (1996).

159. See Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

160. The International Covenant on Civil and Political Rights (ICCPR) was entered into force for the United States on Sept. 8, 1992. See U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1999, at 389 (1999). The ICCPR sets forth provisions ensuring the rights of self-determination, legal redress, equality; life, liberty; freedom of movement; fair, public, and speedy trial of criminal charges, privacy; freedom of expression (including trade union rights); family; and participation in public affairs. It forbids torture; cruel, inhuman or degrading treatment; slavery; arbitrary arrest; double jeopardy; and imprisonment for debt.

161. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) was entered into force for the United States on Nov. 20, 1994. See *id.* at 466. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides for a number of rights that are directly related to rights set forth in the ICCPR, including conditions safeguarding fundamental political and economic freedoms to the individual, conditions of work such as fair pay, equal pay for work of equal value, safe and healthy working conditions, and the right to form and join trade unions.

Discrimination (CERD),<sup>162</sup> and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>163</sup> The United States has signed<sup>164</sup> but has not ratified, the International Covenant on Economic, Social and Cultural Rights (ICESCR) in light of ideological and political opposition to the economic social and cultural rights as rights. Although the United States signed the Committee on the Elimination of Discrimination Against Women in 1980,<sup>165</sup> it still has yet to ratify this treaty that most comprehensively protects fundamental gender-based rights.

In light of these recent developments of U.S. ratification of some key human rights treaties, these domestic “global” moves as it were, suggest that international human rights may be further sources for supporting and expanding the limited domestic discourses and strategies for protection of civil rights and advancement of social justice goals. These domestic calls for the internationalization of domestic civil rights strategies also implicate doctrinal analyses of litigation-based approaches for implementation of international human rights in domestic courts, and national efforts to limit the domestic impact of international law via treaty reservations or arguments based upon the non-self-executing character of treaties or treaty provisions.<sup>166</sup> At the same time, a number of commentators have suggested that domestic laws, for example immigration and asylum law, may be sources for developing more effective enforcement strategies for protection of international human and women’s rights.<sup>167</sup>

While I support and encourage these strategic efforts to draw upon multiple legal regimes, especially upon international human rights law as valuable interventions, at the same time, a more critical assessment of both the domestic and international regimes would contribute to increasing the effectiveness of these global and local moves. For example, as Justice Ginsburg has pointed out, U.S. courts have not been that receptive to looking beyond our own shores: The Supreme Court has mentioned the UDHR just five times, and

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162. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was entered into force for the United States on Nov. 20, 1994. See *id.* at 444.

163. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was entered into force for the United States on Feb. 23, 1989. See *id.* at 385.

164. See Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 473, 482 (Philip Alston ed., 1992) [hereinafter *THE UNITED NATIONS AND HUMAN RIGHTS*].

165. See Roberta Jacobson, *The Committee on the Elimination of Discrimination Against Women*, in *THE UNITED NATIONS AND HUMAN RIGHTS*, *supra* note 164, at 444, 445.

166. See Paust, *supra* note 158, at 662–64, 671–74.

167. See William J. Aceves & Paul L. Hoffman, *Using Immigration Law to Protect Human Rights: A Legislative Proposal*, 20 *MICH. J. INT’L L.* 657, 682–91 (1999); Susannah Smiley, Comment, *Taking the “Force” out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law*, 29 *CAL. W. INT’L L.J.* 339 (1999).

only twice in a majority decision, with the most recent citation appearing twenty-eight years ago, in a dissenting opinion by Justice Thurgood Marshall.<sup>168</sup> As we develop strategic efforts that draw upon multiple legal regimes, especially upon international human rights law as valuable interventions, I want to argue for more nuanced and critical approaches and argue that there are also important insights from the earlier efforts in the late 1940s into the 1950s to deploy international strategies.

There are at least several aspects of a more critical approach to the development of international human rights strategies for domestic U.S. civil rights struggles—critically examining the role of ideology, the doctrinal obstacles in the substantive provisions of various international human rights treaties and instruments, the role of multiple state and nonstate actors, and the structural obstacles and discursive challenges. Reflecting a clear ideological position, the United States for example, despite initial leadership in post-World War II human rights drafting efforts, has strongly rejected economic, cultural, and social rights as “real” rights. During the Reagan Administration, 1986 State Department Instructions to Embassies regarding the preparation of country reports stated that “so-called ‘economic and social rights are not included in our understanding of ‘internationally recognized rights.’”<sup>169</sup>

The failure of the United States to ratify the ICESCR has been attributable to this historic hostility in the United States to economic, social, and cultural rights as *legal* rights as well as to the “lack of consensus within the United States as to the desirability, or philosophical and political acceptability, of the domestic recognition of [these] rights.”<sup>170</sup> Reflecting freedom of the individual rhetoric, a U.S. representative told the Third Committee of the United Nations General Assembly, in November 1988, that “responsible adults select their own careers, obtain their own housing, and arrange for their own medical care.” Other strands in the U.S. government’s policy arguments against the notion of economic, social, and cultural rights as rights is the argument that these rights should be dealt with by qualified experts such as economists, housing experts, and health care providers, rather than injected into discussions

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168. See Ginsburg & Merritt, *supra* note 159.

169. The Reagan years marked yet another shift in this trajectory. Again, the U.S. human rights policy was based upon “the unqualified rejection of economic, social and cultural ‘rights’ as rights” in part as an element of larger cold war strategies. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 372 (1990). A highpoint of this movement was a speech by a State Department official seeking to dispel a number of “myths” regarding human rights, the first of which was that “‘economic and social rights’ constitute human rights.” *Id.* at 374 (quoting Paula Dobriansky, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs, address Before the American Council of Young Political Leaders, Washington, D.C. (June 3, 1988), reprinted in DEPT. STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POL’Y, No. 1091, 1988, at 2).

170. *Id.*

on the limits and obligations of government. Another strand focuses on the issue as an East versus West, but as Philip Alston points out this is really a debate about the United States versus the rest of the world.<sup>171</sup>

This ideological hostility to economic, social, and cultural rights presents political, legal, and ideological difficulties for domestic economic justice projects looking toward international human rights as support.<sup>172</sup> Despite counterrhetoric urging the holistic indivisibility of rights by the international community, asserted distinctions between civil and political rights and economic, social, and cultural rights continue to underlie the political rhetoric of countries defending their human rights record. Distinctions between civil and political rights and economic, social, and cultural rights are also reflected in the mandates, priorities, and strategies of dominant international NGOs and domestic human rights NGOs.

Under both the ICCPR and ICECSR, each State Party, a country that has signed onto the documents, undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” Rooted in political and ideological historical disagreements between the socialist countries and the Western industrialized countries, these two treaties laid the foundation for ongoing tensions between these two generations of rights. Yet, the Vienna Declaration and Programme of Action, the consensus document that emerged from the 1993 United Nations World Conference on Human Rights held in Vienna, Austria, underscores a holistic notion of rights. It states that “[a]ll human rights are universal, indivisible and interdependent.”<sup>173</sup>

There are several ways in which this hierarchy of rights is understood, defended, or contested. Within this hierarchical “generations of rights” framework, a common conceptual and implementation distinction is made between negative human rights obligations that prohibit state action that violates

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171. See *id.* at 374–76.

172. For an historical analysis of economic rights and an argument for more effective international and national protections for the economic rights of the poor, see Frank Deale, *The Unhappy History of Economic Rights Provisions in the United States And Prospects for Creation and Renewal*, 43 *HOW* L.J. (forthcoming 2000). Beginning with a broad historical summary of state welfare regimes dating back to the Colonial era of the United States, and the role of economic rights in the framing of the Constitution, Professor Frank Deale catalogues the ways in which U.S. and international law fail to adequately recognize and enforce the economic rights of the poor. He suggests more effective exploration of international and state strategies that draw on local legislative and constitutional mechanisms.

173. *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, U.N. GAOR, 48th Sess., pt. 3, ¶ 5, U.N. Doc. A/C.157/24 (Part I) (1993), reprinted in 32 *I.L.M.* 1661, 1665 (1993).

specified rights, and positive obligations that require states to take affirmative steps and enact measures to ensure or protect specified rights. For example, the ICESCR Article 2(1) provides that each State Party undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. The ICESCR Article 2(3) provides that developing countries "with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."<sup>174</sup> Unlike the ICCPR, the ICESCR appears to allow for progressive implementation, thus reflecting an ongoing prioritization in implementation obligations on the part of States Parties. However, whether the "progressive implementation" provision is understood as setting forth legal obligations or aspirational goals has been problematic and raises geopolitical, policy, and conceptual issues.

Another way the asserted differences between civil and political rights and economic, social, and cultural rights are mapped, are along an individual and collective divide, or along an East/West fault line.<sup>175</sup> For example, the People's Republic of China asserts a prioritization of social-economic rights over civil-political rights based upon the importance of collective rights. Yet, as Xiaorong Li argues, the assertion of collectivity does not justify the priority assigned to social-economic rights. Furthermore, the assertion of collectivity actually masks the interest of a small political elite. "As China undergoes rapid economic and social change, anyone, rich or poor, big or small, can find their 'individual rights' sacrificed for the 'collective interest' as interpreted by the government."<sup>176</sup> Xiaorong argues against this bifurcation of rights and duties, and suggests that they are inextricably bound, that is, social-economic

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174. International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

175. I have argued that the predominantly statist assumptions and focus of the universalist/relativist debates is incomplete, problematic, and ignores a whole range of civil society actors. I have also suggested more nuanced and problematized attention to the contexts of human rights articulation and implementation such as culture and language, but not as an intervention captured by current (and in my view impoverished) debate about universalism and cultural relativism. See Sharon K. Hom, *Commentary: Re-positioning Human Rights Discourse on "Asian" Perspectives*, 3 BUFF. J. INT'L L. 209, 251-76 (1996). At the same time, a statist emphasis also satisfies nationalist ideologies of ruling groups in developing countries and is acceptable to transnationals who prefer to play national governments off each other rather than be subjected to global regulation. See Sol Picciotto, *International Business and Global Development*, in *LAW AND CRISIS IN THE THIRD WORLD* (S. Adelman & A. Paliwala, eds., 1993).

176. Xiaorong Li, *Are Social and Economic Rights "Collective"?*, CHINA RTS. F., Winter 1997-1998, at 8, 10 (1997).

wellbeing—an adequate standard of living, including jobs, education and health care are human goods for their own sake and form the necessary conditions for enjoying the actual value of political-civil rights. Because both set of rights have a collective aspect as well as a negative and positive aspect, in order to implement these rights, governments must take positive action *and* recognize that violations of both can occur as a result of its omission as well as commission.

However, a distinction should be made between *normative* arguments for the indivisibility and holistic nature of these rights and *strategic* advocacy approaches for monitoring, enforcing, and implementing the various rights. For example, human rights tools of fact-finding, investigation, public reports and exposure of abuses, and advocacy campaigns for the release of prisoners of conscience, have been effective for addressing violations of civil and political rights in many parts of the world. But the realization of economic, social, and cultural rights presents another layer of complexity in terms of measurement, time frames and accountability. The development by the UNDP of an index for measuring human development is one example of this kind of necessary conceptual rethinking along with its methodological and programmatic implications.<sup>177</sup>

As an example of structural issues, as numerous critiques have also pointed out, the existing international human rights regime, particularly as located within the United Nations, suffers from ineffectiveness and institutional, procedural, and political weaknesses shaped by economic and geopolitical self-interests of nation-states and major economic actors such as multinationals (MNCs) and transnationals (TNCs). As the major multilateral organization that has responsibility for peace, security, and human rights protection, the United Nations has promulgated and adopted hundreds of multilateral treaties that address a diverse range of areas that have an impact on the lives of ordinary individuals, including treaties on human rights, health, food, education, pollution, transportation, and television.<sup>178</sup> Article 1 of the United Nations Charter includes among the purposes of the United Nations the promotion and encouragement of respect for human rights. Articles 55 and 56 of the

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177. Beginning in 1990, the United Nations Development Programme (UNDP) introduced an annual Human Development Report ranking all countries according to their "level of human development" by a human development index (HDI). The HDI has four components: productivity, equity, sustainability, and empowerment of people. The HDI measures the average achievement of a country in basic human capabilities. The HDI indicates whether people lead a long and healthy life, are educated and knowledgeable, and enjoy a decent standard of living. See UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT, U.N. Sales No. E.99.III.B (1996).

178. Oscar Schachter, *The UN Legal Order: An Overview*, in THE UNITED NATIONS AND INTERNATIONAL LAW 3, 4 (C.C. Joyner ed., 1997).

United Nations Charter establish the primary human rights obligations of the United Nations member states. Article 55 states:

[T]he United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and universal respect for, observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>179</sup>

In Article 56, all members pledge to “take joint and separate action” to fulfill the purposes set forth in Article 55.<sup>180</sup> Through a structure of charter-based and treaty-based human rights and special ad hoc mechanisms (such as special rapporteurs and thematic working groups),<sup>181</sup> the United Nations has also developed an extensive system (some critics would say an unmanageable bureaucracy) for monitoring, investigating, adjudicating, and interpreting human rights norms, state practices, and country conditions. The international human rights regime that has emerged consists of “those international norms, processes, and institutional arrangements, as well as the activities of domestic and international pressure groups, that are directly related to promoting respect for human rights.”<sup>182</sup>

Four recent reports have studied and assessed the agenda, performance, and role of the United Nations as well as its future prospects. These include Boutros Boutros-Ghali’s *An Agenda for Peace*,<sup>183</sup> Gareth Evan’s *Cooperation for Peace*,<sup>184</sup> the Commission on Global Governance’s *Our Global Neighborhood*,<sup>185</sup> and the Report of the Independent Working Group on the Future of the United Nations funded by the Ford Foundation, *The United Nations in Its Second Half-Century*.<sup>186</sup> All four reports share a belief in multilateralism to replace cold

179. U.N. Charter art. 55.

180. *Id.* art. 56.

181. For example, in response to advocacy and lobbying from NGOs, a Special Rapporteur on Violence Against Women, Its Causes and Consequences was appointed in March 1994. The Special Rapporteur, Radhika Coomaraswamy was given a three-fold mandate: to collect information; to make recommendations at national, regional, and international levels; and to work closely with other special rapporteurs. Her preliminary issued in 1994 focused on three areas of concern: the family (including domestic violence, traditional practices, and infanticide); the community; and the state (women in detention, refugee women, and women in situations of armed conflict).

182. Philip Alston, *Critical Appraisal of the U.N. Human Rights Regime*, in THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 164, at 1, 1.

183. BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE* (1992).

184. GARETH EVAN, *COOPERATION FOR PEACE* (1993).

185. COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD* (1995).

186. INDEPENDENT WORKING GROUP ON THE FUTURE OF THE UN, *THE UNITED NATIONS IN ITS SECOND HALF-CENTURY: A REPORT OF THE INDEPENDENT WORKING GROUP ON THE FUTURE OF THE UNITED NATIONS* (1995).



war protections and advocate strengthening the role of the United Nations in security politics, waxing “eloquent about the transformational possibilities for global politics and about the role of the UN as the prospective global deliverer.”<sup>187</sup> All four reports emphasize the importance of human rights as an issue of domestic and international governance, and view human rights as a matter of principle and as an issue of peace and security. Those involved in the preparation of these reports are self-described liberals, holding beliefs in progress and modernization, and unabashedly promoting the spread of democracy, making the linkages between democracy and legitimacy, peace and security. Boutros-Ghali states: “There is an obvious connection between democratic practices—such as the rule of law and transparency in decision making—and the achievement of true peace and security in any new and stable political order.”<sup>188</sup>

Underlying the policy debates are very real constraints of resources and the willingness of member states to fund the operations of the United Nations. One 1991 report pointed out that

[n]o other [institution] in the world has [185] governments as governors; is required to work in six official languages and to employ citizens of 166 nationalities; and is charged with responsibilities for virtually every facet of the human and planetary condition. To do all this it is provided with less funds per year than Western children spend at Christmas, and fewer staff than the civil service of a medium-size European city.<sup>189</sup>

Or to use a U.S. comparison, “the entire staff of the UN system, worldwide of all grades, to serve the nearly 6 billion people in 185 countries in every field of human endeavor and need, numbers less than the civil servants in the state of Wyoming—population, half a million.”<sup>190</sup> These facts are often ignored or discounted in U.S. political debates about its billions of back dues obligations to the United Nations.

In addition to these debates and assessments of institutional mandates and priorities, the United Nations (and international law more generally) has also been subject to the critiques about its representatives and transparency.<sup>191</sup> For example, there have been numerous critiques of the small numbers of women at the higher echelons of decision-making power within the United Nations

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187. Michael N. Barnett, *Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations*, 49 *WORLD POL.* 526, 527 (1997).

188. *Id.* at 536 (quoting BOUTROS-GHALI, *supra* note 183).

189. Brian Urquhart & Erskine Childers, *Towards a More Effective United Nations*, in 1991 *DEV. DIALOGUE* 1, 5.

190. Erskine Childers, *The United Nations and Global Institutions: Discourse and Reality*, 3 *GLOBAL GOVERNANCE* 269, 273 (1997).

191. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 *AM. J. INT'L L.* 613 (1991).

system itself and its integration of gender concerns. At the same time, the future of an effective and representative United Nations depends upon its ability to reflect in its own staffing, programs, and policy decisions the goals of equality, nondiscrimination, and equity embodied in the treaties, declarations, and formal and ad hoc human rights mechanisms. At the same time, there has always been a tension between the multilateral role of the United Nations as representative of sovereign states and its role as representative of peoples and individuals with universal rights that deserve the protection of the international community. How can the United Nations maintain a legitimate position to monitor the discriminatory practices and human rights records of member states if its own practices reflect a gender-based discrimination or an unequal distribution of power weighted toward the United States and a few industrialized western countries?

Yet, despite the numerous problems facing the United Nations, it cannot simply be written off as a male club dominated by the industrialized countries of the north. The United Nations has responded to critiques from within and without, and any critical assessment needs to take into account the different factors that effect institutional change. For example, in a study of gender mainstreaming, several factors were identified as influential in the institutionalization of gender concerns.<sup>192</sup> These included external pressure by NGOs, governments, and donor governments, the effective use of indirect mechanisms, the gender staffing levels, and a fit between organization mandate, ideology, and procedures. The response of an agency to external pressure is affected by its accountability and governance structure. In the World Bank in which voting is weighted to economic strength, it is more responsive to the largest donors. The ILO's tripartite governance structure of NGO representatives, employer organizations, and trade unions, makes it the most broadly accountable of the specialized United Nations agencies. Although the report recognizes that there is no evidence that women in decision-making positions are more likely to act in women's interests, the case studies of UNDP, ILO, and the World Bank reveal that the majority of advocates for women in development, have been women. These studies have also identified a fit between organizational mandate, ideology and procedures, and women in development (WID)/gender concerns. Each of the agencies studied has a different mandate that was more or less receptive to the integration of gender into its programs. The World Bank's mandate is to facilitate economic growth and efficiency; and the ILO's mandate is to promote social justice. UNDP's unclear mandate left room for elaboration, for example, the sustainable human development mandate "provides a fertile envi-

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192. See S. RAZAVI & C. MILLER, *GENDER MAINSTREAMING: A STUDY OF EFFORTS BY THE UNDP, THE WORLD BANK AND THE ILO TO INSTITUTIONALIZE GENDER ISSUES* (1995).

ronment for the promotion of WID/gender concerns.”<sup>193</sup> This more nuanced analysis of agencies and specialized bodies of the United Nations suggests the importance of strategic analysis of institutional structures, cultures, and values as the basis for developing possibilities for activist intervention.

However, because these conventions are implemented primarily through a self-reporting system monitored by the relevant monitoring body, there is a built-in tension between the self-interest of states and the demands of an open, accountable human rights regime. The implementation of these treaties and nondiscrimination provisions is also hampered by what is essentially an anachronistic consent-based regime.<sup>194</sup> A cynical observer might note that this multilateral self-monitoring consent-based system is not only anachronistic in its enshrinement of state sovereignty, but also is essentially a “fox guarding the hen house” system. The tensions and abuses are apparent if one recalls the horrendous human rights violations perpetuated by military regimes in Haiti, Argentina, Guatemala, and on and on. Yet, as the major multilateral organization with a human rights mandate, the United Nations continues to grapple with questions about its own legitimacy, efficiency, and demands for structural reform from within and without.

However, I am not suggesting that we adopt a self-defeating realpolitik cynicism about the existing international human rights system. Instead, as the history of the modern human rights movement has so powerfully demonstrated, individuals, NGOs, states, and multilateral organizations have made progress toward incorporating fairness, social justice, peace, sustainability, equity, and equality concerns and goals into substantive norms, procedures, and implementation mechanisms across a range of areas.<sup>195</sup> In order for more effective human rights implementation strategies to be developed, mainstream international human rights NGOs must also radically rethink their approaches and ideological investments. For example, Makau wa Matua points out the

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193. *Id.* at 6.

194. One example of the limits of this multilateral consent-based system is the unilateral reservation power of states and the record of qualified ratification of international treaties. For example, as of March 27, 1997, one hundred states have ratified the ICECSR without qualifications and forty with qualifications. Eighty-seven states have ratified the ICCPR without qualifications and fifty-two with qualifications. One hundred fourteen states have ratified Committee on the Elimination of Discrimination Against Women without qualifications and forty-four with qualifications. Ideologically, this system of unilateral state reservations qualifying international “obligations” also reflects the power and the limits of its underlying contract metaphor and privileging of state sovereignty.

195. See Michael H. Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269 (1994); Wendy Schoener, *Non-governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537 (1997); Steiner, *supra* note 40. For a fuller historical account of the proliferation and expanding roles of international NGOs, see CONSTRUCTING WORLD CULTURE: INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS SINCE 1875 (John Boli & George M. Thomas eds., 1999).

ideological alignment of international NGOs with traditional Western civil rights organizations such as the ACLU, the conventional doctrinal reliance on positive law, and stress on civil and political rights despite the mantra of the indivisibility, interrelatedness, and interconnectedness of all human rights. Mutua argues for NGOs to end "their stance of nonpartisan advocacy of benign universality," and to reexamine their relationships with powerful Western states and institutions.<sup>196</sup>

Although NGOs are in a state of flux and there is "no single inspiration or aspiration, neither a spiritual nor secular authority . . . for all within it, no pope and no central committee,"<sup>197</sup> there are also important differences that have emerged and are reflected in criticisms by Third World NGOs of First World NGOs. First World NGOs reference their geographical bases, and typify certain kinds of mandates, functions, and ideological orientations. These include the assumptions of traditional western liberal values and the emphasis on basic civil-political rights; the focus on governmental abuses rather than socioeconomic and other factors that underlie them; and self-characterization of as apolitical monitors, objective investigators, and defenders of legality.<sup>198</sup> In contrast, Third World NGOs tend to stress the importance of eco-social rights, and some argue for transformative social goals. Speaking a different "language" to describe the character of the human rights movement and the explanations for these violations, these Third World NGOs often describe the underlying human rights problems as based in inequitable North-South relations and point to the need to address the structures of political and economic power and ideologies leading to violations. Finally, Third World NGOs emphasize the community as a site for developing solutions to human rights problems.<sup>199</sup>

These ideological differences and the North-South tensions and disagreements regarding the consequences of economic restructuring imposed by multi-lateral lending agencies have an impact on international efforts to build alliances across national, cultural, political, and religious differences. What I do mean by proposing an NGO perspective from which to think about purposes of the categorization problem is to suggest that whatever the differences, there *are or can be* NGO stances that are distinct from and in opposition to the geopolitical power plays of national governments and intergovernmental organizations. Yet, it is very difficult to resist the centrifugal pull of the formal and state-centric processes and text-centered strategies. In addition to the

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196. Makau wa Mutua, *INGOs as Political Actors*, Proceedings of the 93rd Annual Meeting, ASIL, Washington, D.C. (March 24–27, 1999), at 210–11; see also Steiner, *supra* note 40.

197. Steiner, *supra* note 40.

198. See *id.*

199. See *id.*

attention to the role of NGOs within the United Nations system, the focus advocated by Third World NGOs on community as a source of empowerment strategies and a context for individual rights is an important perspective to help develop these stances.

This strategic rethinking must also include multiple simultaneous approaches to addressing powerful transnational corporate actors<sup>200</sup> (the new “masters of the universe”)—actors that are now largely unaccountable to any government or international body for the consequences of their greed and impoverishing economics.<sup>201</sup> As massive concentrations of capital and economic power, multinational and transnational corporations contribute to the inequalities between the countries of the North and the South, and the impoverishment of many local economies and ways of life through short-term profit maximizing investment and exploitation of resources. Masao Miyoshi argues that we are in a period of intensified colonialism as “TNCs rationalize and execute the objectives of colonialism with greater efficiency and rationalism,” and unlike the imperial invaders, TNCs are welcomed.<sup>202</sup> Impelled by their profit seeking, self-concerned, “though aggressively extroverted in cross-border movement,” TNCs are not agents for progress. Rather they have no concern for the general welfare, as they contribute to environmental destruction and exploitation of workers with inadequate pay and care. As the effective global campaign against the draft of the Multilateral Agreement on Investment, the recent mass mobilizations that included teach-ins, civil disobedience, and protests in Seattle during the WTO Ministerial in 1999, and the World Bank meeting in Washington in April 2000 all underscore, it is clear that grassroots organizations, trade unions, human rights, development, and environmental NGOs have and will continue to be important counterforces.

In assessing the realistic spread of voluntary corporate socially responsible citizenship in the world, it is clear that global regulation will be powerfully resisted. In the face of this corporate exploitation of life itself, and the persistent inequity, violence, and inequality that marks the world, the problematics of justice as goal, aspiration, and method must engage more than theoretical inquiry. As the 1999 UNDP Human Development Report, entitled *Globalization with a Human Face*,<sup>203</sup> underscores, inequalities between countries and within countries are increasing, and globalization, while not new, is creating new

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200. See WOMEN'S ENV'T & DEV. ORG., CODES OF CONDUCT FOR TRANSNATIONAL CORPORATIONS: STRATEGIES TOWARD DEMOCRATIC GLOBAL GOVERNANCE (1995).

201. See generally DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995).

202. Masao Miyoshi, *A Borderless World? From Colonialism to Transnationalism and the Decline of the Nation-State*, in GLOBAL/LOCAL: CULTURAL PRODUCTION AND THE TRANSNATIONAL IMAGINARY 78, 96 (Rob Wilson & Wimal Dissanayake eds., 1996).

203. UNITED NATIONS DEV. PROGRAMME, *supra* note 12.

opportunities for human advancement, but is also creating new threats to human security and peace.

For progressive scholars and activists concerned about questions of intellectual accountability and constituency, it is clear that ideas do not necessarily have to be relegated to abstract ivory tower debates or the limited terrain of academia. In fact, the powerful and dangerous partnership between U.S. conservative think tanks, foundations, and academic research institutions demonstrates that scholarship can indeed create the rhetoric, discourse, and justification for policy and programmatic initiatives.<sup>204</sup> At the same time, empirical evidence suggests that critical progressive scholarship can also shift the dominant discourse, contribute to the development of new norms, and reshape the material allocation of resources. For example, over the past decade in the international arena, the concept of development that was once the code word for economic development was expanded by the demands and visions of sustainable and human development. Through the work of legal scholars, women's rights activists, and international and domestic NGOs, the pervasive violence against women throughout the world is now recognized in international documents as a human rights violation.<sup>205</sup>

What is also needed is a discourse of responsibilities in addition to a discourse of rights that inclusively embraces distributive justice principles on individual, group, state, and global levels. A discourse of responsibilities would position each of us as moral agents within a community of mutual obligations and include actors that are marginalized by a statist focus on rights. A discourse of responsibilities also shifts the debates regarding compensatory justice claims and the obligations for realizing a fair and equitable allocation of resources and community power to a more inclusive nonpolar model. A discourse of responsibilities also has foundations in international and regional human rights documents.<sup>206</sup>

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204. See generally JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996).

205. See generally CHARLOTTE BUNCH & NIAMH REILLY, DEMANDING ACCOUNTABILITY: THE GLOBAL CAMPAIGN AND VIENNA TRIBUNAL FOR WOMEN'S HUMAN RIGHTS (1994); WITHOUT RESERVATION: THE BEIJING TRIBUNAL ON ACCOUNTABILITY FOR WOMEN'S HUMAN RIGHTS (Niamh Reilly ed., 1996).

206. Article 28 of the Universal Declaration of Human Rights (UDHR) also states that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." In addition to these rights, the UDHR also suggest that everyone has "duties to the community in which alone the free and full development of his personality is possible." G.A. Res. 217A(III), *supra* note 148, at art. 29. As the prerequisite to rights, the American Declaration of the Rights and Duties of Man sets forth individual duties including the duty to vote, to get an education, work, hold office, render civil and military service, and even to honor your parents. American Declaration of the Rights and Duties of Man, May 2, 1948, arts. 29-38, *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 430.8-430.9 (Richard B. Lillich ed., 2d ed. 1990).

I have argued elsewhere for a more inclusive and generative micro-ethico-political project, which theorizes and acts upon frameworks problematizing the institutional contexts and personal relationships that engage our lives. By ethico-political, I refer to the conjuncture between moral philosophy and power, an awareness of potential moral conflicts, the exercise of human agency to make moral judgments, and the taking of political responsibility for the consequences of these choices. I suggest the exploration of a reconstructive agenda, “trafficking justice,” in which the daily choices we make as human agents in a variety of institutional contexts and social spheres—work, education, family, and politics—are concrete, site specific opportunities for “doing justice” in the here and now.<sup>207</sup>

#### B. How I Found/Lost My Way in the 1950s Enroute to the Twentieth Century

Against the different and related trajectories of the development of civil rights and international human rights discourse and practice in the United States, leaders of domestic civil rights and liberation struggles recognized early that the domestic United States struggles were and are tied to international struggles for social justice. For example, the National Association for the Advancement of Colored People’s (NAACP’s) petition in 1947 to the United Nations denouncing race discrimination, the Petition by the CRC in 1951 charging the United States with genocide against the “Negro People,”<sup>208</sup> and Malcolm X’s call in 1965 to internationalize the domestic racial problem are all historical examples of the recognition of the intersection of domestic and international strategies.<sup>209</sup> In the limited space of this Article, I want to focus on the CRC and its Genocide Petition to the United Nations, as an example of a complex multipronged strategy that included legal, discursive, grassroots organizing, and media aspects played out on a domestic and an international arena.

The publication of Gerald Horne’s seminal work in 1988, *The Communist Front? The Civil Rights Congress: 1946-1956*,<sup>210</sup> retrieved and reconstructed the submerged history of this powerful movement, an interracial, domestic, and international civil and human rights movement that was so far ahead of its times—times of government persecution of suspected “enemies,” red-baiting, and anti-Communist hysteria.<sup>211</sup> The question mark in the book title signals

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207. See Horne, *supra* note 22.

208. See CIVIL RIGHTS CONGRESS, *supra* note 153.

209. See Don T. Nakanishi, *Minorities and International Politics*, in COUNTERPOINT: PERSPECTIVES ON ASIAN AMERICA 81–85 (Emma Gee ed., 1976); Thomas, *supra* note 158, at 18.

210. HORNE, *supra* note 35.

211. See, e.g., MICHAEL BARSON, “BETTER DEAD THAN RED!”: A NOSTALGIC LOOK AT THE GOLDEN YEARS OF RUSSIAPHOBIA, RED-BAITING, AND OTHER COMMIE MADNESS (1992); CEDRIC

Horne's goal to address the errors, omissions, and tendencies of historians to adopt the loose talk about "fronts" and Hoover's red-baiting approach when referencing the CRC's work and its role in U.S. civil rights struggles. Indeed, the CRC was called a "Communist Front" by the House Un-American Committee and Roger Baldwin of the ACLU; and the "most successful Commie hoax of all time" by top "commie hunter" of the now New York World Telegram.<sup>212</sup> In light of the red-baiting politics and reign of terror that silenced and hounded individuals and destroyed "suspected" communist organizations, the organizing success of the CRC is even more impressive. As Horne puts it, "[t]hese were indeed bleak times, particularly for reds pressing the rights of Blacks."<sup>213</sup>

Formed in 1946, from a merger of the National Negro Congress (that formed the heart of the new CRC), the International Labor Defense (that bequeathed many of its mass mobilization strategies to the new CRC), and the National Federation for Constitutional Liberties, the CRC focused on black equality, labor rights, and civil liberties. At its founding meeting, the 372 delegates presented speeches and papers on a wide range of concerns and issues, including the poll tax, peonage, police terror, Jim Crow, Japanese American indemnification, and Puerto Rican independence.<sup>214</sup> The leadership team for the CRC consisted of three brilliant lawyers, Aubrey Grossman (with labor movement expertise), Ralph Powe (a son of a sharecropper, a Tuskegee Graduate who worked with George Washington Carver, and a Howard Law School graduate who coordinated the legal work), and William Lorenzo Patterson (a grandson of a slave, who worked his way through University of California, Hastings School of Law, formed the heart of the CRC, and who became its secretary in 1948). As an interracial organization, with bilingual publications, an organizational commitment to promote women in the leadership network, the linking of mass civil rights strategies (boycotts, petitions, demonstrations), grassroots organizing, carefully developed legal strategies, and cultural strategies (CRC picnics, songs, plays, concerts, rallies, and parties),<sup>215</sup> the work of the CRC presents critical insights even today for civil rights and international human rights work, especially in these times of political retrenchment and conservative backlash. Before the mega-rock benefit concerts of the eighties and nineties,<sup>216</sup> the CRC was reaching out to and was supported

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BELFRAGE, *THE AMERICAN INQUISITION 1945-1960* (1973); ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986).

212. HORNE, *supra* note 35, at 13.

213. *Id.* at 21.

214. *See id.*

215. *See id.*

216. *See* Reebee Garofalo, *Understanding Mega-Events: If We Are the World, Then How Do We Change It?*, in *TECHNOCULTURE* 247, 253 (Constance Penley & Andrew Ross eds., 1991).



by prominent performers and artists, such as Paul Robeson (also trained as a lawyer),<sup>217</sup> Howard Fast, and Paulette Childress.

When we pose the larger project reconstructive questions—how do we reenvision in practical terms the kind of personal and group transformation that, (1) fires imaginations and actions of broad constituencies for peaceably breaking down entrenched social and economic barriers that impoverish many peoples' daily lives, and (2) fosters the building of enduring relationships and the healing of conflicts among diverse groups and communities—this retrieved history of the CRC suggests powerful practical precedents.

For its sheer eloquence of language, cogency, and brilliance of its analysis and application of international law, its herculean marshalling of the massive evidence, and its radical framing of the justice claim in the indictment, the CRC's 1951 petition to the United Nations, "We Charge Genocide,"<sup>218</sup> should be required reading for all human rights lawyers, students, and scholars. Presented in the form of a powerful opening statement, the law, the indictment, followed by the evidence, a summary, and the prayer for relief, the 1951 Genocide Petition was the First National appeal to an international body based upon international law, the Genocide Convention. Unlike the earlier petitions drafted by W.E.B. DuBois for the NAACP and the National Negro Congress that sought redress for grievances suffered by blacks, the CRC Genocide Petition "made a specific charge against the criminal, racist policies of the U.S. Government and the destructive impact this had on national integrity as well as its effect on world peace."<sup>219</sup> The petitioners identified themselves as patriotic Americans and world citizens, and included Dr. W.E.B. DuBois, Paul Robeson, Paul Robeson, Jr., Howard Fast, Jessica Mitford, Rosalie McGee, the wife of Willie McGee who was legally lynched in Jackson, Mississippi,<sup>220</sup> Bessie Mitchell, the sister of one of the framed

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217. As William L. Patterson powerfully summarizes:

Paul Robeson graduated from Rutgers, and then Columbia Law School in 1923. He was an extraordinary athlete, a performer with a baritone voice of great beauty, and was brilliant. His path led him to the privileged oak paneled Wall Street offices. Yet, "Paul's grasp of the situation was extraordinary. The cream of the racists offered him a place in their world. If he took it, he would have to play their game. He saw the role assigned him and rejected it."

WILLIAM L. PATTERSON, *THE MAN WHO CRIED GENOCIDE: AN AUTOBIOGRAPHY* 67 (1971); see also PAUL ROBESON & LLOYD L. BROWN, *HERE I STAND* (1988).

218. CIVIL RIGHTS CONGRESS, *supra* note 153.

219. PATTERSON, *supra* note 217, at 175.

220. Willie McGee, a 36 year-old black veteran, father of four children, was a truck driver in Laurel, Mississippi. Troy Hawkins, white, claimed she was raped by a man with "kinky hair." McGee was arrested and held incommunicado for 32 days until he signed a confession that he later retracted. The all-white jury in the first trial found him guilty after two minutes of deliberating, while a lynch mob waited outside. The Civil Rights Congress (CRC) defended McGee through several trials, organized worldwide protests and extensive media campaigns, and held mass protests in 1950 in Jackson, demanding a new trial and a stay of execution. The Supreme Court issued three stays of execution

Trenton Six,<sup>221</sup> and numerous other writers, artists, black leaders, journalists, and clergy.

As Gerald Horne describes, this 240 page document “hit the Cold War world like a thunder clap—and that was certainly the intention.”<sup>222</sup> The Genocide Petition sold 5000 copies its first week, with 35,000 copies sold in the first six months, and ultimately 45,000 copies sold in the United States,<sup>223</sup> with the total sold abroad far exceeding that amount.<sup>224</sup> With incredibly organized and effective marketing techniques—calendars that focused on the Genocide Petition with pictures of youths lynched, fold-outs for promoting the book, plays and songs written for the book, and special rates set up (\$1.10 per copy for up to 100 copies, 90 cents for over 100 copies), the book was sold at union meetings, house parties, and book fairs. Copies were sent to Charles Fielding of Yale, Supreme Court Justices William Douglas and William Frankfurter, and virtually all third world governments.

Citing Article II of the Genocide Convention, the petition sets out the definition of genocide as the intent to destroy, in whole or part, a national, ethnic, racial, or religious group through acts such as: killing members of the group, causing serious bodily or mental harm, the deliberate inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

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but refused to dismiss or review the case despite new evidence that Hawkins had forced McGee to have sexual relations with her for years by threatening to accuse him of rape. In March 1951, McGee was put to death in the electric chair. See PATTERSON, *supra* note 217, at 157–58.

221. On January 27, 1948, a second-hand merchandise dealer and his wife were attacked in their store. The dealer died and the wife and another witness described the three men who had come into the store as white, or light-skinned blacks. Of the six men picked up, only one was light-skinned and he had one arm, which was not mentioned by any of the witnesses. The six men, Collis English, McKinley Forest, John MacKenzie, Horace Wilson, Ralph Cooper, and James Thorpe (the Trenton Six), were tried by an all-white jury in fifty-five days. See HORNE, *supra* note 35, at 131; PATTERSON, *supra* note 217, at 168 (reporting a forty-eight day trial). The six men were given the death penalty. The CRC entered the case in August 1948, and threw all its resources into the defense and publicizing the case. See PATTERSON, *supra* note 217, at 168. The CRC marshalled tremendous support for the Trenton Six, including international media attention, U.S. and international trade unions, the Elks, students and faculty of area colleges, including City College of New York, Rutgers, and Columbia. See HORNE, *supra* note 35, at 147–54. The case featured an “extraordinary attempt to bar the CRC lawyers from the defense team, fierce squabbling with the NAACP and the ACLU, and an attempt to turn the defendants against CRC.” HORNE, *supra* note 35, at 131. Like McGee, the Trenton Six had the support of tireless female relatives, including Bessie Mitchell, the sister of English. Ralph Cooper, serving a life sentence, pleaded “no defense” and was freed in 1953 in exchange for placing the others in the store. It was not until February 24, 1955 that four of the six were acquitted during a second trial. English, the last to be released, and suffering from heart attacks and the stress of the trials, died before the start of the third trial.

222. HORNE, *supra* note 35, at 167.

223. See *id.* at 169.

224. See PATTERSON, *supra* note 217, at 207.

Article III makes the acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide punishable.<sup>225</sup>

The crimes of the United States alleged in the Petition included conspiracy to genocide, as demonstrated by evidence of the suffering and deaths of 10,000 blacks and the ways they were uniformly segregated, despoiled, impoverished and denied equal protection as result of deliberate, all-pervasive policy of the government and those who controlled it, including the federal government, the Supreme Court, Congress, the Executive branch and all levels of government. The Genocide Petition charged the emasculation of democracy through this reign of terror, killings, and pervasive use of white supremacist language, phrases, and talk.

The evidence and the harms included collection of evidence during the period of 1945–1951, documenting an egregious and pervasive pattern of harms that included lynchings, executions, mutilations, rapes, and discrimination. Each event, act, attack, murder, was carefully documented with dates, names, and details. The acts that constituted killing members of the group included shootings or death for failure to say “sir,” to tip their hats, or to move aside quickly enough, for “looking at a house suspiciously,” resisting arrest, complaining to a restaurant of being short-changed, for trumped up allegations of rape, for being suspected of being armed, refusing to work without boots in a snake-infested swamp, trying to vote, voting, asking for back pay, trade union organizing, asking for a beer, or for sitting in a white section of a restaurant. Other race murders included incendiary chemicals sprayed on a house in a “white” neighborhood, being refused admittance to emergency rooms after serious accidents, and dying with blood still on their faces while being transported three hours to a segregated hospital.<sup>226</sup>

As incitement to Genocide, Governor Herman Talmadge of the State of Georgia is quoted from his radio call to action on October 22, 1949 to defend segregation: “We will fight them in the counties and the cities. . . . We intend to fight hand to hand with all our weapons, and we will never submit one inch of encroachment on our traditional pattern of segregation.”<sup>227</sup> And Senator Allen J. Ellender of Louisiana told the Senate: “The more freedom and the more privilege a Negro is given, the more he will abuse that privilege. He will run wild and do violence to the society in which he moves.”<sup>228</sup> As examples of Klan terror, Reverend Harrison told the Atlanta Klan on November 1, 1948 that it was “no sin to kill a n—r for a n—r is no

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225. See CIVIL RIGHTS CONGRESS, *supra* note 153, at 32.

226. See *id.* at 10–15.

227. *Id.* at 16.

228. *Id.*

more than a dog.”<sup>229</sup> And the President of United Sons of Dixie (that operated as wartime front for Klan) chillingly stated: “We want 15,000,000 members in the U.S., and every one of them with a good gun and plenty of ammunition. Eventually we must eliminate the Negroes from this country.”<sup>230</sup> The population of blacks in the United States at that time was fifteen million—a call for one armed Klansman to “eliminate” each black. The Genocide Petition documents killings by the police, gangs, and the Klan and a shift from the “traditional” method of lynching to “the policeman’s bullet,” by which blacks were beaten to death on chain gangs, back rooms of sheriff’s offices, country jails, police stations, and in the streets, and framed and murdered by sham legal forms and a racist legal bureaucracy.<sup>231</sup>

To support its allegation of the crime of economic genocide, “deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part,” the Genocide Petition cited numerous incidents and patterns of blacks being last hired, first fired, forced into city ghettos or rural equivalents, deprived of health care, decent housing via legal segregation, and suffering humiliation and persecution from birth to death.<sup>232</sup>

The Genocide Petition argued that the object of all these acts of genocide was the perpetuation of economic and political power by the few through the destruction of political protest of the many; its method was to demoralize and divide an entire nation; its evidence was the increase in profits and the unchallenged control by a reactionary clique.<sup>233</sup> In its prayer for relief, the Genocide Petition called upon the General Assembly of the United Nations to find and declare the guilt of the government of the United States for crimes of genocide against the Negro people and to further demand that the U.S. government stop and prevent the crime of genocide. The Genocide Petition also requested condemnation of the United States for its failure to implement and observe its international obligations under the United Nations Charter and the Genocide Convention, and called upon the competent organs of the United Nations to take action. Finally, the petition also requested that the question of the applicability of the Genocide Convention be submitted to the International Court of Justice.<sup>234</sup>

How did such a remarkable document come about? After analyzing the United Nations Conventions, and building upon the CRC legal and political work, Patterson and the CRC felt the time was ripe to bring the black struggle

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229. *Id.* at 17.

230. *Id.*

231. *Id.* at 8.

232. *Id.* at 5.

233. *See id.* at 5, 23–24.

234. *See id.* at 196–97.

to another dimension—to the world stage, and connected to broader peace and freedom struggles. In line with the CRC's organizational approaches, Patterson and his drafting group polled trade unionists, educators, and prominent liberals for reactions. Letters were sent out to select list of prominent men and women at leading law schools inquiring if they believed that the Genocide Convention would apply to the situation of blacks in the United States. The replies fell out along a color fault-line. The majority of the blacks polled supported the invocation of the Genocide Convention, a majority of the white liberals did not agree, and some charged that only a Communist could think of making such a charge. Without exception, the law faculty adamantly opposed the idea as an attack that would impeach the integrity of the nation. Even the "father" of the convention, Professor Lemkin, argued vehemently that the convention bore no relationship to the U.S. government or its treatment of blacks. Patterson writes: "This was only one instance of what racism was doing to the minds and morality of America's men of law and science. Obviously, no effective support for our petition was to come from that direction."<sup>235</sup>

In December 1951, Patterson delivered the Genocide Petition to the United Nations General Assembly in Paris, and Paul Robeson delivered it simultaneously to the United Nations Secretariat in New York (as Robeson had by then had his passport confiscated by the U.S. government). Widely reported in the international press, the delivery of the petition generated a great deal of attention and international embarrassment for the U.S. government that was positioning itself as the leader of the free world in the aftermath of World War II. Professor Lemkin and others branded both Patterson and Robeson as "un-American" elements serving a foreign power.<sup>236</sup> The black members of the U.S. delegation, including Ralph Bunche, and the Chairman of the NAACP, Dr. Channing Tobias, were similarly negative.<sup>237</sup> Eleanor Roosevelt, quoted in an Amsterdam News interview on January 12, 1952, pointed to the efforts made to improve the health of blacks, and added "[t]he charge of genocide against the colored people in America is ridiculous in terms of the United Nations definition."<sup>238</sup>

However, Patterson and his drafting group had no illusions about the role of the United Nations and clearly recognized the limits of that body in effecting fundamental change in the behavior or laws of the member states. Instead, the strategy was to take center stage and announce "to the world audience that until the flagrant injustices of racism had been beaten, no quarter

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235. PATTERSON, *supra* note 217, at 179.

236. *See id.* at 191.

237. *See id.* at 188–92.

238. *Id.* at 206.

of the globe could be safe for those seeking freedom and the enjoyment of life's bounty."<sup>239</sup> That is, the petition made the radical link between domestic and international analyses, when it argued that genocide at home leads to fascism and imperialism abroad; it connected the jellied gasoline in Korea with lynchers' faggots for burning, and the lyncher and the use of the atom bomb (American statesmen referred to the colored peoples of Asia as "asiatic hordes").<sup>240</sup>

Like the dehumanization of blacks, the language and characterization of nonwhites as "hordes" or "infestations" permitted their eradication. Citing the role of media in espousing and inciting genocide, the Genocide Petition quoted the San Francisco Argonaut in 1900: "We do not want the Filipinos. We want the Philippines. The Islands are enormously rich, but, unfortunately they are infested by Philipinos. There are many millions there and it is feared their extinction will be slow."<sup>241</sup> Yet, in a militarized, cold war anti-Communist hysteria, the CRC called for an end to the Korean War. "White supremacy at home makes for colored massacres abroad."<sup>242</sup>

There are sobering and inspired and inspiring lessons here for the analysis of the relationship between racism, imperialism, and war; between international and domestic human rights analysis, between legal, media, cultural, and grassroots strategies. Beyond narrow domestic U.S. legal conceptions, the CRC petition frames the injustice with a powerful naming—genocide. This framing narrative and language was also powerfully and violently resisted—suggesting that the framing of the justice claim affects not only its rhetorical power but also the nature and strength of the opposition it will call forth. In its analysis of the responsibility of government actors, private actors, the media, the role of racist education in a segregated America as "education for genocide," and the role of corporate capitalism and exploitation as "genocide for profit," the CRC Genocide Petition consciously and strategically *politicizes* the U.S. colonial and imperialist past, remembering a historical present. In contrast, the Supreme Court decision in *Rice v. Cayetano* was *depoliticized* and masked selective ideological "recounting" of its justice claim in the antidiscrimination rhetoric of civil rights.<sup>243</sup> Instead of framing their petition in the even then conventional liberal civil rights language, the CRC framed the harm, the crimes, as individual and collective structural violence located within a colonialist and imperialist history.

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239. *Id.* at 175.

240. See CIVIL RIGHTS CONGRESS, *supra* note 153, at 7.

241. *Id.* at 26.

242. *Id.* at 7.

243. See *supra* Part III.

By linking domestic and international struggles and world peace with oppression at home, by naming the linkages between genocide at home and genocide abroad, the CRC created the discursive and political space to build multiracial and international coalitions. By framing the genocide to include economic genocide, and implicating the entire machinery of brutal state power and the role of corporate greed,<sup>244</sup> what the petition named “genocide for profit,” the CRC was invoking a fundamental challenge to the structural order of power—its remedy was therefore not “access” to the table. This challenge to the very distributive shape and destructive capitalistic values of that table recognizes the limits of liberal equality rights-based assertions and claims. By linking domestic and international struggles, the Genocide Petition opens the macrojustice lens to include the distributive outcomes *within* a society and the distributive outcomes *between* societies, which are intrasocietal equality and an international equality. Indeed the CRC was a prototype of a domestic U.S. civil rights NGO that addressed and transcended its national geography and politics, that understood the indivisibility of civil, political, economic, social, and cultural rights, and that made the connection between human rights, peace, and imperialism. And its targets included powerful corporate monopolies—the entities that would spawn the present-day transnational and multinational giants.

As an influential narrative, the Genocide Petition provides the story, the language, ideas, and images not only critically to comprehend the past and frame the present to that reconstructed past, but it also provides the normative story, the grand narrative for how we might envision the future. We need to reclaim the moral urgency, theoretical insights, and strategic lessons of this marginalized history. CRC members, volunteers, and even children and family, were relentlessly hounded and terrorized. The oppressive use of state power to wear down and deplete the limited resources of CRC through tax audits, investigations, and the demand for membership and contributors’ names in a time of rampant McCarthyism, contempt trials, and imprisonment,<sup>245</sup> is a testament to the powerful threat that CRC posed to the political and economic power structures in place. In the end, worn down, the CRC national and local chapters with the single exception of the Seattle chapter, voted for dissolution. Yet, as late as 1962, Attorney General Robert Kennedy was

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244. In its appendix to the Genocide Petition (Document C), the CRC presents data on monopoly control by Morgan and U.S. Steel, the Du Ponts’s rayon, nylon, plastic, explosive, and chemical plants, the Rockefellers and their control over the greatest natural resource of the south, petroleum, as well as the control by Mellon and Gulf Oil Corporation over millions of acres under lease, and data on the rubber, tobacco, cotton, meat-packing, and textiles industry giants. See CIVIL RIGHTS CONGRESS, *supra* note 153, app. at 228–33.

245. See HORNE, *supra* note 35, at 354–58.

still investigating the CRC, and it was not until just before President John F. Kennedy's death that the U.S. Department of Justice formally dropped its case. As yet, as Horne eloquently writes, "It cannot be said that CRC went gently into that good night of liquidation, but rather it raged and raged against the dark dying of the light."<sup>246</sup> Its leadership, including Paul Robeson and Bill Patterson did not simply fade quietly into the night, but continued their social justice struggles to the very end of their lives. Their legacy continued: "Their early anti-anticommunism was vindicated during the Vietnam War. Their anti-Jim Crow crusade paved the way for the gains of the 1960s. Their tactics, like the 'freedom rides,' continue to be emulated."<sup>247</sup>

The CRC times and its resonances with present civil and human rights struggles—witness the police brutality cases, the relentless march of death penalty executions, the violent political and economic antialien and anti-foreign rhetoric in the media, and government attacks on poor people—should warn and encourage *us* to not go silently into the night that faces us today. Patterson appropriately has the last word: "And now, if this great ocean swell of militancy can be mobilized, unified, illuminated by an understanding of the class forces of which they are victims, there will be no turning back. No surveillance, persecution, jailing, murder of individuals can stop them. In the end, the people must prevail."<sup>248</sup>

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246. *Id.* at 354

247. *Id.* at 358.

248. PATTERSON, *supra* note 217, at 223.