

# Inside the Outsider: Critical Race Theory against Human Rights?

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*Abstract.* Although critical race theory and international human rights law share important concerns, there is little clarity about the relationship between them. Two trends have emerged so far. One is *alliance*: some critical race theorists—this article focuses on Mari Matsuda—recognize the importance of a relationship, but mischaracterize it by seeing international human rights law as straightforwardly endorsing substantive norms advocated by critical race theorists. Yet the dominant trend is sheer *neglect*: critical race theorists and international human rights scholars have, for the most part, ignored each other. In this article, both of those trends are rejected. In particular, it is argued that Matsuda’s suggestion of an alliance between the two movements, far from serving the aims and methods of critical race theory, utterly abandons them. It is argued that critical race theory should certainly engage with international human rights law, but that its stance towards international norms and institutions should remain fundamentally critical.

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Critical race theory has become a leading movement in legal scholarship.<sup>2</sup> At first glance, it may seem to be uniquely American. The works of its leading figures, such as Derek Bell, Kimberlè Williams Crenshaw, Richard Delgado, Charles Lawrence, Mari Matsuda, Jean Stefancic, or Patricia Williams, focus on American history and society. However, their insights apply well beyond the American context. Many critical race theorists have adopted the concept of ‘outsider jurisprudence’ to suggest that dominant approaches to law in liberal democracies, despite their universalist and egalitarian pretensions, have systematically subordinated the interests of the disempowered, particularly ethnic minorities, but also, e.g., women or sexual minorities.<sup>3</sup> Those problems of domination, marginalization and exclusion resonate throughout the post-colonial world. They lie at the heart of international human rights law as it has been conceived since the end of the Second World War. What, then, is the

<sup>1</sup> Reader in Law, Queen Mary, University of London.

<sup>2</sup> See, e.g., *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic, eds., 2<sup>nd</sup> ed. 2000) [hereinafter CRT]; *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic, eds., 1997) [hereinafter CWS]. See also, e.g., M.D.A. FREEMAN, *LLOYDS INTRODUCTION TO JURISPRUDENCE* ch. 16 (7th ed. 2001).

<sup>3</sup> See, e.g., Mari Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’, in *WORDS THAT WOUND* 17, 18 – 20 (Mari Matsuda *et al.* eds. 1993) [hereinafter WORDS].

relationship between the two movements? Thus far, two trends have emerged, which I shall call the *alliance trend* and the *neglect trend*.

*The alliance trend.* Some themes in critical race theory resonate with those in international human rights law. For example, in an article entitled ‘A Shifting Balance: Freedom of Expression and Hate Speech Regulation’, Jean Stefancic and Richard Delgado review the broad international consensus in favour of hate speech bans in order to reject American civil libertarian assumptions about liberty, equality and free speech.<sup>4</sup> Mari Matsuda takes a similar position in ‘Public Response to Racist Speech: Considering the Victim’s Story’, published in the frequently cited collection *Words that Wound*.<sup>5</sup> Those and several other critical race theorists argue that racist invective or incitement to racial hatred cause at least as much harm to its victims and to society generally as the kinds of batteries, assaults or illicit speech acts (e.g., fraud, criminal solicitation or conspiracy) that the law has traditionally punished. Failure to punish them, far from pursuing values of liberty and equal protection, merely recapitulates an understanding of individual rights that has traditionally represented a white perspective and has excluded the perspectives of the disempowered.<sup>6</sup>

The respective approaches taken by Matsuda and Stefancic & Delgado are not identical. The analysis of Stefancic & Delgado is more empirical and comparative, responding to other scholarship that has surveyed the regulation of hate speech in various jurisdictions. Elsewhere I have argued that hate speech bans do not and cannot fulfil their aims.<sup>7</sup> As that analysis involves a specific focus on hate speech bans, I shall not pursue it here. Matsuda, by contrast, undertakes no detailed assessments of non-American jurisdictions. She focuses on the overall endorsement of hate speech bans that arose within the United Nations during the drafting and adoption phases of the International Convention on the Elimination of All Forms of Racial Discrimination<sup>8</sup> (CERD). Like Stefancic & Delgado, Matsuda suggests an alliance between challenges to American law posed, on the one hand, within critical race theory, and, on the other hand, within international human rights law.

*The neglect trend.* Those approaches by Matsuda and Stefancic & Delgado, however, represent the exception more than the rule. For the most part, the two movements have ignored each other. Most writing on racism within international human rights law includes few discussions of critical race theory; nor, aside from discussions such as those by Matsuda and Stefancic & Delgado, do critical race theorists pay much attention to international human rights law.

In this article, I shall reject both of those trends. Neither represents the relationship that should exist between the two movements. On the one hand, I shall argue that Matsuda’s dichotomy between a fundamentally correct international consensus and a fundamentally mistaken American exception is not only questionable in substance, but misapplies the methods that critical race theorists see as crucial to the analysis of law. On the other hand, I shall argue that neither movement benefits itself or the other when they ignore each other. The neglect trend errs by failing to see a relationship where one should exist. The alliance trend errs by seeing, but misconceiving it. The alliance trend seeks to challenge the formally proclaimed norms of one big power (the United States), by siding with the formally proclaimed norms of other big powers, i.e., the United Nations and some of its dominant member states. I shall argue that a third trend needs to emerge: a *critical trend*, which pursues a constructive scepticism towards formally proclaimed norms of all states (particularly dominant ones) and of all international institutions (particularly dominant ones).

In Part I, I examine the neglect trend in order to identify points of overlap and tension between critical race theory and international human rights law. In Part II, I reject Matsuda’s

<sup>4</sup> Jean Stefancic & Richard Delgado, ‘A Shifting Balance: Freedom of Expression and Hate Speech Regulation’, 78 IOWA L. REV. 737 (1992 – 1993).

<sup>5</sup> Matsuda, *supra* note 3.

<sup>6</sup> See generally, WORDS, *supra* note 3. See also, e.g., Richard Delgado, ‘About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties,’ in 39 HARV. C.R.-C. L. L. REV. 1 (2004) (reviewing arguments in favour of hate speech bans).

<sup>7</sup> See Eric Heinze, ‘Viewpoint Absolutism and Hate Speech’, MODERN L. REV. (forthcoming 2006).

<sup>8</sup> 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

suggestion of essentially allied positions between the two movements. In Part III, I argue that the opposite stance would have been more faithful to critical race theory and more beneficial to international human rights law, namely, an approach whereby the professed norms of international human rights law are approached with the same methods of contextual analysis that critical race theorists apply to American law.

## ***I. On Neglect***

My primary aim in this article will be to probe Matsuda's view of an alliance between critical race theory and international human rights law. Before doing so, I shall examine the neglect trend. We must first understand *that* there is a relationship between the movements before we ask how it should develop. I shall begin by reviewing some explanations for the neglect trend, arguing that none are entirely satisfying.

### ***A. Rights Scepticism***

Because of its position on hate speech as an issue that illustrates the outsider status of ethnic minorities, *Words that Wound* became more than a book about hate speech. It represents one of the first attempts by its authors to identify a concept of critical race theory as a whole. While noting the diversity of approaches within the movement, the authors set forth six 'defining elements'. Two of them are particularly relevant to critical race theorists' understanding of rights, and, in particular, of formal proclamations of rights (for later reference, I shall insert the letter 'E' for 'element'),

'[E]2. Critical race theory expresses scepticism toward dominant legal claims of neutrality [and] objectivity . . . . These claims are central to an ideology of equal opportunity . . . [which] tells an ahistorical, abstracted story of racial inequality as a series of randomly occurring, intentional, and individualized acts.

'[E]3. Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law. Current inequalities and social/institutional practices are linked to earlier periods in which the intent and cultural meaning of such practices were clear. [...]'<sup>9</sup>

Critical race theory suggests that legal norms cannot be read off the page. They are meaningful only in historical and social context. We can read in the Declaration of Independence that 'all men are created equal', or in the Fourteenth Amendment that the individual states shall guarantee 'equal protection of the law' to all citizens. However, those formally declared norms reveal little about the real brutality, discrimination and exclusion experienced by ethnic minorities throughout much of American history. What Americans call 'equal rights' have largely worked out to be the exclusive privileges of white men.<sup>10</sup> Thus, in *Dred Scott v. Sanford*, an individual right asserted by a white man was cited by the Supreme Court not to overcome slavery but to maintain it.<sup>11</sup> In *Plessy v. Ferguson*, separate facilities for whites and blacks were cited by the Supreme Court not as evidence of unconstitutional discrimination, but as evidence that blacks were being treated equally to whites.<sup>12</sup> Accordingly, one might attribute the neglect trend to critical race theorists' scepticism about formal proclamations of rights: on the one hand, one might imagine that critical race theorists

<sup>9</sup> Charles R. Lawrence *et al.*, 'Introduction', in *WORDS*, *supra* note 3, at 6.

<sup>10</sup> See generally, e.g., CRT, *supra* note 2, pts. I – IV.

<sup>11</sup> *Dred Scott v. Sanford*, 60 U.S. 393 (How.) (1856).

<sup>12</sup> *Plessy v. Ferguson*, 163 US 537 (1896).

would keep their distance from international human rights law in view of its reliance on formal proclamations of individual rights; on the other hand, it might seem that the international human rights community would hesitate to engage with a discipline that—however justified it may be in doing so—takes a sceptical view of rights.

However, critical race theory's rights scepticism cannot really explain the mutual neglect. In *The Alchemy of Race and Rights*, Patricia Williams rejects the rights scepticism that had characterized the critical legal studies movement of the 1970s and 1980s. Williams acknowledges that white Americans had benefited from rights far more than African-Americans. At the same time, she notes that the limited access to rights that African-Americans have enjoyed often provided individual empowerment. In discussing her own search to rent an apartment, she conceded that a white male (such as the white males who had led the American critical legal studies movement) might indeed feel secure in 'overcoming' the impersonal and adversarial nature of rights by striking an informal, oral agreement. She, however, as an African-American woman, was more secure with a formally written agreement that she could wave in court if she were cheated, as so many ethnic minorities and women had been cheated before her.<sup>13</sup> The purported radicalism of critical legal studies suddenly looked like an elitist pastime, while traditional individual rights could be seen as progressive for ethnic minorities—as long as we remained vigilant about the ease with which rights had been turned against the interests of outsider groups in the past.

Other critical race theorists have taken similar positions, rejecting simplistic dualisms between 'rights are good' and 'rights are bad', or 'liberalism is good' and 'liberalism is bad'. They have often acknowledged the empowering potential of rights and of liberalism, while warning that formal proclamations of individual rights must not be taken at face value. Accordingly, another 'defining element' of critical race theory set forth in *Words that Wound* states,

[E]5. Critical race theory is interdisciplinary and eclectic. It borrows from several traditions, including liberalism, law and society, feminism, Marxism, poststructuralism, critical legal theory, pragmatism and nationalism. This eclecticism allows critical race theory to examine and incorporate those aspects of a methodology or theory that effectively enable our voice and advance the cause of racial justice even as we maintain a critical posture.<sup>14</sup>

It cannot be maintained, then, that critical race theory and international human rights have bypassed each other because of critical race theorists' rights scepticism. Critical race theorists' rights scepticism is a vigilance towards rights, not a categorical rejection of them.

### ***B. The Local and the Global***

International human rights must work locally. They must apply to people in particular places at particular times. However, the norms of human rights law have generally been conceived not as a local enterprise but as a global one—as an attempt to generalize about all people everywhere, or, at least, about whole categories of people, such as women<sup>15</sup>, children<sup>16</sup>, workers<sup>17</sup>, etc. The Universal Declaration of Human Rights (UDHR) proclaims the 'inherent dignity and . . . the equal and inalienable rights of *all* members of the human family'.<sup>18</sup>

<sup>13</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 147 – 65 (1991).

<sup>14</sup> Lawrence *et al.*, *supra* note 9, at 6.

<sup>15</sup> See, e.g., [Convention on the Elimination of All Forms of Discrimination against Women](#), 1249 UNTS 513, *entered into force* Sept. 3, 1981.

<sup>16</sup> See, e.g., [Convention on the Rights of the Child](#), 1577 UNTS 3, *entered into force* Sept. 2, 1990.

<sup>17</sup> See, e.g., [Discrimination \(Employment and Occupation\) Convention \(ILO No. 111\)](#), 362 UNTS 31, *entered into force* June 15, 1960.

<sup>18</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), preamb. para. 1 (emphasis added).

International human rights law seeks to speak about *the* human being, about *the* individual *as such*.

Critical race theory moves largely in the opposite direction. Its rights scepticism entails scepticism about abstract and universalist notions of human personality or inborn entitlements. Again, its rights scepticism has grown out of the observation that universalist pretensions have, in practice, commonly reflected, or been deployed in favour of, the interests of privileged groups. Critical race theorists have avoided abstract propositions about all human beings, focussing instead on the histories and effects of slavery, segregation and discrimination within the context of American promises of liberty, equality and democracy. It might seem, then, that the neglect trend has arisen because critical race theorists and international human rights specialists adopt starting points and pursue intellectual paths that are too different to allow sufficient common ground.

However, those differences cannot fully account for the mutual neglect, if only because the two movements share equally compelling affinities. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), for example, states that ‘the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith’ (preamb. para. 4); that the States Parties are ‘[c]onvinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice’ (preamb. para. 6); that they are ‘[c]onvinced that the existence of racial barriers is repugnant to the ideals of any human society’ (preamb. para. 8); and that they are ‘[a]larmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred’ (preamb. para. 9). Meanwhile, a treaty like the Convention concerning Indigenous and Tribal Peoples in Independent Countries<sup>19</sup>, which must deal with wholly distinct and highly contested concepts of ethnic and minority identities<sup>20</sup>, states the aim of ‘removing the assimilationist orientation of the earlier standards, and [r]ecognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live’ (preamb. para. 9).

At the same time, the works by Matsuda and Stefancic & Delgado on hate speech confirm that critical race theorists have identified at least some locus of issues of clear concern to international human rights law. The UN Committee on the Elimination of Racial Discrimination (UN-CERD), responsible for supervising state compliance with CERD obligations, devoted its first General Recommendation to the problem of hate speech, criticizing states parties that had failed to adopt appropriate national legislation.<sup>21</sup> It has reiterated that concern in two subsequent recommendations,<sup>22</sup> and in comments on individual state practices.<sup>23</sup>

<sup>19</sup> ILO No. 169, 72 ILO *Official Bull.* 59, entered into force Sept. 5, 1991.

<sup>20</sup> Cf., e.g., Eric Heinze, ‘The Construction and Contingency of the Minority Concept,’ in *MINORITY AND GROUP RIGHTS TOWARD THE NEW MILLENNIUM 25-74* (Bill Bowring & Deirdre Fottrell, eds. 1999); Eric Heinze, Review of I. Schulte-Tenckhoff, *La Question des peuples autochtones*, 46 *NETHERLANDS J. INT’L L.* 269 (1999).

<sup>21</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 1, ‘States parties’ obligations’ (Fifth session, 1972), U.N. Doc. A/8718 at 37 (1972), reprinted in *COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES*, U.N. Doc. HRI/GEN/1/Rev.6 at 195 (2003) [hereinafter *COMPILATION*].

<sup>22</sup> [Committee on the Elimination of Racial Discrimination, General Recommendation 7](#), ‘Measures to eradicate incitement to or acts of discrimination’ (Thirty-second, 1985), U.N. Doc. A/40/18 at 120 (1985), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 199 (2003); [Committee on the Elimination of Racial Discrimination, General Recommendation 15](#), ‘Measures to eradicate incitement to or acts of discrimination’ (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in *COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES*, U.N. Doc. HRI/GEN/1/Rev.6 at 204 (2003).

<sup>23</sup> See, e.g., ‘Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America,’ U.N. Doc. A/56/18 (2001), at para. 391 (criticising US constitutional protections of hate speech); ‘Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination,

More generally, American racism has spread over too many populations, too many situations, too broad a geography, and too long a time to warrant any understanding of critical race theory as merely ‘local’. The treatment of an African slave on a plantation in Georgia, of an ethnic Chinese labourer in early 20<sup>th</sup> century California, or of Mexican immigrants in Texas today, could scarcely be subsumed by a ‘local’ theory. Internationally, the term ‘American’ may (or may not) be the opposite of ‘global’; Nationally, however, ‘American’ is surely the opposite of ‘local’. Critical race theorists, in order to promote a more general understanding of American law, have had to operate at a level of abstraction general enough to account for the various manifestations of American racism. Accordingly, the neglect trend cannot be attributed to differences in the demographic scale, or level or conceptual abstraction, at which the two movements approach racism or rights.

### C. *Theory and Practice*

In several respects, the international human rights community looks like other legal communities. It includes lawyers, judges (or experts sitting in a quasi-judicial capacity), special advisors and activists. Those with academic interests often keep their analyses within established doctrinal and institutional confines, and, like scholars in other areas of law, do not necessarily refer to more abstract legal theory.<sup>24</sup> International human rights scholars may neglect critical race theory, but no more than they neglect, say, Marxist, deconstructionist or other theoretical approaches. Their neglect of critical race theory may arise not so much as a matter of conceptual incompatibility, but as a matter of professional or scholarly orientation.

For several reasons, however, that explanation too, does not really account for the neglect trend. Although questions of racial discrimination enter all areas of law, right down to the nuts and bolts of contract and tort,<sup>25</sup> human rights law is distinct insofar as it has expressly emerged as a response to, and defined itself in terms of, problems of dominance and oppression. In that respect, human rights law is not just another area of law. Problems raised by critical race theory are central to those raised by human rights.

Moreover, while critical race theorists do indeed propose a comprehensive understanding of law, politics and society, they also share mainstream legal scholars’ caution towards theoretical abstraction, viewing it with the same suspicious eye with which they approach abstractions within substantive law: ‘Critical race theory cannot be understood as an abstract set of ideas or principles. Among its basic theoretical themes is that of privileging contextual and historical descriptions over transhistorical or purely abstract ones.’<sup>26</sup> The authors of *Words that Wound*, for example, while exploring theoretical issues, also aim to achieve concrete legal reform.

Far from being ‘too theoretical’, it is precisely that concern with specific legal reform that may account for the neglect trend. In paying little attention to international human rights, critical race theorists are no different from most other American lawyers and legal scholars. Because of their interest in American legal reform, they presumably prefer to focus on their immediate political and legal context, without injecting the complications of legal norms that still carry little weight in the US.<sup>27</sup> Similarly, international human rights scholars might neglect critical race theory because the latter’s focus on American law surpasses the expertise of those not well versed in American law. But those pragmatic explanations only confirm that there is no real intellectual basis for the neglect trend.

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Denmark’, U.N. Doc. CERD/C/304/Add.2 (1996), para. A.3 (criticizing interview with racists broadcast on Danish television).

<sup>24</sup> Cf. text accompanying note 60 *infra*.

<sup>25</sup> Cf. text accompanying note 13 *supra*.

<sup>26</sup> Lawrence *et al.*, *supra* note 9, at 3.

<sup>27</sup> On the limited influence of international human rights law on US law, see, e.g., HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1029 – 48 (2<sup>nd</sup> ed., 2000).

Finally, we should note that international human rights scholars have not been uniformly impermeable to legal theory. For example, feminist theories<sup>28</sup> or theories of childhood<sup>29</sup> have played a role in their respective areas of human rights law. It is by no means true, then, that the concerns of critical race theory are extraneous to those of international human rights law. Each has a place for the other. The question we must now ask is, what kind of relationship should they develop?

## II. On Listening

When *Words that Wound* was published in 1993, the Cold War had just ended. The first President Bush had called for a ‘new world order’. International human rights law seemed to receive a new impetus after decades of inertia. The treaty-based committees of the United Nations, such as the Committee on the Elimination of Racial Discrimination (UN-CERD), or the Human Rights Committee (UN-HRC), found their activity dramatically increased, as numerous states eager to embrace democracy and human rights submitted declarations of intent<sup>30</sup> to adhere to those committees’ individual complaints procedures.<sup>31</sup> It is perhaps no coincidence that the writings by Matsuda and Delgado & Stefancic examining international human rights date from that period of renewed vigour. Sadly, Cold War divisions were soon replaced by more diffuse and complex ones. With post-Cold War optimism now tempered, it is appropriate to revisit some views towards international human rights law that emerged within critical race theory, in order to consider their significance not only today, but also at the time they were written.

Matsuda discusses the drafting and ratification<sup>32</sup> of CERD article 4, which provides that states parties,

‘(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour of ethnic origin . . . .

‘(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.’

Matsuda praises what she calls an international ‘consensus’<sup>33</sup> favouring the elimination of racist hate propaganda. She criticizes the position of the American government, which was largely isolated at the UN in its opposition to CERD article 4. The American position reflected the increasingly strong protections of free speech and association that had emerged on the United States Supreme Court, and among American civil libertarians, during the 1960s.

<sup>28</sup> See, e.g., *id.* at 403 – 39. See also, e.g., JILL MARSHALL, *HUMANITY, FREEDOM AND FEMINISM* (2005).

<sup>29</sup> See, e.g., Eric Heinze, ‘The Universal Child?’ in *OF INNOCENCE AND AUTONOMY: CHILDREN, SEX AND HUMAN RIGHTS* 3 (Eric Heinze, ed., 2000).

<sup>30</sup> See Office of the United Nations High Commissioner for Human Rights, ‘Statistical survey of individual complaints considered under the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination’, <http://www.unhchr.ch/html/menu2/8/stat4.htm> (updated 31 March 2004) (visited 3/5/2006).

<sup>31</sup> For CERD, cf. text accompanying note 47, *infra*. For the ICCPR, see the [Optional Protocol to the International Covenant on Civil and Political Rights](#), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

<sup>32</sup> For information on official positions taken by states at the United Nations during the Cold War period and throughout the drafting processes of CERD and other instruments, see also, e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991); NATHAN LERNER, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (2<sup>nd</sup> ed. 1980).

<sup>33</sup> Matsuda, *supra* note 3, at 27.



Matsuda equates that American ‘Civil Libertarian’s Story’<sup>34</sup> with ignoring ‘the victims’ experience’<sup>35</sup>, and allies the international consensus with ‘[t]he emerging acceptance of the victim’s story’.<sup>36</sup>

Critical race theorists’ emphasis on the omission of ‘the victims’ experience’ arises through a realist jurisprudence, as expressed in E3, i.e., through an examination of the meanings of ‘liberty’ and ‘equality’ not merely in their black letter, but in the context of the actual applications of those professed ideals in a rather bleaker historical reality. What is surprising about Matsuda’s chapter, however, is that, in examining the international consensus that emerged in support of CERD article 4, she abandons that approach. She accepts the professed ideals of CERD article 4, and positions supporting it expressed by various major powers, entirely on face value.

Matsuda notes that, in 1964, during the drafting phases of CERD, three drafts were submitted to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), respectively, by the United States, the United Kingdom, and the USSR jointly with Poland.<sup>37</sup> The British proposal reflected policies of the Race Relations Act,<sup>38</sup> and generally represented approaches of other Western European states. Elsewhere I have examined the hypocrisies of Western European approaches and argued that they do little justice to minorities.<sup>39</sup> However, in view of the numbers and influence of socialist states during the drafting and signatory phases of CERD—crucial to building the supposed international ‘consensus’—their role in the process merits equal examination.

Matsuda concedes that the USSR-Poland draft, in proposing the strongest and most comprehensive prohibitions of hate speech, was ‘expressing little concern for an individualistic, civil libertarian conception of free speech’<sup>40</sup>. However, she does not unequivocally condemn or condone that stance. Curiously, in view of E2, she strikes a conspicuously neutral tone,

‘The USSR/Poland draft would have banned all “propaganda” of “superiority” and would have criminalized participation in any organization that discriminated or advanced discrimination. In obvious contrast to the U.S. view, the socialist nations proposed direct action against hate messages . . . .’<sup>41</sup>

Matsuda accepts at face value the approach of the USSR and Poland, without a hint of the historical or contextual method that she and other critical race theorists apply to the United States. Both the Soviet and the Chinese spheres of influence by the 1960s included states that had crushed or subjugated vast numbers of minority ethnic groups, and were still doing so. Despite the claims of E2 and E3, Matsuda proceeds, in startlingly few pages, to undertake an entirely ahistorical, abstracted, decontextualized, purportedly neutral, and glaringly black-letter analysis of international human rights. Nowhere does she offer any critical examination of why the USSR-Poland proposal for CERD article 4 was so far reaching, nor who was paying the price of the international ‘consensus’ with which she associates it. Chechens, Baltic peoples, Roma, Jews, Muslims, Romanian ethnic Hungarians, Tibetans or Uighurs represent just some of the more well-known among many groups that were often harshly, even murderously, repressed both preceding and during the very period in which the USSR and Poland were urging their strong version of article 4—a period during which, for example, ‘the Soviet authorities . . . required that every adult’s internal passport indicate the nationality

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<sup>34</sup> *Id.* at 31.

<sup>35</sup> *Id.* at 50

<sup>36</sup> *Id.* at 26

<sup>37</sup> *Id.* at 27.

<sup>38</sup> See, e.g., *id.* at 30.

<sup>39</sup> See Heinze, *supra* note 7.

<sup>40</sup> Matsuda, *supra* note 3, at 28.

<sup>41</sup> *Id.*



of the bearer'<sup>42</sup>. The Soviet Union alone included 'well over one hundred indigenous nationalities, of which twenty-two contain[ed] at least one million people.'<sup>43</sup> Matsuda writes not a word about any of them.

As Huttenbach notes, the story of national and ethnic diversity in the Soviet Union was little more than the continuation of outright conquests during the Tsarist periods,<sup>44</sup>

'Though Stalin initially promoted the Leninist policy of *sblizhenie* ['merging' or 'drawing together' – EH] by relying mostly on cadres drawn from the indigenous minority populations (a policy known as *korenizatsiia*), by the late 1930s he embarked on an open course of blatant Russification as a way to Sovietization and denationalisation, thereby running counter to Lenin's original course, which sought to steer clear of the shoals of overt Russification, a danger [that Lenin] had condemned with one of his more famous aphorisms: "Scratch a Russian Communist and you will find a Russian chauvinist."<sup>45</sup>

Far from hiding its repression of ethnic identities, Soviet policy proudly and actively pursued their dissolution. Barghoorn and Remington wrote during the period of Soviet rule,

'Recognizing that the elimination of national customs and culture in the creation of a homogeneous Soviet nation is a process of protracted duration, the pace of which cannot be forced, Soviet authorities consider that for the foreseeable future the nationalities will be in the process of *drawing together* (*sblizhenie*) so that opportunities, occupations, and values increasingly converge.'<sup>46</sup>

Matsuda praises the progressive Soviet stance, yet fails to explain why, throughout the Cold War period, the USSR, its allies, and dozens of other states never submitted<sup>47</sup> to CERD's individual complaint procedure—arguably a far more revealing test of international 'consensus' than states' formal proclamations—as set forth under article 14(1), which provides, in part,

'A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention.'

Matsuda praises the achievements of the United Nations on racial discrimination, yet the Human Rights Commission, a notoriously cynical political body throughout the Cold War,<sup>48</sup> never condemned the treatment of ethnic minorities by the Soviet Union or other socialist states. Nor could the treaty-based bodies like the UN-HRC or UN-CERD exercise any real influence, not only because of socialist states' refusal to adhere to the individual complaints procedure, but, more generally, because the opacity of socialist regimes allowed only limited monitoring of the treatment of ethnic minorities and of human rights generally.<sup>49</sup>

<sup>42</sup> FREDERICK C. BARGHOORN & THOMAS F. REMINGTON, *POLITICS IN THE USSR* 71 (3<sup>rd</sup> ed., 1986).

<sup>43</sup> *Id.* at 71 – 72.

<sup>44</sup> Henry R. Huttenbach, 'Introduction: Towards a Unitary Soviet State: Managing a Multinational Society, 1917 – 1985', in *SOVIET NATIONALITY POLICIES: RULING ETHNIC GROUPS IN THE USSR* 1, 3 – 4 (Henry R. Huttenbach, ed., 1990) [hereinafter *SOVIET NATIONALITY POLICIES*].

<sup>45</sup> *Id.* at 5.

<sup>46</sup> BARGHOORN & REMINGTON, *supra* note 42, at 74 (original emphasis). Cf. *id.* at 71.

<sup>47</sup> For dates of submissions of declarations under CERD article 14, see Office of the United Nations High Commissioner for Human Rights, *supra* note 30.

<sup>48</sup> See, e.g., Eric Heinze, 'Testing for Legitimate Mandates: A Social Contract for the Human Rights Community', (forthcoming). See also, e.g., A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 83 – 89 (4<sup>th</sup> ed., 1996); STEINER & ALSTON, *supra* note 27, at 611 – 40.

<sup>49</sup> See, e.g., ROBERTSON & MERRILLS, *supra* note 48, at 31, 83 – 89; STEINER & ALSTON, *supra* note 27, at 611 – 40.

It was well-known during the Cold War that the socialist states criticized and relativized civil and political rights, purporting instead to advocate social and economic rights<sup>50</sup>. For present purposes, we can leave aside the questionable social and economic rights that were accorded to tens of millions of lives lost or damaged by famines, farm collectivisations, or forced internal displacements during successions of Soviet-style economic programmes or Mao's Cultural Revolution and 'Great Leap Forward'. In any event, that 'socialist approach to rights' (if it was one—but Matsuda casts no doubt on it) is not immediately relevant to CERD article 4. CERD article 4 is not about economic or social rights in any specific sense.<sup>51</sup> It concerns the control of speech, expression and association by the state. It is remarkable that a scholar purporting to look beyond law's black letter, to analyse law in historical and contextual terms, would have posed not a single question about the motives or effects of the socialist states in their strong stance on controlling expression and association—let alone doing so in the name of ethnic harmony—and the real consequences for their own ethnic and national minorities.

Matsuda's suggestion that the socialist states made an essentially useful, constructive and good faith contribution to CERD presupposes that those states saw CERD not as an instrument of sheer political and social control, but as a genuine commitment to the prosperity and autonomous empowerment of their ethnic minorities. Yet that would be quite a claim. Whatever might have been the motives of the USSR, Poland and other socialist states at the time, the benefits to totalitarian regimes of the broadest possible wording for article 4 limits on expression and political organization were obvious enough, precisely insofar as article 4 bans not merely the hardest core of racist speech, but massive amounts of speech that socialist states saw as politically destabilizing, such as legitimate criticism by minority ethnic groups about ethnic majority practices—one of the mainstays of critical race theory in the United States. Under Soviet rule, the sheer publication of works in many minority languages was rigidly controlled as a means of suppressing non-Russian identities. In an era when Black Panther leader Eldridge Cleaver was free to condemn American ethnic oppression in *Soul on Ice*, Lithuanians could not even publish an automotive magazine: 'the Russian-language *Za rulem* was supposed to fill the gap.'<sup>52</sup>

Matsuda rests the authority of her analysis, as critical race theory, on a normative framework that was advanced by states that, if we care about actual realities behind declared norms, would have crushed anything remotely resembling the American civil rights movement of the 1950s and 60s (let alone a critical race theory) among their own ethnic minority groups. Non-American ethnic minorities, whose interests were as much at stake in CERD as American ones, are not even named, let alone examined in Matsuda's chapter. They are, to use the concepts of critical race theory, the unseen, unheard absences of Matsuda's commitment to the black letter of CERD article 4 and what she sees as the 'community of nations'<sup>53</sup> standing behind it. Matsuda's chapter is sprinkled with quotations from or about victims of racism, but only victims of American racism.<sup>54</sup> Not one victim in any socialist state is cited. That is remarkable for a chapter seeking to overcome the parochialism of a purely American focus—seeking 'a just *world* free of existing conditions of domination.'<sup>55</sup> And it is utterly baffling for a chapter that, in Matsuda's words, 'focuses on the phenomenology of racism'<sup>56</sup> with reference to a supposed global consensus. To endorse the formal proclamation of article 4 whilst ignoring the context of its emergence is to embrace the kind of arid formalism that would have done the *Plessy* Court proud.

<sup>50</sup> See, e.g., ROBERTSON & MERRILLS, *supra* note 48, at 30 – 38.

<sup>51</sup> For an analysis of the relationship of hate speech bans to broader political and economic models, see Heinze, *supra* note 39, sections II.C, III and IV.

<sup>52</sup> Romuald J. Misiunas, 'Baltic Nationalism and Soviet Language Policy', in SOVIET NATIONALITY POLICIES, *supra* note 44, 206, at 210.

<sup>53</sup> Matsuda, *supra* note 3, at 29.

<sup>54</sup> Except for one passage that cites Matsuda's personal experience of in Australia. *Id.* at 17.

<sup>55</sup> *Id.* at 19 (emphasis added).

<sup>56</sup> *Id.* at 22. Cf. *id.* at 50.

To be sure, many members of non-American ethnic minority groups, particularly those subject to the racism of dominant groups, would certainly have been sympathetic to the *values expressed* in CERD article 4.<sup>57</sup> But that proves little. Many American minorities are also sympathetic to the *values expressed* in the US Constitution and Declaration of Independence.<sup>58</sup> The whole aim of critical race theory is to look beyond governments' official proclamations, condemning their hypocrisies and focussing on 'real harm to real people'.<sup>59</sup> Matsuda's analysis of the international 'consensus' does just the opposite, citing only the formally proclaimed norms pushed by big powers.

Had Matsuda taken a critical, contextual approach to international human rights law, much of her thesis would have collapsed. She would have been barred from suggesting that American dissent from the black-letter of article 4 was particularly deviant. Admittedly, the story of deviant America has long had real attraction to those who purport to do progressive politics. In its policies and practices, the United States has defied international norms governing, for example, hate speech, the death penalty, social and economic rights, environmental protection, or international criminal law. Curiously, however, it is black-letter international lawyers who end up better equipped to criticize the US on such issues, since the black-letter lawyer largely avoids questions of historical, political and social context. For example, in an article whose normative conclusions concur with those of Matsuda or Delgado & Stefancic, the UK international human rights lawyer Kevin Boyle, too, criticizes American exceptionalism and the American position on hate speech, advocating instead the international 'consensus' reflected in CERD article 4.<sup>60</sup> Boyle can do so plausibly because he never purports to embrace a method that looks behind norms to the actual attitudes and practices of the governments who draft and implement them. His method remains squarely within the conventional black-letter confines of international human rights practitioners: it does not matter that the Soviet Union and its satellites advocated strong versions of CERD article 4 while crushing many of their own minorities, or that the corresponding limitations on speech strongly supported Soviet restrictions on free speech and expression. All that matters is that we accept the literal text of the human rights instruments at face value.

The realist analysis required by critical race theorists would have ruined Matsuda's story of a distinctly deviant America, yielding a rather more humdrum conclusion, namely, that the United States—which, presumably, would have had to be examined along with other countries of reasonably comparable complexity and demographics—has, at worst, delivered pretty much the same mixed bag that we find in other such countries. In much of international human rights law, and certainly in the minds of a broad non-American public, the story of a uniquely deviant America may be highly compelling, but it is a formalist story, not a realist one (using those two terms in their jurisprudential sense). In the same year that Matsuda, a critical race scholar, published her account of the specifically deviant American approach, Scott Davidson, a human rights scholar, published a rather different, even diametrically opposed, conclusion: '[T]he denial of human rights stands in direct proportion to the denial of democratic participation in a government.'<sup>61</sup> Davidson's proportionality test in no way denies human rights abuses or democratic lapses, even grave ones, in democratic states. It does, however, suggest an assessment of human rights different from Matsuda's theory of an essentially mistaken US view deviating from an essentially correct international consensus.

Seeking to criticize American exceptionalism, Matsuda adopts not contextual legal realism, but rather the decontextualized legal formalism that critical race theorists purport to

<sup>57</sup> More recently, for example, there was broad participation by non-governmental organizations in the drafting of the 2001 'Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance' adopted in Durban, South Africa (also called the 'Durban Declaration and Programme of Action'). U.N. Doc. A/ CONF.189/12 (2001).

<sup>58</sup> Cf. text accompanying note 85 *infra*.

<sup>59</sup> Matsuda, *supra* note 3, at 50.

<sup>60</sup> See Kevin Boyle, 'Hate Speech: The United States *versus* the Rest of the World?' 53 MAINE LAW REVIEW 487 (2001).

<sup>61</sup> Scott Davidson, HUMAN RIGHTS 165 (1993).

reject. She endorses the literal language of CERD article 4 not *because* of the integrity of its drafters but regardless of it. Like any efficient lawyer, she endorses its literal wording simply because it advances her cause. A recurring theme for critical race theorists is the necessity of ‘listening’ to unheard voices.<sup>62</sup> Elsewhere I have noted that, in the context of hate speech, such listening mysteriously turns deaf when some of society’s weakest groups are concerned.<sup>63</sup> Similarly, we find Matsuda’s listening disturbingly selective, cleanly divided between the voices of American minorities, which are named and heard, and those of non-American minorities, which are excluded. If, during the drafting period of CERD, the great numbers of oppressed ethnic and national groups in the socialist states received nothing near the attention that had been focused, both in the US and abroad, on American racism, it was not because of their great empowerment under socialist rule, but because of their massive disempowerment.

Matsuda’s inconsistencies run deeper in her discussion of Marxism. A commonly recited (and, again, for socialist states, expedient) ground for prohibiting hate speech is that it can lead to instability or violence. In a famous American case leading up to the McCarthy era, a question arose as to whether the government could ban the expression of Marxist views in light of their advocacy of violent overthrow of liberal-democratic government and institutions.<sup>64</sup> That question re-emerges today in view of critical race theorists’ advocacy of hate speech bans: if racist speech should be banned because it is either a form or a cause of violence—indeed, even racist speech that does not expressly advocate violent conduct—then surely it is all the more justifiable to ban the dissemination of ideas, like orthodox Marxism, that *do* expressly advocate violence.<sup>65</sup> However, Matsuda reaches the opposite conclusion: governments should ban racist speech but not Marxist speech. She invokes the international consensus around CERD to argue that, unlike racist speech,

‘Marxist speech . . . is not universally condemned. Marxism presents a philosophy for political organization, distribution of wealth and power, ordering of values, and promotion of social change. [...] It is impossible to achieve world consensus . . . against this political view. Marxists teach in universities. Although Marxist ideas are rejected and abhorred by many, Marxist thought, like liberal thought, neoconservative economic theory, and other conflicting structures for understanding life and politics, is part of the ongoing efforts of human beings to understand their world and improve life in it.’<sup>66</sup>

There are numerous difficulties with that position. First, the suggestion that speech may be prohibited in proportion to the degree to which it is ‘condemned’ is highly questionable. We need not travel far back in time to find blasphemy, contraception, abortion, homosexuality, transsexualism, single motherhood, fornication, erotic art—or advocacy of them—condemned throughout the Western world. Second, I have already challenged the dubious international ‘consensus’ that Matsuda sees behind CERD, insofar as she, contrary to her approach to the US, recognizes no distinction between governments’ officially stated policies and their actual practices.

Third, without greater clarity on what, exactly, is meant by a ‘world consensus’, it is equally questionable whether a consensus against Marxism—at least one comparable to the consensus Matsuda sees against racism—is ‘impossible’, particularly if we look at the rejection of Marxist doctrine as such by countless Eastern Europeans (even by those who may otherwise favour a Western European type of a redistributive social-welfare state, financed through the revenues of more-or-less liberalized markets), or by a radically changed Chinese population. Notwithstanding age-old controversies about which, if any, regimes ‘really’

<sup>62</sup> See generally Matsuda, *supra* note 3. See also, e.g., Charles R. Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech on Campus’, 1990 DUKE L.J. 431, 436 (1990) [*reprinted in* WORDS, *supra* note 3, ch. 3].

<sup>63</sup> See Heinze, *supra* note 39, at section II.B.

<sup>64</sup> See *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>65</sup> See Heinze, *supra* note 39, at section III.A.

<sup>66</sup> Matsuda, *supra* note 3, at 37

counted as Marxist, it is surprising that Matsuda, writing in 1993, should have expressed such faith in the overall global respectability of Marxism, within just a few years of the rise of Solidarność in Poland, China's Tiananmen Square massacre (and its government's progressive abandonment of collectivised, command economics since Deng Xio-ping), the Timisoara uprising against the Ceaucescu regime, the fall of the Berlin Wall, and the final collapse of the Soviet Union and the remainder of its satellites. Indeed, anti-globalisation movements both at the time Matsuda was writing and more recently, although echoing a Marxist ancestry, omit rigorously Marxist analyses<sup>67</sup>, arguably because of widespread understandings of the inadequacies of, and of the horrors wrought through political applications of Marxist doctrine.

Fourth, and far more importantly, as Nazism shows, racism commonly presents 'a philosophy for political organization, distribution of wealth and power, ordering of values, and promotion of social change [and is] part of the ongoing efforts of human beings to understand their world and improve life in it.' Critical race theorists frequently argue that American slavery and segregation were anything but a mere sequence of random, philosophically indifferent arrangements. Leading cases in American constitutional law from *Dred Scot* and *Plessy* through to the 1960s dramatically illustrated how racism, far from being occasional or episodic, had become a total philosophical system, a total economic system, a total social system, a total psychological system, governing every detail of life in many (and, in some sense, all) American states.<sup>68</sup> The very idea of the hegemony of American racism suggests the degree to which it was steeped in a 'philosophy for political organization, distribution of wealth and power [and] ordering of values'. That is why critical race theorists teach that 'racism is endemic to American life'<sup>69</sup> and has come to be 'normal, not aberrant, in American society.'<sup>70</sup>

Fifth—and here we see the link to Matsuda's broader analyses—Matsuda's view once again illustrates the discrepancy between critical race theorists' refusal to take American liberal democratic political and legal ideals at face value and her own willingness to take contrary political and legal ideals at face value. If Matsuda holds that legal protections for hate speech stand not as legitimate vindications of liberal ideals, but as illegitimate abuses of them, then why cannot advocacy of violent overthrow of existing institutions be banned not merely as *abuses* of orthodox Marxism, but indeed as *faithful interpretations* of it? You might say: 'Very well. It should be permissible for Marxism to be published and preached, except for the bits that advocate violence.' But that would be ludicrous. The necessity of violence to the property-owning bourgeoisie is no flight of fancy in Marxism. It lies at the core of Marx's analysis of the history and dynamics of class conflict. State coercion to disseminate a sanitised Marxism would be as pernicious as state coercion banning its dissemination entirely. Be that as it may, on Matsuda's view, racist speech is illegitimate, since a contextual analysis shows it to be a form or cause of violence. Marxist speech, however, is legitimate, insofar as an uncontextual analysis shows it to be a 'philosophy' and an 'ordering of values'.

Finally, it is difficult to understand why the supposed respectability of Marxism ('Marxists teach in universities'—a mark of respectability, we are meant to believe) would diminish its violent message. We might arguably think the opposite—that the respectability of Marxism in comparison to racism renders that much more legitimate the view that it should be taken seriously and acted upon. Certainly, from an historical perspective, it cannot be argued that applications of Marxist ideas have had a significantly less brutal effect on

<sup>67</sup> See, e.g., MICHAEL HARTD & ANTONIO NEGRI, *EMPIRE* (2001); NAOMI KLEIN, *NO LOGO* (2002). See also, e.g., 'Introduction to Anti-Globalization - Definition and Resources', <http://www.anti-marketing.com/anti-globalization.html> (visited 3/5/2006).

<sup>68</sup> See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (concerning racial segregation in state schools); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (concerning discriminatory access to commercial goods and services); *Loving v. Virginia*, 388 U.S. 1 (1967) (concerning prohibitions on interracial marriage).

<sup>69</sup> Lawrence *et al.*, *supra* note 26, at 6.

<sup>70</sup> Richard Delgado & Jean Stefancic, 'Introduction', *in* CRT, *supra* note 2, at xvi.

humanity than applications of racist ideas have had. Matsuda still misses what Lenin had clearly seen: just how nationalist and racist—just how brutal—a supposed Marxist could be.<sup>71</sup>

### III. On Alliances

We can imagine several defences of Matsuda's approach. One might be that she never intends her discussion of international human rights to occupy centre ground. The overall concerns of her chapter and the book as a whole are expressly rooted in American law and do not claim to solve problems beyond American borders. It might be said, then, that her analysis cites international law only as one ingredient in a complex blend.

Yet surely that is no defence. Matsuda constructs a surprisingly straightforward dichotomy between American practice (wrong) and international consensus (right) that generally purports to resolve the problems raised in her chapter, at least insofar as they can be resolved through formal legal norms. She expressly proposes what she calls a 'bipolar' distinction between 'the victim's story of the effects of racist hate messages' and 'the first amendment story of free speech' in order to explain 'different ways of knowing to determine [*sic*] what is true and what is just'.<sup>72</sup> She then equates the 'international law of human rights' with 'the emerging acceptance of the victim's story'.<sup>73</sup> Indeed, any attempt to diminish Matsuda's recourse to international law would contradict E2 and E3 in suggesting that international human rights can be thrown into the overall argument as an essentially neutral element, not requiring any contextual analysis that would bear meaningfully on her overall position.

Matsuda claims that critical race theory rejects 'falsely universalist' norms through an approach that is 'realist' and that 'accepts the standard teaching of street wisdom: Law is political'.<sup>74</sup> But if law is political, always at risk of betraying justice by serving dominant interests, then what gives the purely formal proclamations of international human rights law and institutions the authority Matsuda that accords them? The black-letter of the Universal Declaration of Human Rights (UDHR) article 1 tells us that 'All human beings are born free and equal in dignity and rights'.<sup>75</sup> The UN General Assembly adopted the UDHR with the votes of some of history's most oppressive regimes. If UDHR article 1 is 'truly' universalist, on what basis do we ignore that context? And if, like key provisions of the American Constitution, it is 'falsely' universalist, then why would its black letter, and that of its progeny (like CERD), carry any greater authority? (Matsuda's concept of 'false universalism' is altogether opaque, as it presupposes either of two tacit concepts which are mutually incompatible. Either she means that some universalist claims or assumptions are true and others false, or that all are false. If the latter, then it would be difficult to understand how international human rights law would provide any authority at all. If the former, then Matsuda would have to explain what makes the international human rights norms truly universal and the American ones—or at least the ones she rejects—falsely universal. Alternatively, Matsuda could be interpreted to mean that some universalist claims are false, while others are indeterminate as to their truth or falsehood. But that position would render paradoxical her reliance on a 'consensus' whose global applicability is left wholly undecided.)

Incidentally, it might be argued that Matsuda's discussion of international law was minimized as a purely practical matter. After all, it is rarely possible for an author to cover all points exhaustively, so some points must inevitably be omitted or condensed. Yet that suggestion, too, would be unconvincing. Neither the book nor Matsuda's chapter are long. Even a few sentences acknowledging the historical price paid by ethnic minorities, in states

<sup>71</sup> See text accompanying note 45 *supra*.

<sup>72</sup> Cf. Matsuda, *supra* note 3, at 17.

<sup>73</sup> *Id.* at 26.

<sup>74</sup> Matsuda, *supra* note 3, at 19.

<sup>75</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 1.

whose positions Matsuda sees as progressive, would have differed starkly from her stone silence.

It might also be argued that the atrocities of socialist states were so well known, such staples of Cold War rhetoric, that they could be taken as read, requiring no special attention on Matsuda's part. But that position would be surprising. If the attention due to a problem is inversely proportionate to the publicity it has already received, then one might wonder why Matsuda would be concerned with American racism at all. The volume of ink spilled, celluloid shot, cases litigated and courses taught on American racism far exceeds that spent on all ethnic minorities of all former and current socialist states combined.<sup>76</sup> As late as 1990, for example, Huttenbach wrote,

‘Unfortunately, the multinational and hence multicultural character of the Soviet Union and the obvious difficulties of governing a heterogeneous population has not been the central concern of most scholars of the Soviet Union, perhaps, in part, because the Bolsheviks themselves and their heirs also did not stress the highly visible fact of the multifariousness and potential divisiveness of the composition of their citizenry. (From the outset, an optimistic emphasis was placed upon the singleness rather than the plurality of the post-Revolution Soviet population.) Even the more recent publications place little or no emphasis on the Soviet Union as a multinational entity.’<sup>77</sup>

Huttenbach criticizes leading works by Western scholars on Soviet politics and history for systematic omissions of ethnic and national groups, even when issues of interethnic tension are central to the problems those authors are discussing.<sup>78</sup> If we are to set up an international pecking order based on publicity already received (precisely the kind of ‘more victim than thou’ trap which I have criticized elsewhere as a danger inherent in the analyses of some critical race theorists<sup>79</sup>) then it is the ethnic minorities of former and current socialist states who would have to take clear precedence.

A variation on that theme would be the view that anti-communism was a well-worn tool of American conservatives and of American governments throughout the Cold War. The task of critical race theory, one might argue, is not to echo but to challenge dominant and establishment attitudes from the perspective of the outsider. But that argument is also unpersuasive. Anti-communist rhetoric was indeed a staple of the American mainstream, but no more so than the anti-American rhetoric that dominated political discourse and journalism in socialist states. Critical race theory is hardly served when, in order to challenge one 800 pound gorilla, Matsuda uncritically endorses the stance of another.

Finally, it might be argued that, when Matsuda was writing, the Soviet Union and its satellites had already collapsed. There was no longer any point to fighting old cold war battles. But that view, too, is unpersuasive. The focus of Matsuda's analysis is on the drafting history of CERD and on the consensus around it at the time it was adopted. The context within which CERD arose cannot be ignored simply because conditions subsequently changed—no more than it could be maintained that law, politics and society prior to *Brown v. Board of Education*<sup>80</sup> were no longer relevant to law, politics and society after that decision. Moreover, it cannot be said now, and certainly could not have been said at the time of Matsuda's writing, that conditions for ethnic minorities in many of those former socialist states had generally improved.

As mentioned earlier, Matsuda's article suggests a dichotomy between two opposing ‘stories’. The misguided story of the American civil libertarian who defends certain forms of hate speech<sup>81</sup> is contrasted with the stories of the outsider victims who suffer from it.<sup>82</sup> Yet

<sup>76</sup> See, e.g., Huttenbach, *supra* note 44, at 1 (noting the scarcity of scholarship on nationality and ethnicity in the Soviet Union).

<sup>77</sup> *Id.* at 2.

<sup>78</sup> *Id.* at 2 – 3.

<sup>79</sup> See Heinze, *supra* note 39, at section II.B.

<sup>80</sup> Cf. text accompanying note 68 *supra*.

<sup>81</sup> Matsuda, *supra* note 3, at 31 – 35.



the international human rights movement also has its own story, which, contrary to Matsuda's suggestion<sup>83</sup>, does not merely recapitulate the victims' story. It is a story found in many textbooks on human rights.<sup>84</sup> It might even be invoked as a further defence of Matsuda's approach, and goes something like this: 'Yes the UN and its member states are far from perfect. After all, the world is an untidy place. The Cold War was a period of great divisions. Nevertheless, CERD and other instruments prove that the UN could still get some things right. For all the foibles of its drafters, the core values of CERD and other human rights instruments are good. We must accept and try to work with the norms we have.'

That story will satisfy many international lawyers, for whom the ethos of 'Let's work with what we have' or 'A lot has been done, but there still remains a lot to do' is about as deep as they go. But it hardly serves to defend Matsuda's approach. It merely recapitulates the same story that outsider groups in the US were told for generations, ardently rejected by critical race theorists: 'Yes, the United States is far from perfect. After all, the world is an untidy place. American society has faced great divisions. Nevertheless, the core values of the Declaration of Independence and the Constitution are good. We must accept and try to work with the norms we have.' Incidentally, that *was* essentially the message of Martin Luther King, Jr. King never condemned dominant American values. He passionately embraced them. He condemned white America not for proclaiming them but for failing to live up to them: 'One day the South will know that when these disinherited children of God sat down at lunch counters, they were . . . bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.'<sup>85</sup> While King is revered around the world as a symbol of justice, he is barely discussed in critical race theory<sup>86</sup>, which rejects strong endorsements of purely-proclaimed American values.

In discussing the three drafts that were submitted to the UN Sub-Commission by the US, the UK and USSR-Poland, Matsuda writes, 'Thus the sub-commission [*sic*] had the benefit of vastly different ideological views as well as a basic consensus on the necessity of combating discrimination.'<sup>87</sup> Vastly different ideological views? Well, yes and no. Certainly, the US advocated a more classical, liberal view of free speech, while Western European social democracies advocated greater restrictions.<sup>88</sup> As to the socialist states, it remains unclear what 'ideology' Matsuda thinks they represented, in good faith or otherwise. To place Matsuda's argument in the best light, however, let's assume that they represented something good. Matsuda's strategy is obvious enough. The more the international consensus can be shown to unify 'vastly different' ideologies, the more deviant the dissenting American position will appear.

Once again, we might have expected to read the view that the three drafts represented 'vastly different ideological views' in conventional textbooks on international law, which generally discuss the views advanced by various states during the Cold War without any deep inquiry into their political or historical origins, let alone into the sincerity with which they are made.<sup>89</sup> But we should hardly expect to hear it from someone who insists on placing official proclamations in their historical context. Let's take a longer view of history. If those were the three 'ideological views' that happened to be presented to the UN Sub-Commission, it is not so much because they were 'vastly different', but because they represented the official

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<sup>82</sup> *Id.* at 35 – 38.

<sup>83</sup> Cf. text accompanying note 73 *supra*.

<sup>84</sup> See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* (1990); ROBERTSON & MERRILLS, *supra* note 48, at 114 – 15; RHONA K.M. SMITH, *TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS* ch. 23 (2<sup>nd</sup> ed., 2005).

<sup>85</sup> See, e.g., Martin Luther King, Jr., 'Letter from a Birmingham City Jail,' in *CLASSICS OF POLITICAL AND MORAL PHILOSOPHY 1200, 1209* (Steven M. Cahn, ed. 2002).

<sup>86</sup> See, e.g., 'Index', in CRT, *supra* note 2, 673, 677 (citing only three references to King); 'Index' in CWS, *supra* note 2, 671, 675 (citing only two references to King).

<sup>87</sup> Matsuda, *supra* note 3, at 27.

<sup>88</sup> Cf. Heinze, *supra* note 39, at section II.C.

<sup>89</sup> See, e.g., ROBERTSON & MERRILLS, *supra* note 48, at 30 – 38. Remarkably, Smith appears not to find the drafting histories relevant *at all*, let alone any 'vastly different' ideological differences behind them. See Smith, *supra* note 84, at 45 – 51.

statements of power blocks that had come to dominate the world after centuries of imperial extinction or conquest of thousands of peoples who *genuinely did* represent vastly different world views ('ideologies')—views so different from those familiar to us parochial Western legal scholars, different at the most fundamental linguistic and cognitive levels,<sup>90</sup> that our minds would require years to begin to understand just one of them, let alone to generalize glibly about all of them. If we follow critical race theorists' advice to examine law and society historically, then arguably the Cold War emerges as one of the most intellectually steam-rolled, one of the most intellectually ('ideologically'<sup>91</sup>) impoverished periods in human history. Matsuda's sell-out to the dominant power politics of the Cold War, whereby an international 'consensus' is praised while not a single ethnic group outside the US is even named, along with the popular academic fairytale of the Cold War's 'vast' ideological diversity, is one of the greatest betrayals of non-American outsider groups that one can imagine. It is a high price for Matsuda to pay for the sheer aim of showing how deviant the United States was at the level of purely formal norms.

That point is important, as it responds, if not to an affirmative defence of Matsuda's position, at least to an objection that could be brought against mine. Major powers did indeed play a leading role in drafting CERD, but by no means an exclusive one. Many states, including various developing or unaligned states, participated as well. It might be thought that, by emphasizing the Soviet Union and socialist states, I retain the same kind of narrow focus that I reproach Matsuda for adopting. Certainly, there can be no doubt that participation in the drafting was broad, and much of it made in good faith by states and independent experts genuinely concerned about racism. Nevertheless, that participation took place within the confines of discourse and ideas already strongly defined, throughout decades and even centuries, by dominant powers. Again, if the international 'consensus' against racism was as lucid as Matsuda suggests, it is hard to understand why, during the Cold War period, not even a dozen states adhered to CERD's individual complaint procedure—which does not even endow the Committee (UN-CERD) with any compulsory enforcement power—and, indeed, why less than a quarter of UN member states adhere to it *today*<sup>92</sup> (that relative increase, incidentally, being due almost entirely to the *democratisation* of former socialist states).

Critical race theory cannot depict American ideals of democracy, freedom and equality as lies and betrayals while praising those same kinds of values formally professed by any number of ghastly regimes. Either it should remain suspicious of the professed human rights norms generated by all powerful states, or it should welcome those norms, on their own terms, across the board. Either it should subject all official norms and institutions to critical historical examination, or should accept all of them on face value. When Matsuda was choosing her friends and foes, she got her line-up backwards. If she really needed her 'bipolar' structure, she should have placed all the gorillas—the US, the Soviet Union, China, Western Europe, the UN, etc.—on one side, and the real outsiders, including American as well as non-American minorities, on the other. Critical race theorists may well condemn Pericles for warfare, slavery, misogyny or imperialism. But they should think twice before heralding Xerxes as the great consensus builder or the voice of the voiceless. If critical race theorists mean to apply their methods to law *as such*, and not merely to American law, then there are no grounds for stopping short of international law. The correct analysis would have been for Matsuda to accept CERD article 4 (although I reject it<sup>93</sup>) not because of an international 'consensus' driven by big and often oppressive powers, but as a matter of principle, with or without any such consensus, and then to subject the UN and its other member states to the same kind of analysis that she reserves for the United States. Of course,

<sup>90</sup> See generally, e.g., JACQUES VANDERLINDEN, *ANTHROPOLOGIE JURIDIQUE* (1996).

<sup>91</sup> In view of my argument here, I would suggest that a term like 'ideology'—even leaving aside its distinct role in Marxist analysis (Marx, at least, was clear in his use of it)—exemplifies the kind of word that scholars use when they do not wish to take the time to examine what kinds of propositions they have in mind, where those propositions come from, and what they mean. It is remarkable how frequently such rhetorical tropes are deployed by theorists whose careers are largely built on exhorting the rest of us to scrutinize our unexamined assumptions.

<sup>92</sup> See Office of the United Nations High Commissioner for Human Rights, *supra* note 30.

<sup>93</sup> See generally, Heinze, *supra* note 39.

that approach would have collapsed her story of a distinctly deviant America, but would have given her a more genuine outsider jurisprudence, and a more genuinely international one. If institutional allies were required, she should have sought them among respected non-governmental organizations, such as Minority Rights Group International or SOS-Racisme, who co-operate with intergovernmental organizations when it is productive to do so, but always maintain a critical distance from them.

There should, then, be a relationship between critical race theory and international human rights law. However, it should not follow the alliance trend, citing international human rights law merely to show that American law is wrong. That is what conventional, black-letter international human rights law already does.<sup>94</sup> There can be no deep alliance between critical race theory and the dominant international human rights movement for the same reason that there can be no such alliance between critical race theory and dominant American legal norms and institutions. Bodies like the UN-HRC and UN-CERD cannot proceed on the assumption that the texts of the treaties they interpret only take on real meaning in light of the hypocritical practices of their drafters and signatories (even if those committees' individual members, as private persons, know perfectly well that the international 'consensus' behind ICCPR and CERD was, if we look at the human rights practices of many of the powerful signatory states at the time, an utter bluff—and I am by no means convinced that many of them would even admit *that* much). In a word, bodies like the UN-HRC and UN-CERD *cannot do critical race theory*, no more than an American court can easily say 'Well, the Fourteenth Amendment may promise equal protection, but we all know that the drafters never really meant it.' That is why we need critical race theory.

But theory and practice are different things. There are good reasons to think that the critical relationship I propose will never emerge; that the dominant relationship between the two movements will continue to be one of mutual neglect. Having understood the complexity of inter-ethnic dynamics in their own country, it may be that some American critical race theorists would appreciate the difficulty of understanding even one minority ethnic population living in a society very different from the United States, let alone generalizing over all of them; that they might fear to tread where Matsuda rushes in. Indeed, that sense of respect for the specific situations of non-American minority groups might represent the one truly plausible explanation for the neglect trend, and would be preferable to a false alliance. Nevertheless, I maintain my conclusion that the best relationship would be fundamentally critical one—an international outsider jurisprudence that parallels an American one.

Of course, a further problem with the concepts of the 'outsider' and the implied 'insider' is that they suggest a simple dichotomy where complex pluralities are more likely to be found. Is a millionaire white battered woman in New York an outsider? As much as a poor black one? Once again, the ominous pecking order looms. Although critical race theorists acknowledge that their movement accommodates a variety of perspectives and resists simple classifications, Matsuda's analysis never reaches beyond her pat 'bipolarity' between misguided American and correct international approaches. It may have been necessary for Matsuda to retain the categories of insider and outsider, but she should not have retreated from an unsatisfying American-outside into an illusory UN-inside.

Critical race theorists do, of course, advocate situational and strategic recourse to American law in order to achieve concrete ends.<sup>95</sup> In that respect, they accept a provisional, surface reconciliation with some of the traditionally professed values of American law. But they reject the proposition that those legal values can ever be read as having been principally intended, or historically applied, to include marginalized groups (outsiders). Critical race theorists reject any deep reconciliation of critical race theory with dominant American legal norms and practices. The day any such deep reconciliation occurs, or is even possible, will be the day that critical race theory no longer stands on the outside—is no longer critical race theory at all. Some UN bodies, such as the treaty-based committees, do reasonably good

<sup>94</sup> See, e.g., 'Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America,' *supra* note 23. See also text accompanying note 60 *supra*.

<sup>95</sup> See generally, e.g., Lawrence *et al.*, 'Introduction', *supra* note 26.

work. But that work is not and cannot be the work of critical race theory. Critical race theory should continue to join with the world's outsiders in asking: What has the UN promised? With what intentions? With what results? Just as it asks of American law, critical race theory must ask of international law: What have you overlooked? Where have you lied? Where have you failed? Critical race theory can search for situational and strategic recourse to international human rights law in order to achieve limited, concrete ends, and can, in that respect, accept some surface reconciliation. What it cannot plausibly do is to reject the black-letter of American norms while accepting on face value an international consensus built with powerful states who often promoted strong norms concerning ethnic minorities, not to lift them up but to shut them up.