RIGHTING WRONGS

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What is the meaning of civil rights? Are there some wrongs that civil rights cannot address? In this Commentary, Professor Leti Volpp discusses two contributions to this Symposium that address the future of civil rights. Professor Richard Ford cautions that civil rights protections should not be extended to claims of cultural identity. In contrast, Professors Sharon Hom and Eric Yamamoto seek to revitalize civil rights to create a new movement, transnational in scope. These contributions radically differ in the work they would ask of civil rights. Professor Volpp critically engages the assumptions that underlie these different proposals in order to suggest the consequences of their adoption.

INTRODUCTION

What is the meaning of civil rights? What wrongs should the doctrine of civil rights rectify? Are there some injustices that civil rights cannot redress? The contributions of Richard Ford[1] and Sharon Hom and Eric Yamamoto[2] to this Symposium provide very different answers to these questions.

Professor Ford cautions us that civil rights must not be pushed too far, lest novel claims jeopardize the entire enterprise. He argues that these claims, specifically claims that purport to protect cultural identity, actually reflect completely different values than do traditional civil rights protections for

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1. *See* Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803 (2000).

2. *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000).

minorities. Thus, he seeks to limit the work we would ask of civil rights, and in terms of legal solutions, suggests that we rely on traditional civil rights claims to redress racial discrimination.

In contrast, Professors Hom and Yamamoto presume the insufficiency of traditional civil rights. They seek to revitalize civil rights to create a new global movement that links civil rights to redistributive ethics, in order to break down entrenched social and economic barriers and to create a mechanism that heals conflicts between communities while forming group relationships. Hom and Yamamoto exhort us to reenvision civil rights across theoretical, structural, relational, and spiritual realms—and thus seek to vastly broaden the work of civil rights.

That civil rights is asked to do such different things rests not only on diverse assumptions about its meaning, but on the very different philosophical perspectives and political projects of these authors.

I. A CAUTIONARY TALE

In his thoughtful and thought-provoking Essay, *Race as Culture*, Ford argues against expanding civil rights laws to include claims to protect traits or behavior related to one's cultural identity. His objections to this expansion are manifold. For one, Ford asserts that the purpose of civil rights laws must not be misunderstood and thereafter misapplied to buttress the claims of, for example, those seeking to prohibit discrimination on the basis of personal appearance—the subject of a proposed ordinance in Santa Cruz[3]—or of bicyclists in San Francisco who seek hate crimes protection from violence by motorists. Civil rights laws initially developed to fight racism, which he argues should be understood not as the stigma imputed to individuals based

3. For a discussion of this proposed ordinance and its meaning in antidiscrimination doctrine, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 2–7 (2000). Robert Post's Article addresses different issues than those raised by Richard Ford regarding the couching of appearance discrimination claims in the language of cultural identity. The response by Reva Siegel to Post, in which she reconceptualizes antidiscrimination law to be centered around social stratification, bears some similarity to Ford's effort to redirect the project of civil rights from protecting group-based characteristics to eradicating the production of subordination. *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 105, 113–15 (2000). Siegel's discussion of race and colorblindness relies, in particular, on the work of Neil Gotanda. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

I want to note here that I perceive some forms of appearance discrimination, for example, discrimination on the basis of height and weight, as similarly producing subordination in the manner of more popularly recognized forms of discrimination.

on a set of given characteristics, but as a process whereby individuals are assigned to established racial categories in the production of subordination.[4]

Ford claims that the misperception that racism consists of stigma, assigned to certain identity-based characteristics, is facilitated by the popularity of contemporary multiculturalism and identity politics. Both multiculturalism and identity politics defend certain practices because they are believed to be subjectively important to a sense of self—they correlate with one's identity—and must be recognized and respected for that reason. But this, Ford argues, leads to an incorrect understanding of both racism and the project of antiracism. He asserts that the focus of antiracism must not be to safeguard the ascribed characteristics of people, but rather to attack the practices and institutions that generate and reproduce subordination. To clarify this distinction, Ford gives the example of how the diversity rationale in Justice Lewis F. Powell Jr.'s opinion in *Regents of the University of California v. Bakke*[5] required people of color seeking affirmative action admissions to perform their racial identity as cultural difference, as well as the example of the reformed federal census that allows individuals of mixed race to check more than one box.

Ford's analysis of *Bakke* is brilliant. He argues that Justice Powell relied upon an ethnicity model of race to silently analogize racial diversity and ethnic diversity. This emphasized cultural difference, not state-sponsored and institutional subordination, in shaping groups. This prioritization of cultural difference, says Ford, changed not just the character of affirmative action, it also changed the performance of racial identity.[6] When the diversity rationale constitutes the only reason why race is significant, students seeking admission must highlight their distinctiveness—their "cultural" identity—to justify their presence.[7]

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4. Ford writes:

> Racism must not be understood as a set of practices that targets a group because of some preexisting characteristic of its members, but instead as a set of practices that establishes racial hierarchy and assigns individuals to distinctive statuses within that hierarchy.

Ford, *supra* note 1, at 1805. In this Commentary, I interpret Ford to mean the following: Racism is commonly perceived to mean stigma attached to traits. These traits are assumed to have a salience that preexists the attaching of stigma. But these characteristics do not exist prior to racism. What we think of as racial traits are formed through the process of racism, whereby these characteristics are identified, infused with meaning, and then used to assign individuals to subordinated racial groups. This is why the traits, in and of themselves, should not be the focus of antiracist protections.

5. 438 U.S. 265 (1978).

6. On the performance of racial identity, particularly within the workplace, see generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 89 CORNELL L. REV. (forthcoming July 2000).

7. This has facilitated, for example, the idea that people of color speak with a singular different voice. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1269–72 (1993) (describing

But Ford's analysis of the multiracial category on the census can be criticized. The concerns he expresses with the reformed census are twofold. First, Ford fears that by allowing multiracial individuals to mark multiple boxes, the census will not accurately reflect populations for civil rights purposes. In reality, this may not be an issue because individuals who check both white and a minority identity are to be designated as minorities for civil rights purposes.[8] Secondly, Ford is concerned that the reformed census shifts attention away from "how others see me" to "how I see myself."[9] This, he says, replaces the census function of a snapshot of how individuals are racially mapped,[10] with a masking of that racial power so that the census appears to be about internal subjective identification. Thus, the recognition of multiracial identity changes popular understanding of the census from a conception of state regulation to a liberatory, self-affirming process. But I would argue that any shift from mapping by others to self-identification is better understood as having taken place in 1960, with the change from

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the "different voice" thesis and arguing that it constitutes an essentialist trap that masks the fact that perspective matters).

8. The battle between those seeking a self-affirming experience on the census, and those concerned that checking more than one box would dilute the count for reapportionment and federal resources, resulted in a compromise that would appear to let one both have one's cake and eat it too. This compromise is that the information will be reported differently for different purposes. For the purpose of recognizing multiracial status, the 2000 Census allows for 63 different possible racial combinations. For civil rights purposes, individuals who check both white and a minority identity, are designated as minorities.

Responses that include two or more minority races are allocated as follows:

> If the enforcement action is in response to a complaint, the individual is to be allocated to the race that the complainant alleges the discrimination was based on.
>
> If the enforcement action requires assessing disparate impact or discriminatory patterns, the agency is to analyze the patterns based on alternative allocations to each of the minority groups.

See Office of Management & Budget, *OMB Bulletin No. 00-02* (Mar. 9, 2000) <http://www.whitehouse.gov/omb/bulletins/b00-02.html> (regarding "guidance on aggregation and allocation of data on race for use in civil rights monitoring and enforcement" (capitalization removed)). But I will note here that while such an allocation is prescribed by the Office of Management and Budget, it is not yet apparent whether jurisdictions will be mandated to follow this, or whether they will choose to use the statistics generated for the purpose of recognizing multiracial status when they calculate populations for civil rights purposes. For a discussion of the multiracial category, see generally Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998).

9. Ford, *supra* note 1, at 1808.

10. I agree it is important to remember the impetus for mapping race via tools such as the census. *See* Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1227 (1999) (describing the development of an "apparatus occupied . . . with classifying people and their attributes, with censuses, surveys, ethnographies, recording of transactions, marking spaces, establishing routines, and standardizing practices . . . . [and the development of] disciplines like anthropology, ethnology, [and] physical anthropology," all in the service of justifying colonialism).

census enumerators, who would visit households and mark down their perception of the racial background of individuals, to a system of subjective identification that primarily relies on forms sent in the mail.[11] Checking a particular racial box on the 1990 census—as "white" or as "other"—should be considered just as much a projection of "how I see myself" as is identifying oneself as multiracial on the 2000 census.[12]

Ford then shifts from substantive arguments to those of strategy. He is concerned that claims calling for the protection of cultural identity will "boomerang" and "poison the delicate but real consensus in favor of legal guarantees against overt status discrimination."[13] As a mode of argument, I think this can be problematic. What will be positioned as potentially dragging down the enterprise will always be the claims of those considered least popular. Witness, for example, the hostility of some toward calling gay and lesbian rights, or disability rights, "civil rights."[14] More compellingly, Ford

11. Since 1960, with the advent of the extensive use of the mails in collecting data, the decennial census has largely relied upon self-enumeration. *See* United States Historical Census Data Browser, *Historical Background* (visited July 30, 2000) <http://fisher.lib.virginia.edu/census/background/>; *see also* Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1275 (1996) (noting that self-reported data is recent, because prior to 1960 census enumerators collected race data by observation).

12. I acknowledge here that the adding of more categories to the census to reflect multiracial identity supports the misperception that categories on the census only exist because the state is responding to the production of identities created by individuals. More accurate would be the assessment that categories on the census exist because the state is producing the racial categories that individuals inhabit. Nonetheless, I find it interesting that the concern with this misperception seems to be most often expressed in regard to the assertion of multiracial, as opposed to any other, identity, when the census has created other new categories in response to popular protest. For example, the "Asian and Pacific Islander" category was split in 1997 in response to concerns voiced by Native Hawaiians that their status as indigenous people and their specific issues were diluted by their inclusion in the category. This led to the creation of a new racial category on the 2000 decennial census, of "Native Hawaiian or Other Pacific Islander." *See* Yen Le Espiritu & Michael Omi, *"Who Are You Calling Asian?": Shifting Identity Claims, Racial Classification, and the Census*, *in* TRANSFORMING RACE RELATIONS: THE STATE OF ASIAN PACIFIC AMERICA 43, 66–75 (2000); Office of Management & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity* (Oct. 30, 1997) <http://www.whitehouse.gov/omb/fedreg/ombdir15.html>.

13. Ford, *supra* note 1, at 1810.

14. For criticisms of the argument that gay rights do not constitute civil rights, see generally Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); and Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994). A similar mode of argument requiring the splitting off of the less popular group was espoused by those who successfully advocated separating anti-immigrant legislation into two distinct bills dealing with legal and illegal immigration. *See, e.g.*, Jay Root, *Immigration Reform Hits Snag as Battle Begins in Congress*, AGENCE FRANCE-PRESSE, Mar. 15, 1996, *available in* 1996 WL 3822569 (quoting Frank Sharry, director of the National Immigration Forum, as stating that battling legal instead of illegal immigration is like "fighting crime by jailing the innocent"). For a discussion of the philosophical complexities involved in advocating on behalf of undocumented

suggests that cultural identity claims shift an understanding of racial subordination to prioritize hurt feelings and emotional discomfort. He also notes that claims focusing on the subjective importance of language, dress, hair style, or other cultural affect to the individual litigant cannot distinguish between the stigmatized racial group member and the member of any subcultural group, for example, the bicyclists.

Lastly, Ford makes the very important argument that perhaps the most detrimental impact of extending civil rights protections to cultural identity claims is the regulatory effect of invoking cultural identity claims on other members of the minority group. He warns us that claims to cultural identity function to create culture through legal codification, and that asking courts to determine authentic culture discredits anyone who does not fit the cultural style ascribed to their racial group. The example he gives is of Orlando Patterson's "cultural defense" of Clarence Thomas's "down-home courting" of Anita Hill.[15] Patterson asserted that Hill "perfectly understood" the context of Thomas's overtures because of their common "southern working-class backgrounds, white or black, especially the latter."[16] As Ford notes, this would suggest that black culture embraces such sexual overtures, and that, as a black woman, Anita Hill must embrace this depiction of her culture as well.

As an example of the dangers of invoking cultural identity, Patterson's defense seems something of a straw horse. One could easily argue that the primary problem posed by Patterson's defense was not his making a claim to cultural identity, but rather his getting the culture wrong in the depiction of a monolithic black culture that endorsed sexual harassment.[17] To say that culture matters is not to say that its meaning, and the legitimacy of its invocation, should not always be contested.[18] Harder examples would be posed by claims to cultural identity that are not so easily discreditable. Nonetheless, Ford's general argument as to the regulatory effect of cultural identity claims is well taken, as discussed below.

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immigrants, see Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996).

15. Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER 402, 427 (Toni Morrison ed., 1992). For a discussion of Orlando Patterson's defense of Clarence Thomas, see *id.* at 421–31.

16. Ford, *supra* note 1, at 1811.

17. *See* Homi K. Bhabha, *A Good Judge of Character: Men, Metaphors, and the Common Culture*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 15, at 232, 236–37; Crenshaw, *supra* note 15, at 421–31.

18. One could analogize this to the invocation of race. That claims to race are misused, or are presented so as to implicate group members in ways they would dislike, does not mean that one should not be allowed to make rights-based claims premised on racial categories. Authenticity is not only an issue when race is couched in terms of culture. I am indebted to Devon Carbado for this point.

Ford concludes the piece by explicating that he seeks to combat the disciplinary idea of a racial culture inherent in the protection of rights to cultural identity. His essay is an attack on the romanticism of cultural tradition and on the presumption of racial authenticity.

I find Ford's piece largely persuasive and extremely insightful. But there are additional criticisms that I would make of the main thrust of his analysis. There are some interesting omissions. For one, his Essay fails to point out that it is not only the expansion of civil rights claims to include cultural identity that treats identity as being fixed. Ford does not subject traditional civil rights claims to this same analysis. The presumption implicit in *Race as Culture* is that, while claims to cultural identity somehow fix identity, traditional civil rights claims do not. But traditional civil rights claims, just as much as claims to cultural identity, presume a particular identity of the subject. This is true even when they ultimately aim to destabilize identity.

Take, for example, a sexual harassment claim that challenges the idea that women are flattered by sexual harassment. In filing such a claim, the idea that certain acts constitute, or fail to constitute, cognizable sex discrimination serves to help fix what we assume to be a "man" or a "woman." As another example, imagine a defendant who points to other employees, members of the same racial group as the plaintiff, but who, unlike the plaintiff, have not been fired. In doing so, a racial identity is being constructed through the suggestion that whatever behavior the plaintiff has engaged in is not essential to that group's racial identity. These examples should help clarify that both traditional civil rights claims and cultural identity claims rely on assertions of group-based identity.[19]

Race as Culture also omits the fact that the impetus to expand civil rights protection to cultural traits has in part come from those who note that traditional civil rights protections have failed to adequately protect individuals from discrimination, for example, on the basis of national origin.[20] While I am sympathetic to Ford's critique, I want to highlight specific contexts in which his proposal would have a detrimental impact. For one, those seeking civil rights protections, who would turn to cultural identity claims, might be those considered to be the least assimilated into

19. In discouraging the expansion of civil rights to protect identity-correlated traits, *Race as Culture* can be read to implicitly suggest that we can somehow leave the law out of codifying identity. The desire to not ask the state to intervene vis-à-vis this kind of discrimination can be seen as reflecting a libertarian impulse to keep the state out. But regulation does not just happen when we invite the law in and ask courts to protect claims that are explicitly based upon our identity.

20. *See generally* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

mainstream norms. Imagine an employer who tries to protect herself from charges of discrimination by hiring other employees of the same background as the plaintiff, but who were, to the employer, less offensively "foreign." The way in which the plaintiff would seek to distinguish himself from the other employees would be to point to the particular behavior in which he engaged that was so offensive to the employer. This behavior would presumably be a description of traits or practices that the plaintiff would link to a protected identity.[21] This kind of argument as to identity-correlated traits is not something needed only by plaintiffs suing on the basis of national origin discrimination. In fact, the need to raise identity-correlated traits can arise for anyone suing against a defendant who points to others of the same protected group as part of a defense.[22] The manner in which such a case, say one alleging racial discrimination, might proceed is as follows:

> Employer: I'm not discriminating against you on the basis of race. Look, I still have another African American working for me.
>
> Employee: Yes, you are. You have not fired him because he does not have dreadlocks. I do. You are discriminating against me on the basis of race.
>
> Employer: Your wearing dreadlocks has nothing to do with your being African American. And the fact that I don't like dreadlocks in this workplace has nothing to do with race.
>
> Employee: Yes, it does.[23]

Thus, this employee is attempting an antidiscrimination claim on the basis of behavior that he connects to his identity as an African American. What recourse would he have if this kind of argument was no longer available to him?

Ford's essay also fails to examine the likelihood that its proposal might disproportionately impact individuals not otherwise considered to fit into a

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21. *See* Carbado & Gulati, *supra* note 6; *see also* Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1164–66 (1985). As Cutler points out, courts have upheld this vision of Title VII in cases involving racial and sexual discrimination. *See id.* at 1171; *see also* Reeb v. Marshall, 626 F.2d 43, 46 (8th Cir. 1980) (concluding that a plaintiff discharged because of "her failure to conform to her supervisor's stereotype of a professional woman," that she be a docile, unaggressive female, could prevail under a disparate treatment theory even though she was replaced by another woman).

22. For a discussion of how people who belong to the same identity category can be treated differently based upon how they inhabit that category, see Carbado & Gulati, *supra* note 6.

23. The Employment Law Center of San Francisco is currently litigating a case on behalf of an African American employee fired under an employer's rule against dreadlocks, arguing that the rule constitutes racial discrimination under Title VII, because the employee's dreadlocks constitute a central manifestation of his racial identity. *See* Letter from Chris Ho, Senior Staff Attorney, Employment Law Center, to Leti Volpp (June 5, 2000) (on file with author).

protectible racial class under traditional civil rights doctrine. This would include Latinas and Latinos, for example, who are often not considered to belong to a cognizable racial class.[24] Why they might not be presumed to fit involves both the historical biologism of understandings of race,[25] and the conflation of race and ethnicity. For these reasons, the idea of cultural traits—such as speaking Spanish—may be conceptualized as a way to extend civil rights protections to individuals and groups who might otherwise be without recourse.

Ford's opposition to the notion of cultural traits stems from concern about the turn from considerations of race to those of ethnicity.[26] Privileging ethnicity—and its concomitant reliance on culture—over race is indeed a problem.[27] But it is important to understand that opposition to cultural traits is very often an expression of racial hostility. In other words, practices that are frequently explained through the discourse of ethnicity, for example, appearance, language, and accent, provide a site for the expression of racial subordination.[28] This can be illustrated through examining the context of language rights.

Ford seems to underestimate the extent to which the denial—including in the workplace—of the right to speak languages other than English, or of the right to speak with a so-called accent, functions as a racist practice that constructs groups as subordinate. *Race as Culture* minimizes this effect in an interesting differentiation between official English proclamations and workplace English. In seeking to defend his thesis that notions of culture provide a "mystifying rhetoric" that sweeps disparate issues into its ambit, Ford attempts to distinguish official English proclamations

24. On the failure to see Latinas and Latinos as racially recognizable, see *Hernandez v. Texas*, 251 S.W.2d 531, 535 (Tex. Crim. App. 1952), *rev'd*, 347 U.S. 475 (1954) (identifying Mexican Americans as "white people of Spanish descent"), and Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1146–47 (1997) (calling for a conceptualization of Latinas and Latinos in racial terms).

25. The science of ethnology created taxonomies that divided mankind into classifications such as white, black, yellow, and red that reflected purported biological traits. For a discussion of the shifting nature of these taxonomies, see Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. (forthcoming August 2000) (describing attempts to classify Filipinos as "Malays" or "Mongolians" under a statute forbidding marriages between "whites" and "Mongolians").

26. An example Ford provides is his criticism of the equation presumed by the analysis in *Bakke* between Italian Americans and African Americans. *See* Ford, *supra* 1, at 1809.

27. *See* Haney López, *supra* note 24, at 1192–202 (describing risks entailed by the substitution of ethnic for racial rhetoric, namely the obscuring of experiences and conditions particular to racialized communities, and secondly, the denial of the extent to which ethnic groups have been racialized as nonwhite).

28. Ford does recognize this when he writes, "Sometimes discrimination against racially correlated cultural practices is really just a proxy for forbidden racial discrimination." Ford, *supra* note 1, at 1812.

from Title VII protections against employer requirements to speak a particular language.[29] He argues that one "could easily support one form of language rights while questioning the other" both because official language proclamations more clearly target stigmatized racial groups and are more sweeping in their scope, and because "one may find the arguments in favor of linguistic restrictions more compelling" in the workplace.[30] Ford appears to need to make this distinction because the arguments used to ground Title VII protections against workplace English frequently invoke notions of cultural identity and the importance of language to identity.[31] I disagree with Ford's attempt to make this distinction between official proclamations and workplace English. In reality, workplace English clearly stigmatizes racial groups and has, in practical terms, a highly significant effect on the daily lives of racialized minorities. English-only rules in the workplace force employees to speak English, or to lose their jobs,[32] while also creating symbolic harms.[33] The prohibition of language other than English in the workplace is a practice that produces subordination.

Turning now to Ford's final point, concerning the regulatory function of cultural identity claims, we might query whether the extension of civil rights to protect cultural identity has really functioned to discipline groups

29. Ford, *supra* note 1, at 1813. Ford does acknowledge that there are good arguments that official English and workplace English are analogous. *See id.*

30. *Id.* For a criticism of employer rationales for workplace English policies, see Linda M. Mealey, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 430–35 (1989) (criticizing employer rationales, for example, that a workplace without mandatory English is like the "Tower of Babel," that English-only is necessary to assuage employee discomfort, that it promotes racial harmony, and that it only improves workers' English fluency).

31. *See, e.g.*, Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting) ("Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as an 'inconvenience' to the affected employees . . . ."); *see also* Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999); Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1366 (1997) ("To suppress the speaking of Spanish is to suppress an essential, if not *the* essential, component of Latino identity.").

32. Employers can terminate workers without fear of discrimination suits when workers use a language other than English, even if the conversation involves only a few words and does not otherwise impede performance of assigned tasks. *See* Ruiz Cameron, *supra* note 31, at 1349.

33. *See, e.g.*, EEOC v. Vencor, C 99-1977 VRW (N.D. Cal.), *described in* Marcia Mitchell et al., *Developments in Federal Employment Litigation: Recent Trends & Emerging Issues*, *in* EEOC LITIGATION 1999, at 410 (416 PLI Litig. 403, 1999) (noting that an employer policy requiring that employees speak English at all times created an atmosphere of isolation, intimidation, and inferiority.

into cultural uniformity.[34] At this point, cultural identity claims in the civil rights context have arguably been too few and too unsuccessful[35] to regulate culture in the sense of court decisions that actually codify the cultural traits of a group.[36] Cases in the criminal context, however, concretely support Ford's concerns as to what might ensue in the future, with the court-driven regulation of culture. There is good documentation of this phenomenon occurring with battered woman syndrome, in which the creation of a generalized model has invited courts to prevent fair trials of those who do not fit the stereotype of the model battered woman.[37] This phenomenon also occurs in the context of so-called "cultural defenses"—in which we can see claims by individual criminal defendants that attempt to explain their mental state in relation to cultural factors—that shape legal and popular understandings of cultural identity in often deeply problematic ways.[38]

"Cultural defenses" in the criminal law show there is indeed a risk of freezing identity in allowing individuals to invoke claims to culture. But it is important to underline that, nonetheless, defendants have a right to invoke culture in the presentation of social context evidence, so long as the information is relevant to their mental state. Calling for a bar on cultural evidence

34. The inquiry into a claim involving cultural identity would not be whether the trait is essential to the group's identity, but instead, whether the trait is closely linked to membership in the group and can thus be used as a de facto marker of that group for civil rights purposes. *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir. 1993) (noting that even if not all Latina/o workers speak Spanish, there can be a cognizable disparate impact claim on the basis of national origin if most of the workers who speak Spanish as their primary language are Latina/o). I understand Ford to be asserting that even the latter inquiry would spur the subsequent discrediting of any group member who does not exhibit those traits.

35. *See, e.g., id.* at 1487 ("Title VII . . . does not protect the ability of workers to express their cultural heritage at the workplace. . . . It is axiomatic that an employee must often sacrifice individual self-expression during working hours." (citations omitted)); Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (stating that "[n]ational origin must not be confused with ethnic or sociocultural traits" and that Title VII provides no protection for the latter); Rogers v. American Airlines, Inc., 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981) (denying plaintiff's contention that a braided hairstyle had any special significance for black women).

36. I am drawing a distinction here from the regulatory function performed by discursive invocations of these claims, which may have already had a profound effect.

37. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"* 17 HARV. WOMEN'S L.J. 57, 91–93 (1994) (describing the creation of a generalized model of battered women that prohibits women not considered to be model battered women from accessing battered woman syndrome).

38. For example, specific cases in which defendants have invoked culture to explain their actions have helped to perpetrate the assumption that certain forms of male violence against women constitute cultural practices unknown in the United States. *See* Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1576–77 (1996).

prejudices the rights of defendants, and the impetus for such a call often seems to stem from xenophobia and an assimilationist perspective.[39] Barring culture falsely presumes that culture is not already present in the courtroom, and it presents majority culture as a norm.[40]

Does this criticism of calls to bar culture in criminal cases tell us anything about Ford's proposal to bar the consideration of cultural identity in civil rights claims? Civil plaintiffs in employment or other discrimination suits may seem to have less at stake than criminal defendants, which would justify the risks inherent in allowing such invocations of culture. But, as in the criminal context, arguing we should bar explicit claims to cultural identity in discrimination cases presumes that there is not already culture at work, and can be seen as reflecting an impulse for assimilation into the norms of the workplace.

Seeking to curb the manner in which plaintiffs can articulate claims in their discrimination cases seems a misplacement of the burden of subordination, especially when increasingly savvy employers couch discrimination in terms that are difficult to redress through traditional civil rights mechanisms. Ford recognizes that his proposal would reduce the ability of plaintiffs to file discrimination suits, and so suggests as an alternative that we reshape civil rights doctrine. This reshaping would "relax the burden of proof on plaintiffs, expand the category of actionable disparate impact, and admit additional evidence of potential racial discrimination."[41] But this reshaping does nothing to help those discriminated against who can only bring a claim based on traits.

I would suggest that we could consider simultaneously embracing such a reshaping of civil rights doctrine and allowing plaintiffs to allege claims to cultural identity. Yes, there are serious problems with claims to cultural identity—and Ford's piece provides us with an important caution—but it is also important to allow advocates to wax creative in the struggle against subordination. The key here is to be aware of the dynamics Ford points to in navigating these claims. It may well be that in certain instances the cultural claims appear so repugnant, for example in Patterson's defense of Clarence Thomas, that we would then want to rally against such an allegation of culture in a civil rights suit. And it is important to keep in mind the constant risks posed by alleging culture—even when the claim does not appear repugnant—both to group regulation and to understandings of how subordi-

39. *See generally id.*
40. *See id.* at 1612–13.
41. Ford, *supra* note 1, at 1813.

nation is produced, which Ford has wisely identified. But there will likely be contexts, for example in language rights cases, in which claims to cultural identity may prove important in grounding a plaintiff's suit, and in which we would not want to bar the plaintiff from access to potential claims.[42]

Lastly, I think there is a way out of the conundrum Ford poses, which is how to differentiate civil rights claims that mitigate against subordination without sliding down the slippery slope to also embrace the claims of the bicyclists. As presently constituted, our civil rights laws do not generally protect groups such as bicyclists from discrimination. Our civil rights laws protect from discrimination those groups whose existence is understood to reflect a process of subordination, for example, groups classified on the basis of race, national origin, gender, or disability. It is the *expansion* of groups that might be cognizable as subjects of protection that engenders much of Ford's concern. If greater attention is given in the legislative process to the groups that are added to the list of who is protected against discrimination, and if this attention follows Ford's distinction between groups with identifiable traits versus groups produced through subordination, this should mitigate his concern. Thus, for example, a legislature would understand that bicyclists constitute a group with identifiable traits, but that bicyclists are not a group produced through subordination. Therefore, bicyclists should not receive antidiscrimination protections. Careful attention to the legislative process would seem a preferable response than the actual contents of Ford's proposal, which calls for a reduction of the kinds of claims that subordinated groups can make when facing discrimination. Why restrict the options of subordinated communities seeking to struggle against discrimination?

That Ford's short Essay can elicit these concerns is a sign of its richness and substance, as well as his courage in launching what might be heard as controversial arguments. It is a gratifying challenge to engage with the strong claims that Ford makes.

Race as Culture provides a timely and important intervention in the debate on multiculturalism and identity. Ford's intervention is a necessary counterbalance to the manner in which multiculturalism is too often conceptualized as a celebratory call for the recognition of ethnic and racial difference. Such a celebratory call does not imagine the risks of freezing identity and depoliticizing racism that are described in *Race as Culture*.

42. For a discussion of a similar proposal in the criminal context that suggests that we should permit strategic invocations of culture, despite the inherent risks, when the invocations reflect the value of antisubordination, see Volpp, *supra* note 37, at 95–100.

II. A CALL FOR RECONSTRUCTION

Sharon Hom and Eric Yamamoto have written an Article that is both inspiring and suggestive of new paradigms and possibilities. Their main stated purpose is to give renewed strategic currency to civil rights in what they call sobering, or uncivil, times. Rather than abandon civil rights in the ashes of what has been labeled an era of postcivil rights, they seek to birth a new civil rights project. While they acknowledge concerns about the cooptation of civil rights by the right, and about the "crowding" at the table of diverse claims for rights, they nonetheless believe that the idea of civil rights still carries an enormous purchase. This purchase resides in both the embedding of civil rights in established law and the way in which civil rights signifies transformation, mass protest, and the struggle of African Americans for freedom and equality. This remaining salience of civil rights is why they seek to hook their project to its history and framework. The question we might ask is whether civil rights can hold all with which they seek to infuse it.

One suggestion I would make is to unpack the civil rights movement, civil rights rhetoric, and civil rights law to figure out how best to recuperate and transform specific strands of what constitutes civil rights. For example, Hom and Yamamoto seek to address economic equality through revitalizing civil rights. While the civil rights movement embraced the issue of economic conditions with the Poor People's campaign, civil rights law is not currently understood to mandate economic equality, and contemporary civil rights rhetoric most often seems confined to the civil and the political.[43] Moreover, the economic inequality Hom and Yamamoto seek to address is not limited to a national scope. Civil rights seem to suggest the civic, the citizen, the nation state, and to definitionally exclude the international. Is there nonetheless a convincing way to pull global economic rights into the ambit of contemporary civil rights?

43. I am referring here to popular conceptions of the term "civil rights," which I think may pragmatically limit the extent to which we can revitalize the term with different meanings. I do, nonetheless, think it is imperative to attempt to broaden the understanding of civil rights, as Hom and Yamamoto attempt to do. Along these lines, the assumption that civil rights are negative rights that, in contrast to economic and social rights, require no material support from the state, should be examined. Catherine Powell writes that while the distinction between civil and political rights on the one hand, and economic, social, and cultural rights on the other, is often understood as a rearticulation of the negative/affirmative rights dichotomy, this can be criticized. Effectuating welfare rights (typically considered an affirmative or economic right) requires no greater affirmative government outlays than the right to liberty (typically considered a negative or civil right), which requires supporting the cost of a police force, judicial system, and the right to counsel for indigent defendants. *See* Catherine Powell, *Introduction: Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 203 n.5 (1999).

To that end, I would push Hom and Yamamoto harder on why this is solely a project to re-form civil rights, and not also one to bolster the strategic currency of human rights in the United States. This seems especially important given the use of both terms in their Article, which frequently invokes human rights, and not civil rights, in describing rights that have been violated. It is indeed the case, as the authors point out, that human rights law is largely ignored in U.S. courts, and it does not have the historical purchase that civil rights does. At the same time, people outside of this country are much more likely to frame their claims and struggles within the rubric of human rights; human rights claims easily carry a much broader scope, and, in addition, claims to human rights appear to be less undermined and appropriated than civil rights claims have been in the United States.[44] As discussed below, there appear to be moments in which the analysis in *Re-Forming Civil Rights* is constrained by the persistent need to frame the entire project in the discourse of civil rights.

A. History and Memory

The particular focus of *Re-Forming Civil Rights* is twofold. First, in a section authored by Eric Yamamoto, the Article examines the dynamics of collective memory that support claims—or denials of such—to group-based justice. Second, in Sharon Hom's section, *Re-Forming Civil Rights* examines the current move of "internationalizing U.S. civil rights."[45]

Turning to the section on reparation, justice, and accountability, Yamamoto addresses complicated questions about how to frame claims to justice when group understandings are largely constructed in the present, through the creation of collective memory. He points out that groups seeking social justice, in order to fuel political movements, construct group memory, and that memories are shaped in relation to present day ideology, political goals, and identity formation.[46] And, Yamamoto adds, remembering the past is neither innocent nor objective because we lack one lens to coalesce coherent memories that connect the past to the present: Multiple experiences become condensed into a singular past. What I think might be useful

44. That human rights claims are less undermined and appropriated than civil rights claims—by, for example, conservative rhetoric as to reverse discrimination or colorblindness—may just be a reflection of the fact that human rights law and human rights discourse have historically been much less popular than civil rights law and discourse in the United States.

45. Hom & Yamamoto, *supra* note 2, at 1777 (capitalization removed).

46. For this point, Eric Yamamoto relies on Peter Novic. *See* PETER NOVIC, THE HOLOCAUST IN AMERICAN LIFE (1999).

here is to examine more deeply in what manner this process occurs in the making of history.[47]

History is always constructed. It is not something to be found or excavated, but is interpreted and made through its telling and retelling.[48] Kendall Thomas suggests we can understand historiography as a literary genre, so that historical discourse has much more in common with other types of storytelling than many have been willing to concede.[49] The same event or set of events may be viewed in radically different ways, and the content of the narrative theme around which a historical interpretation crystallizes may reflect a profoundly teleological or metaphysical attitude toward historical process.[50] For example, representing a set of events in terms of a single theme presupposes that the past possesses a unitary logic or rationality, and imposes an order on its object that is more fictive than real.[51] What we know as history is always partial.[52] And partial in two senses: partial as incomplete and partial as ideologically shaped.[53] History is the story of the victors, those with power and position.

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47. *See generally* Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995) (analogizing the malleability of collective memory to the interpreting of history). Mark Osiel writes: "Like historical writing, collective memory does not preserve any single, dispositive account of what happened, still less of its meaning. What is remembered evolves with the changing interests and ideals of whoever is doing the remembering . . . ." *Id.* at 631.

48. *See* Nayan Shah, *Sexuality, Identity, and the Uses of History*, *in* Q AND A: QUEER IN ASIAN AMERICA 141, 147–49 (David L. Eng & Alice Y. Hom eds., 1998). As Nayan Shah writes, "The past is not a thing waiting to be discovered and recovered." *Id.* at 148. On the relation of history, memory and law, see generally Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, *in* HISTORY, MEMORY, AND THE LAW 1 (Austin Sarat & Thomas R. Kearns eds., 1999).

49. *See* Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2658 (1992).

50. *See id.* at 2659.

51. *See id.*

52. As Claude Levi-Strauss argues, a truly total history would confront one with chaos. He writes:

> Every corner of space conceals a multitude of individuals each of whom totalizes the trend of history in a manner which cannot be compared to the others; for any one of these individuals, each moment in time is inexhaustibly rich in physical and psychical incidents which all play their part in his totalization. Even history which claims to be universal is still only a juxtaposition of a few local histories within which (and between which) very much more is left out than is put in. And it would be vain to hope that by increasing the number of collaborators and making research more intensive one would obtain a better result.

CLAUDE LEVI-STRAUSS, THE SAVAGE MIND 257 (1966).

53. Levi-Strauss uses these two senses of partiality in describing history and suggests that "[h]istory is therefore never history, but history-for. It is partial in the sense of being biased even when it claims not to be, for it inevitably remains partial—that is, incomplete—and this is itself a form of partiality." *Id.* at 257–58.

Yamamoto seeks to examine how those who are definitionally not the victors attempt to reconstruct group memory in order to support justice claims against those who are. One example he gives poses some of the difficulties with this effort. This is the example of the use of group memory to support the 1980s redress movement by Japanese Americans. Yamamoto calls that group memory partial—in both senses—because the group memory that sufficed to motivate Congress to grant reparations erased the history of Japanese American resistance to internment in favor of a narrative of loyalty and acquiescence. Here we see a retelling of history by Japanese Americans in an effort to secure justice from those with power, representing events in terms of a single theme, governmental obligation for redress grounded in loyalty, that excluded the theme of resistance to the government.[54] It might seem that narratives that frame redress for injustice from still existing governments may require those who suffered to portray themselves as nonthreatening to those governments in ways that can be considered dehumanizing.

The difficulty of reconciling rights-based claims, or legal claims in general, with this more complicated understanding of history is a point on which Yamamoto could elaborate. For claims of redress to succeed, one needs to argue that the history of the victors is "not true," and that the popular memory of the oppressed is, in fact, what is "true." But the retelling, just like the history of the victors, will always also be partial, incomplete, and ideological. Admitting this partiality would appear to make justice claims that rely on claims to truth more difficult. How does Yamamoto's integration of multidisciplinary approaches to understanding history and memory reconcile with the imperatives of how we understand truth in our legal system?

In an important part of the Article, Yamamoto illustrates the creation of collective memory, both on the part of Native Hawaiians, and by the U.S. Supreme Court, in a retelling of *Rice v. Cayetano*.[55] In the opinion, the majority of the Court told a story of the "civilization" of Hawai'i by Christian missionaries, "Western business interests and property owners."[56] In doing so, the Court refused the Native Hawaiians' collective memory of the United States overthrowing an internationally recognized sovereign. Yamamoto provides an urgently needed retelling of history from the perspective of Native Hawaiians that foregrounds both the overthrow and annexation of Hawai'i by the United States and the ravages of colonization.

54. *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, 394–95, 409–10 (1998).

55. 120 S. Ct. 1044 (2000).

56. *Id.* at 1048–50.

I think we must ask: What does it mean to discuss *Rice* within an Article seeking to promote the rubric of "re-forming civil rights" when it is the very limits of our current civil rights jurisprudence that allowed the voting limitation of the Office of Hawaiian Affairs at issue to be struck down? By these limits, I mean the failure of our civil rights jurisprudence to recognize historical subordination and the concomitant embrace of the idea of reverse discrimination. The majority of the Supreme Court accepted the conceptualization that the voting limitation was a special privilege to a racial minority—Native Hawaiians—and constituted a violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution, in the form of reverse discrimination against the white plaintiff. Yamamoto notes this when he criticizes the *Rice* majority's appropriation of the antidiscrimination rhetoric of civil rights. And, as he argues, the distorted idea of civil rights that supported the decision must be re-formed.

But, given current conceptual limits of what constitutes civil rights, would it make more sense to frame *Rice* within a broader project, not of re-forming civil rights, but of combating colonialism? And, in general, what would be gained by reconceptualizing our understandings of racial subordination through the lens, not of civil rights, but of colonialism? Of course, the idea of anticolonialism hardly has enormous purchase in the American mind, given the political mythology of U.S. history and national identity—a mythology that presents the United States, in contrast to European colonial powers, as an exception—in what has been termed "American exceptionalism" to the project of global imperialism.[57] This mythology relies on the idea that America's unique nature stems from the struggle for independence from British colonialism, so that the United States is represented as inherently anti-imperialist. The narrative features the origins of the United States in "discovery" and as an "errand into the wilderness," its development in Western "settlement of the frontier" and in "manifest destiny" and the exportation of "American democracy," and its contemporary incarnation as now the world's sole superpower.[58] What this narrative denies is the understanding of the United States as an empire, engaged in colonial subjugation of native peoples and colonial possessions, and involved in contemporary neocolonial relations of economic and military subordination.

It strikes me that it would be productive to retheorize racial subordination through the lens of colonial relationships, for the disjunction between

57. *See* Amy Kaplan, *"Left Alone with America": The Absence of Empire in the Study of American Culture*, *in* CULTURES OF UNITED STATES IMPERIALISM 3, 11 (Amy Kaplan & Donald E. Pease eds., 1993).

58. *Id.* at 10–13.

the fact of American colonialism and imperialism and the idea of American republicanism and democracy has been facilitated through the expression of racial difference. Liberalism and colonialism developed at the same time. Their contradictions were allowed because the eligibility for so-called universal rights was understood to be conditioned upon one's subjectivity, shaped by notions of racial superiority.[59] The subordination produced through this encounter does not solely implicate what is sought to be redressed through civil rights. The idea of civil rights is predicated upon a particular desired goal: the equality of citizens within a nation state. When the favored liberatory or progressive framework is assumed to be that of civil rights, the reality of specific relations of inequality may be left inaccurately described. In particular, this may be the case when what is at issue is really sovereignty.[60] Thus, to fold anticolonial struggle into an already developed civil rights project may not always be the best way of redressing certain wrongs.

B. Internationalizing Civil Rights

In the Article's discussion about internationalizing U.S. civil rights, Sharon Hom examines the manner in which many seeking to redress wrongs within the United States are looking to international human rights law as a resource. She provides a critical reading that foregrounds many of the limits of such "domestic 'global' moves."[61] This includes an exploration of the hostility by the United States to recognize economic, social, and cultural rights as legal rights, and of the limits within international human rights treaties and instruments as well as the obstacles posed by state and nonstate actors. Lastly, she also interprets the history of using international strategies by some in the early civil rights movement, in particular, the 1951 Petition to the United Nations, "We Charge Genocide," of the Civil Rights Congress (CRC), charging the United States with genocide of the "Negro People." As Hom notes, the petition framed its grievances in a number of significant ways. Documented were harms ranging from murder to economic genocide, thus shifting the focus beyond traditional civil rights

59. *See* Mahmud, *supra* note 10, at 1222.

60. *See* Marie Anna Jaimes Guerrero, *Civil Rights Versus Sovereignty: Native American Women in Life and Land Struggles*, *in* FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES 101, 102–07 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997) (arguing that in the United States context the rubric of civil rights has been used to whittle away legal claims of tribal sovereignty, and in addition, contradictions of dual citizenry fall disproportionately on native women). On the issue of sovereignty of native Hawaiian peoples, see generally Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

61. Hom & Yamamoto, *supra* note 2, at 1781.

to include issues of structural economic injustice. The petition linked oppression within the United States to U.S. colonialism of the Philippines and neoimperialism in Korea. Thus, Hom argues, the CRC's petition provides a model for us today of the analysis possible for domestically based U.S. civil rights groups that is transnational in scope, weaves together the domestic and the international, and looks beyond simply "'access' to the table."[62] Hom's retrieval of the specifics of the CRC's petition certainly lend a sense of the possible that we seem to have forgotten over the last fifty years. What is not mentioned in *Re-Forming Civil Rights* is the reaction of the United States to the petition, which may have something to do with this forgetting. Following the CRC's petition and the 1947 petition filed by the NAACP denouncing race discrimination in the United States, the United States refused to participate in the United Nations human rights treaty system for about thirty years—fearing that such involvement would expose itself to findings of human rights violations.[63]

Short of a petition with the scope and sweep of the CRC's petition, what are the particular sites in which human rights claims have been successfully articulated in U.S. courts? Hom mentions the scanty acknowledgement of the Universal Declaration of Human Rights by the Supreme Court.[64] But I think it is important to also acknowledge the statutory basis for the vast majority of international human rights claims brought in U.S. courts. This is the Alien Tort Claims Act (ATCA),[65] which allows aliens to bring in federal court claims for torts committed in violation of a U.S. treaty or the law of nations.[66] Torture has been successfully alleged under the ATCA, as

62. Hom & Yamamoto, *supra* note 2, at 1801.

63. *See* Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 17 (1996). *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

64. The Universal Declaration of Human Rights has been mentioned by the Supreme Court six times, most recently in *Knight v. Florida*, 120 S. Ct. 459, 463–64 (1999) (Breyer, J., dissenting), in which Justice Stephen G. Breyer notes that the United Nations Human Rights Committee indicated that a delay of 10 years between sentencing and execution does not necessarily violate standards under the Universal Declaration of Human Rights, and that such authority is "useful even though not binding." *Id.* at 464.

65. Alien Tort Claims Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (1994)) (providing for federal district court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

66. *See* Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 125–29 (2000) (describing the Alien Tort Claims Act (ATCA) and suggesting 42 U.S.C. section 1983 as another possible statutory basis for asserting international human rights claims in the United States).

have genocide, war crimes (including rape), disappearance, arbitrary detention, cruel, inhuman and degrading treatment, and forced labor.[67]

These examples, I think, both show the possibilities and the present limitations as to the kinds of abuses our domestic courts are willing to recognize as violations of international law. All of these claims involve practices that shock the conscience. Claims of forced labor, while involving injustices of economic and social rights, also fall within the rubric of the economic and political because of the nature of imprisonment involved. While the primary focus of ATCA claims to date has been "aliens" whose rights were violated outside of the United States, there is no statutory authority that would prohibit an ATCA claim from being filed on behalf of an alien whose rights were violated within the United States.[68] Thus, we could envision the ATCA as a possible basis on which domestic civil rights violations might be prosecuted on behalf of aliens within the United States. But in stating this, it bears considering what kind of legal structure and social movement—rights based or not—would serve to remedy the kind of everyday mundane violation that does not shock the conscience.

One small point of concern in this part of *Re-Forming Civil Rights* is the call for a discourse of responsibilities as well as a discourse of rights.[69] The invocation of responsibilities, as well as rights, positions each of us as a moral agent within a community of mutual obligations. But the recent passage of the Personal Responsibility and Work Opportunity Reconciliation

67. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (cruel and inhuman and degrading treatment); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes, and rape); *In re* Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (summary execution); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (torture); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (forced labor); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (arbitrary detention); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (disappearance). For a discussion of cases brought under the ATCA, see Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1561–66 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996)).

68. For an example of such a case, see *Okezie v. Udogwu*, No 99 Civ. 3345 (S.D.N.Y. May 7, 1999) (regarding a complaint on behalf of a Nigerian immigrant held as "slave and involuntary servant" in New York, alleging that defendants, by requiring plaintiff to participate in a system of involuntary servitude, forced labor, slavery, and peonage, committed torts in violation of treaties of the United States and of the law of nations for purpose of the ATCA). Treaties alleged to be violated include International Covenant of Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 6 I.L.M. 368; Convention Concerning Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291; Supplementary Slavery Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 U.N.T.S. 253. The law of nations allegedly violated includes the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (Ill.), U.N. GAOR, 3rd Sess., U.N. Doc. A/ILO (1948), and customary international law.

69. *See* Hom & Yamamoto, *supra* note 2, at 1792.

Act[70] and the Illegal Immigration Reform and Immigrant Responsibility Act[71] reminds us that it is difficult to call for a greater adherence to responsibilities in the abstract, when certain groups of individuals are assumed to be inherently irresponsible.[72]

Lastly, I would ask that the section on internationalizing U.S. civil rights directly address the concerns raised in Yamamoto's discussion of *Rice v. Cayetano*. This might be a way of pulling these two disparate sections of the Article together. Given the limitations of traditional civil rights discourse, painfully evident in the majority decision in *Rice*, how might internationalizing U.S. civil rights have been helpful to the claims of Native Hawaiians? Are there concrete legal strategies Hom could suggest that we might use as part of a project to combat U.S. colonialism of Hawai'i?[73] Hom invokes the manner in which the CRC posed domestic civil rights within a context of colonialist and imperialist history. I would ask for more guidance on how we might do that today.

CONCLUSION

That these two important pieces position the project of civil rights in such diametrically opposed ways creates the possibility of a dialectical exchange. Reading the two pieces across each other suggests some questions. What might Ford's Essay mean for that of Hom and Yamamoto? For one, it would caution that stretching civil rights in the manner they do might increase hostility toward traditional civil rights claims. For another, the paper might suggest the need for a highly nuanced understanding of how claims to culture ground collective memory, and the idea that there are dangers to fixing identity through the use of legal recognition of such memory. What might Hom and Yamamoto's Article suggest to Ford? We could imagine that they would ask whether the traditional civil rights claims he seeks to safeguard really address the transnational and economic complexities of present-day subordination. They might question whether his project was one of reconstruction and broadly defined social justice, and

70. Pub. L. No. 104-193, § 400, 110 Stat. 2105 (1996) (codified at 8 U.S.C. § 1601 (Supp. IV 1998)).

71. Pub. L. No. 104-208, § 1(a), 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 101 (1994)).

72. *See, e.g.*, Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996) (analyzing why only certain reproductive choices are deemed irresponsible).

73. For a discussion of how international human rights laws apply to the issue of the self-determination of Native Hawaiians, see S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994).

whether his proposal will really get us there. We can understand what underlies the tensions in such a cross reading, if we recognize that *Re-Forming Civil Rights* posits a much more aspirational project than does *Race as Culture*. That these projects are so different is a good thing. If we want to work toward an eradication of wrongs, we need to be simultaneously reformist, critical, and visionary. All of these approaches are necessary as we rethink the future of the discourse of civil rights.

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