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TRUTH AND MYTH IN CRITICAL RACE THEORY AND LATCRIT: HUMAN RIGHTS AND THE ETHNOCENTRISM OF ANTI-ETHNOCENTRISM

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ARTICLE

TRUTH AND MYTH IN CRITICAL RACE THEORY AND LATCRIT: HUMAN RIGHTS AND THE ETHNOCENTRISM OF ANTI-ETHNOCENTRISM

Eric Heinze*

ABSTRACT

Critical Race Theorists and LatCrits argue that, throughout U.S. history, norms promising liberty and equality have been myths. They examine the formalisms of U.S. rights discourse through the lens of a realist jurisprudence, arguing that guarantees of “equal protection” or “due process” have failed non-dominant groups throughout long histories of slavery, segregation, subordination, and ongoing exclusion. However, a number of them merely substitute a simplistic myth of “U.S.-is-good” with an equally simplistic myth of “U.S.-is-bad.” Scholars such as Mari Matsuda, Richard Delgado, Celina Romany, Berta Esperanza Hernández-Truyol, and Elisabeth Iglesias condemn those who praise the black letter of U.S. law while overlooking its brutal realities; yet they then take precisely that approach to non-U.S. legal regimes, such as the standard norms of international human rights law, praising the black-letter norms while ignoring the oppressive politics and histories of many of the powerful countries and institutions behind them. Far from overcoming American ethnocentrism, they thereby recapitulate it. Within an ever more global discourse of human rights, critical theorists can only retain credibility by applying the same realist methods to international and non-U.S. regimes that they demand for U.S. law.

“The mere experience of racial oppression provides no inoculation against complacency.”

Randall Kennedy¹

“...und jedesmal, wenn ich anfing, die Nazis mit den Kommunisten zu vergleichen, wurde er wütend. . . .”

Heinrich Böll²

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² Heinrich Böll, Ansichten eines Clowns 47 Munich: DTV, 1967 (F.R.G.) ("...and whenever I started comparing Nazis with Communists, he became angry") (Eric Heinze trans.).
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Introduction

Once upon a time there lived some pious souls. They desired only the freedom to follow their conscience. They were industrious, yet thrifty; prosperous, yet humble. Persecution made them abandon their English homeland. They sailed the stormy Atlantic in quest of the sacred birthright of all mankind: democracy. Yet the English tyrant still blighted them in America, as he had done in England. So they mustered a ragtag army whose sparse but brave men at first seemed no match for the vast empire. Clever and agile, and with right on their side, they nevertheless threw off the English despot. They founded a new nation, indivisible, with liberty and justice for all.

That schoolroom fairytale was once ubiquitous in the United States. It is by no means dead today. It is anathema to Critical Race Theorists and LatCrits.4 It lies because it glorifies democracy where African-Americans, Latinos, Native Americans, Asians, women, sexual minorities, and other outsiders,5 have faced brutality and exclusion. It lies by silencing as much as it tells. It tells the conquerors’ story. The conquered go unnamed, their story untold. It lies because it is a myth that speaks of “liberty and justice for all,”6 while disguising a political history that long favored a straight, white, male elite. It lies by parading the dominant group’s ideals as the American reality; by proclaiming the very partial and particular ideals of one American group as the universal ideals held equally by all American

3. For examples of leading contributions, see generally Words That Wound (Mari Matsuda et al. eds. 1993) [hereinafter Words]; Critical Race Theory: The Cutting Edge (Richard Delgado & Jean Stefancic, eds. 2000) [hereinafter CRT], as well as such specialized journals as the National Black Law Journal or the Harvard Black Letter Journal.
4. For examples of leading contributions, see generally Harvard Law Review, La Raza Law Journal or Chicano Latino Law Review.
5. On the concept of outsider groups and outsider jurisprudence, see e.g., Mari Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, in Words, supra note 3, at 17, 18–20.
groups, even those who were systematically barred from sharing in that ideal. A cardinal task of Critical Race Theorists and LatCrits has been to explode that kind of American myth in order to unmask the politics behind it.

But here’s another fairytale. Once upon a time, children from around the globe, of all races, creeds, and colors, with brightly beaming faces, gathered together and joined hands. Adults looked on in tearful joy, and learned their lesson, as the children’s voices sang out, in gleeful counterpoint, “It’s a small world after all.” In demolishing the American fairytale, have some Critical Race Theorists and LatCrits merely adopted that internationalist one? Are they making their own choices about which partial ideals they will universalize and which embarrassing truths they will silence, in order to promote platforms that do not even reflect the interests of the outsiders for whom they speak?

Critical Race Theory and LatCrit might at first appear to be distinctly American movements, insofar as their criticisms have largely focused on U.S. law. Their analyses of history and culture draw strongly upon the experiences of minorities in the United States. Their exponents are generally based in U.S. universities, and the movements have arisen from their teachings and publications within the American academic establishment. However, problems of domination, marginalization, exclusion or inter-ethnic conflict resonate throughout the post-colonial world, and throughout the international human rights movement. Several Critical Race Theorists and LatCrits have looked beyond U.S. shores, seeking solutions within international law and institutions. That trend emerges in the approaches of such leading Critical Race Theorists as Mari Matsuda, Richard Delgado, and Jean Stefancic, as well as such LatCrits as Celina Romany, Berta Esperanza Hernández-Truyol and Elizabeth Iglesias.

In some of their work, however, these scholars have played the same game of simplification, myth-making, and exclusion-of-outsiders that they rightly condemn when it is played to spread the old myths of white America. They claim to reject abstract, decontextualized, or formalist interpretations of U.S. law, insisting on a method of legal realism that would look to the brutal realities behind empty promises of “liberty” or “equal protection.” However, in an effort to forge political alliances against U.S. law—in particular, against the American civil liberties tradition—they then proceed to adopt wholly abstract, decontextualized, and formalist readings of international norms. They endorse the empty promises of international norms while abandoning the same legal realism that would reveal brutal realities waged against non-American outsider groups.

A legal realist approach has prompted these scholars to reject any idealism about what U.S. law promises by condemning what it has actually delivered. However, they then claim an ally in a mythical international “community,” applauding what it has promised, while resorting to equally idealized legal formalisms in order to ignore what that “community” has actually delivered. Instead of seeking a balanced assessment of the U.S. in

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7. See supra text accompanying notes 3-4.
8. See infra text accompanying note 99.
light of other societies of comparable history and demographics, they merely replace the old American myths with new internationalist ones.

In an age of growing internationalization of human rights, critical theorists must approach international norms with the same rigour they have applied to the bleak histories and manipulative formalisms of U.S. law. In this article, I shall argue that, by doing so, their work will provide more accurate insight, not only into the ideals and realities of the United States, but also into the ideals and realities of the so-called “international community.”

In Part I, I argue that two principle trends have emerged in the relationships between those two critical movements and international law. On the one hand, some Critical Race Theorists and LatCrits suggest a thoroughgoing harmony between their movements and international law. I call that tendency the alliance trend. On the other hand, many scholars, particularly among Critical Race Theorists, have ignored international law altogether. I call that tendency the neglect trend. In Part II, I turn first to the neglect trend, examining but rejecting the reasons why Critical Race Theorists might be thought to share little common cause with international human rights law, and arguing that their overlaps are important. In Part III, however, I discuss the alliance trend, equally rejecting suggestions of straightforwardly allied positions between these critical movements and international law. Instead, I advocate critical scholars’ return to their own critical and realist approach, i.e., to a critical trend, whereby they might scrutinize the professed norms of international law with the same rigor that they have applied to U.S. law. In Part IV, I examine alternative principles that might guide future critical approaches to outsider jurisprudence in an age of globalization.

I. THE TWO PRINCIPLE TRENDS

Critical Race Theorists and LatCrits have suggested two general kinds of relationships between their movements and international human rights law, which I shall call alliance and neglect. I compare those two trends briefly here, then examine them individually in Parts II and III.

The alliance trend. Some Critical Race Theorists and LatCrits suggest a straightforward, essentially unproblematic, alliance between their theories and international human rights law. They argue that racist invective causes as much harm as the batteries, assaults, or illicit speech acts (e.g., fraud, criminal solicitation or conspiracy) that domestic legal systems have traditionally outlawed. They argue that the American failure to punish hate speech, on grounds of abstract, universalist understandings of liberty, serves only to enhance the liberties of traditionally dominant groups. The disempowered then become further marginalized.

In an article entitled “A Shifting Balance: Freedom of Expression and Hate Speech Regulation,” Jean Stefancic and Richard Delgado review the international consensus in favor of hate speech bans, in order to reject

9. The literature on hate speech is massive. For a recent discussion with reference to international norms, see, e.g., Eric Heinze, Viewpoint Absolutism and Hate Speech, 69(4) Mod. L. REV. 543, 577–78 (2006) [hereinafter Heinze, Viewpoint Absolutism].

10. See generally WORDS, supra note 3.
American civil libertarian defenses of free speech.\textsuperscript{11} Mari Matsuda reaches similar conclusions in "Public Response to Racist Speech: Considering the Victim's Story," published in the frequently cited collection *Words that Wound.*\textsuperscript{12} The analyses of Stefancic & Delgado and Matsuda join those of many other Critical Race Theorists\textsuperscript{13} and human rights advocates.\textsuperscript{14}

Stefancic & Delgado’s analysis is comparative. They review hate speech bans in various countries, often adopted pursuant to international treaty obligations. As I have already commented on that approach elsewhere,\textsuperscript{15} my focus in this article will be on Matsuda’s piece. Matsuda does not analyse domestic jurisdictions. Instead, she explores bans on hate speech advocated at the United Nations during the drafting of the International Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{16}

The alliance trend has emerged more prominently in LatCrit. LatCrits are concerned with ethnic minority communities whose experiences, albeit sharing important similarities with African-American communities, have also had distinct experiences and problems. Berta Esperanza Hernández-Truyol sees LatCrit as interested in “the Latina/o multidimensional experience within the *fronteras estadounidenses* . . . multiracial, multicultural, multilingual, multiethnic, and even multinational.”\textsuperscript{17}

Unlike much Critical Race Theory, international perspectives have become central to core LatCrit concerns. LatCrits’ interest in immigration, cross-border employment, or economic development in the Americas, has lead them to look beyond U.S. law when international law offers attractive


\textsuperscript{12} Matsuda, supra note 5, at 17.


\textsuperscript{17} Berta Esperanza Hernández-Truyol, *Building Bridges IV: Of Cultures, Colors, and Clashes—Capturing the International in Delgado’s Chronicles*, 4 HARR. LATINO L. REV. 115, 118 (2000). The phrase *fronteras estadounidenses*, meaning “borders of the United States,” allows the adjective *estadounidenses*, which is more precise than any English equivalent, to overcome ambiguities in the term “American,” which can apply as much to Latin “Americans” as to U.S. “Americans.”
solutions. The experience of being defined by identities reaching beyond U.S. frontiers has also led some LatCrits to a more deeply existential identification with international human rights law—to a sense that only a legal system recognizing individual and collective identities beyond national borders can embrace their experience of multiple and conflicting selves. The alliance trend, then, encompasses both Critical Race Theorists and LatCrits who not only reject fundamental elements of U.S. law, but claim to find superior alternatives within international law.

The Neglect Trend. Within Critical Race Theory, those approaches by Matsuda and Stefancic & Delgado still represent the exception more than the rule. Unlike LatCrits, most Critical Race Theorists have paid little attention to international law, having generally confined their analyses to U.S. law and history. It is always difficult to analyze a negative—in this case, to ask why most Critical Race Theorists have not turned their attention to international human rights law. But it is important to ask that question. Have they neglected international law because of some fundamental incompatibility between Critical Race Theory and internationalism? Or, does the neglect arise more from pragmatics than from principle? Those two questions provide a starting point. We must first establish whether there is a genuine relationship between these two critical movements and international human rights law before we ask what that relationship should be.

II. The Failure of the “Neglect” Trend

I shall begin, then, with the neglect trend. I shall argue that some critical theorists have indeed tended to overlook international law, but only for pragmatic, and not theoretical reasons. The theoretical and historical relationships among Critical Race Theory, LatCrit, and international human rights law are crucial—but, as I shall explain in Part III, not for the reasons suggested by many Critical Race Theorists and LatCrits.

A. Critical Race Theory and Rights Skepticism

Because its authors see hate speech as broadly reflecting the outsider status of ethnic minorities, Words that Wound became more than a book about hate speech. The book has become a landmark text in critical theory. It stands among Critical Race Theorists’ first attempts to characterize outsider jurisprudence in general terms. While noting a diversity of ap-
proaches to outsider jurisprudence, the authors set forth six “defining elements.” Two are particularly relevant to understanding rights, and, in particular, to understanding the kinds of formal proclamations of rights that we find in national instruments, such as the U.S. Bill of Rights, as well as international instruments, such as the Universal Declaration of Human Rights (for later reference, I shall insert the letter “E” for “element”).


[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. [. . . ]

Critical Race Theorists maintain that legal norms cannot be read off the page. They are meaningful only in historical and social context. We can read in the U.S. Declaration of Independence that “all men are created equal,” or in the Constitution’s Fourteenth Amendment that the individual states shall guarantee “equal protection of the law” or “due process” to all citizens. For Critical Race Theory, however, those formally declared norms have systemically worked out to be the exclusive privileges of white males. In Dred Scott v. Sanford, the Supreme Court used the discourse of higher-law rights not to defeat slavery but to affirm whites’ property interests in their slaves. In Plessy v. Ferguson, the Court cited “separate but equal” facilities for whites and blacks not as evidence of unconstitutional discrimination, but as evidence that blacks were being treated equally to whites.

Accordingly, it might at first seem that Critical Race Theorists’ general neglect of international human rights law arises from an overall skepticism about formal proclamations of rights. Critical Race Theorists might seem justified in keeping some distance from the leading international human rights instruments, like the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights, in view of the historical failures of individual rights promulgated in abstract universalist terms.

That rights skepticism, however, cannot really explain the neglect trend. In The Alchemy of Race and Rights, Patricia Williams famously rejects the skepticism about rights that had characterized the Critical Legal

24. See generally Crt, supra note 3, pts. I–IV.
Studies movement of the 1970’s and 1980’s. Williams certainly 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 have often provided real empowerment.

In discussing her search to rent an apartment, Williams concedes that white males (such as those who had formed the American critical legal studies movement) might, through their inherited social privilege, feel secure in “overcoming” the impersonal and adversarial nature of contract rights, by striking a friendly, informal, oral agreement. She, however, as an African-American woman, felt more secure with a formal, written agreement that she could wave in court if she were cheated, as ethnic minorities and women had been cheated in the past. The would-be radicalism of the Critical Legal Studies movement suddenly looked like an elitist, white, middle-class pastime. Traditional individual rights could be seen as constructive for outsider groups, as long as they remained vigilant about the ease with which rights had been turned against their interests in the past.

Other Critical Race Theorists have taken similar positions: rejecting simple dualisms between “rights are good” and “rights are bad.” They acknowledge the empowering potential of rights, but warn that formal proclamations must not be taken at face value. 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.

It would be misleading, then, to believe that Critical Race Theorists had bypassed international human rights because of their rights skepticism. Critical Race Theorists’ rights skepticism is a vigilance about rights discourse, not a rejection of it.

B. Critical Race Theory and Anti-Universalism

International human rights must apply to people in particular places at particular times. For the most part, however, the norms of human rights law have been formulated not in local but in global terms. They attempt to generalize about all people everywhere, or, at least, about whole categories of people, such as women, children or workers. Much of international human rights law speaks about the human being, about the individual

30. Lawrence et al., supra note 23, at 6.
as such. The Universal Declaration of Human Rights proclaims the "inherent dignity and . . . the equal and inalienable rights of all members of the human family."

Critical Race Theory has moved in the opposite direction. Its "vigilant" rights skepticism calls for a cautious approach to abstract and universalist claims about human beings or human experience. That skepticism is illustrated through storytelling, a crucial innovation of Critical Race Theory. Storytelling focuses on the complexities of individually lived experiences that cannot be grasped either through terse and highly generalized norms, or through traditional, abstract, "disembodied" legal theory. For many minority persons," writes Richard Delgado, "the principle instrument of their subordination . . . is the prevailing mindset by means of which members of the dominant group justify the world as it is."

That mindset, its assumptions and attitudes, can be said to pervade not only mass culture, but also the more rarefied discourses of traditional legal culture and analysis. It may indeed be overtly racist: "with whites on top and browns and blacks at the bottom." However, it can also be more diffuse. It often persists within a society whose formally adopted norms include universalist values of "liberty," "democracy," "due process," or "equal protection." Those norms may have been legislated with the best will in the world by a liberally minded elite. In reality, however, they apply without regard to subtler relationships of power and subordination that systematically pervert the very fairness that those norms are designed to promote.

Cases such as Washington v. Davis or McCleskey v. Kemp suggest that racism more deeply seated within social attitudes may threaten justice, even as judges insist that the universalist norms of equal protection and due process are adequate to assure fairness. Racism can be disempowering, despite formal, abstract, universalist promises of empowerment. Disempowerment, in turn, signifies alienation and exclusion. Where, then, can outsider groups draw strength? How do they empower themselves? Delgado continues,
The attraction of stories should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.43 If we care not only about abstract ideals, but also about concrete reality, that vigilance towards formal, abstract, universalist concepts can be applied to the Universal Declaration of Human Rights. The Universal Declaration purports to speak equally for “all members of the human family,” yet continues to do so in a world of flagrant inequalities.

International human rights law relies on global organizations and institutions. The latter are, in turn, influenced by powerful states. One could argue, then, that human rights law serves not to challenge existing arrangements of global exploitation, but merely to legitimate them through a hollow universalist discourse. That is precisely what Critical Race Theorists often accuse U.S. law of having done.44 Critical Race Theorists remind us that pseudo-cosmopolitan notions of American federal sovereignty, vested in “We the People,”45 turned out to exclude slaves, who had counted as only three-fifths of a person,46 and then segregated blacks, who were “separate but equal.”47 Accordingly, the neglect trend might appear to stand as a rejection of those abstract concepts of “the human being” or “the human family,” which, like promises of “equal protection” or “due process,” have served as means of oppressing society’s outsiders.

That conclusion, however, also fails to explain the neglect trend. While remaining cautious about conceptual abstractions, critical theory cannot avoid them. No clear lines can be drawn between “abstract” and “concrete” expressions of social problems or legal interests. Ethnic differences in the U.S. have 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,” “immediate,” or “concrete.” One need merely compare Soujourner Truth to Clarence Thomas, Billie Holliday to Will Smith, to recognise that “the African-American,” let alone “the outsider,” can only ever be a vast, diverse, inevitably abstract category. That is why storytelling can only ever tell part of its story. If law is to be transformed into a means of empowerment for such a large and diverse population, we cannot eschew its abstractions and generalities. No less than black-letter human rights lawyers must critical theorists deal in conceptual abstractions and generalized human categories.

Accordingly, just as with Critical Race Theorists’ approach to rights, their approach toward abstract human classifications is one of vigilance, not outright rejection. Higher and lower levels of abstraction inevitably blend to shape any movement dealing with vast and complex issues: terms like “Black,” “African-American,” “Latina/o,” “women,” “minority,” “gay,” “sexual minority,” are all abstractions, covering people in different circumstances. Internationally, the term “American” may (or may not) be

43. Delgado, Storytelling, supra note 38 at 2412.
44. See infra Part III.
45. U.S. Const. pmbl.
46. U.S. Const. art. 1, § 2, cl. 3.
47. See supra text accompanying note 26.
the opposite of "global;" nationally, however, "American"—along with "African American," "gay American," etc.—is surely the opposite of "local." Critical Race Theorists' neglect of international human rights law cannot, then, be attributed to the levels of conceptual abstraction at which the two movements approach the human being. Both deal with the human being at significant levels of abstraction, and can scarcely do otherwise.

C. Pragmatics

The tendency of many Critical Race Theorists to neglect international law cannot be explained on the foregoing theoretical grounds—neither in terms of their caution toward rights discourse, nor in terms of their caution toward abstract or universalist discourses. Rather, the neglect trend arises from purely practical constraints. In paying little attention to international law, Critical Race Theorists are no different from many other U.S. public interest lawyers and legal scholars (the LatCrits are an unusual exception, in view of the more immediately transnational character of many of their communities and legal problems). U.S. public interest lawyers who seek real reforms have long recognized the limited force of international human rights on domestic U.S. law, at federal, state, and local levels.\textsuperscript{48} High-profile civil rights battles in the United States demonstrate that international human rights law, albeit occasionally mentioned, is rarely decisive for U.S. courts.

Consider the civil rights movement of the 1950's and 1960's, the death penalty, religious freedom, free speech, women's rights, or abortion rights. Some scholars have pointed to occasional initiatives by U.S. civil rights organizations to bring action against the United States within the United Nations.\textsuperscript{49} None, however, have argued that those initiatives amounted to a central pillar of legal or political strategy. Within U.S. legal practice, such attempts tend to be notable as rare exceptions, and not routine practice.\textsuperscript{50} For Critical Race Theorists and most law reform movements in the United States, the thickets of the federal and case-law system have been dense enough, without their having to face the complications of legal norms that have heretofore carried little weight in domestic U.S. law.

D. Overall Affinities

If the neglect trend arises from pragmatic constraints, it becomes that much clearer that there is no conceptual barrier between the fundamental concerns of Critical Race Theory and those of international human rights law. The two movements share deep affinities.\textsuperscript{51} Many international

\textsuperscript{49} See, e.g., Thomas, supra note 48, at 17.
\textsuperscript{50} Roper v. Simmons, 543 U.S. 551, 604 (2005)(referring to a 2005 the Supreme Court case discussing international standards in striking down the death penalty for persons who were juveniles at the time the crime was committed). That decision was chastised for being highly unusual for, if not patently incompatible with, American law. See, e.g., id. (Scalia, J., dissenting).
\textsuperscript{51} For a strong statement of the overlapping concerns of Critical Race Theory, LatCrit and international human rights law, see, e.g., Hernández-Truyol, supra note 17, at 122 and passim
norms and proclamations concerning racism could easily have been penned by Critical Race Theorists. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 52 for example, condemns “colonialism and all practices of segregation and discrimination associated therewith” (preamb. para. 4). States Parties proclaim themselves “[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). They further declare themselves “[c]onvinced that the existence of racial barriers is repugnant to the ideals of any human society” (preamb. para. 8), and “[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).” Those thematic overlaps between Critical Race Theory and international human rights law are no coincidence. American racism arose entirely within the context of history’s first great calamity of globalization, the trans-Atlantic slave trade. The roots (recalling that word’s rich significance in recent years) 53 of American racism were nothing if not international.

During the Cold War, when human rights activity within the United Nations was largely immobilized by political differences, South African apartheid became one of the few situations that commanded broad consensus. Sufficient anti-apartheid sentiment in both east and west fostered a mighty global response. Apartheid became the paradigm of a global human rights issue. 54 Further norm creation within the United Nations was often far reaching. Article 2(2) of the Declaration on Race and Racial Prejudice (DRRP), 55 for example, depicts racism in expansive terms, Racism includes racist ideologies, prejudiced attitudes, discriminatory behaviour, structural arrangements and institutionalized practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practise it, divides nations internally, impedes international co-operation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security.

DRRP’s normative recommendations follow that ambitious sweep. According to article 3,

Any distinction, exclusion, restriction or preference based on race, colour, ethnic or national origin or religious intolerance motivated by racist

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considerations, which destroys or compromises the sovereign equality of States and the right of peoples to self-determination, or which limits in an arbitrary or discriminatory manner the right of every human being and group to full development is incompatible with the requirements of an international order which is just and guarantees respect for human rights; the right to full development implies equal access to the means of personal and collective advancement and fulfilment in a climate of respect for the values of civilizations and cultures, both national and world-wide.

The Convention Concerning Indigenous and Tribal Peoples in Independent Countries, which must deal with wholly distinct and highly contested concepts of ethnic and minority identities, takes a further step. It declares the aims of "removing the assimilationist orientation" of earlier international documents. It proclaims "the aspirations" of indigenous and tribal 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)."

The writings by Matsuda and Stefancic & Delgado on hate speech further confirms that Critical Race Theorists have identified issues of immediate concern within international human rights law. The UN Committee on the Elimination of Racial Discrimination, 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. It has reiterated that concern in two subsequent recommendations and in comments on individual state practices.

III. THE FAILURE OF THE "ALLIANCE" TREND

There can be no doubt, then, about the themes that link critical theory to international human rights law. The next question is, what relationships should emerge among Critical Race Theory, LatCrit, and international human rights law? Are they all fully allied—merely different ways of saying the same things? I shall argue in this section that they are not; that critical theorists must retain the same critical, vigilant attitude towards international law that they apply to U.S. law. In failing to do so, they have betrayed the outsiders for whom they purport to speak.

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,” and international human rights law was enjoying a fresh start after decades of inertia. The treaty-based committees of the United Nations, including the Committee on the Elimination of Racial Discrimination (UN-CERD) and the Human Rights Committee (UN-HRC), found their activity increased. States newly embracing democracy submitted declarations of intent to adhere to individual complaints procedures. It may be no coincidence that writings by Critical Race Theorists and LatCrits examining international human rights began to emerge at that time of renewed vigour.

The fact that Critical Race Theory, LatCrits, and international human rights law share common concerns does not mean, however, that they share common understandings. International human rights law is largely the creation of states and power blocks, often pursuing the interests of those in power. As we have seen, its documents are expressed through the same kinds of abstract, universalist formalisms as the U.S. Bill of Rights which has provoked such concern for critical legal theory. The substantive scope of those documents does reach much further, including, for example, social, economic, and group rights. As I shall argue in Sections III.D and III.E, those, too, pose problems for critical theory. Before turning to those issues, I shall argue that an approach such as Matsuda’s merely generates myths about international law. Insisting upon legal realism for U.S. law, while abandoning any realist analysis of international law, Matsuda constructs wholly misleading notions about both U.S. and international norms and realities.

A. Formalism and Realism: the Critical Race Theory of Mary Matsuda

In her discussion of hate speech, Matsuda recalls the drafting and ratification of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which provides that state parties,

(a) Shall declare an offense 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"\(^{64}\) favoring the elimination of racist hate propaganda. She rejects the U.S. government position, which was, and to this day remains,\(^ {65}\) isolated at the UN in its opposition to article 4. The U.S. position reflected increasing strong protections of speech and association that had been pushed by U.S. civil libertarians, and began to triumph on the Supreme Court, during the 1960's.\(^ {66}\)

Most importantly, Matsuda proposes what she calls a "bipolar"\(^ {67}\) distinction between (a) the "first amendment story of free speech", which, in her view, disregards "the victims' experience,"\(^ {68}\) and (b) the international "consensus" behind CERD article 4, which, in her view, illustrates "[t]he emerging acceptance of the victim's story."\(^ {69}\)

That is where the mythmaking begins. I shall now argue that Matsuda first embraces a myth of an essentially benign "international community," from which she derives her "bipolar" distinction. Her concept of an international community is a myth, because it depends upon the same kind of naïve anti-realism, the same ignoring of brutal realities that had propelled the old myths of white America. She achieves her bipolar analysis only by turning the same blind eye towards the atrocities of the "international community" which she had condemned when it was turned towards American atrocities. She then devises a story of an essentially oppressive U.S., which she constructs in "bipolar" opposition to that mythical international community. She attacks the old, uniformed myths of U.S.-is-good, not in a quest for a more nuanced and balanced assessment—for example, an understanding that the U.S.-is-complex, based on a critical exploration of the actual realities of both U.S.\(^ {66}\) and international law and institutions—but in a quest for an equally simplistic myth of U.S.-is-bad. She in no way challenges the international power politics that betray human rights in the way she and other Critical Race Theorists attack American politics that have betrayed American legal norms. She advances American outsider groups

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64. Matsuda, supra note 5, at 27.
65. See generally Boyle, supra note 14, at 497.
67. Matsuda, supra note 5, at 17.
68. Id. at 50.
69. Id. at 26.
only at the price of ignoring non-American ones. By using international law not to overcome American parochialism but to recapitulate it, she exhibits what I shall call an “anti-ethnocentric ethnocentrism.”

Matsuda notes that, during the drafting phases of CERD in 1964, the United States, the United Kingdom, and the USSR jointly with Poland, each submitted a draft to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities\(^8\) (now the Sub-Commission on the Promotion and Protection of Human Rights).\(^9\) The British proposal\(^10\) generally represented approaches of Western European states in endorsing limited bans on hate speech. Elsewhere I have criticized the shortcomings of the Western European approaches.\(^11\) 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 specifically applauds the USSR-Poland draft for overcoming the “individualistic, civil libertarian conception of free speech.”\(^12\) She notes, “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 . . . .”\(^13\) Matsuda praises the Soviet-Polish proposal’s black letter without posing a single question about how the Soviet Union and its satellites were actually treating their minorities at the time of the proposal. Principles E2 and E3 from Words that Wound exhort: Don’t just look at the black-letter norms of the U.S. Constitution. Look also at the brutal histories behind them. We might therefore expect Matsuda to apply precisely that critical realist method to the Soviet-Polish proposal.

But she does nothing of the kind. The Sovietologists Barghoorn & Remington write that, throughout its existence, the Soviet Union alone had included “well over one hundred indigenous nationalities, of which twenty-

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\(^70\) Matsuda, supra note 5, at 27.
\(^72\) See, e.g., id. at 30.
\(^73\) See Heinze, Viewpoint Absolutism, supra note 9. In particular, I argue that hate speech bans may be required for weaker or newly emerging democracies, but are generally inappropriate for longstanding, stable and prosperous ones. In common usage, the terms ‘longstanding’, ‘stable’ and ‘prosperous’ are, of course, vague. However, general principles governing derogations jurisprudence, which examine a government’s overall ability to maintain civil peace, give those terms sufficiently precise meaning to warrant a finding that, outside of legitimately declared states of emergency, any conduct likely to threaten vulnerable groups can be prevented and punished through means more effective and more legitimate than hate speech bans. See Abolition, supra note 15, at 298–99, 306-07. See, e.g., Human Rights Committee, General Comment 5, art. 4, (Jul. 31, 1981), Compilation of General Comments and General Recommendations, U.N. Doc. HRI/GEN/1/Rev.1 at 5 (1994) and Human Rights Committee, General Comment 29, States of Emergency (art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) for discussion on derogations and states of emergency. Cf. Alastair MOWBRAY, CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS Ch. 15 (2004); D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS Ch. 16 (1995); P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS Ch. VIII, § 4 (1998).
\(^74\) Matsuda, supra note 5, at 28.
\(^75\) Id. at 28.
two contain[ed] at least one million people.”76 Both the Soviet and the Chinese (the two dominant socialist) spheres of influence by the 1960’s included states that had crushed vast numbers of minority ethnic and outsider groups, and were continuing to do so through the 1980’s, through the periods relevant to emergence of the UN human rights work to which Matsuda refers. Chechens, Ingush, Balkars, Baltic peoples, Roma, Jews, Muslims, Romanian ethnic Hungarians, Tibetans or Uighurs represent only a very few of the many groups that were often harshly, even murderous, repressed both preceding and during the very period in which the USSR and Poland were pushing their strong version of article 4.77

Despite the claims of E2 and E3, Matsuda never asks why the Soviet proposal for CERD article 4 was so far reaching, nor who was paying the price of the international “consensus” with which she associates it. As the Sovietologist Henry 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:78

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 korenizatsiya), 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.”79

Far from downplaying their repression of ethnic identities, Soviet policy proudly and actively pursued their dissolution. Soviet authorities avowedly deemed “the elimination of national customs and culture in the creation of a homogeneous Soviet nation” to be a ‘process of protracted duration.”80

Matusda, then, does precisely what Words That Wound had condemned the dominant American civil liberties tradition for doing. She takes the high-minded pretensions of black-letter norms on face value, overlooking the brutal realities lurking behind them. That choice is disturbing from an author who purports to overcome a narrowly American focus in order to seek “a just world free of existing conditions of domination.”81 It is particularly disquieting for a chapter that, in Matsuda’s words, “focuses on the phenomenology of racism”82 with reference to a supposed global “consensus.” Matsuda’s chapter is sprinkled with quotations from or about victims of racism, including sinister phrases like “everywhere the crosses are burning”83 or “a noose was hanging one day in his work area.”84 Such passages

77. See generally BARGHOORN & REMINGTON, supra note 76. See generally SOVIET NATIONALITY POLICIES: RULING ETHNIC GROUPS IN THE USSR (Henry R. Huttenbach, ed., Mansell, 1990) [hereinafter SOVIET NATIONALITY POLICIES].
79. Id. at 5.
80. BARGHOORN & REMINGTON, supra note 76, at 74.
81. Id. at 19 (emphasis added).
82. Id. at 22.
83. Matsuda, supra note 5, at 24.
rightly humanize the targets of oppression, giving them a voice that cold facts and figures can never impart. Sadly, however, for a scholar purporting to situate the U.S. within a global context, Matsuda selects only passages concerning victims of U.S. oppression.\textsuperscript{85} She cites not one victim within those socialist states whose proposals she applauds.

A recurring theme for Critical Race Theory is the necessity of listening to unheard voices.\textsuperscript{86} Elsewhere I have objected that, in the context of hate speech, critical theorists turn mysteriously deaf when some of society’s weakest groups are concerned, such as the physically or mentally disabled, whom Critical Race Theorists, feminists, queer theorists, and others generally exclude from their proposed hate speech bans.\textsuperscript{87} Similarly, we find Matsuda’s listening disturbingly selective, cleanly divided between the voices of U.S. minorities, which are named and heard, and those of non-U.S. minorities, which are excluded while Matsuda embraces their governments’ official positions.

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 U.S. and abroad, on U.S. racism, it was not because of their great empowerment under socialist rule, but because of a disempowerment so massive, so systematically repressive of dissenting voices, and so entirely overlooked by Western leftist intellectuals,\textsuperscript{88} that we find a putatively critical theorist like Matsuda endorsing the official line of the socialist states as the worthy and principled position.

As late as 1990, Huttenbach could still show how scholars purporting to do critical analysis had bought into socialist states’ official self-image, 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 So-

\textsuperscript{84} Id. at 20.

\textsuperscript{85} Id. at 17 (noting the one exception where Matsuda’s personal experience in Australia is described).

\textsuperscript{86} See generally id. See also, 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.

\textsuperscript{87} That silence comes not because the many advocates of hate speech bans among American and international legal writers have all mysteriously forgotten about the disabled, who, after all, have long been included within standard anti-discrimination norms. Rather, those writers have declined to acknowledge that banning words like “stupid,” “moron,” “dimwit,” “schizo,” “spas,” and countless other notions or works that equate disability with inferiority or ineptitude, would mean censoring endless quantities of public and media expression, and would give the lie to their insistence that even-handed, non-discriminatory application of hate speech bans entails only marginal censorship. Other such outsiders might include, say, the elderly (“senile” or “old bag”) or overweight (“fat slob”). Because hate speech bans cannot include outsiders such as the disabled, who surely count among society’s most vulnerable, critical theorists merely ignore them, and keep them outside. The whole concept of ‘outsider’ is introduced in Words to stress that the book is not only about race, but also includes, say, Jews or gays. See Words, supra note 3. However, categories such as physical or mental disability show how theorists of the “outsider” select their own insiders and outsiders from the moment that a favored norm, like a hate speech ban, simply cannot accommodate all longstanding victims of hate speech. See generally, Eric Heinze, Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age and Obesity, 12 International Journal of Human Rights (forthcoming Summer 2008).

\textsuperscript{88} Cf., Caroline Fourest, La Tentation Obscurantiste 9–13 (2005) (criticizing traditional leftist sympathies for totalitarianism).
viet 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.\textsuperscript{89}

Huttenbach criticizes Western scholars for having effectively recapitulated official Soviet policy through their failure to examine ethnic and national groups, even when issues of interethnic tension have been central to the problems those authors are discussing.\textsuperscript{90}

Adherence to complaint and reporting procedures was crucial to the credibility and authority of CERD and of the UN treaty system during those formative years. There could be no effective international human rights law without the co-operation and support of UN member states. How successful were those arrangements? Matsuda endorses what she sees as the progressive Soviet stance. While insisting that we must examine states’ actual adherence to the norms they profess, however, she fails to explain why, throughout the Cold War period, the USSR and its allies systematically sabotaged UN human rights work by refusing to submit\textsuperscript{91} to CERD 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.

The United States, too, can be accused of having failed to subscribe to article 14(1). However, any legal-realist analysis would show that, by the 1960’s, U.S. federal and state legislatures and courts were beginning to secure far better protections for ethnic minorities\textsuperscript{92} than anything to be found throughout much of the Soviet, Chinese or non-aligned\textsuperscript{93} spheres. Meanwhile, free speech was paving the way for the breaking of taboos around other outsiders, such as women, immigrants, or sexual minorities, in a way that was unthinkable in socialist states at the time. Figures as different as Martin Luther King, Cesar Chavez, Angela Davis, Betty Friedan, or Gloria Steinem, knew well what it meant for themselves and their supporters to be mistreated by law and by society. But free speech, secured through the now-dominant First Amendment civil liberties jurisprudence, carried their messages into millions of homes.\textsuperscript{94} That possibility was unimaginable for outsiders and dissidents in socialist states. Under Soviet rule, publication of even the most anodyne works in many minority languages was rigidly controlled as a means of suppressing non-Russian identities.\textsuperscript{95} In an era when the U.S. Black Panther leader Eldridge Cleaver enjoyed the freedom

\textsuperscript{89} Huttenbach, supra note 78, at 2.
\textsuperscript{90} Id. at 2-3.
\textsuperscript{91} See, e.g., Survey of CERD article 14, supra note 63.
\textsuperscript{92} See, e.g., NOWAK & ROTUNDA, supra note 66, at §14.8(2).
\textsuperscript{93} Cf. infra text accompanying note 109.
\textsuperscript{94} See, e.g., ROBERT A. DEVINE, ET AL., AMERICA: PAST AND PRESENT chs. 29-31 (8th ed. 2007).
\textsuperscript{95} See generally SOVIET NATIONALITY POLICIES, supra note 77.
to condemn U.S. oppression in *Soul on Ice*. Lithuanians could not even publish an automotive magazine in their own language: "the Russian-language *Za rulom* was supposed to fill the gap." Matsuda rests the authority of her analysis on a normative framework advanced by states that were crushing anything remotely resembling civil rights movements among their own ethnic minority groups (let alone the remotest analogue of a Critical Race Theory within their universities). Non-U.S. ethnic minorities, whose interests were as much at stake in CERD as U.S. ones, are, to use the language of Critical Race Theory, the unseen, unheard absences of Matsuda's commitment to the sanitized black letter of CERD article 4, and to what she mythically constructs as a fundamentally benign "community of nations" standing behind it.

Matsuda praises the achievements of the United Nations on racial discrimination. However, the Human Rights Commission, a notoriously cynical political body throughout the Cold War, never condemned the treatment of ethnic minorities by the Soviet Union or other socialist states. Those states systematically prevented examinations of their human rights records. Neither UN-HRC nor UN-CERD could exert real influence. The socialist states' refusal to adhere to complaints procedures and the opacity of socialist regimes allowed only limited monitoring of the treatment of ethnic minorities and of human rights by either outside or even inside observers. For all its defects, a U.S.-style civil liberties approach would have been a boon to minorities, dissidents, and outcasts under socialist rule.

It is disconcerting that a scholar who trumpets the imperative of critical realism, of analyzing law in historical and contextual terms, would have overlooked socialist states' sheer self-interest in pushing for strong limits on expression and association. Matsuda's suggestion that the socialist states made an essentially good-faith contribution to CERD presupposes that those states saw CERD as a genuine commitment to the prosperity and autonomous empowerment of their ethnic minorities.

101. See, e.g., Eric Heinze, *Even-handedness and the Politics of Human Rights*, 21 *Harvard Hum. Rights J.* 7 (2008) [hereinafter Heinze, *Even-handedness*]. See also, e.g., Robertson & Merrills, supra note 54, at 83–89; See also, e.g., Steiner & Alston, supra note 48, at 611–40. Nor is it by any means clear that the Council formed to replace the Commission will operate more effectively. Despite ongoing atrocities in Sudan, The Economist recently reported that the Council is "unlikely...[t]o hold Sudan's rulers to account. That is partly because Muslim countries, along with various non-democracies with a soft spot for tyrants, hold a majority of the council's 47 seats." *Great Expectations*, The Economist Mar. 24, 2007, at 76.
102. See, e.g., Robertson & Merrills, supra note 54, at 31, 83-89; Steiner & Alston, supra note 48, at 611–40.
But that would be quite a claim. The benefits to totalitarian regimes of the broadest possible wording for limits on expression and political organization were obvious enough. Article 4 bans not merely the hardest core of racist speech, but, on the Soviet-Polish approach, would have banned massive amounts of speech that socialist states saw as politically destabilizing, including legitimate criticism by minority ethnic groups about ethnic majority practices running from the tsarist through to the Soviet periods.\(^{103}\) Totalitarian dictatorships rarely see restrictions on speech that they do not like. They gleefully draft them in the broadest terms, and can always do so in the name of some vague, wholly formal ideal such as “peace” or “stability” or “security” or even “tolerance.” The more we look at international reality, the more Matsuda’s tidy ‘bipolar’ scheme crumbles.

Doubtful commitments to human rights have not come only from socialist states. Japan ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979, though it did not become party to CERD until 1995.\(^{104}\) Over decades, however, it has taken few steps to combat systemic discrimination against Ainu, Buraku or ethnic Koreans.\(^{105}\) Japan still declines to accede to the ICCPR and CERD individual complaints procedures,\(^{106}\) despite ample prosperity and resources to meet its obligations. India ratified CERD in 1968 and acceded to ICCPR in 1969,\(^{107}\) but has also failed to adhere to those treaties’ individual complaint procedures.\(^{108}\) Although massive and brutal ethnic and caste discrimination has claimed millions of victims over generations, government action against it has long proved inadequate.\(^{109}\)

Of course, many members of non-U.S. ethnic minority groups would certainly have been sympathetic to the values expressed in CERD article 4. 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).\(^{110}\) Yet many U.S. minorities, too, have long been sympathetic to the values expressed in the U.S. Constitution and Declaration of Independence. Once again, E2 and E3 teach that the task


\(^{104}\) See UNHCRH, supra note 16.


\(^{106}\) See, e.g., Survey of CERD article 14, supra note 63; Survey of ICCPR Optional Protocol, supra note 63.

\(^{107}\) See UNHCRH, supra note 16.

\(^{108}\) See, e.g., Survey of CERD article 14, supra note 63; Survey of ICCPR Optional Protocol, supra note 63.


of critical theory is to look beyond official proclamations, condemning hypocrisies and abuses.

If the international "consensus" against racism really represented "[t]he emerging acceptance of the victim's story," it is hard to understand why less than a dozen states adhered to CERD's individual complaint procedure—which does not even endow the Committee (UN-CERD) with any compulsory enforcement power—during the Cold War, and why less than a quarter of UN member states adhere to it even today.111 Even that increase is due largely to the democratization of former socialist states, pushed by the U.S. in the immediate post-Cold War years.

Matsuda's internationalist myths renounce traditional American ethnocentrism in order to create what I shall call an "anti-ethnocentric ethnocentrism." "Ethnocentrism" has been described as a "view of things in which one's own group is the center of everything, and all others are scaled and rated with reference to it."112 Let's recall a standard type of ethnocentrism before considering Matsuda's variation.

Ordinarily, we would associate American ethnocentrism with a powerful white, Anglo-Protestant elite, viewing the rest of the world through a lens of U.S. superiority. Other cultures might be seen as scaled and rated, as "high" or "low," depending on the degree to which they embrace U.S. values or practices.113 In recent years, high marks might go to Margaret Thatcher's or Tony Blair's Britain; low marks to Mahmoud Ahmadinejad's Iran, or to Kim Jong II's North Korea. Such a view is ethnocentric because those societies are understood entirely in terms of U.S. values, and not with reference to their own histories and cultures. Their identities are constructed wholly with respect to the extent to which they appear to accept or reject the values of U.S.-is-good. Matsuda's internationalism purports to do the opposite, but ends up doing the same. Failing to recognize the grim realities of human rights lurking behind her "international community", her "UN", or her "socialist nations", she constructs their views as essentially correct insofar as they reject U.S. views. She recognizes in them no reality aside from the negatively defined reality of not-being-the-U.S. No other identity, no other brutality, no other victims matter. Her supposed anti-ethnocentrism is wholly ethnocentric.

Critical Race Theorists have, admittedly, branched off in various directions. They cannot always be assumed to be speaking for each other. Nevertheless, Matsuda's contributions, and Words that Wound generally, have counted among the most frequently cited works within the movement. No one has seriously challenged Matsuda's "bipolar" scheme. It would be difficult, for example, to distinguish Matsuda's approach from that of Stefancic & Delgado. Although they do not analyze the genesis of international norms, "A Shifting Balance" and other of their comparative arguments mirror Matsuda's underlying dichotomy. They equate the American

111. See Office of the United Nations High Commissioner, supra note 62.
112. Political Ideologies 142 (Matthew Festenstein & Michael Kenny eds. 2005).
civil liberties position with an oppressive U.S. approach, and international hate speech bans with the plight of the victims.\textsuperscript{114}

As recently as 2000, Hernández-Truyol endorsed a similar approach. She praised the “vision . . . of communist States . . . that the masses could and would be liberated only by the grant of positive social and economic rights.”\textsuperscript{115} Missing from her view is any trace of critical realism, which might have explained exactly what kind of “vision,” what kind of “liberation,” and what kinds of social and economic rights were actually provided for tens of millions of lives killed, ruined or culturally suppressed through mass deportations, farm collectivizations, agro-industrial complexes, political purges, state-generated famines or religious persecution.\textsuperscript{116} Her work provides another example of a critical theorist abandoning the approach taken to the U.S., asking us to look only at the lofty promises of socialist states, and not at their bleak realities.

Matsuda’s strategy is clear. Having seen that a realist jurisprudence reveals much of the evil of U.S. law, she assumes that by broadening her scholarly context to situate U.S. law within international human rights law, U.S. law will look that much more aberrant when measured against international standards. And U.S. law does indeed pale when, precisely at the point of introducing international law, Matsuda’s goalposts suddenly shift from hard-nosed realism to idealized, black-letter formalism. By that point in her analysis, she is forced to take that regressive step: she had failed to anticipate the embarrassment that, by applying the critical-realistic approach to the socialist countries with which she was comparing the U.S. position, the U.S. would start to look better. Had Matsuda taken her movement’s critical, contextual approach to international human rights law, she would have been forced into the rather less dazzling, more humdrum conclusion that the U.S., when compared to countries of generally similar complexity and demographics, has, at worst, delivered a mixed bag of undeniable abuses coupled with important advances. American ideals only emerge as signally dystopian when compared with a wholly utopian “international community.”

The story of a uniquely deviant U.S. has undeniable appeal for those who purport to do progressive politics. In its policies and practices, the United States has defied many black-letter international norms governing, for example, social and economic rights,\textsuperscript{117} environmental protection,\textsuperscript{118} the death penalty,\textsuperscript{119} or international law of armed conflict.\textsuperscript{120} However, that narrative of a distinctly aberrant U.S. often turns out to rely more on formalism than realism.

\textsuperscript{114} Cf., Hernández-Truyol, supra note 51 (noting the essential similarity between Delgado’s positions and those of international human rights law).
\textsuperscript{115} Id. at 127.
\textsuperscript{116} See generally Politics In The USSR, supra note 76; Frank Füredi, The Soviet Union Demystified (1986).
\textsuperscript{117} See infra § III.D.
\textsuperscript{118} See infra text accompanying note 121.
\textsuperscript{120} See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (examining rights of detainees at the Guantanamo Bay detention facility).
Consider an analogy to the problem of climate change. A formalist can readily condemn the United States for its defiant stance in refusing to sign the Kyoto agreement on climate change.\textsuperscript{121} The realist, however, must ask whether those countries that \textit{did} sign it, particularly wealthy and powerful states, have in fact been progressing towards their targets. As of this writing, European Union states, with a combined wealth greater than that of the United States, have largely failed to do so.\textsuperscript{122} The realist picture of adherence and defiance on climate change (what states are actually doing) differs markedly from the formalist one (what they are officially proclaiming). Indeed, American exceptionalism runs both ways. As of this writing, for example, U.S. government condemnation of genocide in Darfur\textsuperscript{123} has gone largely unheeded in Europe, the UN, and much of the world.\textsuperscript{124}

Striking a balance between deontology (an ethics based on the intrinsic value of some act $x$, or on some specific duty to undertake or to refrain from committing $x$) and consequentialism (an ethics based on the value of a specific \textit{outcome} of act $x$, as distinguished from its intrinsic value or its specific intent) within critical theories is no easy task. Noting the various intellectual movements that inform Critical Race Theory, E5 strongly suggests an agnostic or eclectic stance. Wholly fallacious, however, is a methodology that applies a strict consequentialism to condemn U.S. law, while praising an international human rights regime on grounds of an utterly idealized deontology, expressed solely through states’ formal proclamations of their obligations. Matsuda, Stefancic & Delgado, and Hernández-Truyol are not alone in constructing their myths under the guise of progressive politics. When it comes to the United Nations, and the patina of internationalism associated with it, the historian Perry Anderson has noted, generally, the same kinds of “mind-numbing pieties from assorted well-wishers in the universities.”\textsuperscript{125}

Ironically, on hate speech, it is the conventional, black-letter international lawyer, and not the critical realist, who ends up better equipped to depict the U.S. as uniquely deviant, since the black-letter lawyer by definition avoids questions of historical, political or social context. In an article drawing normative conclusions similar to those of Matsuda or Delgado & Stefancic, the black-letter human rights lawyer Kevin Boyle criticizes American exceptionalism, and the U.S. position on hate speech, advocating instead the international “consensus” reflected in CERD article 4.\textsuperscript{126} 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 govern-


\textsuperscript{126} See Boyle, supra note 14, at 496-497, 502.
ments who draft them. It simply does not matter to his analysis 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 norms of human rights instruments at face value, and then proceed to apply them mechanically. For the black-letter lawyer, there would be no inconsistency in claiming that socialist states’ formal proclamations amounted to an “emerging acceptance of the victim’s story.” 127 However, if we care about what those states were actually doing, if we care about “real harm to real people,” 128 then Matsuda’s fantasy of an “international community” that “listens” to the “victims’ story” becomes downright Orwellian.

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.” 129 That is no small claim for someone embracing international human rights law—rarely drafted on the streets—and for which universalist concepts are core components. 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 high authority that Matsuda 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.” 130 We have seen, however, that the UN General Assembly adopted the UDHR and subsequent instruments with the votes of some of history’s most oppressive regimes. If UDHR article 1 is “truly” universalist, on what grounds does Matsuda ignore such contexts? And if it is “falsely” universalist, then why would its black letter, and that of its progeny, carry any greater authority than key provisions of the U.S. Constitution?

Matsuda’s concept of “false universalism” is altogether opaque. It presupposes either of two spurious concepts. Either she means that some universalist claims or assumptions are true and others false, or that all are false. If she means that all are false, then it becomes difficult to understand how international human rights law would provide any authority at all, let alone the peremptory role it plays in her analysis. By contrast, if she means that some universalist claims or assumptions are true and others false, then she would have to explain which belong to which category, and why. In particular, she would have to explain how a realist analysis shows the international human rights norms to be truly universal and the U.S. ones to be falsely universal.

In discussing the three drafts that the U.S., the UK, and USSR-Poland submitted to the UN Sub-Commission, Matsuda writes that “the sub-commission [sic] had the benefit of vastly different ideological views as well as a basic consensus on the necessity of combating discrimination.” 131 Vastly

127. See Matsuda, supra note 5, at 26.
128. Id. at 50.
129. Id. at 19.
131. Matsuda, supra note 5, at 27.
different ideological views? Of all Matusda’s claims, that one is perhaps
the most offensive to any global or historically sensitive notion of legal
outsiders. Predictably, the U.S. advocated a more classical, liberal view of
free speech, while Western European social democracies advocated greater
restrictions. As to the socialist states, it remains unclear what “ideology”
Matsuda thinks they represented, in good faith or otherwise. To place Mat-
suda’s argument in the best light, however, let’s assume that they repre-
sented something good. Matsuda’s strategy then becomes obvious enough:
the more the ‘international consensus’ can be shown to unify “vastly differ-
ent” ideologies, the more deviant the dissenting U.S. position will appear.

We might have expected to read the view that the three drafts repre-
sented “vastly different ideological views” in conventional textbooks on in-
ternational human rights law, which generally discuss the views advanced
by various states during the Cold War without any deep inquiry into their
political or historical origins, or indeed into the sincerity with which they
are made. But we should hardly expect to read it from someone who
insists on placing official proclamations in their historical context.

So let’s take a longer view of history. If those were indeed the three
“ideological views” that happened to be presented to the UN Sub-Commis-
sion, it is not so much because they were “vastly different,” but because
they represented the official statements of power blocks that had come to
dominate the world after centuries of imperial extinction or subjugation
of countless peoples who genuinely had represented “vastly different” world
views—views so different from those familiar to Western legal scholars,
different at the most fundamental linguistic and cognitive levels, that our

132. See Heinze, Viewpoint Absolutism, supra note 73, at section II.C.
133. See, e.g., Robertson & Merrill, supra note 54, 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 Rhona K.M. Smith, Textbook on International Hum. Rts. 45–51 (2d ed.,
2005).
134. A striking example of that kind of ongoing historical amnesia appears in a 2007 Latin
American address of Pope Benedict XVI. In a key passage, the Pontiff asks, “[W]hat did the
acceptance of the Christian faith mean for the nations of Latin America and the Caribbean? For
them, it meant knowing and welcoming . . . the unknown God whom their ancestors were seek-
ing, without realizing it . . . . [T]hey received the Holy Spirit who came to make their cultures
fruitful, purifying them . . . .” Omitting any reference to violence, coercion or cultural destruction
on the part of Europeans, the Pontiff continues, “In effect, the proclamation of Jesus and of his
Gospel did not at any point involve an alienation of the pre-Columbian cultures, nor was it the
imposition of a foreign culture.” (emphasis added) See Benedict XVI, Inaugural Session of the
Fifth General Conference of the Bishops of Latin America and the Caribbean: Address of His
course, Benedict’s remarks can be construed in strictly theological terms, as having merely re-
\ stated age-old universalist Church teaching. Cf., e.g., St. Augustine, I.2 City of God 6 – 7 (arguing
that ‘God’s providence constantly uses war to correct and chasten the corrupt morals of man-
kind’, Christian and pagan alike). Moreover, in response to widespread outrage, the Pontiff did
subsequently acknowledge “[t]he suffering [and] injustices inflicted by the colonisers on the indig-
enous population”. See John Hooper & Rory Carroll, Pope faces German revolt as anger grows
2007/may/25/catholicism.religion. Nevertheless, that limited concession in no way diminishes the
fundamental negation, however ‘theological’ it may be, of pre-Columbian cultural, intellectual or
spiritual life and values.
minds would require years to begin to understand just one of them, let alone to generalize so glibly about all of them.\textsuperscript{135}

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 ("ideologically") impoverished periods in human history. An internationalist fairyland may indeed tell us that the UN emerged out of "vastly different ideological views." But history recites a rather bleaker tale. The idea of an overarching system of international law replete with a "United Nations," and a sufficiently shared set of norms and concepts, surfaces only at that moment in world history when sufficient human diversity has been either exterminated or subordinated by big powers. The less than 200 seats representing the member states of the United Nations pay tribute not to the countless distinct peoples that have populated the earth, but to their systematic elimination and subordination over centuries of big-power politics.\textsuperscript{136} The three draft proposals for CERD article 4, far from representing "vastly different ideological views," reflected entirely run-of-the-mill debates about the extent and limits of individual rights. They assume post-Westphalian, post-Enlightenment, Euro-centric approaches to law, largely overlooking any number of fundamentally distinct ethical, political or legal "ideologies."

Matsuda's uncritical acceptance of the power politics of the Cold War, whereby an international "consensus" is praised while not a single ethnic group outside the U.S. is even named, along with the hackneyed internationalist myth of the Cold War's "vast" ideological diversity, wholly betrays history's extinguished and marginalized outsiders. E3 turns out to apply only to U.S. outsiders, not to others. Historical memory becomes historical manipulation. Matsuda does not lead us out of U.S.-ethnocentrism. She crudely recapitulates it. The fact that someone, somewhere, safely ensconced within the sterile chambers of the UN, said "No" to the U.S., meant that the world contained "vastly different ideological views."

That point also responds, if not to an affirmative defense of Matsuda's position, then to an objection that could be brought against mine. Major powers did 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 big-power 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. The important point, however, is that such participation took place within the confines of political and legal discourses and ideas already strongly defined, throughout decades, even centuries, by dominant powers.

B. Objections and Replies to My Analysis of Matsuda

A difficulty in assessing Matsuda's contribution to Words that Wound is that she shows little critical awareness of the historical and geopolitical


\textsuperscript{136} See, e.g., Heinze, Review, supra, note 57.
assumptions that she is making, or expects the reader to supply. Does she neglect the abuses of the USSR, and of other oppressive states that supported CERD article 4, because she thinks the readers will have already understood the shortcomings of the UN and its member states? If so, why wouldn’t they also have already understood the shortcomings of the U.S., particularly in view of the book’s wholly American focus? As no close reading of her views is possible without some attention to those issues, some discussion of them is appropriate before we turn to other writers.

**Instrumentalist approaches to rights.** In praising international human rights, perhaps Matsuda was merely assuming an instrumentalist conception, whereby only certain ends of social justice are important, regardless of the conceptual means employed to achieve them. That approach might well comport with the intellectual eclecticism of E5, which can be read to suggest the importance of achieving certain concrete ends, regardless of the vocabulary or concepts (“rights,” “fairness,” “utility,” etc.) used to achieve them. That instrumentalist interpretation, however, would scarcely fit Matsuda’s “bipolar” scheme, which she conspicuously embraces as a matter of fundamental normative principle. More importantly, that approach would only beg the question: an instrument of which substantive political or legal values—i.e., which values pursued not for other ends but as ends in themselves—and how does Matsuda think the “international community” was promoting those values? In sum, it is unlikely that an instrumentalist reading of Matsuda would yield very different results.

**The overall role of international law in Matsuda’s analysis.** In Matsuda’s defense, it might be suggested that she never intends her discussion of international human rights to occupy center stage. Instead she remains focused on specific problems within American society, making no claim to solve problems beyond U.S. borders. She might be said to cite international law as only one ingredient in a complex blend.

**But** that defense, too, would be unpersuasive. Recall that Matsuda equates the dichotomy between regressive U.S. practice and a progressive international consensus with her “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.”[^137] Accordingly, she equates the “international law of human rights” with “the emerging acceptance of the victim’s story.”[^138] Any attempt to diminish that recourse to international law would contradict E2 in suggesting that international human rights can be thrown into the overall argument as an essentially neutral, background element of analysis.

Alternatively, it might be argued that Matsuda keeps her discussion of international law brief 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 unpersuasive. Neither the book nor Matsuda’s chapter are long. Even a few sentences acknowledging the historical price paid by ethnic minorities

[^137]: Matsuda, *supra* note 5, at 17.
[^138]: *Id.* at 26.
in those states whose positions Matsuda praises, would have differed from her stone silence.

*The history of Cold War rhetoric.* It might be argued that, by the time *Words that Wound* appeared, the Soviet Union and its satellites had already collapsed. There was no longer any point to fighting old cold war battles. But that view would contradict Critical Race Theorists’ insistence on the role of long histories of oppression, and their view that oppression does not suddenly end simply through a handful of constitutional or legal changes. Under the historical readings required by E3, Critical Race Theorists forbid us from looking at U.S. law only from the time of *Brown v. Board of Education*,\(^{139}\) when the U.S. began moving more decisively against discrimination. The memories of slavery, *Dred Scott, Plessy*, Jim Crow, segregation, and indeed the entire colonial enterprise since the early modern period, are kept alive, on the view that those strands of history continue in the form of ongoing injustices. That is why “[c]urrent inequalities and social/institutional practices are linked to earlier periods in which the intent and cultural meaning of such practices were clear.”\(^{140}\)

Matsuda, however, looks only at the Soviet-Polish proposal, and at international law and institutions, from the time of CERD’s drafting in the post-Stalinist 1960s. She ignores the histories of the USSR and other socialist states. She also ignores the entire positivist heritage of earlier international law, whereby states’ treatment of their own nationals (up to and including genocide) was deemed a purely internal affair\(^{141}\)—a position maintained by totalitarian regimes through the Cold War to the present day, and which has hardly been overcome, in view of the ongoing human rights records of states like China,\(^{142}\) Russia,\(^{143}\) Iran,\(^{144}\) Saudi Arabia,\(^{145}\) and many others.\(^{146}\)

Some LatCrits do gingerly mention the flawed history of international law.\(^{147}\) It cannot seriously be suggested, however, that they apply to it the unrelenting rigour that they direct at U.S. law.\(^{148}\) Many international lawyers, acknowledging the pernicious and ongoing legacy of classical positivism, might argue that international law can be no more humane, and no more effective, than states allow it to be. That explanation is plausible, but can hardly satisfy a critical realist: it only reinforces the suggestion that many of the realities behind international human rights norms must be ex-

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140. Cf. Lawrence *supra* text accompanying note 23.

141. See, e.g., MALCOM SHAW, INTERNATIONAL LAW 200 (4th ed. 1997). Cf. id. at 201–02 (discussing special regimes including humanitarian law and protection of minorities and workers).


148. Cf., e.g., infra text accompanying notes 302-303.
amined with reference to the actual practices of states, and not in an ideal-
izing vacuum. The fundamental international human rights framework is a
product of a long positivist heritage and of the Cold War, which are no
more redundant than are slavery and Jim Crow. Critical theorists must
decide: either both histories are dead and are superceded by current im-
provements, or both histories are living and are germane to current forms
of injustice. We cannot claim that Stalin and Mao are dead, while insisting
that *Dred Scott* lives on.

It might be argued that the atrocities of socialist states have been so
well publicized in the West, and were such staples of Cold War rhetoric,
that they could be taken as read in Matsuda's analysis, requiring no special
attention. But that suggestion would be equally unconvincing. If the atten-
tion due to a problem is inversely proportional to the publicity it has al-
ready received, then one might wonder why critical scholars would be
concerned with the United States at all. Surely, the volume of ink spilled,
celluloid shot, broadcasts transmitted, cases litigated and courses taught on
American racism far exceeds that spent on all ethnic minorities of all for-
mer and current socialist states combined. Have the major Russian or Chi-
nese media outlets produced anything like, say, Tibetan, Chechen or Baltic
counterparts to *Roots*, *The Colour Purple*, *In the Heat of the Night*, *Missi-
sippi Burning* or even *Uncle Tom's Cabin*, which captured both national
and international audiences from the moment they were released? If we
are to set up an international pecking order based on publicity already re-
ceived (precisely the kind of "more victim than thou" trap that I have re-
jected as a danger inherent in the analyses of some critical theorists),149
then minorities of former and current socialist states would have to take
clear precedence.

A variation on that theme would be the view that anti-communism
was a well-worn tool of U.S. conservatives and of U.S. governments
throughout the Cold War. The task of Critical Race Theorists and Lat-
Crits, one might argue, is not to echo but to challenge dominant and estab-
lishment attitudes from the perspective of the outsider. But that argument
also fails. Critical theory is hardly served when, in order to challenge one
800 pound gorilla, it uncritically endorses the stance of another. Perhaps
we should condemn Pericles for warfare, slavery or misogyny; but we
should think twice before heralding Xerxes as the voice of the voiceless.
If Matsuda needed a bipolar structure (though we might question whether
she did), she should have placed *all* states and state-directed bodies on one
side, and the real outsiders, including non-U.S. as well as U.S. minorities,
on the other. If institutional allies were required, they should have been
sought among such non-governmental organizations as Minority Rights
Group International150 or SOS-Racisme,151 who co-operate with intergov-
ernmental organizations when it is productive to do so, while maintaining a
critical distance from them.

149. Heinze, *Viewpoint Absolutism*, supra note 15, at section II.B.
26, 2008).
The specific claims of American democracy. The Cold War was derived largely from U.S. claims to promote democracy, and to oppose those who repressed it. In Matsuda’s defense, one might argue that it was legitimate to hold the U.S. to a higher standard. In other words, we would expect the Soviet Union to oppress its people; yet we would be legitimately outraged by a U.S. government, the so-called leader of the free world, that promises rights while practicing discrimination. That double standard, however, contradicts core tenets of that same human rights law that Matsuda invokes. It would be sordid indeed to suggest that the most brutal, even genocidal, regimes should be held to a lower standard simply because they make no pretense of being democracies. Human rights law requires that all governments be held accountable for human rights, in proportion to the abuses for which they are responsible. No doctrine of human rights law suggests that democracies carry an additional burden. Quite the contrary. Lack of democracy is ordinarily seen as an aggravating, not an ameliorating, factor in assessing a states’ human rights record, not only because it denies fundamental human rights of political participation, but also because non-democracies tend to curtail the media in ways that makes their overall human rights situations more difficult to monitor.

Moreover, that double standard overlooks the fact that all governments justify their hold on power in the name of purportedly beneficial ideals. That strategy has never been the particular preserve of democracies. The USSR had “promised” to be “a socialist state of the whole people, expressing the will and interests of the workers, peasants, and intelligentsia, the working people of all the nations and nationalities of the country.” Similarly, China “promises” to be a “People’s Republic”. North Korea “promises” to be a “Democratic People’s Republic.” Iran promises to be an “Islamic Republic.” The United Nations, despite having constantly shielded the world’s most brutal regimes “promises” to “promote social progress and better standards of life in larger freedom.” Like any number of Western constitutions, the constitutions of the USSR and its allies had promised regimes of rights, liberties and equalities. Why would we hold only the U.S., and no other power, to its proclaimed ideals? Miss Russia’s plea to stop world hunger scarcely shows up Miss America’s call for world peace. Nor can the United States be accused of dominance over UN human rights policy in the present case, and many like it, as Matsuda’s whole point is to condemn U.S. deviance from the domi-

152. U.N. Charter, art. 1, ¶ 3, art. 55-56.
153. See Heinze, Even-handedness, supra note 101.
155. KONSTITUTSIIA SSSR, chs. 6-7 [Constitution](USSR)(1977).
156. XIAN FA [Constitution](P.R.C.) (1982).
159. See supra text accompanying notes 100-101.
161. KONSTITUTSIIA SSSR, chs. 6-7 [Constitution](USSR)(1977).
nant norms and policies, i.e., from norms and policies that have been adopted despite rigorous U.S. opposition.

In the same year that Matsuda published her account of the specifically deviant U.S. approach, the human rights scholar Scott Davidson embraced a diametrically opposed thesis: "[T]he denial of human rights stands in direct proportion to the denial of democratic participation in a government." 162 Davidson’s proportionality test in no way denies human rights abuses or institutional lapses, even grave and systemic ones, in a democratic nation such as the U.S. It does, however, suggest an assessment of human rights contrary to Matsuda’s suggestion of a distinctly aberrant U.S. deviating from an essentially benign international community.

Perhaps the best demonstration of Davidson’s proportionality test can be found in the actual work of the better non-governmental organisations (NGOs). For example, in Amnesty International’s 2006 Annual Report, even well-performing states like Finland 163 or Sweden 164 let alone the United States, 165 face sharp criticism, and earlier reports have done the same. No state or government anywhere is a priori immune from suspicion of human rights abuses. Potential to commit abuse inheres in the very fact of political power and is therefore common to all regimes. 166 At the same time, reports on states such as China 167 or Saudi Arabia, 168 suggest scales of abuse altogether surpassing Finland, Sweden or even the United States. No state is to be presumed free from suspicion. Every state should be condemned, as nearly as possible, in proportion to its overall levels of abuse.

Some have claimed that organizations like Amnesty or Human Rights Watch place too much focus on the U.S. and other Western states, making them appear to be on par with far more abusive, non-Western states or entities. 169 Having examined the problem of even-handedness elsewhere, 170 I shall not consider it here. Even if that claim has merit, the principle evident in their work overall, as illustrated particularly in Amnesty’s annual reports, is a principle of even-handedness, that is, of condemnation generally proportionate to abuse. It is contrary to the aims of human rights law and to the interests of outsiders for critical theorists to overlook the abuses of dictatorial states, simply because they posture as an “ideological” counter-weight to the United States.

162. **Scott Davidson, Human Rights** 165 (1993).
166. See generally, e.g., Ludger Kühnhardt, **Die Universalität Der Menschenrechte** (1988) (critical of claims about the universality of human rights, but recognizing attempts to curb abusive government power as a foundation for such claims).
International law and critical realism. Even as a prima facie matter, Matsuda's praise for the "emerging acceptance of the victim's story" within the UN is puzzling. Despite much of the excellent work of human rights experts, particularly those appointed in their independent capacities, the promulgation of norms, positions and procedures on human rights at the UN have always remained subject to individual states' self-interest. No one, for example, seriously claims that appointees from states such as Burma, China, Cuba, Iran, Libya, North Korea, Saudi Arabia, Russia, Sudan, Syria, Tunisia or Zimbabwe have generally spoken out against their governments' dictates. Even on face value, it is bizarre for Matsuda to equate official government positions proclaimed within the UN with any "emerging acceptance of the victim's story."

The word "emerging" might be taken to mean that Matsuda seeks to describe only an encouraging trend rather than a fait accompli. But that interpretation is implausible. If she intends the word in a strong sense, to mean "already substantially emerged," then we are still left with a gaping divide between proclaimed norms and actual practice. Yet she cannot mean it in a weak sense, as merely an "embryonic leaning" towards emergence, as that would suggest that she thinks the dominant international reality to be something very different, which she never suggests, and which would defeat her belief in a distinct "bipolarity" between U.S. and international approaches.

C. Critical Theories and "Ideology"

A commonly recited (and, again, for socialist states, expedient) ground for prohibiting hate speech is that it can lead to instability or violence. In Dennis v. United States, upon the threshold of the McCarthy era, a question arose as to whether government could ban the expression of Marxist views in light of their advocacy of violent overthrow of liberal-democratic government and institutions. That question re-emerges today in view of many critical theorists' advocacy of hate speech bans. If racist speech should be banned because it is either a form or a cause of violence—even racist speech that does not expressly advocate any specifically violent acts—then surely it is all the more justifiable to ban the dissemination of ideas, like orthodox Marxism, that do expressly advocate violence.

Matsuda argues the opposite: governments should ban racist speech but not Marxist speech, once again relying upon a supposed international consensus. She cites the 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

171. Both CERD art. 8(1) and ICCPR art. 28(3) provide that members of their respective supervisory committees shall serve not as official representatives of their governments, but "in their personal capacity."
173. See supra text accompanying notes 11 - 12.
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.174

A contextual analysis, as required by critical theory, suggests why such a position is wrong. First, I have already challenged the dubious international “consensus” that Matsuda sees behind such condemnation, insofar as she, contrary to her approach to the U.S., recognizes no distinction between governments’ officially stated policies and their actual practices.

Second, the suggestion that speech may be prohibited in proportion to the degree to which it is “condemned” is surprising from someone who claims to speak for historically condemned outsiders. We need not travel far back in time to find blasphemy, contraception, abortion, homosexuality, miscegenation, or erotic art “condemned” throughout the Western world. Third, racism most certainly can present “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.” Nazism provided a notorious example. Neither Nazis nor other white supremacists are consciously seeking to make their lives worse. As stated in E2, Critical Race Theorists frequently argue that American slavery and segregation were anything but a mere sequence of “randomly occurring,”175 philosophically indifferent arrangements. Jim Crow was utterly “a philosophy for political organization, distribution of wealth and power, ordering of values, and promotion of social change [and] part of the ongoing efforts of human beings to understand their world and improve life in it.” Leading cases in U.S. 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) U.S. states.176 The very idea of hegemony as characteristic of U.S. 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”177 and has come to be “normal, not aberrant, in American society.”178

Fourth, without greater clarity about what is meant by a “world consensus,” it is questionable whether a consensus against Marxism—at least, one comparable to the consensus Matsuda sees against racism—is “impossible.” Countless Eastern Europeans, along with a radically changing Chinese population, were rejecting Marxism precisely at the time Matsuda wrote those words, including many who otherwise favored some type of social-welfare state, albeit financed through the revenues of relatively liber-

175. See *supra* text accompanying note 23.
alized markets. Notwithstanding age-old controversies about which, if any, regimes ‘really’ counted as Marxist, it is odd that Matsuda, writing in 1993, should have expressed such strong faith in the overall global respectability of Marxism [i.e., 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].179 Indeed, anti-globalization movements both at the time Matsuda was writing and today, even if echoing a Marxist ancestry, omit rigorously Marxist analyses.180 They do so, arguably, because of widespread understandings of the inadequacies of, and of the horrors wrought through political applications of Marxist doctrine.

Fifth—and here we see the link to Matsuda’s broader analysis—Matusda’s view once again illustrates the discrepancy between some 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 it is difficult to understand why advocacy of violent overthrow of existing institutions, invoked to justify the slaughter and abuse of tens of millions, cannot be banned, indeed not merely as abuses of orthodox Marxism, but as officially sanctioned interpretations of it. One 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 grimly comical. The necessity of violence to the property-owning class is no flight of fancy in Marxism. It lies at the core of Marx’s analysis of the history and dynamics of social conflict. On Matsuda’s view, racist speech is illegitimate, since a contextual analysis shows it to be a form of violence. Marxist speech, however, becomes legitimate, insofar as an uncontextual analysis, conveniently abstracted from the millions brutalised in its name, shows it to be a “philosophy” and an “ordering of values.”

Finally, it is difficult to understand why the supposed intellectual respectability of Marxism (“Marxists teach in universities”) would diminish its violent message. One would expect the opposite. The supposed respectability of Marxism in comparison to racism renders it that much more influential. Certainly, from an historical perspective, it cannot be argued that applications of Marxist ideas have had a significantly less brutal effect on humanity than applications of racist ideas have had. As late as 1993, Matsuda, despite decades of hindsight and tens of millions of lives wasted in the name of Marxist “philosophy,” still missed what even Lenin had so clearly seen: just how despotick a supposed Marxist could be.181

179. On the “politics of denial,” see infra Part III.D.
181. See supra text accompanying note 79.
D. Social and Economic Rights: A LatCrit Perspective

In an article entitled "Claiming a Global Identity," Celina Romany continues the campaign against the American civil liberties tradition. Where Matsuda rejects that tradition by favoring hate speech bans, Romany rejects it by advocating altogether an alternative human rights regime. Romany calls for a wholesale "dismantling" of the U.S. "civil rights agenda," advocating the full incorporation of social and economic rights recognized under international law, e.g., under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Romany claims that "the need to pass from a civil rights agenda to its human rights counterpart has reached emergency proportions." With little elaboration, she calls social and economic rights "particularly important in our efforts to redefine political citizenship along the lines of identity politics and revised social contracts which incorporate the connections between cultural disrespect and social/political marginality." For present purposes, I shall leave to one side Romany's rather dense concepts of "identity politics" and "social contracts, since she does not explain how she is using them. More immediately relevant, for present purposes, is her sheer recapitulation of the formal proclamations of economic, social and cultural rights as they appear in the standard international instruments. Once again, a dominant position within international human rights law is accepted entirely at face value. At the outset, Romany does claim to advocate a "critique of an international human rights framework that fails short in delivering the promised goods to subordinated groups," and then later favors "critiques of exclusionary constructions and practices in international human rights law." At no point, however, does she develop any genuinely critical analysis along those lines.

There are ample grounds for arguing that the U.S. government could embrace more effective measures for lifting millions of Americans out of poverty. Most Western European states have introduced minimum levels of benefits to reduce mass homelessness, malnutrition, unemployment, and the like. However, particularly from a LatCrit perspective, there is an important difference between the U.S. and Western Europe. Western

182. Romany, supra note 19.
184. Romany, supra note 19, at 215.
185. Id. at 217.
187. For standard criticisms of recent or revised contractual models, see Sandel, supra note 35; See also, e.g., ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1985).
188. Romany, supra note 19, at 217.
189. Id. at 219. See, e.g., Hernández-Truyol, supra note 19, at 224 – 25 for other strong endorsements of the overall international programme of social and economic rights; see also, e.g., Elizabeth M. Iglesias, International Law, Human Rights, and LatCrit Theory, 28 U. Miami Inter-Am. L. Rev. 177, 185 – 86 (1996-1997).
European states, despite having admitted considerable numbers of immigrants since the economic revivals of the 1960's, have not generally been, nor identified themselves as, nations of immigrants.

LatCrits have often demanded flexible immigration policies that would maintain fluid inter-American borders. By contrast, Western European states have shown little willingness to liberalise immigration to that degree. Their attitudes to immigration have, in general, remained pragmatic and discretionary. They open their borders in times of economic expansion and low unemployment, but just as surely close them in tougher times. In racial terms, preference for EU nationals simply means that easier access for majority-white Europeans—like the mobility of majority-white Americans moving across state lines—inevitably limits access for non-white, non-Europeans.

Wealthier states such as Germany and France have limited immigration flows even from some of the newer EU accession states, in view of their own unemployment rates. The model of “Fortress Europe” does preserve socio-economic entitlements within the borders of the European Union. It does so, however, at the price of restrictions on the movement of goods, services and immigration from developing states, contrary to the policies that LatCrits advocate for the U.S. Indifference to that more restrictive side of Fortress Europe again risks creating simplistic, myths of a ‘bipolarity’ between liberal European immigration and harsh U.S. controls, when, in fact, both Europe and the U.S. have remained vigilant about immigration in recent decades, reacting sometimes in purely pragmatic ways, other times in seemingly arbitrary ways.

In his Rodrigo Chronicles, Delgado portrays the alienation of a character of both African-American and Latino origin. At the outset, a series of events leading to the prospect of Rodrigo’s loss of U.S. citizenship provides a metaphor for the unstable or alienated sense of belonging of ethnic minorities in the U.S. These events are related through dialogues between the book’s two main protagonists: an ethnic minority American law professor and his protégé Rodrigo.

Rodrigo’s Italian citizenship brings him through EU channels to Ireland, from where Irish-U.S. contacts then facilitate his U.S. repatriation. Hernández-Truyol praises two elements of that odyssey. First, she writes, “This manoeuvre is made possible by European Union provisions that per-

192. Cf. supra text accompanying note 18.
195. And, even then, under regimes of increasing government cutbacks. See, e.g., Concluding Observations, supra note 191 (showing reports on Germany, the Netherlands or Switzerland).
199. DELGAIDO, supra note 197, at 17–21.
mit free travel between member States.” Second, it symbolizes the “typically creative” ways in which ethnic minorities negotiate their predicaments in American life and law.

The Chronicles merit attention before we return to Romany, as attacks on the American civil liberties tradition inevitably invite broader comparisons between the U.S. and European social welfare states. The book shifts among geographical registers. Sometimes it directs a critique at Western culture as a whole. At other times, it narrows its focus either to Europe or the U.S., with some comparisons drawn between them. However, while discussions of the whole of Western history, culture, economics, or politics are constant themes, the book directs the only rigorous critique at the U.S. European misdeeds remain safely consigned to the past. The only serious discussion of them comes in the form of well-worn assaults on European Christianity and the Enlightenment. Even those remarks are used more to pursue the analysis of the U.S. than to return to any deeply reflective view of current, post-colonial European events or attitudes.

Delgado, followed by Hernández-Truyol, constructs the United States as unjust, alienating, marginalising and opaque, in bipolar opposition to a modern Europe constructed in terms of justice, freedom, nurturing, and flexible movement. Europe may have done wrong, but, unlike the U.S., has learned its lessons. Mussolini and Franco are dead; Plessy lives on. For example, in Delgado’s own Orwellian move, we find a comparison between European and U.S. immigration policies. Rodrigo has just mentioned the free movement of persons within the European Union. The professor responds.

“Sounds sensible to me,” I said. “Although I can’t help contrasting it to the situation here [in the U.S.]. If anything, we’ve been tightening up our own immigration policies in response to growing xenophobia aimed at limiting the influx of outsiders—particularly ones with coloration like yours and mine. It reminds me of those waves of ‘nativism’ that seem to rise up when our culture is under threat.”

It is astonishing that, in order to deride a presumed preference for white immigration to the U.S., Delgado and Hernández-Truyol would compare it to EU open borders, which, again, being purely internal, serve the convenience and prosperity of an overwhelmingly majority-white, Christian European population. Neither author asks about immigration, say, for nationals of former colonial states, such as North Africans in France.

200. Hernández-Truyol, supra note 17, at 117.
201. Id.
202. Cf., e.g., Eric Heinze, Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Extreme Speech, in Extreme Speech and Democracy (James Weinstein & Ivan Hare, eds., forthcoming 2009) (challenging misleading assumptions that may underlie comparisons of U.S. and European approaches to hate speech) [hereinafter Heinze, Wild-West Cowboys].
203. DELGADO, supra note 197, passim.
204. See, e.g., id. ch. 7.
205. See infra text accompanying note 274.
206. DELGADO, supra note 197, at 20.
207. “Christian” being understood here as a common heritage and tradition, and not as a description of strict or routine adherence to any specific church, faith or doctrine.
or African and sub-continental Asians in Britain, although one might argue that France owes a larger debt to Algeria, that Italy owes a larger debt to Libya or Ethiopia, than either owes to lily-white Belgium or Denmark.

If we compare the U.S. and the EU as composite social and cultural entities, internal EU movement is, in terms of race or ethnicity, more like that between Kansas and Nebraska than between Arizona and Mexico. The U.S. is no more closed to Mexico or El Salvador than is the EU towards Morocco or Tunisia. Prospects of Turkish membership have, for years, provoked outrage within the EU, not only on narrowly economic grounds, but on expressly cultural grounds.

It is baffling that Delgado and Hernández-Truyol should find preference for white immigration so appalling in the U.S., yet so praiseworthy in Europe. It is only U.S. immigration that Delgado discusses in racial terms. On the readings of Delgado and Hernández-Truyol, it is only U.S. immigration policy, and not European, that creates outsiders along racial and ethnic lines. (Nor, as I shall explain below, is Delgado’s bizarre suggestion that Southern Europeans somehow count as non-white, insofar as they are “non-Saxon,” anything more than his ethnocentric projection of wholly American demographics onto Europe, utterly absent from any serious European discourse on race, ethnicity or multiculturalism.)

Before even having attended any U.S. universities, Rodrigo offers endless insights into their searing injustices, and indeed into the entire calamity of U.S. civilization. Since he has spent his early adult life and entire undergraduate career not in the U.S., but in Italy, one could only assume that he should have far more, and far more incisive, insights into post-colonialism, race relations, gender relations, and sexual orientation in Italian and European societies and institutions. Yet he offers nothing of the kind—a suspicious coyness from an otherwise loquacious student who, we are asked to believe, has already published a scholarly article providing nothing less than an “analysis of Western culture.”

If we care not so much about an idealized modern Europe, but about the real one, we might wonder why Rodrigo utters not a word, for example, about the countless North and Sub-Saharan Africans who risk their lives or savings on Europe-bound boats, only to be turned back (or drowned), such that no amount of “typical creativity” can help them, and who would envy the kinds of opportunities represented even by Rodrigo’s encumbered

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209. See generally Special Report, supra note 193.
210. See Reynolds, supra note 196 (commenting on restrictive European immigration policies).
211. See, e.g., Mark Mardell, Turkey’s EU membership bid stalls, BBC NEWS, Dec. 11, 2006, at http://news.bbc.co.uk/2/hi/europe/6170749.stm. (Noting a “background of prominent politicians in many EU countries questioning whether the predominantly Muslim country should ever be a member because of its different culture - which in their view is not European”).
212. See infra text accompanying notes 237-250.
213. Delgado, supra note 197, at 69.
U.S. ties. Rodrigo might have done well for himself in Italy, along with any number of Italian nationals who have benefited from open internal EU borders. But genuine EU-outsiders have had no such luck. As observers have long reported, "fears that many of the thousands of migrants and asylum-seekers arriving in Italy by boat, mainly from Libya, were forcibly returned to countries where they were at risk of human right violations" have remained perennial in Italy well into the 21st century.\textsuperscript{215} Nor in Ireland, Rodrigo’s next port of call where he notices little more than "a great literary and intellectual life,"\textsuperscript{216} are outsiders always so lucky. UN-CERD has found ongoing “racist and xenophobic incidents and discriminatory attitudes towards ethnic minorities.”\textsuperscript{217}

When warned against expressing sympathy for movements of violent resistance while inside the U.S., Rodrigo's sententious reply descends into farce: “I had no idea those were the rules of [U.S.] discourse. On the Continent we discuss these things openly.” Of course, Delgado cannot have legal rules in mind, as he has counted among the most virulent critics of First Amendment freedoms,\textsuperscript{218} which, as he knows, are more protective of speech than legal rules elsewhere.\textsuperscript{219} Obviously, then, he is referring to informal, social taboos.

For all the profuse insights into the U.S, is it possible that Delgado’s “Italian” knows not the first thing about Europe? If he does, then perhaps he will explain someday why, on a continent basking in such open discussion, it was not until the presidency of Jacques Chirac that France officially acknowledged its complicity in the Holocaust (which the Socialist Mitterand as well as his predecessors had refused to do).\textsuperscript{220} Perhaps Rodrigo will explain why Belgium retains publicly displayed statues of Leopold II, who oversaw the systematic murders of at least ten million Congolese (no U.S. slavery practices ever approached that number of Africans summarily murdered), and the enslavement of virtually that entire population in the space of just 40 years, from 1880–1920.\textsuperscript{221} That history is taught and discussed only minimally, if at all, in a Europe which, disturbingly, like Rodrigo, has often taken a far keener interest in “rules of discourse” in the U.S.\textsuperscript{222} The

\begin{itemize}
  \item \textsuperscript{215} \textit{Id.}
  \item \textsuperscript{216} Delgado, supra note 197, at 20.
  \item \textsuperscript{218} See generally, e.g., Delgado & Stefancic, supra note 11; Delgado, supra note 13; Richard Delgado & Jean Stefancic, \textit{Understanding Words that Wound} (2004).
  \item \textsuperscript{219} Cf. Heinze, \textit{Wild-West Cowboys}, supra note 202.
  \item \textsuperscript{220} See Jacques Chirac, French President, \textit{Commémoration de la grande rafle des 16 et 17 juillet 1942} [public address commemorating deportation of French Jews of July 16-17, 1942] (Jul. 16, 1995), \textit{in Les discours de Jacques Chirac, in LE MONDE, available at} http://www.lemonde.fr/web/articleinteractif/0,41-06-2-823448,49-910136@45-3641.0.html.
  \item \textsuperscript{222} See, e.g., Jean-Paul Sartre, \textit{La Putain respectueuse} (1946) (landmark play portraying racial injustice in the United States).
\end{itemize}
murderous consequences for central Africa, recently tolling over three million dead, continue to this day.\textsuperscript{223}

Perhaps Rodrigo will tell us precisely how many "sit-ins" and "teach-ins"—a practice long familiar in U.S. universities—demanding greater hiring of, say, ethnic minority or gay and lesbian faculty (perhaps drawn in part from Italy's former colonials, to whom Italian borders have remained largely impermeable)\textsuperscript{224}—he attended at his "sophisticated and highly political"\textsuperscript{225} Italian university, or at other such institutions in Southern Europe from the 1980s through the early 1990s when, presumably, he would have lived there. Until Rodrigo can explain the "rules of discourse" in those instances, I fear I cannot draw Delgado's lofty comparisons between the U.S. and Europe. My own conclusions will have to remain more humdrum: whilst local preferences and taboos arise everywhere, the overall openness of "discourse" does not look very different in Europe and the U.S.\textsuperscript{226}

Given the colonization of large portions of the globe by European powers, it is remarkable that the Rodrigo Chronicles criticise insidious "white domination" only in American universities,\textsuperscript{227} while European universities are praised for their cultural and intellectual "ferment."\textsuperscript{228} Does Delgado seriously believe that, in their staff or student composition, European universities have been more, or even equally concerned with progressive hiring and enrolment on grounds of race, colonialism, gender, or sexual orientation? He certainly provides no evidence to that effect, despite his compulsive recourse to footnotes when he feels he can substantiate anecdotal assertions elsewhere in the book.\textsuperscript{229}

Maybe Rodrigo will tell us someday to what extent he would say that teaching staff throughout Italian or other European Universities have, in the post-WWII period, represented a cornucopia of multi-ethnicity and multi-culturalism (from my own time as a student in France, Germany and the Netherlands, which would roughly coincide with the years Rodrigo would have been there, I generally recall white, European, mostly male faces among my course instructors, and certainly never a "sit-in" demanding greater minority hiring); or how many of Europe's academics—in Italy, of all places—got their jobs by noting their sexual orientations on their CVs, or indeed even publicized their sexual orientation once they were on permanent contracts ("academic tenure," in U.S. terms), as impressive numbers of U.S. academics have done for some years, on the view that the personal is political.


\textsuperscript{224} See Amnesty International, supra note 214.

\textsuperscript{225} DELGADO, supra note 197, at 149.

\textsuperscript{226} See generally, e.g., Heinze, supra note 219.

\textsuperscript{227} See, e.g., id. at 3.

\textsuperscript{228} Id. at 136.

\textsuperscript{229} See id. at 213–75 (providing 62 pages of references to support arguments presented in the narrative portion of the text).
Perhaps someday Rodrigo will tell us why France, with one of the world’s oldest and most vigorous traditions of journalism and media, and despite its longstanding presence of North and Sub-Saharan African intellectuals, did not see its first non-white presenter of a major television news show until 2006—and then only under political pressure after nationwide race riots.\textsuperscript{230} Perhaps he will explain why it is that, for example, Henri Pena-Ruiz, hardly presenting an unusual or controversial account, finds concepts of multi-culturalism and distinct community identities to be deeply at odds with the fundamental French political and legal concept of laïcité, thus requiring that such community identities be essentially consigned to the private sphere\textsuperscript{231} (as any devout Muslim girl desiring to wear a headscarf in a French state school can certainly attest).\textsuperscript{232}

I am not asking why, in the eyes of Matsuda or Delgado, the U.S. should become the target of embarrassing treatment. If the U.S. merits embarrassment, then let’s embarrass it. I am only asking: Why must these scholars construct that America in “bipolar” opposition to transparently sanitized accounts of some non-American “other,” be it the Soviet block, the United Nations, or Europe—accounts that systematically negate the experiences of outsiders to those regimes? If such authors have no intention of drawing a genuine comparison, taking seriously the achievements and failures, the social complexities and intricate histories of both or many sides, why do they bother with comparisons at all, if not to engage in such rigorously deceptive mythmaking?

We humans seem forever tempted to criticize X by idealizing some imagined not-X, even when X can well withstand criticism on its own terms. To be sure, that habit is not peculiar to critical legal theorists. If, to cite a high-profile example, the 2003 U.S. invasion of Iraq was horrendous in itself, why did the filmmaker Michael Moore need to enhance his critique by constructing Saddam’s Iraq through a Theresienstadt-image of blissful children in a playground?\textsuperscript{233} If U.S. health care is woefully deficient on its own terms, why does Moore need to augment that critique by simplistically idealizing the British National Health Service (NHS)?\textsuperscript{234} As with Matsuda’s “international community” or Delgado’s “Europe,” had Moore undertaken an examination of Saddam’s Iraq or Britain’s NHS as rigorous as his scrutiny of the U.S., he might have had to accept that, beyond the polemics, complex ethical realities rarely reduce to simplistic bipolarities. The horrors of U.S. racism and exclusion do not gain in moral gravitas simply because counter-American Potemkin villages are manufactured to prop them up.

Matsuda’s ethnocentrism shows her ignoring the non-American history that runs contrary to her internationalist myth. Delgado’s ethnocentrism, by contrast, shows him re-writing a non-American history, turning it into an American one. For example, with good reason, Americans, in re-

\textsuperscript{230} \textit{See} John Lichfield, \textit{France Gets its First Black TV Presenter after Chirac Pressure}, \textit{in The Independent on Sunday}, Mar. 8, 2006, \textit{available at} \url{http://news.independent.co.uk/europe/article349902.ece}.

\textsuperscript{231} \textit{See generally} Henri Pena-Ruiz, \textit{Qu’est-ce que la laïcité} ch. 4 and \textit{passim} (2003).

\textsuperscript{232} \textit{Cf. id. at chs. 11 – 12 and \textit{passim}}.

\textsuperscript{233} \textit{See} Farenheit 9/11 (\textit{Dog Eat Dog Films} 2004).

\textsuperscript{234} \textit{See} Sicko (\textit{Dog Eat Dog Films} 2007).
cent years, have had to revisit old myths of a singularly white, Northern European Protestant creation of American culture. Recent American texts highlight the accomplishments of ethnic minorities.\textsuperscript{235} Frederick Douglas and Martin Luther King have begun to assume their place alongside George Washington, Thomas Jefferson, or James Madison.\textsuperscript{236} Because Americans have struggled with history in those terms, however, Delgado assumes that Europeans have done so in largely the same terms.

In a striking excursion, Delgado elaborates a history of Europe, supposedly learned by Rodrigo in his "programme of studies at Bologna."\textsuperscript{237} It turns out merely to recapitulate entirely American circumstances. Delgado discerns a strain of "Saxon-Teuton" domination of European power or culture, stretching over a vast period from "the late Middle Ages" to its supposed "decline beginning a few decades ago,"\textsuperscript{238} and which, on overtly racial or ethnic grounds, would have fundamentally eclipsed the achievements of what he takes to be darker (itself a questionable description) Southern Europeans.

The term "Saxon-Teuton" is virtually unknown in ordinary scholarly or media discussions of European demography—wholly unlike "white, Anglo-Saxon" and cognate phrases, which are common in the U.S. Delgado suggests, however, that the specific achievements of "Saxon-Teutons" must be relativized in order to highlight the achievements of Southern Europeans like "Cervantes, Verdi and Michelangelo."\textsuperscript{239} Delgado outlandishly throws the latter together with Duke Ellington, and even with "black or brown" American Critical Race Theorists, all under the category of "non-Saxons."\textsuperscript{240} In so doing, he suggests that, within European history, Cervantes, Verdi and Michelangelo have stood in the shadow of "Rembrandt, Mozart, Shakespeare [and] Milton"\textsuperscript{241} on grounds of a pan-European racial or ethnic divide. We are asked to believe that Rembrandt, Mozart, Shakespeare and Milton succeeded through the Saxon-Teutons' "staying and adaptive powers to remain on top,"\textsuperscript{242} whilst Cervantes, Verdi or Michelangelo, by comparison, suffered some comparative disadvantage as ethnically distinct non-Saxons.

It would be difficult to paint a more extreme caricature of European history viewed through parochial American eyes. No analysis of European history supports the thesis of a "Saxon-Teuton" domination somehow unequivocally prevailing, throughout that long period, over the concurrent and constantly shifting influences of Papal, Hapsburg (covering Southern as well as Eastern and Central European territories), Bourbon, Napoleonic, Russian-Tsarist, for example, and any number of other powers, cultures or influences.\textsuperscript{243} In his major 1996 tome, Norman Davies identifies at

\begin{itemize}
\item \textsuperscript{235} See generally Devine et al., supra note 94 (showing an example of a recent text).
\item \textsuperscript{236} See, e.g., id. at 401–02. See also id. chs. 29–30.
\item \textsuperscript{237} Delgado, supra note 197, at 9.
\item \textsuperscript{238} Id. at 10.
\item \textsuperscript{239} Id. at 12.
\item \textsuperscript{240} Id. at 11–12.
\item \textsuperscript{241} Id. at 12.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} One will search in vain for any such concept in, for example, Dominique Colas’s comprehensive survey. See Dominique Colas, RACES ET RACISMS DE PLATON À DERRIDA (2004) (examining concepts of cultural and ethnic difference in classical and contemporary European
least "a dozen or so" historical currents that have shaped Europe. Northern European influences certainly figure strongly, although Davies wisely avoids any comparative weighing of the strands he describes, as if they could be quantified or even easily held apart.

"Saxon-Teuton" influences did not shape the overall period from the late Middle Ages through to recent decades any more decisively than what Davies calls "the Catholic world," "the French variant" or even the "Roman" strand. No plausible history can suggest that Northern Europeans are to Southern Europeans as American whites are to American non-whites; that John Milton is to Michelangelo as, say, Nathaniel Hawthorne is to Duke Ellington; nor indeed that the Hapsburg world of figures from Mozart and Haydn through to Schubert, Liszt, Musil, or Wittgenstein can altogether be called "Saxon-Teuton." Where would Rabelais, Montaigne, Descartes, Corneille, Molière, Racine, Rameau, Voltaire, Diderot, Montesquieu, Hugo, Balzac, Flaubert, Baudelaire, Rimbaud, Verlaine, Bize, Berlioz, Delacroix, Monet, and any number of other exponents of Europe's truly dominant cultural and political power from the 17th-19th centuries, fit into that Europe supposedly dominated by "Saxon-Teutons?"

American immigration officials sometimes distinguished, with a sense of ethnic hierarchy, between traditionally Northern Protestant and Southern Catholic Europeans (with Northern European Catholics, notably Irish, falling vaguely in between). There is no evidence to suggest, however, that, in so doing, they were recapitulating or anticipating fundamentally European perceptions (except, perhaps, Nazi ones). They were inventing an American concept of Europe in response to American demographic anxieties.

As in Matsuda's approach, attention to U.S. outsiders is purchased at the price of silence about any number of non-U.S. outsiders, who go unnamed and unaccounted for, without regard to the influences of "Southern" European adventures on the cultures and descendents of Ethiopians, Eritreans, and Libyans; Aztecs, Incas, and Mayans, for exemple. Admittedly, Rodrigo's lot is precarious. But how he and his family might have fared had they descended from, say, Italy's post-colonial Ethiopia, is not the kind of question with which Delgado, for all his pretenses of comparing the U.S. to Europe, is much concerned. When asked whether "the Spanish and Italians" (itself a questionable aggregation throughout European his-

thought). Nor, for example, does Tzvetan Todorov adopt any such view in Tzvetan Todorov, Nous et les autres: la réflexion française sur la diversité humaine (1989).


245. Id. at 22 – 23. For Davies's application of those "variants" from the late Middle Ages to the present, see id. chs. 6–12.

246. To be sure, nationalist barbs have long featured in European societies. Traditional British comedy is rich with examples. John Cleese's hit series Fawlty Towers did indeed play on a distasteful stereotype in the character of Manuel as the "dumb spic." Yet John Cleese's same humour, notorious in the series Monty Python's Flying Circus, constantly rails against Germans ("Saxon-Teutons," presumably), as did Dad's Army and other shows. Some considerable study would be required, however, before one could draw serious comparisons to U.S. racial attitudes.

247. DAVIES, supra note 245, at chs. 7–9.


tory) were “exempt from criticism for ‘Western’ foibles”, Rodrigo peremptorily declares that U.S. atrocities “are far worse and more systematic.”

That reply comes as no surprise, as Rodrigo appears wholly ignorant of European colonial histories and their aftermath. It replaces any examination of Europe with a leftist platitude.

In another discussion, Delgado reaches still further back, all the way to Aristotle, who is described as an exponent of the Western “white” elite. Aristotle somehow counts as “white.” Meanwhile, Cervantes, Verdi and Michelangelo appear, together with Duke Ellington and non-white (“black or brown”) American Critical Race Theorists, among racial or ethnic outgroups. Why does it matter that Cervantes is “non-Saxon” but not that Aristotle is, too? It cannot be because Southern European influence subsequently (i.e., well after Cervantes, Verdi and Michelangelo) declined, since the ancient Greece poleis had suffered that same fate far more drastically.

Aristotelian ideas were certainly appropriated by what might be identified (with greater or lesser qualifications) as “white” elites from the time of medieval or early modern Europe, a thousand years after Aristotle lived. However, to assume European “whiteness” as a continuous social or political category, distinctly identifiable in ancient Greece—a racial concept utterly alien to Aristotle, who, moreover, described non-Greek European peoples as suited to slavery, in specific contrast to Greeks—further compounds Delgado’s anachronism and ethnocentrism. It scarcely accords with the specific constructions of social identities, and of categories of “insiders” and “outsiders,” in ancient Greece. Did ancient Greeks embrace concepts of superior and inferior societies? No doubt. Would Aristotle have understood himself, or would his civilisation, or any neighbouring civilisation, have referred to him, as racially “white,” belonging to a people denominated as racially “white” and therefore superior, in contrast to racially inferior “non-whites?” Hardly.

Turning next to philosophical doctrine, Delgado examines Aristotle’s concept of the “golden mean.” Despite the curious assertion that “[e]very one [sic] reverses” that concept, Delgado never explains what he thinks Aristotle means by it. Delgado suggests that such a concept can (1) be transposed willy-nilly into post-Westphalian, post-industrial, pervasively globalized Western law and society, and, on that basis (2) can then be found to be misbegotten, because, in some cases, “the discourse of modera-

250. DELGADO, supra note 197, at 12.
251. Id. at 92.
252. See, e.g., ST. THOMAS AQUINAS: ON LAW, MORALITY AND POLITICS XIV – XV (William P. Baumgarth & Richard J. Regan, eds. 1988) (providing an example on the recovery of Aristotelianism in Europe in the 12th and 13th centuries, as witnessed in Aquinas’ work).
254. See generally e.g., PAUL CARTLEDGE, THE GREEKS (rev’d ed. 1993) (critically examining the construction of social identities in ancient Greece).
255. See, e.g., id. chs. 1-3, 5, 6.
256. Accounts of the emergence of race theory, and constructions of racial identities, in the late 18th and early 19th centuries have been familiar for so long, that it is astonishing that a Critical Race Theorist would, in 1995, still be making any such suggestion. See generally Heinze, Construction and Contingency, supra note 57. See also, Todorov, supra note 243.
257. DELGADO, supra note 197, at 93.
tion” is inappropriate. 258 He does so without even a passing reference, e.g., to the specific concepts of polis or nomos within which Aristotle understood his ethics and politics to function. 259 Further recapitulating the same narrow anachronism and ethnocentrism. 260 Delgado’s final verdict that such speculation, coupled with the sheer fact of the decline of Greek poleis in the 4th century B.C.E., somehow justify the grand pronouncement that Aristotle’s entire output on law, ethics and politics (numbering well over 300 pages in a leading standard edition), 261 amount to nothing more than, to use Delgado’s high phrase, “the politics of denial,” 262 can only be called spectacular.

Among scholars who purport to do progressive politics, pretensions to challenging the Western canon have long been a familiar trope. 263 How much of “the Western canon” any such scholar has actually read is often less than clear. 264 In the case of legal theory, the distance Aristotle takes from abstract, rule-bound concepts of law arguably creates some common cause with critical theory. 265 Be that as it may, like the “international community” or “Europe,” Delgado’s “Aristotle,” too, becomes a sheer pretext to lend some veneer of authority to a political critique that never examines Aristotle’s ideas in any depth, despite the flowering of Aristotelian scholarship in recent decades, 266 which has inspired such scholars as Martha Nussbaum 267 or Alastayre MacIntyre. 268

It might appear that Delgado simply discusses Aristotle in an incidental, offhand way, to pursue broader points about Western culture, without seeking to pronounce on broader elements of Aristotle’s ethical or political philosophy. However, it cannot be maintained that any credible discussion

258. Id. In other words, Delgado cannot plausibly reach step (2) without step (1) already assumed.

259. See generally Eric Heinze, Epinomia: Plato and the First Theory of Law, 20 Ratio Juris 97, 106–07, 130 (2007) [hereinafter Heinze, Epinomia]. See also, e.g., ARISTOTLE’S POLITICS: CRITICAL ESSAYS 12-13 (Richard Kraut & Steven Skultety eds., 2005); RICHARD KRAUT, ARISTOTLE 105 (2002);


261. See THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATIONS 1729–1867, 1922–81, 1986-2129 (Jonathan Barnes, ed. 1984) (including only the pages where the works are generally considered authentic, and running considerably higher if we include, for example, the ethical and political observations in the Rhetoric id., at 2152 – 2269, or other Peripatetic works within the corpus aristotelicum, see id. at 1816–1921, 2130–51, 2341–83).

262. DELGADO, supra note 197, at 93.

263. Elsewhere I have noted the emergence of that trend in response to 20th century fascism and totalitarianism. See Heinze, Classical Natural Law, supra note 260 at 324. However, as analyzes like Delgado’s suggest, that approach certainly encompasses theory critical of American democracy. See, e.g., DELGADO, supra note 197, at 111.

264. On legal theorists’ inadequate readings of classic tests, see generally id.

265. See e.g., Heinze, Epinomia supra note 259.

266. For examples of recent scholarly work on Aristotle, see ARISTOTLE’S POLITICS, supra note 259.


268. ALASTAIR MACINTYRE, AFTER VIRTUE chs. 9, 12 (1981).
of Aristotle would reach such a categorical conclusion about Aristotle’s supposed “politics of denial” on the basis of references that extend no further than a wholly unelucidated concept of the “golden mean.” Certainly, we must challenge and re-visit intellectual canons and authorities. But do we best challenge the myth of Aristotle-is-supreme through an equally simplistic, bipolar opposite of Aristotle-is-in-denial? Might there not be alternatives, such as Greece-was-contradictory or Aristotle-is-multifaceted? Such sweeping and dismissive accounts raise questions about who, exactly, has fallen prey to the “politics of denial” and about who is silencing what.

Delgado’s patronizing accolades for Europe’s “open discourse,” “great literary and intellectual life,” and “sophisticated and highly political” intellectual life, supplanting any rigorous understanding of public discourse in today’s Europe (though presumably intended to mimic such an understanding), occasionally degenerate into full-on kitsch. A three-day visit reveals the Old World’s innocent, untainted joys, replete with “arcaded walkways.” We even get the ultimate cliché that “there’s nothing a European intellectual loves better than to sit in a café and discuss politics.”

All that is missing are Audrey Hepburn and a giddy accordionist accompanying Maurice Chevalier to Thank Heaven for Little Girls. Meanwhile, back at home, even American ice cream, “with all that butterfat,” turns out to be a killer. A world-weary Rodrigo struggles to explain his “favorite flavor” of gelato to some hapless American waiter. Failing in his lonely onslaught against the American lacto-industrial complex, Rodrigo is forced to “settle” for “second best.” Who said the revolution would be easy?

At one point, it finally looks as if it will be Europeans, for once, who mess things up. Referring to the activities of violent groups in the 1970s, Rodrigo explains that the Italian authorities had “tried for a time to exclude leftist organizations.” But no. Unlike U.S. elites, they quickly learn the error of their ways: “A few kidnappings and commando raids, and they were ready for serious negotiation.”

In another passage, it almost seems as if Delgado might finally be taking a serious look at European conditions. Rodrigo describes a student-run burlesque he had supposedly attended in Italy, tastelessly portraying “anti-female or anti-minority” content, mocking affirmative action, gays and lesbians, or AIDS. In a footnote, however, we learn that the incident inspiring that conversation had occurred at Harvard Law School. The proposition that Harvard stands as a proxy for any other institution in Eu-

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269. Jacques Derrida’s deconstruction of Western classics, for example, whether one accepts or rejects them, engages them in at least reasonable detail. See generally, e.g., JACQUES DERRIDA, L’ECRITURE ET LA DIFFERENCES (1967); JACQUES DERRIDA, DE LA GRAMMATOLOGIE (1967).
270. DELGADO, supra note 197, at 150.
271. Id. at 136.
272. DELGADO, supra note 197, at 150. A semiotics of ‘gelato’ as an American-projected symbol of European cultural refinement, vis-à-vis some mysteriously unidentified, yet, by definition, inferior American ‘next best thing’, emerges as an intriguing subtext in the book. Id. at 171.
273. Id. at 16.
274. Id.
275. Id. at 59.
276. Id. at 59 n. 3.
urope or the world may come as no surprise to Harvard’s senior management. But its ethnocentrism raises doubts from a theorist who purports to challenge the cultural hegemony of America’s dominant institutions. Nowhere does Delgado provide any information that might tell us more about actual social or academic attitudes in Italian or European institutions. Once again, it is mystifying that Delgado, having heaped unqualified praise on Italian or European higher education, lacked any inclination to find out what racial, ethnic, post-colonial or sexual politics, or lack thereof, actually go on in Italian or other European universities, or what attitudes their students actually hold. Delgado’s stance recapitulates more of an American condescension to Europe than the kind of respect that the book desperately feigns.

Simplistic myths include simplistic characters. Delgado’s interlocutors are a humourless, self-righteous pair. Like figures from a medieval morality play, they only ever do good. They never curse, cheat, dish gossip, slam a door, talk with food in their mouths, or leave a stack of dishes for someone else to clean. They are as whitewashed as their Disneyesque Europe of gelato and “arcaded walkways.” They never really disagree on anything. Any surface divergences serve only as pathways to yet another radical insight. Of course, from Plato to Berkeley and Diderot, recourse to a dialogue form has long stood as a means of exploring ideas, without the authors always sketching contexts or characters in detail. In Delgado’s case, however, that observation tends more to diminish his project than to enhance it. Had he merely adopted his interlocutors as vehicles for teasing out ideas, with no pretense of giving them any real-world context, he would have extended no invitation to the reader to contemplate his presentation of action or character.

Those points bring us back to Romany. When we push aside the myths, the flip-side of freedom, mobility and generosity within European welfare states turns out to be the exclusion of needy immigrants, and even refugees and asylum seekers. Moreover, some EU states, such as France, have pursued protectionist agricultural policies, to the detriment of third-world farmers. Such policies present a questionable model for those LatCrits whose concerns extend to communities in developing Latin American states. Despite having long been hailed for its social welfare model within a highly successful market economy, Germany now records five to six million in chronic poverty, with little prospect of (re)integration.

Certainly, those figures are, in large part, attributable to the enormous and sudden burden of impoverishment from the East incurred upon East-

277. See, e.g., id. at 111.
278. See Reynolds, supra note 196.
280. See, e.g., Thomas E. Schmidt, Reden über die Unbenennbaren, DIE ZEIT, OCT. 19, 2006 at 4; Uwe Jean Heuser, Investiert in die Kinder, DIE ZEIT, OCT. 19, 2006 at 27–8 (interview with Ernst-Ulrich Huster) (noting similar problems of long-term unemployment in other European states); Cerstin Gammelin, Der lange Weg ins Nichts, DIE ZEIT, OCT. 19, 2006 at 28–9.
West unification in 1990.\textsuperscript{281} However, precisely because U.S. levels of poverty are now estimated somewhere just above ten percent of the population,\textsuperscript{282} the costs and requirements of proposed U.S. government intervention can perhaps realistically compare to those of post-unification Germany. Yet German third-generation immigrants are actually less well adapted than were their parents and grandparents.\textsuperscript{283} Nor, as racial tensions in the Netherlands\textsuperscript{284} or the French riots of 2005\textsuperscript{285} would suggest, have the generous European social welfare policies of the 1960's-1980's guaranteed successful social integration or inter-ethnic harmony.

Those observations do not mean that the U.S. should forego greater socio-economic protections. Poverty levels in the U.S. are excessive, and targeted measures for eliminating it have been sorely neglected.\textsuperscript{286} Romany, however, provides not a clue about how, specifically, reform is to take place. Her proposal of an all-out dismantling of the American civil liberties project offers little more than recitations of black-letter international human rights norms, and uncritical praise of UN monitoring procedures. She claims, for example, that, "[t]he existence of treaty-bodies, which allow for the presentation of state reports and international and regional complaint mechanisms as well as the potential litigation around violations of customary norms of international law, broadens the range of necessary dialogues."\textsuperscript{287} She introduces that argument in order to promote the view that Americans must "expand the range,\textsuperscript{288} of institutional entities to whom their government is accountable.

It might in some cases be argued that improvement in a state's performance has followed wholly or partly as a response to comments of the UN Committee on Economic, Social and Cultural Rights (in its official capacity as supervisory body for implementation of the ICESCR).\textsuperscript{289} But that will not always be an easy observation to make. Legislative or other government motives in complex social and economic areas are varied. For example, in a 2002 report on the United Kingdom, the Committee "commends measures undertaken" by the UK, such as the Blair government's "New Deal programme for employment, the introduction of a national minimum wage in 1999, and measures taken to reduce homelessness, rough sleeping and permanent exclusions from schools."\textsuperscript{290} However, in view of the high political profile of those Labour Party programs (leaving aside any assessments of their actual success), it is doubtful whether any of them were adopted as responses to the Committee's views. Even for the states receiving warm praise from the Committee, it would be unusual for it, or

\textsuperscript{281} Heuser, supra note 280.

\textsuperscript{282} See, e.g., Institute for Research on Poverty, supra note 190.

\textsuperscript{283} Heuser, supra note 280.

\textsuperscript{284} See, e.g., EEN POLITIEKE AARDVERSCHUIVING (Robbert Coops et al. eds. 2003).


\textsuperscript{286} For updated reports, see, e.g., Institute for Research on Poverty, supra note 190.

\textsuperscript{287} Romany, supra note 19, at 218.

\textsuperscript{288} Id.

\textsuperscript{289} See generally Concluding Observations, supra note 192.

for anyone else, to suggest that improvements by those states resulted from the Committee’s own positions or actions. The proposition that the existence of reporting and complaints procedures broadens the range of necessary dialogues in the area of social and economic rights should be critically examined rather than casually assumed.

Romany pursues her own version of the “International—good; U.S.—bad” dichotomy when she claims that only in “few instances [have] U.S.-based NGOs... documented human rights violations.” Such a remark is perplexing. Notwithstanding undeniable shortcomings of U.S. authorities in securing rights and prosperity for those in need, it is unlikely that any country can boast a greater number of independent national, state, and local organizations critically monitoring its performance. Bodies such as American Federation of Labor and Congress of Industrial Organizations, Aids Action, the Center for Reproductive Rights, the Children’s Defense Fund, the National Centre for Children in Poverty, the National Organization for Women, the National Urban League, Public Citizen, and numerous State Public Interest Research Groups are just a few of many that monitor U.S. federal, state and local government on a range of issues.

Hernández-Truyol certainly anticipates my suggestion that critical theory should turn the same critical eye towards international law that it has cast upon U.S. law. She advocates “using domestic Critical Theory to develop and transform the context, meaning and application of international human rights norms.” arguing that “the human rights vision itself must be reconstructed.” Yet her specific criticisms consist, once again, of rehearsing the age-old critique of the traditionally privileged status of civil and political rights. As her and Romany’s own accounts constantly ac-

291. See generally Concluding Observations, supra note 191.
292. Romany, supra note 19, at 218.
303. Id. at 123.
304. See Id.
knowledge, that critique has already formed part of the dominant approaches to international human rights law for decades.\footnote{305}

Hernández-Truyol recapitulates a standard nostrum of contemporary international law, arguing—from a critical-realist standpoint, rather bizarrely—that "critical movements follow the lead of the human rights model which transformed the doctrine of State sovereignty from one in which individuals are objects of State power to one in which individuals become the subjects of international law."\footnote{306} Of course, the myth of transforming individuals from objects to subjects of law is centuries old. It is identifiable in Locke's rejection of the Hobbesian absolute sovereign,\footnote{307} then amplified by Rousseau's concept of the social contract.\footnote{308} It certainly underpins the U.S. Constitution's concept of popular sovereignty, with the rather dubious \textit{real} results I have already mentioned.\footnote{309}

If critical theory has shown that ideal to be deeply discredited in the classical liberal or specifically American versions, on what \textit{realist} basis does it triumph in international law? If we were to visit any number of the vast array of states that have ratified the leading human rights treaties, would we find ourselves among populations whom international law has somehow fundamentally transformed into legal subjects? If so, then how, in looking about us, would we notice that fact in \textit{real} terms? Surprisingly, Hernández-Truyol's next sentence states, "Human rights norms demand accountability for a State’s treatment of all persons within its jurisdiction."\footnote{310} Yes, and U.S. laws too, the Bill of Rights not least among them, also "demand" a good deal of government accountability, at least some of which is achieved through binding legal procedures. But critical theorists have been insisting all along that the real question is not what norms formally "demand," but what law has actually achieved.

E. \textit{Collective Rights}

Romany further nurtures the internationalist mythology, and the attack on the American civil liberties tradition, by praising the so-called "third generation" of human rights: group and collective rights. The third generation of rights, in Romany's view, "travels the roads of communitarian values, privileging the welfare of groups and elaborating notions of the human rights subject which transcend the individual."\footnote{311} Romany advocates "[d]iscussions about the contours of the right to development and self-determination,"\footnote{312} but neither provides any detail on the content of rights to (as opposed, say, to \textit{programmes of}, or \textit{policies of}) development and self-determination, nor how problematical, in \textit{real} terms, third genera-

\footnote{306. Hernández-Truyol, supra note 17, at 122.}
\footnote{308. Jean-Jacques Rousseau, \textit{Du Contrat social, in 3 Oeuvres Complètes} 347 (1964).}
\footnote{309. \textit{Cf.}, U.S. CONST. supra note 45.}
\footnote{310. Hernández-Truyol, supra note 51, at 122–23.}
\footnote{311. Romany, supra note 19, at 217.}
\footnote{312. \textit{Id.}}
tion rights may be.\textsuperscript{313} As with economic, social and cultural rights, they here become accepted uncritically as a \textit{fait accompli}, as permanent fixtures, with no inquiry as to whether one set of hollow formalisms is just being replaced by another, perhaps even less effective set.

For greater insight into the claims made for collective rights, we can turn to Natsu Taylor Saito. Saito develops that theme in “Beyond Civil Rights: Considering Third Generation International Human Rights Law in the United States.”\textsuperscript{314} Once again, U.S. law is criticised for the narrowness of its traditional scheme of civil rights and liberties, with alternative schemes of rights praised as being manifestly preferable for American minorities. Problems of social, economic and group rights are mentioned casually, and in more-or-less familiar terms, but never receive serious scrutiny.

Saito’s analysis of group, collective or third-generation rights (notoriously murky within international human rights law)\textsuperscript{315} begins in a section entitled, “Group Rights in the United States: An Historical Perspective.”\textsuperscript{316} Saito writes that “[t]he history of U.S. law is, in many respects, a history of the struggles of groups to assert or protect their rights, identities, or cultures.” Surely that claim is either incorrect or vacuous. The reference to “identities” or “cultures” cannot mean “as opposed to rights” since it would then add nothing to an agenda or analysis of group rights. Saito suggests, then, that ethnic struggles in the U.S. have taken the form of actual or implicit assertions of group rights. Yet we find no serious evidence to support that claim. Saito writes, for example, “Since the first resistance of Native Americans to colonial rule, the first slave revolts, and the first efforts by Mexicans to prevent annexation of their lands, peoples who are now identified as ‘racial minorities’ in [the United States] have organized and fought for group rights.”\textsuperscript{317}

That claim might plausibly apply to Native Americans, who, in pre-Columbian times, had fostered relationships with and understandings of land different from Locke’s or other European proprietary conceptions.\textsuperscript{318} But nowhere does Saito explain how such relationships took the form of group \textit{rights}, as opposed to the sheer concerted action of one people or group resisting another.

By definition, the first slave revolts involved concerted action in a common cause. However, unless the concept of group rights is to be emptied of all meaning, reducing to virtually anything that people undertake to do together based on some shared interest or conviction, Saito does not explain how the sheer fact of coordinated action transforms such acts into assertions of group rights, any more than, say, abortion becomes a group right simply because women mobilize and act in concert to defend it.

\textsuperscript{313} Cf., STEINER & ALSTON, supra note 48, at chs. 15–16.


\textsuperscript{315} See text accompanying note 313.

\textsuperscript{316} See Saito, supra note 314, at 402, 403.

\textsuperscript{317} Id. at 403.

When William the Conqueror won the Battle of Hastings, or Henry V triumphed at Agincourt, were either the victorious or the defeated sides asserting group rights in some sense that is conceptually distinguishable from merely taking up arms in order to win? Was Tsar Alexander not merely defending, but also somehow vindicating the group rights of, Russians against Napoleon (particularly if we apply Saito’s unexplained notion of ‘unarticulated’ concepts of group rights)?

As to Mexicans, it might well be argued that land annexations were unlawful or unjust. However, Saito does not explain how Mexican resistance, albeit conducted through collective action, took the form of specific assertions of group rights, or indeed how those rights would be defined or identified. Does Saito believe that the needs or interests of U.S. minorities are promoted by being re-branded as “group rights,” while she fails to provide any specific sense of the definition, content, scope or limits of such rights? What can a group do with such a right? Saito continues,

Other explicit assertions of what could be termed third generation human rights can be seen in what are often labelled “nationalist” movements. For example, “[t]o advocate self-determination” was one of the eight key points of the Universal Negro Improvement Association founded by Marcus Garvey in the early 1900s. Malcom X advocated the need to move from individual rights to group rights, and the need to see the struggle for these rights in an international context.

That use of a more-or-less descriptive concept of collective rights might work if, contrary to E3, Saito were claiming to be writing a chronicle in more-or-less neutral terms. However, her article is not merely describing, but advocating group rights. One would therefore expect some specific, critical or realist analysis of those black nationalist programmes. Does Saito think that, in the interests of those most concerned, those programmes should have been realized? Fully? Or only in part (and, if so, which part, and with what kinds of group rights)? She continues,

In recent decades, these struggles have taken many forms, from community and church-based grassroots organizations; to groups such as the National Association for the Advancement of Coloured People (NAACP), the Urban League, the League of United Latin American Citizens, or the Japanese-American Citizens League, which tended to support assimilation; to organizations such as the Black Panthers, Brown Berets, and Young Lords which more explicitly advocated the empowerment of groups based on their ethnic or racial affiliations. Regardless of their particular ideological bent, these movements themselves can be seen as assertions of third generation human rights . . .

Saito does not explain how, for example, the NAACP, which advocated individual civil rights and liberties (and was even, she suggests, to some degree sympathetic to social and economic rights), and which “support[ed] assimilation,” was therefore advocating group rights, or how those rights would work. As to the more radical groups, like the Black Panthers, Saito merely equates—again, with no critical or conceptual analysis—their call for “empowerment of groups” with group rights. Neither logically nor legally does any concept of group rights intrinsically follow from a concept

319. See Saito, supra note 314, at 404.
320. Id. at 403.
321. Id. at 404.
of group empowerment. For example, it may be empowering to teach a
given group of adults how to run their own businesses, or to engage in
charitable fundraising. Those skills do not, however, confer upon them dis-
tinct rights which they assert (in court, for example) as a group. Perhaps
Saito does not have litigious rights in mind, but only some symbolic sense
of rights. If that is the case, it is no trivial matter. It should be stated
explicitly. It may be worthy, but is hardly inconsequential, to be advocating
a concept of rights, while assuming them to have no identifiable func-
tion or utility.

Despite widespread anti-Semitism in the U.S. from the 19th through to
the early or mid 20th century, Jews in the United States did relatively well,
i.e., became “empowered,” more-or-less on par with white middle-class
Anglo-Americans.\textsuperscript{322} Does that mean that they thereby acquired group
rights? If not, in what sense was the NAACP distinctly working towards
group rights for blacks, and what might a realist analysis suggest about the
working content of those rights? Insofar as any of those radical groups was
advocating distinct concepts of group rights, Saito does not identify what
those rights were, much less subject them to any critical-realist scrutiny.

IV. CONCLUSION: CRITICAL THEORY IN A GLOBALIZED WORLD

By definition, the neglect trend omits any examination of the U.S.
within an international perspective. However, with theories like those of
Matsuda, Delgado, Romany, Hernández-Truyol or Saito, the alliance trend
goes little further. Through largely conventional or formalist readings of
black-letter international human rights norms, their analyses remain as pa-
rochially focused on the United States, bereft of any critical, realist or his-
torical analysis of the international context within which they purport to
analyse U.S. law. If the American civil liberties tradition is as manifestly
defective as those scholars claim, then it is difficult to understand why they
resort to such betrayals of their own professed ideals in order to prove it.
We must demand greater consistency of critical theory because that is what
it demands of us. Critical Race Theory and LatCrit are about nothing, if
not about the dangers of hypocrisies and double standards.

We have seen how \textit{Words That Wound} attempted to ground Critical
Race Theory by setting forth a list of six principles. In view of the forego-
ing analysis, I would recommend three more, enumerated with a “G,” to
signify the aim of directing critical theory towards a 21st century era of
globalization. I would see them as principles for critical theory in an era of
globalization, not negating so much as applying E1 – E6 with greater con-
sistency. They propose a movement away from the bipolar, “U.S. \textit{versus}
the world” view of Matsuda, Romany, or Hernández-Truyol, towards a crit-
ical, historical and realist analysis of the totality of international norms,
institutions and processes,

G1. International human rights norms, like those within many national
legal systems, are often formulated in abstract terms. Critical theory
must resist purely surface readings of their black-letter content. It must
analyse such norms precisely as it has analysed them in U.S. law, within
the context of their overall genesis, interpretation and implementation.

\begin{footnote}
\textsuperscript{322} See, e.g., \textit{Andrew Heinze, Adapting To Abundance} (1992).
\end{footnote}
G2. Human rights standards impose obligations on all states.\textsuperscript{323} The vices of one must not be silenced solely for the purpose of condemning those of another. Many states, not limited to liberal democracies, preach norms that they fail to practice, often with devastating consequences for their populations and their outsider groups. States should be condemned in proportion to their levels of abuse.

G3. Popular and scholarly attention to oppression inevitably depends on relative freedom of the media, with the result that human rights abuses in societies with a free press attract the greatest attention. Lack of publicity must never be equated with lack of abuse. Critical theorists must recall their pledge to listen to voices where they are least heard.

How might we apply those principles? To take one example, as noted earlier, the global struggle against \textit{apartheid}, waged largely through UN-coordinated action, became one of the few relative successes of the Cold War period. But can a critically-minded theory be fully satisfied? Again, during that same period, many regimes were committing equal and worse acts of genocide and brutality, often with ethnic dimensions. They, however, were exempt from condemnation because of their powerful or strategic positions at the United Nations. From the point of view of those victims, the struggle against \textit{apartheid} became more of an international foil for avoiding their plight than a credible expression of a deep commitment to human rights; a way of making the ‘international community’ look like it was \textit{doing something} about violations, while it was systematically ignoring some of the worst of them.\textsuperscript{324}

In the 1980’s, college campuses and public commons throughout the Western world became venues for energetic anti-\textit{apartheid} campaigns. To remain silent about \textit{apartheid}—to plead for “quiet diplomacy”—was to be complicit with it. No such grassroots activism has been directed against Robert Mugabe’s abuse of millions of Zimbabweans,\textsuperscript{325} nor against South Africa’s ruling ANC and its “quiet diplomacy.” One might argue that Critical Race Theory or LatCrit are bound to focus on white, Western oppression. However, that choice would raise some moral dilemmas. Leaving aside the question of whether murder, torture or rape \textit{hurt more} when committed by someone with whiter skin, any choice to focus exclusively on the colonial, white-on-black dynamic departs from approaches actually adopted within the UN. UN-CERD, for example, has declined to treat “race” and “ethnicity” as distinct categories, having recognized inter-ethnic oppression and discrimination as falling within the scope of norms governing racial discrimination under CERD.\textsuperscript{326} The former UN Secretary

\textsuperscript{323} Limited only, where appropriate, by those states’ ability to fulfill those obligations. Obligations imposed by social and economic rights are recognized as relative to states’ available wealth and resources. See \textit{Covenant on Economic, Social and Cultural Rights}, supra note 183. Obligations imposed by civil and political rights may be limited, e.g., under legitimately declared states of emergency, where the state lacks the means to secure them. See supra note 73.

\textsuperscript{324} See \textsc{Robertson & Merrills}, supra note 54, at 83-89; See also, e.g., \textsc{Steiner & Alston}, supra note 48, at 611–40.


\textsuperscript{326} That concern has included not only conflicts among indigenous groups but also conflicts arising through immigration. See, e.g., \textit{Comm. on the Elimination of Racial Discrimination, Conclusions and Recommendations of the Comm. on the Elimination of Racial Discrimination}, Nigeria, pt. c., U.N. Doc. CERD/C/NGA/CO/18 (Aug. 19, 2005); \textit{Comm. on the Elimination of Racial
General Kofi Annan recently stated that "Africans must guard against a pernicious, self-destructive form of racism that unites citizens to rise up and expel tyrannical rulers who are white, but to excuse tyrannical rulers who are black." 327

Similarly, the gestational years of African human rights law and institutions were marked by both highly politicised and almost deliberately ineffective approaches. Instruments like the Declarations of the First and Second Conferences of Independent African States or the Resolutions of the First Assembly of the Heads of State and Government of the Organization of African Unity 328 overwhelmingly condemned only oppression by whites. They remained silent about brutal and dictatorial practices which often claimed far more black-on-black, albeit commonly inter-ethnic, victims. Perhaps another foil to deflect attention from human rights than any kind of commitment to them? 329 There can be no internationally-minded critical theory without a review of such attitudes, and of their persistence and consequences in today's world.

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