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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



**NATIONAL
LAWYERS
GUILD**

Founded 1937

GUILD PRACTITIONER

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“72 years of law for the people.”

EDITOR'S PREFACE

When the previous editor-in-chief, David Gespass, learned that he had been elected President of the NLG he asked if I would take over his duties as editor-in-chief. It was an honor I hadn't expected and I am thrilled to have been given the opportunity. I have been aware of the National Lawyers Guild's rich and storied history as a champion for justice in America and around the world since I joined the NLG as a third-year law student in 2006. I am determined to continue this great legacy in the pages of this journal.

The writings featured in this issue are diverse in their style, content and purpose, though each focuses on a subject consistent with the interests and efforts of the NLG.

Three of these writings are first-person essays in which the author shares his or her personal experience and perspective on an idea that, from its founding in 1937, has been one of the NLG's most fundamental goals—defending the rights of discriminated-against minorities. In the first of these essays, “Class, Identity and the Future of the National Lawyers Guild,” NLG President David Gespass revisits the history of the NLG's fight against discrimination based on group identity in an effort to explain how these forms of discrimination are integrally connected to class-based economic exploitation. The former, Mr. Gespass argues, is a method of achieving the latter. The NLG should continue supporting the struggle of each targeted and oppressed group, he argues, but with the recognition that at bottom a common struggle, against the perverse values of global capitalism, unites us all. The second essay, “Empathy and Guerilla Lawyering: ‘What Happens to a Dream Deferred?’” is a tribute to past NLG President of Paul Harris by Lauri Tanner, one of his students at Golden Gate University School of Law. The third essay, “On White Scholars Teaching Federal Indian Law,” is a meditation I wrote on the delicate racial dynamics at

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DAVID GEPASS

**CLASS, IDENTITY
AND THE FUTURE OF THE
NATIONAL LAWYERS GUILD**

Introduction

When I was back there in law school, there was an older NLG member (one of the three Guild members left in Washington from the McCarthy era) who put forth the proposition that we needed to be guided by some ideology.¹ What Selma meant was that we younger members really needed to learn the ideology that guided the work of the older members who remained. This was 1969 or so, when McCarthyism had almost destroyed the Guild. A precious few stuck with the Guild through the 1950s and virtually an entire generation of membership was skipped until the organization's revival, beginning in the mid-'60s. My friend, John, told Selma that he hoped our generation could develop its own ideology without reference to the past.

I learned much, and continue to learn, about ideology and politics from those who lived through McCarthyism. Despite many differences, I am grateful I had the opportunity to work with, and be mentored by, those "older members." I had the good fortune to learn something of ideology with the guidance of David Rein, his wife, Selma and his partner, Joe Forer. Through that experience, I developed an understanding of why we could not develop our own ideology without reference to the past.

I am especially grateful for those experiences, as the march of time has transformed me from Young Turk to graybeard.² Parenthetically, I am editing this piece two days after I learned of the death of Doris Walker, which makes the memories especially poignant. Now that I have either lost the passion of youth or gained the insight of experience, I find myself better able to see the merit in other points of view.

It is true that our ideology must develop, change, and evolve to reflect new realities and changing times. But it is equally true that we cannot sensibly develop, as John hoped we would, a new ideology from whole cloth. We must build on the lessons of the past and base our ideology on that which guided our predecessors.³ It is inevitable that, with new challenges and succeeding generations, mistakes will be made. One of the ways to minimize mistakes and move the struggle forward is to study the past and learn, or re-learn, the lessons taught by past experience.⁴ An old college professor of mine was fond of saying that if you stop learning, you stop living.

Neither can ideology be static or it will die. It must be informed by the insights and concerns of subsequent generations and must adjust to societal evolution

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and scientific development.⁴ Cross-fertilization sustains and strengthens all life. Inbreeding leads to extinction. One of the reasons the NLG has survived for so long (while most other institutions on the “Left” have died) is that we have been open to new ideas and to the “cross fertilization” of all progressive agendas.

One of the principal debates in the Guild today is between what I will refer to as “identity politics” on the one hand, and the view of “Class” and the economic system that creates class distinctions as the fundamental division in society on the other. To be sure, the differences are not as simple as I have just stated and most of us have views somewhere in between those two poles. The debate, in my view, is really over how much emphasis should be given to one or the other, not whether one or the other should be discarded entirely. It is important to understand that, while the debate appears to break down primarily on generational lines, it is “ideological” and as I noted, we cannot simply create a new ideology without it referring to, and being informed by, past lessons.

Definitions matter here. I expect that many will disagree with my definition of “identity politics” and many more will disagree with the assertion that they subscribe to it. Nevertheless, we have to start somewhere even while recognizing that the term is shorthand for something complex and encompasses among its adherents a broad spectrum of politics. Identity politics, as I understand the term and as I will use it, is rooted in the shared experiences of oppression and injustice suffered by people based upon a common characteristic, such as—but not limited to—race and gender. People thus organize to achieve greater self-determination, equality of treatment, autonomy, etc. based upon their being part of a specific constituency in society, rather than around a shared political ideology, particularly one based upon class or economic status. Clearly such organization is both necessary and needed. It is usually, but not always, progressive.

Where we came from

The emergence of identity politics in the 1970s can be seen, at least in part, as a reflection of the weaknesses of the traditional left-wing, communist, socialist, and working class movements. Workers’ movements in the United States were historically permeated with white male supremacist ideology, reflecting ruling class ideology rather than working class interests. In southern states, white workers were known to go on strike to protest being required to work alongside African-Americans. Divisions were exploited by employers who would use African-Americans as strikebreakers or as a pool of cheap labor (a role which is now often being played by foreign workers). Many unions were slow to support the civil rights struggles of the ’50s and ’60s, a point made by Phil Ochs in his song, “Links on the Chain.”⁵

Within the Lawyers Guild itself, many failed to recognize the importance of the Civil Rights Movement and opposed sending lawyers and legal workers south for Mississippi Freedom Summer, arguing that we needed to continue to put our energies into supporting unions and the workers’ movement. These divisions badly damaged both the workers’ movement and the civil rights struggle. In

retrospect, we can see that the decision of the Guild to support the Civil Rights struggle, and specifically “Freedom Summer” revitalized our organization.

The ’60s and ’70s also saw a revival of Marxism after a generation of dormancy following the McCarthy era witch-hunts. An unfortunate symptom of this revival was the spawning of a number of groups, grouplets and sects, each with its own political line and often intolerant of any opposing viewpoint. Thus, an inordinate amount of time was spent on political infighting among these groups rather than building principled alliances and coalitions around the important struggles of the day. The real struggle against real enemies in ways that would have built greater unity and a more powerful movement was lost.⁶

This period saw a great deal of ferment that was fertile soil for any number of other progressive movements. Students and youth saw themselves as different from previous generations. Others—women, gays, lesbians and national minorities among them—took their cue from the African-American struggle and began demanding equal rights. By meeting some of the demands of the most privileged sectors within these groups, capitalism demonstrated its adaptability and capacity to co-opt and sidetrack liberation struggles. Women, for example, began entering professional schools in unprecedented numbers. They were no longer nurses, but doctors; no longer secretaries, but lawyers and now constitute more than half of students at professional schools. Recall that, when Ruth Bader Ginsberg attended Harvard Law School, a dean asked her why she was taking space intended for a man. Not even the most chauvinist of today’s men would ask why she is taking a place on the Supreme Court that should be reserved for a man.

Affirmative action for national minorities was touted as a means of insuring their most “talented tenth” got their “fair share” of the pie (which remains less than equal). In the end, it was better for monopoly capital to permit more diversity in the penthouse, or at least some of the luxury suites, than to distribute its riches more equitably throughout the whole building.

All this ferment resulted in enormous changes *within* the system but no fundamental change *of* the system. A few people of color and a substantial number of women found themselves advancing in business, politics and the professions. The vast majority of people of color were still relegated to the dirtiest, most dangerous, least desirable jobs. Women still bump their heads on the glass ceiling and are paid less than men for the same work. As the current economic crisis has made painfully evident, the less fortunate 90 percent will always be a paycheck or two away from destitution regardless of how much “equality” is achieved by “elite” members of these identity groups (including white men).

African-American leaders of the Civil Rights Movement of the ’50s and ’60s, who demonstrated courage and determination in the face of dangers to which I have never been subjected, led a struggle that changed the United States, unalterably and for the better. Yet many today have been transformed into reactionaries, not because their ideology has changed but because it has not, while the times

have. Ministers who opened their churches to the Movement now close their eyes and hearts to their gay members who have been ravaged by HIV and suffer discrimination both because of their race and their sexuality. Others defend police misconduct and repression, preferring a false sense of safety from street crime to safety from police brutality. In the end, they are happy with what they have achieved for themselves and their families even if those achievements have not appreciably changed life at the bottom of the ladder. It doesn't matter that you have a right to be served at lunch counters throughout the South if you don't have the price of lunch.

This unalterable truth of capitalism, that it will adapt to accept the "talented tenth" but cannot adapt to fundamental change, will lead identity politics to a dead end. At the same time, the failure of the traditional left to recognize the significance of the struggles waged by identity groups for equality both hurt the working class movement and limited the demand for equality among all groups. However, the cross-pollination of these struggles, their mutual respect, support and acknowledgment of their mutual legitimacy hold the promise of genuine liberation for all those who are oppressed and exploited.

Moving Forward

Oppression is not inherent in human nature. It only exists if someone benefits from it. If there is no profit in oppression, there is no reason to oppress. Oppression, after all, breeds resistance and the oppressor risks payback. Without some benefit to the oppressor, the risk is not worth the gamble.

The root cause of oppression is exploitation. Consider, for example, the curious anomaly that African descendants were deemed to be "Negro" if only one of their great-grandparents (hence the term "octoroon") was African while indigenous peoples would not be deemed "true" members of a native nation unless three of their four grandparents were full-blooded. Indigenous peoples and Africans were the greatest victims of white America, but were defined in opposite ways. What possible reason could there be for the odd disparity in how those oppressed nationalities were defined? The answer lies in the different manner in which African descendants and native peoples were exploited in the United States.

The *labor* of African descendants was exploited for profit by both plantation owners and factory owners so, the more there were, the more there were to exploit and the more competition there would be for jobs, enabling bosses to get rid of "troublemakers" and pay lower wages to everyone. By contrast, native peoples' *land* was stolen, so the fewer the numbers, the easier the expropriation. Thus, the different forms of exploitation resulted, in both cases, in brutal oppression, albeit by different means calculated to most benefit the oppressors.

Moreover, capitalism, oppression and exploitation adapt. When it benefited the ruling classes, the myth of the superiority of the so-called "white race" was widely spread, justified by scientists, promoted by presidents and rationalized by bible-quoting clergy. Today, those who formerly most vociferously

proclaimed white supremacy now decry “reverse discrimination” and, making reference to Martin Luther King, say that any consideration of race in assessing an individual’s qualifications betrays his “dream”⁷ by not judging each individual on the “content of his character.” The end result remains a product of racism and continues to relegate African descendants to disproportionately lower wages, dirtier, more dangerous jobs, poorer neighborhoods, higher rates of incarceration, poorer education and all the other myriad effects of slavery and Jim Crow. In short, implementing the proclamation that “(t)he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” denies African-Americans genuine equality as effectively as did Jim Crow in an earlier era.⁸

In order to eliminate oppression, we must eliminate the exploitation that gives rise to it. This position, too often taken to its logical extreme, was the viewpoint of the more traditional radical and revolutionary forces who argued that struggles of specific disadvantaged and oppressed groups must be subordinated to the working class struggle or deferred, pending fundamental systemic change. This attitude, which essentially tells the oppressed, “trust us, we’ll take care of you (all in good time) when we are in control” was rightly offensive to minority groups and women. It effectively aided the rise of bourgeois identity politics and caused unnecessary divisions among the oppressed and exploited.

Nevertheless, it **is** true that we must eliminate a political and economic system that thrives on oppression and exploitation if those particular forms of oppression are to be completely eliminated. Thus, we must find ways to actively combat particular forms of oppression without losing sight of the need for fundamental societal change and without deferring *that* struggle or subordinating it to the demands of particular identity groups. Put simply, we cannot lose sight of particular forms of oppression nor can we defer the struggle against them but we must recognize they are all based in an economic system based upon class exploitation.

Identity politics, when separated from the general fight against exploitation, focuses on our differences rather than our commonality. I am reminded of a particularly stark example from my youth. Demonstrations were organized in Washington, DC on the occasion of the inauguration of Ronald Reagan and buses were taking people from around the country. A bus from New York was boarded by members of DARE (Dykes Against Racism Everywhere), who would not allow the bus to stop to pick up a group of men who were also going to the demonstration. It is not often that identity politics reaches such extremes, and it is easy to carry almost anything to a logical absurdity, but if it has happened before, it can happen again.

The point of “logical absurdity” of identity politics is the emphasis on the commonality within the group to the detriment of the huge majority of that group’s members. This is not speculative, it has happened again and again. This is the ideology that glorifies Alberto Gonzales as a Hispanic role model

and Clarence Thomas as an African-American leader. It says the ascension of Margaret Thatcher as prime minister in England, or Golda Meir in Israel, was a victory for women. This ideology tells members of the “advantaged” group (invariably straight, white males) that while they may give up a few places at the table, they will continue to own the table itself.

Thomas and Gonzales may seem easy cases in hindsight. Thomas, of course, garnered little, if any, support among African-American activists, but Gonzales was supported by important Latino organizations, including the National Council of La Raza and the League of United Latin American Citizens. The Guild was criticized by La Raza for its opposition to Gonzales.⁹ It is safe to say that history quickly absolved the Guild.

The nomination of Sonia Sotomayor to the Supreme Court presented a much more difficult and nuanced problem. She is no reactionary as are Thomas and Gonzales. She is not about to defend torture. She is, as best anyone can tell (Supreme Court appointments often, though not as often as they used to, surprise), exactly what she was described as by her Senatorial supporters—a middle-of-the-road jurist loyal to the rule of law. Of course, the law that rules today is a product of more than a generation of reactionary judicial selections who have blithely repudiated all manner of precedent in service of their reactionary conception of federalism. Neither her professional career nor her record would lead the Guild to whole-heartedly endorse her if she were a white man. Before becoming a judge, she was a prosecutor and a corporate lawyer and her decisions reflected that history, generally supporting government actors in civil rights actions and the prosecution in criminal cases.

Yet her appointment is historic, both because of who she is and because of who nominated her, and its importance in that regard cannot be discounted. Nor is she a reactionary ideologue like Scalia or Thomas. The question of principle progressive forces faced with the nomination was whether a nominee who would likely not shift the terms of debate within the Supreme Court but not bolster its right wing should be supported because of the historic significance of her being Latina. Most liberal organizations answered that question in the affirmative. The Guild, not without serious dissent,¹⁰ chose not to endorse her nomination. Rather, it called for a rapid decision based upon her qualifications and not on the various racist criticisms made of her.

We will certainly be faced with difficult decisions like this in the future. The question, to use Carlos’s distinction, is where the line is drawn between right-wing identity politics and progressive identity politics. The answer, I suggest, is that identity politics can only be progressive when it recognizes that class-based exploitation is at the root of society’s problems and ending that exploitation is a necessary component of liberation. Similarly, there can be such a thing as reactionary working class politics. I will leave that analysis to another day except to say that calls for working class liberation that do not take into *sufficient* account the demands of oppressed groups (it is not enough, as noted above, to

just give lip service to such demands; one must empathize with those impacted by the oppression they are resisting) will inevitably strengthen bourgeois rule to the detriment of almost all of us.

How, then, do we persuade straight white men to make common cause with oppressed identity groups, when they enjoy certain advantages identity groups do not? It is, first of all, important to recognize that, for most whites, those advantages are not worth the exploitation to which they are subjected and the difficulties they continue to endure. However, telling those who enjoy even such modest advantages they should give them up is generally futile. Large numbers of people do not readily give up whatever small privileges they may have out of a sense of benevolence.¹¹ It may be difficult to persuade the white male, privileged, sectors of the working class that it is in their interest to form alliances with oppressed identity groups, but we must undertake that task if we are to succeed and grow, and there are ways to accomplish the task. People can readily be persuaded to join together with others for mutual benefit if that benefit can be spelled-out. When people recognize they are gaining only slight advantages at the expense of their continuing to suffer serious exploitation, they will be prepared to give up some of those so-called advantages. Demagoguery is easier (two-thirds of poor Alabamians voted against having their taxes decreased and taxes for the rich increased because of fears about raising taxes), but patient, clear advocacy can win the day.

By failing to recognize, and respond to, the multiple and varied forms of oppression through which the American ruling class maintains its power, the traditional left allowed U.S. capitalism to portray itself as the great defender of diversity and equality. The truth is that the U.S. bourgeoisie was dragged kicking and screaming into that role and has been half-hearted and inconsistent in fulfilling it. Still, it has done enough so that many have taken the bait and have abandoned the whole because a few members of their particular groups flourished, in the generally vain hope that they, too, will rise.¹²

Real liberation is dependent upon both sides in this debate renouncing their past errors and joining together to fight a common enemy. Thus, we cannot wait until we change the system before we change ourselves. But that change must come through common struggle against a common enemy. We must work to transform ourselves, but can only do so effectively in the course of the greater battle to transform the political, economic and social system we live under that has made us what we are.

It is particularly important for white men to engage in such transformation by learning to empathize with those oppressed by our society. That does not mean acceding to every demand or accepting every criticism. That would be patronizing, not empathizing. It *does* mean considering those things from the perspective of the source. In his book, *Black Rage Confronts the Law*,¹³ Paul Harris teaches how to do this—and, not incidentally, explains how lawyers can improve their advocacy by doing so—with remarkable clarity and vision. He

reflects the Guild at its best and sets a standard to which we should all aspire, both as professionals and in our personal relationships.

In the National Lawyers Guild, we have taken principled stand after principled stand for the liberation of countries from U.S. imperialism. We have taken the principled stand to fight racism within our own organization. We have defended workers against capitalist attacks, within the U.S. and internationally. The task before us now is to integrate all those struggles. More specifically, it is to recognize they are all fronts of a single struggle.

NOTES

1. As the great bluesman, Johnny Shines, was fond of saying: "If Mother Nature don't get you, Father Time will."
2. See Doris Brin Walker, *How I Happened to Become the Guild's First Woman President*, 64 GUILD PRAC. 65 (Summer 2007). My first NLG convention was 1970 in Washington, DC when she was elected our first woman president. That was also the convention at which law students became full Guild members, a change Doris opposed. As a consequence of her opposition, students considered running their own candidate. Her account of how her opponents in those days became dear friends over the years is instructive.
3. I have referred to this before, but it is always appropriate. See Dorie Ellzey Blessoff, "Ones Who've Gone Before Us." Lyrics can be found at <http://doriezblesoff.com/archive/ONES-BEFOREUS.pdf>.
4. Woody Guthrie wrote a raft of songs about the glories of the Grand Coulee Dam. We know today that, while it did help to "run the great turbines and water the land," it also endangered the salmon and thereby threatened the ecology of the northwest. No progress comes without some detriment.
5. See <http://www.musicsonglyrics.com/P/philochslyrics/philochslinksonthechainlyrics.htm>.
6. It is easy for me to criticize these things now, but I was immersed in those debates then.
8. See *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 127 S. Ct. 2738 (2007)(Roberts, CJ).
9. Carlos Villareal, executive director of the San Francisco NLG chapter, responded with a polemic published in *Common Dreams* in which he criticized "right-wing identity politics." See <http://www.commondreams.org/views04/1128-29.htm>. It should also be acknowledged that a legitimate criticism was made, and quickly accepted by the Guild, about the accusation contained in the Guild's press statement that "(i)f Gonzales were living in a Latin American country he would no doubt be a member of a repressive oligarchy."
10. The San Francisco chapter chose to endorse her.
11. There is a story, likely apocryphal, about Chiang Kai-shek, son of a peasant and the leader of the anti-Communist Kuomintang, meeting Zhou Enlai, son of wealth and the first prime minister of the People's Republic of China. Chiang pointed out the differences in their respective backgrounds and Zhou responded, "And we are both traitors to our class." But such class traitors as Zhou are rare.
12. It is worth remembering what Eugene Debs said: "When I rise, it will be with the masses, not from them."
13. PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 13 (1997)



LAURI R. TANNER

**EMPATHY & GUERRILLA
LAWYERING: “WHAT HAPPENS
TO A DREAM DEFERRED?”**

This short essay is dedicated to my father, Dr. Robert Tanner, who passed away recently, and who inspired me throughout his life with both his empathy and sense of historical perspective, two of the compelling threads that run through Paul Harris’ engaging ‘Guerrilla Lawyering’ law school course and his book *Black Rage Confronts the Law* (New York University Press, 1997.) My father was an avid reader during almost all of his eighty-nine years, and on the personalized nameplates he put inside of his hundreds of books, he quoted the last stanza of a poem by the renowned labor activist Ralph Chaplin:

“Mourn Not The Dead”...
But rather mourn the apathetic throng
The cowed and the meek
Who see the world’s great anguish and its wrong,
And dare not speak.

Like my father, I am inspired by Paul Harris. Paul is someone who sees the wrongs of our society and our legal system and dares to speak out. Harris insightfully breaks through the myths of practicing law and the legal status-quo by addressing six goals of Guerrilla Lawyering: (1) Winning Cases; (2) Building Power; (3) Dignifying the Client; (4) Demystifying the Law; (5) De-Legitimizing the Law; and (6) Breaking Hierarchies. What kept me connected to this material was Paul’s overriding conviction that to reach these goals, law students, lawyers, and others working in the legal arena must always strive to realize our ideals while continuing to develop and refine our skills throughout our lives.

Underlying Paul’s course and book are the four principles of Guerrilla Lawyering, summed up as Empathy, Audacity, Polishing Skills & Preparation, and Historical Perspective. Weaving together the key issues of strategy and emotional reality, Paul constantly reminds his students and readers to keep focusing on our identification with the character and experiences of another person. Through dozens of examples of heart-wrenching cases, mostly criminal in nature but some civil cases as well, we embark upon a journey that allows us to understand the social and economic hardships that explain why people commit crimes. Repeatedly, we return to the question of society’s responsibility for shaping the criminal offender.

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I completed Paul's book and course convinced of the necessity to educate people who work in legal settings about the destruction of the human spirit caused by racial and economic injustice, and to integrate the anti-racist strategies learned in Paul's class into all aspects of our legal training and preparation. Additionally, I was persuaded not only of the ongoing need to dignify individual clients, but realized that we must also recognize the dignity of jurors, opposing counsel, judges, and all of the other professionals or non-professionals with whom we interact.

Paul writes and speaks eloquently about assuming that people of different races, cultures and classes can understand and empathize with each other if given the chance to truly hear the other person and the evidence he or she is presenting. "Giving each other the chance" means empowering clients and ourselves by practicing deep listening, seeing the strengths in each client, educating that client and others about how the legal system actually works, and allowing for the full participation of our client's family and friends and the legal staff with whom we work. Consistently exploring the social context of each client's case, and engaging with plaintiffs or defendants as "partners in a joint effort to achieve some measure of justice" helps us create possibilities otherwise unimagined.

In one of Harris' major cases, in which bank robber Steven Robinson was acquitted, Paul read to the jurors a famous poem by Langston Hughes that starts with the line "What happens to a dream deferred?" Through deconstructing Robinson's life story and the facts of his criminal case, Paul opens a window into which his students and readers can look more deeply at the effects of socio-economic hardships, allowing us to integrate this heightened awareness into our theories and arguments about the case.

When a juror can understand someone who has killed, maimed, or attacked as a fellow human being—as a "decent, vulnerable, troubled" person with "dreams deferred," instead of "a menacing, treacherous criminal"—then the common sense of that juror has been respected and acknowledged. In those moments, a progressive lawyer can expose the institutional racism inherent in so many situations of criminal and civil injustice, and can articulate society's responsibility in a way that jurors, judges, parole commissioners, and others may comprehend. Paul points out that "the jurors' life experiences teach them that race and class can have powerful effects on a person's life, and no amount of lawyerly cross-examination can overrule their common sense."

Recognizing and respecting this "common sense" of not just jurors, but of all the players in legal dramas in which we are engaged, gives our work the compassion found in one of Paul's favorite sayings of Che Guevara: "At the risk of seeming ridiculous, true revolutionaries are guided by feelings of love."

In his *Black Rage Confronts the Law*, Paul tells the stories of numerous guerrilla lawyers like himself, including two from Detroit, Justin Ravitz and Ken Cockrel, who exemplified this deep compassion and commitment to expressing the humanity of the people they represent and serve. During his time on the

bench, Judge Ravitz showed his passion for social justice in his writings and by giving public talks, using his courtroom “to teach how the legal system really functioned, and by rejecting the myths of a colorblind courtroom and the law’s neutrality and objectivity.”

When Cockrel passed away unexpectedly at the age of fifty, his wife said that she would like him to be remembered “as a man with a passion for justice and an impeccable integrity, and that he believed in making things better for working people and poor people with his whole heart and soul.” When Paul writes and speaks about jurors confronting their own stereotypes and how one can connect societal racism and criminal behavior, he holds a mirror up to each of us, gently but firmly guiding us inward at our own subtle or unconscious racism. While he never directly confronts the individual student’s or reader’s personal attitudes or prejudices, it is hard not to accept the exhortation to introspection that comes from Paul’s calls for fearless advocacy, innovative pleadings and creative legal action.

By distinguishing larger structures of race-based power and control from individual prejudice and bigotry, progressive advocates can demystify the legal system for all with whom we are engaged, as we strive in each situation to find the warrior-lawyer perspective. The “black rage defense” that Paul pioneered and which is explored in detail in this book, presents race in a powerfully emotional and also philosophical context. However, a key point for me is that this strategic legal concept is not only limited to African American defendants and plaintiffs, because its aim is to tie together individual behavior and societal conditions of all peoples and all races.

The beauty and power of Paul’s teachings are found in the way he continually takes us back and forth in the classic balancing act of the personal and the political—for example, asserting that “sometimes we can lose the case, but win the human being.” He follows the advice of Bryan Stevenson from the Equal Justice Initiative by using deeply-affecting cases of real-life people to explain how racism and poverty have shaped the histories and lives of individual defendants.

Paul Harris likes to share Thomas A. Edison’s observation that, “A genius is just a talented person who does their homework.” On my desk I have another inspiring saying from Edison, which reminds me of Paul:

If we did all the things we are capable of doing, we would literally astound ourselves.



NATHAN GOETTING

**ON WHITE SCHOLARS TEACHING
FEDERAL INDIAN LAW**

Last February I flew to Baton Rouge to give a presentation to The National Association of Native American Studies annual conference. It was my first time attending, let alone presenting at this conference and I had no idea what to expect. A few days before the event I tried to imagine what awaited me—would there be a large audience? Would they have read my abstract? Was I ready for whatever questions would follow? I began to visualize my audience. Then I asked myself: how many Native Americans would be attending? What if I had an entirely monochrome audience of the sort that I was not so accustomed to—every single attendee a Native American belonging to a tribe, including the tribes I would be speaking on? I had been excited about the conference ever since my abstract had been accepted, but now a strange feeling of perplexed audacity welled up inside me, not uncommon, I have since been told, among white professors teaching minority studies. It had been very easy to discuss American Indian legal issues with my almost exclusively non-Indian colleagues and students in the past and to teach in this area with a certain amount of confidence in my own understanding of the subject matter. But now what had been eager anticipation had grown into something more pensive and tentative. As I stood reviewing my notes for the last time at the front of the conference hall, I scanned the faces of the attendees. There were no Native Americans present, as best I could tell. A colleague of mine, a white professor of African-American literature, as it happens, told me afterward that he thought I'd done a great job, but a nagging question prevented me from feeling any satisfaction: How qualified can a white scholar ever be to teach lessons on how U.S. law has affected the history of Native Americans—to Native Americans?

The article that follows this piece largely focuses on a trio of Supreme Court cases involving Indian tribes that took place during the early years of our republic. While I am convinced that you will find the facts and claims within it accurate and persuasive, scholarship means considering the source, which I would like to do for a moment before beginning our topic in earnest.

White scholars inevitably enter into dangerous territory when lecturing on Native American studies. Despite their expertise there are certain fundamental ways in which they can never truly be experts. More than that, there is an increased burden put on them—fairly, I would say—before they are given credibility. Racial identity and perspective matters and it is impossible, for instance, for a white scholar raised off the reservation system to write and presume to teach on the history of U.S.–Indian relations as if he or she has been able to internal-

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ize how that history has affected actual Native Americans. When the white scholar speaks of Indian pain and persecution he or she is inevitably speaking with analogies and metaphors.

While it is true that scholars gain perspective through their work, the perspective gained at all times belongs to that same scholar, who, no matter how rigorous his research, can never shed his or her skin and transform into his or her subject. The issue of intercultural or interracial scholarship is ontological as much as it is cultural and pedagogical. Full appreciation of Indian life, certainly, means inclusion within it. Not just studying it, but *being* it. This kind of personal awareness outsiders looking in can never attain, no matter how hard they look. The American Indian experience is too unique to be gotten at by analogy, approximation or empathy from afar, and studying it up close, as opposed to processing it into one's own personal identity, is in many ways still a distance too far. Indianness, indeed, most belongs to the Indian. So how, exactly, can a white scholar become expert in the transmission of the effects of U.S. policy on Native Americans to others? To put it in sociological terms, how does a member of an in-group teach what it is like to be a member of an out-group?

The short answer is that he or she cannot. Not the way an equally trained member of the in-group can, anyway. This deficiency is exacerbated in the instant case, where the out-group member is a white scholar belonging to the dominant American culture. Given the struggles, past and present, between America's traditionally white culture and Indian cultures, and how the popular and scholarly literature of these struggles has until recent generations been cast in highly charged us-versus-them racial terms, any white scholar presuming to have *too much* insight into Indian life is more than just too presumptuous. He runs the risk of being boorish to the point of alienating the better elements of his audience and disqualifying himself as an expert. The history of American Indians has been replete with battles against two kinds of white antagonists: the racists who hate them and the fools who claim to have figured them out. Which of the two has been more pernicious is open to debate. Most white American scholars want to help eliminate the former but while doing so must be ever-vigilant of becoming the latter.

This tension was thrown into vivid relief with the publication of Ian Frazier's *On the Rez* in 2000. *On the Rez* sought to introduce the larger American public to the identity and plight of Native Americans living among but apart from them in the reservation system. It is written with a deftness and keen sympathy for its subject that seems infinite and, in some places, extremely touching. Frazier, a white litterateur who for years wrote regularly for *The New Yorker*, begins *On the Rez* by writing "This is a book about Indians..." and then proceeds on to a magisterial account of what being an Indian means—to Ian Frazier. *On the Rez* prompted a lacerating review by the great Indian novelist Sherman Alexie, who objected to Frazier's pose as a compatriot and authority on contemporary Indian life. The very title, Alexie claimed, is an insult to the complexity of Indian

identity and should have been titled “On Their Reservation” to illustrate the unbridgeable distance between the Indian insider and the white outsider.

It has been the centuries-long mixture of unconcern and contempt for Indian cultures amongst the historically white dominant culture that has wrought such colossal devastation to native peoples. The function of the white Native American Studies scholar is to help bridge the distance between scholar and subject while always respecting that distance—and then communicate that respect (for subject, bridge and distance) to his or her readers and students. It is a noble and worthwhile function, maybe even a possible one, and one that the following article hopes to perpetuate. This was Frazier’s goal, too, I think. And while perhaps Frazier’s over-familiarity merited Alexie’s admonition to respect the distance between them, Frazier’s attempt to compel us to deal with the living consequences of what has amounted to genocide-in-slow-motion should be admired and repeated.



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NATHAN GOETTING

THE MARSHALL TRILOGY
AND THE CONSTITUTIONAL
DEHUMANIZATION OF
AMERICAN INDIANS

“What law have I broken? Is it wrong for me to love my own? Is it wicked in me because my skin is red?”

—Sitting Bull¹

“Nits make lice.”

—Col. John Chivington²

I. The court as person-definer

While it is too simple to say that racism was the sole cause of the conquest and subjugation of the North American native population, it was certainly at the heart of it, just as racism was not the sole cause but was nonetheless at the heart of the antebellum slave system. There was an attitude of greedy supremacy behind Indian land snatching just as there was behind the intercontinental slave trade. And just as the south’s “peculiar institution” had a U.S. Supreme Court case, *Dred Scott v. Sandford*,³ in which the court dehumanized an entire race of people by affirming and promoting bigoted legal doctrines, so did the system of expropriating Indian territories—three cases, in fact. This article seeks to explain these three cases within the context of the court’s historical role of defining who is and is not (or what divisions of the human species are or are not) persons under the fundamental law of the land, the U.S. Constitution.

A few times each century, it seems, the Supreme Court really does transcend its role as a judicial tribunal and, by dint of the extraordinary constitutional issues of the cases at bar, finds itself ruling as aspiring philosopher kings. These can be dangerous moments for our republic. Oftentimes these cases involve a decision about whether a particular sector of our population—a particular racial or biological category of person—is fully human for purposes of protection under our Constitution. These are cases in which the Court is not judging a person’s actions but instead whether the Constitution recognizes the members of certain groups as persons at all. The aims of this section are modest. They are only to demonstrate that such cases periodically occur and that when they do the most basic rights of an entire group of persons can be placed in jeopardy.

When in 1857 the Court declared in *Dred Scott* that, because of their race, African Americans are incapable of becoming U.S. citizens and are so “inferior that they had no rights which the white man was bound to respect”⁴ the Court was not just making a legal determination. It was making a pseudo-anthropological

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(and diabolically philosophical) statement on what, exactly, it means to be fully human. Along with so many other questions central to America's identity as a nation, the merits of *Dred Scott* were ultimately re-argued on the battlefield of the Civil War. With the defeat of the Confederacy, the core holdings of this case, for which the Court will forever live in infamy, were quickly repealed with the passage of the Thirteenth, Fourteenth and Fifteenth Amendments.

The court rendered a similarly dehumanizing (though less infamous and politically combustible) race-based ruling in 1944 with *Korematsu v. U.S.*⁵ Here the court upheld the military's race-based policy of interning 110,000 Japanese Americans and Japanese nationals living in America, including children, in contravention of their most fundamental rights. The court reasoned that because of the pressing need to win the war with imperial Japan and the diversion of governmental time and resources enforcing due process of law would require, the clause in the Fifth Amendment which reads "[N]or shall any *person*... be deprived of life, liberty or property without due process of law"⁶ was to be suspended for this racial group. In other words, it was the court's judgment that, because the government could not be bothered to find and legally prosecute actual traitors and subversives, all members of that racial group, however innocent, would be treated as if they were among the guilty. Racially Japanese Americans had effectively been deemed a kind of lower-order person to whom the protections of the Constitution did not apply. As a constitutional matter, *Korematsu* is still good law and in its most vital aspects will remain with us, it seems, in perpetuity. It is a constitutional tragedy uniquely immune from our political system's two usual methods of reversing bad constitutional decision-making by the Court: (1) passage of a constitutional amendment or (2) a rehearing by the court.⁷ This is because rights are usually won or lost when the Court classifies them as either fundamental (i.e., "of the very essence of a scheme of ordered liberty"⁸) or non-fundamental. When the right the government seeks to abridge is deemed fundamental the government must meet the extremely high burden of showing that the abridgement of that right is narrowly tailored to meet a compelling state purpose and that the government action or statute is the least restrictive means of achieving serving that purpose.⁹ It is a nearly impossibly high burden. *Korematsu* is an extremely rare exception in which the Court fully recognized that Fred Korematsu's fundamental rights were being violated yet thought the government's internment policy had successfully met this "strict scrutiny" standard. As I have argued elsewhere, "[I]f the state's interest is compelling enough, any right, no matter how fundamental, can be alienated. In this way, *Korematsu* will always be good law."¹⁰

The Court's tendency to recognize categories of persons as less equal than others is not limited to issues of race. In the 1927 case of *Buck v. Bell*¹¹ the Court passed judgment on the constitutional personhood of the mentally retarded when it upheld a eugenics-based Virginia compulsory sterilization statute designed to purge the population of "defectives" and the "feeble minded." The Court supported Virginia's presumption that unless the mentally handicapped were

divested of their right to parenthood and bodily integrity their offspring would either drain state welfare resources or have future generations of “defectives” who will cause our nation to be “swamped with incompetence.”¹² The Court concluded that Emma, Carrie and Vivian Buck—mother, daughter and granddaughter—were each “socially inadequate” and that compulsory vasectomies and salpingectomies were remedies compatible with the Constitution that the state might use against all those designated likewise. Carrie Buck’s claim that she was being denied her Fourteenth Amendment guarantee of “equal protection of the laws,”¹³ not because of anything she did but rather because of who she was (someone designated mentally retarded and institutionalized by the state) did not impress the court. “Three generations of imbeciles,” Justice Oliver Wendell Holmes, Jr. wrote in his majority opinion, “is enough.”¹⁴

While the constitutional holding in this case has not been overturned, the legal potency of *Buck* was somewhat vitiated by *Skinner v. Oklahoma*.¹⁵ *Skinner* did not directly address the rights of the mentally handicapped, but it limited the power of states to use compulsory sterilization generally by recognizing the right to have offspring as fundamental under the Fourteenth Amendment’s Due Process Clause.¹⁶ In *Skinner* the Court struck down a punitive eugenics statute in Oklahoma that mandated sterilization for criminal recidivists. However, even while announcing a fundamental right to reproduce, the Court struck the statute down not so much on the issue of compulsory sterilization as on an exemption in the statute that protected those convicted of certain upscale crimes like embezzlement and political corruption. The Court found that the disparity in treatment between what we would now call street and white-collar criminals was “artificial” and amounted to a violation of the Fourteenth Amendment’s Equal Protection Clause.¹⁷ At no point, though, was the holding of *Buck*, which applied to non-criminals who had not offended the state other than with their “feeble-mindedness,” ever repudiated. It was instead explicitly affirmed. The Court reasoned that, no longer threatening to reproduce, those forcibly sterilized might be able to leave the state institution, thus freeing up space for someone else.¹⁸ This, the Court insisted, is a “saving feature.”¹⁹ *Buck*, though weakened, is still the law of the land.

It is more than a coincidence that there is a tendency in many of these person-defining cases, like *Korematsu* and *Buck*, for the state to present false evidence and defraud the Court. As he chronicles in his *A People’s History of the Supreme Court*,²⁰ Peter Irons was able to successfully vacate Fred Korematsu’s conviction by proving that the solicitor general who argued that case willfully suppressed FBI and other intelligence documents stating that Korematsu and his fellow Japanese-American internees were not the threat the government argued they were.²¹ Likewise, Paul A. Lombardo has earned widespread acclaim for his 1985 article²² and 2008 book²³ on *Buck*, in which he convincingly argues that not only were none of the Bucks retarded, as contemporaneous documents (including those showing Vivian Buck was on her school’s honor roll)²⁴ and research into subsequent life of Carrie Buck plainly show,²⁵ but that a bevy of

characters, including Carrie Buck's own attorney, colluded to mislead the court system and guarantee that the Virginia eugenics statute would be upheld.²⁶ As these cases show, the superciliousness and contempt that causes dominant groups to dehumanize others is fertile soil for a whole host of other evils, duplicity first among them.

1973's *Roe v. Wade*²⁷ was a person-defining case of a different sort and In this case the Court interpreted the Substantive Due Process Clause of the Fourteenth Amendment in a way that established a woman's fundamental privacy right to abortion during the first trimester of pregnancy. While it would be inaccurate and unfair to characterize those who sought to win that right as being actuated by a supremacist's contempt for fetuses, it is nonetheless the case that here the Court was required to give the Constitution's answer to the basic anthropological question of whether fetuses are persons. While the Court explicitly declared that it had no interest in determining when, exactly, life begins,²⁸ choosing not to decide, in this instance, was inevitably to have something like the force and effect of making a choice. Whereas in the aforementioned cases the Court actively sought to define sectors of the population as non-persons or less-than-persons, here the Court did its best to avoid the question of fetal personhood. Abortion, the Court averred, was not a fetal rights issue. It was instead a matter to be resolved by balancing the rights of pregnant women against the interests of the state.²⁹ But the Court's own logic defeated its attempt at evasion. If there is a fundamental right to abort first trimester fetuses—which would be performed by doctors licensed by states, who, under the Fourteenth Amendment, cannot deprive any person of life without due process of law³⁰—those fetuses certainly have been categorized in some fashion as belonging to a different, less protected legal, anthropological—even ontological—class. When referring to a fetus, the Court in *Roe* regularly refers to the state's interest in "potential life,"³¹ and, as any student of Aristotle will tell you, the difference between potential and actual is the difference between non-being and being. Whatever one thinks of the merits of the Court's decision in this case, and despite its profound differences with those mentioned above, it seems plain that the Court, despite itself, likewise engaged in constitutional person-defining.

All of these person-defining cases required the Court to stretch beyond its judicial competence into controversial questions of philosophy and science that Supreme Court justices, mere lawyers decked in robes, simply are not equipped to resolve. The Court's answer to the question of the personhood of the American Indian is one of the great tragedies of American history.

II. Pseudo-anthropology as the basis for two racist legal structures

A sequence of early nineteenth century Supreme Court opinions by Chief Justice John Marshall—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, known collectively as the Marshall trilogy—interpreted the Constitution in a way that defined tribal Indians as less than fully human, thereby justifying past depredations and providing legal impetus and

justification for others that would follow. The Marshall trilogy constitutes the foundation of American Indian law. These cases still determine the limits of tribal self-government and how tribes relate to state and federal governments in our federalist system. This article focuses on just one dimension of these complex and influential cases—how they dehumanized the tribal Indian under the Constitution and thereby facilitated the continuation of the government's unconscionable policies of land expropriation and political subjection. Though over 175 years old, these cases are far more than of just historical interest. They remain the fundamental law of the land, taught in every course on American Indian Law. They continue to be the Court's, and therefore the Constitution's, definitive statement on the personhood of tribal Indians.

The comparisons between The Marshall Trilogy and the abovementioned cases, especially *Dred Scott*, are not made lightly or without awareness of their inexactitude. One of the most fascinating and horrifying facts of American legal history is the way courts, despite their constitutional role as the branch most jealous of individual rights, have been complicit with the other branches in constructing two very distinct hegemonic systems of racial subjugation, one for Native Americans and another for African Americans, each one buttressed by its own unique (and uniquely perverse) legal principles and justifications.

While Chief Justice Marshall was at times in his own mind sympathetic to the plight of the tribes while hearing these cases,³² this sympathy was nonetheless soaked with the common racist condescension of his time. Both Native Americans and African Americans were often caught between the virulent racism of those who openly sought to crush their liberty and a softer kind, like Marshall's, that was animated less by explicit rancor than a lordly sense of paternalistic superiority. Marshall did not outwardly show hate for Indian tribes in his opinions but rather a conviction that they were comprised of desperate children in need of help. Though Chief Justice Roger Taney manumitted his own slaves and as a young attorney had at least one abolitionist client,³³ the racism of his opinion in *Dred Scott* is of the former, fiercer and more direct kind—as one might expect from an appointee and close political advisor of the man most responsible for the Trail of Tears, President Andrew Jackson. And while some mixture of condescension and contempt are integral parts of any racist legal system, these two cases became both harbingers and spiritual microcosms of the separate systems of racist oppression they defended and perpetuated. Marshall's oft emphasized belief that native peoples were puerile, innocent and in desperate need of the federal government's beneficent guidance became the prevailing spirit of the following reservation system, which sought to improve the tribes by inculcating in them the blessings of Christianity and western culture. Taney's overt denunciation of the very notion that black people could have any rights at all, let alone equality under the law, became the animating spirit of vicious and degrading Jim Crow legislation in the south. While understanding and respect for the gravity of each these vast and ornate systems of racial oppression requires that their many distinctions be borne in mind, they

both ultimately stem from the same basic legal (and pseudo-anthropological) premise recognized and upheld by the court in *The Marshall Trilogy* and *Dred Scott*—that because these groups are not white the highest law in the land, the Constitution, regards them as less-than-human and undeserving of its full protection. “An inferior race of people,”³⁴ Chief Justice Marshall writes of Native Americans in *M’Intosh*; “beings of an inferior order,”³⁵ Chief Justice Taney writes of African Americans in *Dred Scott*. This is the very essence of racism winnowed down to a single idea—the place where Marshall’s condescension and Taney’s contempt prove themselves identical.

III. Treaties and landsnatching

It would have been suicidal at the beginning of the European colonization of North America for the vastly outnumbered settlers to rely primarily on military tactics to achieve their goal of displacing tribes, as European states had often done with other newly discovered lands. Instead of physical force, colonists more frequently used cunning and manipulative treaties to swindle tribes. As Prof. Kades points out in his magisterial work on this subject,³⁶ brutality would have been a poor tactic for the colonists. Great wars and massacres of the kind that would come to take hold of the popular imagination were actually rather rare considering the amount of land the settlers were taking. The work of destroying native peoples and their culture was usually much more mundane. Disease and game-thinning did the killing.³⁷ Treaties did the stealing. For the most part, this was extermination not with a sword but with a pen and a handshake.

The English pilgrims settling North America and native tribes had very different understandings of what treaties were and how they would be enforced. Settlers marveled at the tribes’ innocence of the very notion of private property. “There is no *meum* and *tuum* (mine or thine) amongst them,” according to Puritan preacher Robert Gray.³⁸ To the settlers land was meant to be owned by individuals and farmed for crops that could be eaten or sold for profit. To the tribes it was to be shared and respected. Hunter-gatherers, as many tribes were, did not use the land correctly, the settlers thought. To allow them to continue occupying it was to let it go to waste.

Generally speaking, to Indians treaty-making was friend-making. These agreements were sacred covenants based on mutual *agape*, not *realpolitik*. The peace pipe created bonds of amity that should be honored readily and with deep-seated commitment, not reluctantly or out of legal obligation. They were rarely entered into cynically or with a spirit of evasion and wealth maximization. If a treaty partner grew weaker over time it was understood that the stronger party’s obligation to the weaker would increase rather than vice-versa.³⁹ Tribes often sought the aid of treaty partners beyond the four corners of the document, presuming that the friendship created by their agreement was consideration enough for the favor.⁴⁰ Treaties would be renewed with commemorative festivals, celebrations and great shows of comradeship with the intent of preserving the love and affection the original treaty signified.⁴¹ The custom of using treaties

as whites did, as political expedients or self-interested maneuvers in a slow-moving cold war to grab more land, was incomprehensible.

The U.S. emerged from its war for independence against Britain as a fragile union of states with a weak national government. Many tribes, stung by the brutal treatment at the hands of colonists before and during the war, including Washington's wholesale slaughter of the Six Nations Confederacy in western New York, had sided with the British.⁴² While prolonged and bloody fighting with Native American tribes continued in many areas of the country, at this early point in its history, on the heels of difficult and protracted war, the U.S. lacked the resources and will to continue fighting a full-scale war of the kind it had just won against Britain. Instead, Washington wrote the head of the Continental Congress' Committee of Indian Affairs, James Duane, that he thought that it would be "expedient" to construct a policy of ostensible forgiveness and conciliation with the hitherto enemy tribes.⁴³ Their plan was to acquire tribal lands by agreement rather than martial annexation:

[W]e will draw a veil over what has past...[P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their lands in preference to attempting to drive them by force of arms out of their Country.⁴⁴

As difficult as it is to ascribe tolerance and virtue to the general responsible for the murderous raids against the Six Tribes Confederacy during the war for independence, in the years immediately after the war Washington was comparatively sympathetic to the plight of Indian tribes and, as president, would express outrage over their maltreatment by frontiersman and local governments. Washington believed treaties with tribes should be honored by both sides alike and he had little patience for whites who failed to do so.⁴⁵ That said, Washington, like every U.S. politician of that era understood that the inevitable trajectory of U.S. politics and culture was expansion into the western frontier, which meant confrontation with the tribes currently residing there.

The result of Washington's policy of bloodless land acquisition was a series of treaties like the 1785 Treaty of Hopewell signed by the Choctaws and Chickasaws in the south, which, amongst many other things, set up carefully delimited areas for white settlement in exchange for promises to protect tribes from white incursion by state governments and individual frontiersman. These treaties were exploited by whites from the outset, many of whom believed that the federal government lacked the constitutional authority to bind them. Whites ignored treaty provisions, often with savage cruelty, more or less whenever it suited them. States sometimes subverted federal treaties by negotiating their own agreements with tribes. This general flouting of federal law and policy outraged Washington and set in motion a forty-four year (1790-1834) anthology of legislation collectively known as The Trade and Intercourse Acts that was designed to reaffirm federal supremacy on the issue of Indian affairs and set up the rules guiding America's westward expansion.⁴⁶ These laws established

two legal doctrines that would be affirmed in the Marshall Trilogy cases: (1) Only the federal government, never the states or private citizens, has the power to acquire tribal land. (2) The only legal method of acquiring title to tribal land is by treaty.

Treaties are by definition international. They are agreements between autonomous nations. Recognition of national sovereignty has always been tacit in the very idea of treaty-making.⁴⁷ The Constitution has rules governing the treaty-making process—i.e., they must be made by the president and approved by two-thirds of the senate. By choosing treaties as the method by which to acquire tribal lands, the government was often able to achieve its goal bloodlessly.⁴⁸ More than that, treaties also covered the expropriation of tribal land with the veneer of legal and moral legitimacy. While Washington's administration was comparatively scrupulous in its desire to deal decently with tribes, future administrations would apply a far more sinister moral calculus to the treaty-making and enforcement process, using coercion, duress, legal trickery, intercultural confusion and other shady means to reach an agreement, and then behaving as if their agreements were true meetings of the minds rather than the one-sided predatory instruments of greed so many of them actually were.

Legally, the Trade and Intercourse Acts established or affirmed multiple legal principals that would prove constitutionally problematic and would be taken up in the Marshall Trilogy. Not only was a treaty then understood as a compact between nations, which presumes the national sovereignty and independent statehood of all signing parties,⁴⁹ but these treaties in particular also presumed that tribes held legal title to the land the government was taking—that is, that the Indians legally *owned* the land before the government took it from them. Treaties were meant to represent the transfer of legal title to the land from one party to another. These two basic premises of the Trade and Intercourse Acts—that Indian tribes were sovereign states and that they could hold legal title to land—were in conflict with the English common law and a number of colonial laws which expressly denied that tribes were sovereign nations capable of selling land.⁵⁰ The government was in a quandary. Taking tribal lands by force was generally too costly yet the most effective way of obtaining them, the treaty, had the off-putting effect of treating tribes too much like legal equals. The Marshall Trilogy would solve this quandary once and for all.

IV. Judging the parts by the whole

The federal courts almost never dealt directly with the constitutional rights of individual tribal Indians in the early nineteenth century. Tribal Indians born in the United States were not given U.S. citizenship as whites were,⁵¹ and because tribes generally existed outside or on the periphery of the American body politic and judicial system, courts usually ruled on the constitutional rights of entire tribes rather than on the individuals comprising them. There were no major Supreme Court cases during the early years of the republic ruling directly on whether individual Native Americans were “persons” under the Fifth

Amendment's Due Process Clause or "citizens" under Article III, Section 2, Clause 1, as was the case with African Americans in *Dred Scott*. The rights of the individual tribal Indian could only be ascertained indirectly from the court's rulings on the rights and prerogatives of tribes as collective political entities. The framers of the Constitution anticipated regular interaction with tribes and the phrase "Indian tribes" exists in the text of the Constitution.⁵² For this reason it makes sense that federal courts would hear cases requiring them to flesh out what this phrase within our most sacrosanct body of law means. However, the document never speaks about tribal Indians having rights apart from their tribe. The constitutional standing of the particular tribal Indians was therefore derivative: courts would render judgments on the rights of tribes and then, by inference, these judgments were filtered down to individual tribal members. The courts judged the parts implicitly through their judgments of the whole. To the extent the courts granted tribes sovereignty they granted individual tribal Indians liberty; as sovereignty was limited, so were the liberties of its members. To the extent courts regarded tribal governments as political equals it regarded Native Americans as equal to the white citizens of the United States.

V. *Johnson v. M'Intosh*

The first case in The Marshall Trilogy, *Johnson v. M'Intosh* (1823), dealt with the kind of interest Indian tribes could legally hold in land. Chief Justice Marshall invoked the Discovery Doctrine to answer this question. The Discovery Doctrine⁵³ is a piece of international law that originated during the middle ages with the Crusades and was meant to preserve peace amongst Christian European nations who were regularly "discovering" new lands during the age of exploration. To European explorers newly charted land was *vacuum domicilium*, an empty domicile, and the natives occupying it, because they were non-Christian, were *perpetui inimici*, perpetual enemies.⁵⁴ Only colonizing (i.e. "discovering") Christian nations could hold a fee simple estate in land. Native peoples in colonized nations held a lesser "aboriginal title." Aboriginal title meant little more than the right to use and occupy the land and was sometimes referred to as the "Indian right of occupancy."⁵⁵

Marshall was a great admirer of his fellow Virginian, George Washington, about whom he published a lavish five-volume biography. Like Washington, Marshall thought of the federal government as the only entity capable of protecting tribes from the cruel depredations of land-hungry settlers and state governments. The Discovery Doctrine and aboriginal title, entrenched in our constitutional law by Marshall's opinion in *M'Intosh*, prohibited states and individuals from buying tribal land by divesting the tribes of their right to sell it. *M'Intosh* put tribal land completely under the protection of its lawful owners, the federal government. Marshall reasoned that under the Discovery Doctrine England had acquired title to North America by conquest. Aboriginal title was a lower-order estate in land subordinate to absolute legal dominion enjoyed by the British government. The federal government, Marshall declared, had inherited

these lands by virtue of the Treaty of Paris (1783), which marked America's victory over the British during the war for independence.⁵⁶ Aboriginal title holders could not sell or rent their interests in land to states or private citizens. They could only sell their right to occupy to the federal government.

M'Intosh made it clear that, in the everyday sense of the term, the tribes owned no land whatsoever. More than that, by eliminating all its competition this case made treaty-negotiations for the tribes' (right to occupy) land much easier for the federal government. In the words of Prof. Kades, "The rule of *M'Intosh* was part and parcel of a larger process: efficient (cheap) European expropriation of Indian lands."⁵⁷

The Discovery Doctrine as limned in *M'Intosh* is still good law and this case is included in most law school property textbooks. However, Marshall's opinion in *M'Intosh* has as much to do with political and human rights as it does property law, and its effect not just on the wealth but on the autonomy and fundamental dignity of tribes under U.S. law has been profound. Marshall was very explicit that his decision to apply the Discovery Doctrine was based on the longstanding tradition of racism and ethnocentrism inherent in the laws dealing with native peoples. Anglo-American law has always recognized Native Americans "as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government."⁵⁸ By depriving the tribes of land ownership (and citizenship) based on the "inferiority" of their race and culture Marshall was making a political and anthropological judgment. Tribes, Marshall is stating, may not own land (or become citizens) because they are not as human as whites are.

The American war for independence was fought largely to vindicate the political and property rights of the colonial bourgeois. Many of the founding fathers accepted the Lockean view that the political and property rights they were fighting for were inextricably linked. This linkage profoundly influenced early American legislation and legal interpretation. "The people who own the country ought to govern it,"⁵⁹ John Jay, the first Chief Justice of the Supreme Court once famously said. It is no coincidence that while ruling that tribes cannot own land Marshall reminds us that they also cannot be citizens. After all, if the tribes lack the capacity for land ownership due to their racial inferiority, as *M'Intosh* states, it only stands to reason that they also lack the capacity for the more sophisticated task of self-government. Tribes were "fierce savages"⁶⁰ and "their rights to complete sovereignty as independent nations," Marshall writes, "were necessarily diminished."⁶¹ To Marshall the tribes could not handle the responsibilities attached to land ownership and the political rights and autonomy that flow therefrom. *M'Intosh* thus rendered tribes both permanent tenant-occupants of land owned and controlled by the U.S. government and foreshadowed subsequent cases that would make them perpetual political subordinates.

VI. The Cherokee cases

There was never any serious doubt amongst politicians during America's first century that, though assimilation had been tried in numerous places, it would not work and tribes would not be incorporated into the larger American polity. Rancor between whites and the tribes was especially vicious in the south, where the racism and greed of settlers was limitless and without let. As early as the Jefferson administration a consensus began to develop that the federal government should begin pressuring tribes to uproot and remove beyond the western pale of white settlement.⁶² In 1804 future president William Henry Harrison brokered a sham removal treaty with the Sauk and Fox tribes, whereby the Sauk and Fox ceded their land in what would become Indiana for money and federal protection.⁶³ A similar arrangement was made in 1818 with the Delaware. A policy of full-blown nation-wide ethnic cleansing had begun, pushing tribes into the more agriculturally barren lands of the plains. It would reach its climax with the remaining two cases of the Marshall trilogy, whose aftermath would include both a legendary confrontation between the executive and judicial branches and the Trail of Tears.

From presidents Jefferson to Van Buren the objective of the federal government was to resettle tribes to land newly acquired in the Louisiana Purchase. Jefferson brokered the Compact of 1802 with Georgia whereby the latter ceded a wide range of its western territory (now Alabama and Mississippi) in exchange for a promise that, eventually, the federal government would extinguish the title tribes had to land in that state.⁶⁴ The cause of Indian removal brought together a perverse political coalition—landgrabbers impatient to see the tribes go and humanitarians impatient to see the tribes free of the abuses of the landgrabbers. Of course, many of the former pretended to be the latter, conveniently insisting that only removal could save tribes from extermination.

President Andrew Jackson had been a successful and prolific crusader against Indian tribes throughout his military career and, though the Cherokee pleaded with him to honor peace treaties signed by previous administrations guaranteeing protection, Jackson supported Georgia's depredations against the tribe in that state. Jackson had long been an advocate of Indian removal and his blood-stained resume in previous Indian wars—including the killing of 800 traditionalist Creek Indians at Horseshoe Bend in 1814⁶⁵ and the razing of over 300 Seminole homes in the First Seminole War in 1818⁶⁶—was well-known by Americans of every race. Jackson is America's quintessential Indian killer. Though he has been celebrated in recent years with a spate of biographies written by award-winning authors whose works minimize his malevolence and in places border on hagiography,⁶⁷ he is considered "the equivalent of Hitler" to scholars like Donna Akers, whose great-great-great grandmother walked the Trail of Tears.⁶⁸

From the outset of his administration Jackson viewed passage of an official and authoritative federal Indian Removal Act, such as President Monroe had

outlined in an 1825 message to Congress, as a fundamental goal of his presidency. He knew from years of personal experience as an unscrupulous treaty negotiator how much a removal statute that enabled the executive branch to negotiate “treaties” would help him in his effort to rid the eastern United States of Indian tribes. Jackson had become adept at putting tribes under duress with intimidation and threats, which he sometimes enforced with wholesale violence. When in 1820 he told the Choctaw during a removal negotiation “If you refuse . . . the [Choctaw] nation will be destroyed,”⁶⁹ they had every reason to believe him. Jackson’s removal treaties, before and after his presidency began, were nearly always the very quintessence of victor’s justice.

In Jackson’s annual address to Congress in 1830 he sang the praises of the ongoing removal policy and urged for its aggrandizement. Under the careful maintenance of the federal government, removal, he insisted, would actually benefit the tribes remaining in the east. It would help them “cast off their savage habits and become an interesting, civilized, and Christian community. . . . How many of our own people would gladly embrace the opportunity of removing west on such conditions?”⁷⁰ Removalists often couched their policies in humanitarian terms, no matter how brazen their lies or feeble their rationalizations. Wilson Lumpkin, who served as a U.S. Congressman, Governor and U.S. Senator from Georgia during this period once said of removal that it was the Cherokees’ “only hope of salvation. . . . No man entertains kinder feelings toward the Indians than Andrew Jackson.”⁷¹ Southern tribes like the Cherokee knew they were in jeopardy, as did the whites, many of them missionaries, who stood alongside them. Passage of the Indian Removal Act of 1830, which would bring about a sequence of unconscionable removal treaties and the deaths of thousands, was just months away.

Impatient for the federal government to fulfill the promise made with the Compact of 1802, Georgia brutally asserted itself over the Cherokee, snatching land and passing menacing statutes that interfered with tribal autonomy in ways that violated the treaties of Hopewell and Holston. The land was too lush and fertile to go to waste on Indians, Georgians thought. When gold was discovered in 1827 the lust for Cherokee land became insatiable. Ultimately the Georgia Legislature completely abolished the Cherokee Nation, seized and distributed all nine million acres of its land—land that would quickly be populated with slaves and newly planted cotton.

Senator Theodore Freylinghuysen of New Jersey and other missionary-minded northeastern legislators opposed the Removal Act, denouncing it as racist. They unavailingly sought an amendment to the Removal Act to guarantee free and fair negotiations with the tribes.⁷² The bill was passed into law, finally, after bitter and protracted debate. The evangelization efforts of those like Freylinghuysen had been especially effective amongst the Cherokee Nation in Georgia, who had adopted many of the trappings of the dominant white culture. There were schoolhouses, churches, a newspaper, a constitution with

a tripartite government modeled on the U.S. Constitution,⁷³ even black slaves working Cherokee plantations.⁷⁴ The only threat the Cherokee Nation posed to the Georgians was to their acquisitiveness.

Knowing the Cherokee Nation was losing with the legislative and executive branches, Frelinghuysen advised Cherokee Chief John Ross to seek relief from the Supreme Court, where they could argue that Georgia's anti-Cherokee statutes violated federal law. The Cherokee seemed to have a strong case. The Supremacy Clause of the U.S. Constitution⁷⁵ is clear that when state and federal laws conflict—as Georgia's laws plainly conflicted with federal treaties and Trade and Intercourse Acts—federal laws prevail. Moreover, the Cherokee argued that, as a sovereign and foreign nation of the kind capable of entering into treaties with the U.S. government, they were not subject to Georgia's laws. However, the court chose not to hear this case on the merits. *Cherokee Nation v. Georgia*,⁷⁶ the second case of the Marshall trilogy, was instead dismissed on jurisdictional grounds. The Cherokee Nation, the court ruled, did not have standing to bring suit.

Article III of the constitution grants the U.S. Supreme Court jurisdiction over cases between “a State, or the Citizens thereof, and foreign states.”⁷⁷ The issue in this case, then, was whether Indian tribes were “foreign states” like England, France and other nations the federal government recognized as sovereign and independent. With this case, finally, the court was compelled to determine what kind of polity Native American tribes were and, by extension, how much liberty and self-government the people comprising them would be allowed. The six voting justices on the court could hardly have been more divided on this issue. The court was “split”⁷⁸ three ways: two justices, Johnson and Baldwin saw the tribes as “possessing no sovereignty at all.”⁷⁹ Another two, Thompson and Story, ruled that tribes were fully fledged independent nations with full political sovereignty.⁸⁰ Justice McLean agreed with Chief Justice Marshall's opinion, which attempted to carve a kind of middle path. It is Marshall's opinion that spoke for the court and, since its publication, it has had the force and effect of binding constitutional law.

Marshall reasoned that tribes are not foreign (they exist on U.S. soil) and they are not sovereign states (*M'Intosh* says they are under the “pupilage” of the federal government).⁸¹ They are instead something altogether unique in U.S. law—*sui generis*—they are “domestic dependent nations.” “Domestic” because they exist within U.S. borders; “dependent” because the federal government ultimately owns and controls their lands and interacts with states and foreign powers on their behalf; yet still a “nation” because, though limited and revocable by Congress, the tribes still possess some of the elements of self-government. “Their relation to the United States,” Justice Marshall tells us, “resembles that of a ward to his guardian.”⁸²

However perverse and galling this guardian-ward “trust” relationship might seem in light of the federal government's subsequent history as a perpetual

abuser of Native Americans, in his own mind, by placing the tribes safety in the hands of the federal government, Marshall was safeguarding them from what we would now call genocide at the hands of a merciless Georgia state government. "They look to our government for protections; rely upon its kindness and its power; appeal to it for relief of their wants."⁸³

Had Justice Thompson's dissenting opinion prevailed, and tribes won their jurisdictional argument and been recognized as fully sovereign foreign nations, it is hardly certain that the Cherokee would have won this case on the merits. Georgia might very well have argued that the recognition of a sovereign Cherokee Nation within its borders violates Art. IV. Sect III of the Constitution, which reads "no new states shall be formed or erected within the Jurisdiction of any other State...without the consent of the legislatures of the states concerned." Such speculation is purely academic, though, given the Court's refusal to hear the case.

Georgia did not recognize the Court's authority to hear cases on the constitutionality of its laws and, in protest, did not appear to make any arguments in this case or the subsequent and related case, last in the Marshall trilogy, *Worcester v. Georgia*.⁸⁴ The same year *Cherokee Nation* was heard, 1830, a Cherokee named George Tassel was convicted of murder in a Georgia state court for a killing that occurred in Cherokee territory. Tassel challenged the legality of his conviction in an appeal to Chief Justice Marshall himself. Marshall agreed to hear the case and issued a writ of error. Georgia hanged Tassel anyway.⁸⁵ Georgia's contempt for both the Cherokees and the U.S. Supreme Court had become, literally, homicidal.

The next year Samuel Worcester, a Vermont missionary to the Cherokees who had translated "Amazing Grace" into their language,⁸⁶ and his companion Elizur Butler were found guilty of violating a Georgia law that banned all non-Indians from living amid the Cherokees without a license. They appealed their verdict to the U.S. Supreme Court. Now, finally, the court would rule on the constitutionality of Georgia's efforts to destroy the native population in that state.

The Court roundly struck down the laws Georgia had passed to harass the Cherokee. However, Marshall's argument was not rooted in the tribes' innate right to be let alone or the blatant inhumanity of Georgia's aggressively cruel policies. Instead Marshall saw Georgia's laws as a violation of the guardian-ward or "trust" relationship between tribes and the federal government described in *Cherokee Nation* the year before. To Marshall the issue in *Worcester* was one of federalism. The Indian Commerce Clause in the U.S. Constitution, Marshall reasoned, grants the U.S. Congress plenary power over the tribes.⁸⁷ Moreover, it has been firmly established that treaties are the method by which tribes should be dealt with and treaties are the

exclusive province of the federal government. "The constitution, by declaring treaties... to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."⁸⁸

Just because tribes are "domestic dependent nations... associating with a stronger [nation] and taking its protection"⁸⁹ does not mean they necessarily forfeit *all* their independence and self-government, Marshall reasoned. "The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." The Constitution, Marshall ruled, gives the federal government absolute power over the tribes. State governments, such as Georgia's, have no authority to pass laws on Indian affairs. Georgia's ruthless Indian policies violated federal law and were struck down.

Marshall's controversial opinion in *Marbury v. Madison*⁹⁰ in 1803 made the Court the ultimate interpreter of the Constitution. The Court went on to rule in 1816 that the federal courts have the power to strike down state actions that violate federal law.⁹¹ But, though the Court had widened its power to interpret the law against the other branches of the federal government and the states with these rulings, it lacked the power to enforce them. The Constitution's Executive Vesting Clause⁹² had given all federal law enforcement power, including the power to enforce Marshall's ruling in *Worcester*, to the president. The president at that time was Andrew Jackson, who vehemently disagreed with Marshall both on the newly gained powers of the Court in general and on its ruling in *Worcester* in particular. Jackson believed the president's interpretation of the Constitution should be as binding as the Court's and that he, as President, should not be compelled to enforce rulings he thinks erroneous.⁹³ He viewed *Worcester* as a usurpation of Georgia's rightful power as a sovereign state confronted with antagonists living within its boundaries: "Absolute independence of the Indian tribes from state authority can never bear intelligent investigation,"⁹⁴ he stated. The Cherokees' victory in this case had won them nothing and, by eliciting a ruling that placed Indian tribes permanently under the authority of a federal government that in decades to come would often prove as merciless as Georgia, would cost all tribes dearly. Jackson refused to enforce the ruling. Knowing no authority would stop them, Georgia was free to continue doing its worst.

In 1834 Jackson's War Department offered the Cherokee a removal treaty that was roundly rejected in a tribal referendum. In 1835 while the Cherokee Nation's rightful leader, John Ross, was in Washington pleading for his tribe, a small party of Ross' political antagonists, recognized as legitimate by scheming government officials, signed the Treaty of New Echota, to the

fury and consternation of Ross, the Cherokee General Council and most of the Cherokee population.⁹⁵ Even Georgia's governor, William Schley, saw the treaty for what it was: "[I]t was not made with sanction of their leaders," he said.⁹⁶

The treaty gave the Cherokee two years to prepare. The pro-treaty faction and some others voluntarily emigrated west to present day Oklahoma. The leader of this faction, Major Ridge, and his son would soon be assassinated along with others for their perfidy.⁹⁷ Most Cherokee would not leave. In 1838 General Winfield Scott marched down to Georgia with 7,000 men⁹⁸ to round them up into concentration camps before their forced march of 800–850 miles westward along the Trail of Tears.

Corrupt and incompetent government officials⁹⁹ hired the cheapest contractors, mishandled the logistics and otherwise did a sloppy and slipshod job shepherding the Cherokee to their new location. Four thousand died¹⁰⁰ of disease, starvation and exposure in the holding camps or during the six month march at gunpoint across the American southeast.

VII. Conclusion

The Marshall trilogy is more than merely a collection of legal opinions, just as the document it interprets, the Constitution, is more than merely a system of laws. These Supreme Court opinions provided all Americans with a definitive statement on how our nation's self-defining document regards the original inhabitants of this land. It is no coincidence that, having been assured by the court that tribes are incapable of understanding and appreciating liberty and property, the federal government and the American people would spend the next several decades systematically stealing as much of both as they could. *M'Intosh* made the tribes tenants on their own land with the federal government serving as perpetual landlord.¹⁰¹ The guardian-ward or "trust" relationship described in the two Cherokee cases made them that same government's permanent political subjects.¹⁰² The still-existing system of limited and revocable sovereignty described in these cases is the very essence of political domination and hegemony, allowing the tribes self-government, as it does, until their true governors choose to intervene.

These three cases remain the constitutional foundation and framework within which all Indian law is practiced in the U.S. There have been no major constitutional amendments or reinterpretations regarding the personhood and fundamental dignity of the tribal American Indian. On these issues the Constitution means today precisely what it meant in the early nineteenth century—and will continue with this meaning until tribes are granted real ownership of their land and are recognized as sovereign and foreign powers, un beholden to the federal government, as the Cherokees argued they were back in 1830.

This article is dedicated to my newborn son, Lucas Augustine Goetting. I can't wait to hear what he thinks of all this.

NOTES

1. GREAT SPEECHES BY NATIVE AMERICANS 175 (Bob Blaisdell ed., 2000) (citing W[ILLIS]. FLETCHER JOHNSON, LIFE OF SITTING BULL AND HISTORY OF THE INDIAN WAR OF 1890-'91 201 (1891))
2. DEE BROWN, BURY MY HEART AT WOUNDED KNEE 90 (Thirtieth Anniversary Edition 2001). Col. Chivington led the notorious 1864 massacre at Sand Creek.
3. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
4. *Id.* at 407.
5. *Korematsu v. U.S.*, 323 U.S. 214 (1944).
6. U.S. CONST. amend. V (emphasis added). The Constitution is a document containing its share of tragedy and farce and its use of the word "person" is both tragic and farcical. Slaves in America were, of course, legally regarded as property. Slavery is referred to three times in the Constitution: in the Three-fifths Clause, the Importation Clause and the Fugitive Slave Clause; but never by name. U.S. CONST. art. I, § 2 cl. 3; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. IV, § 2, cl. 3. Instead in each clause slaves are euphemistically referred to as "persons." In terms of their legal rights the use of the appellation "persons" was meaningless. Slaves were treated under law as property, not persons. For instance, in *Dred Scott* the court struck down the Missouri Compromise as violating the Fifth Amendment because it deprived a person (i.e. a slaveholder) of his property (i.e. slaves) without due process of law." *Scott v. Sandford* 60 U.S. 393, 450-52 (1857).
7. See Nathan Goetting, *A Perfect Peace Too Horrible To Contemplate: Justice Holmes and the Perpetual Conviction of Eugene Debs*, 63 GUILD PRAC. 135, 136-37 (2006).
8. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).
9. *U.S.v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938).
10. Goetting, *supra* note 5, at 136.
11. *Buck v. Bell* 274 U.S. 200 (1927).
12. *Id.* at 207.
13. U.S. CONST. amend. XIV.
14. *Buck*, 274 U.S. at 200.
15. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
16. *Id.* at 541.
17. *Id.* at 542.
18. *Id.*
19. *Id.*
20. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT (1999).
21. *Id.* at 362-364.
22. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. Rev. 30 (1985).
23. PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008).
24. Lombardo, *supra* note 22 at 61.
25. *Id.*
26. *Id.* At 50-60.
27. *Roe v. Wade*, 410 U.S. 113 (1973).
28. *Id.* at 159.
29. *Id.* at 154.
30. U.S. CONST. amend. XIV § 1.

31. *Roe*, 410 U.S. at 150, 154, 156.
32. Marshall's feelings toward Native Americans as a race are hard to pin down. Prof. Fletcher quotes from an 1828 letter written by Marshall to Justice Story in which the former refers to Native Americans as "a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements." Matthew M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 158, 164-165 (2008) (citing RICHARD C. BROWN, *ILLUSTRIOUS AMERICANS: JOHN MARSHALL* 213 (1968)). While historical psychoanalysis of this kind is inevitably inexact and often fruitless, it seems fairly safe to say that Marshall's attitude thawed between writing this letter and the Cherokee cases described *infra*.
33. Mark E. Steiner, *Testing Constitutional Limits*, at <http://www.lib.lsu.edu/civilwarbookreview/index.php?q=2716&field=ID&browse=yes&record=full&searching=yes&Submit=Search> (last visited Sept. 6, 2009) (reviewing JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION AND THE PRESIDENT'S WAR POWERS* (2006)).
34. *Johnson v. M'Intosh*, 21 U.S. 543, 569 (1823).
35. *Scott*, 60 U.S. at 407.
36. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands* 148 U. PA. L. REV. 1065 (1999-2000).
37. *Id.* at 1073.
38. *Id.* at 1076 (citing ROBERT A. WILLIAMS JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 211 (1990)).
39. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 77 (4th ed 1998).
40. *Id.* at 76.
41. *Id.* at 79-80.
42. ALVIN M. JOSEPHY, JR., 500 NATIONS 269 (1994).
43. GETCHES, *supra* note 39 at 83-84.
44. *Id.* at 84.
45. *Id.* at 90.
46. *Id.* at 87-93.
47. U.S. CONST. art. II, § 2, cl. 2.
48. Prof. Kades calls the enlightened self-interest by which settlers appropriated tribal lands "the theory of efficient expropriation." Kades, *supra* note 36, at 1073.
49. GETCHES, *supra* note 39, at 57.
50. Kades, *supra* note 36, at 1079.
51. Indian Citizenship Act of 1924 ended this policy. 43 Stat. 253 (1924).
52. *Cf.* U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause).
53. For more reading on the Discovery Doctrine, see Angus Love et al., *The Supreme Court, Tribal Land Claims, and the Doctrine of Discovery; Trampling on the Walking Purchase*, 65 GUILD PRAC., 104.
54. GETCHES, *supra* note 39, at 54-55.
55. *Id.* at 70.
56. *M'Intosh*, 21 U.S. at 584.
57. Kades, *supra* note 36, at 1104.
58. *M'Intosh*, 21 U.S. at 569.
59. FRANK MONAGHAN, *JOHN JAY: DEFENDER OF LIBERTY* 323 (1935). This quote cannot be found in Jay's extant writings but is reputed to be among the Chief Justices favorite sayings.

60. *M'Intosh*, 21 U.S. at 590.
61. *Id.* at 574.
62. Mark Hirsch, *Thomas Jefferson, Founding Father of Indian Removal*, at <http://westgatehouse.com/art263.html> (last visited Sept. 26, 2009).
63. Four low-level chiefs, without authority, signed the treaty, unbeknownst to the Sauk and Fox tribal councils. James Lewis, *The Black Hawk War of 1832*, at <http://lincoln.lib.niu.edu/blackhawk/page1.html> (last visited Sept. 7, 2009).
64. LOUIS F. BURNS, *A HISTORY OF THE OSAGE PEOPLE* 177 (2004).
65. National Park Service, *The Battle of Horseshoe Bend*, at <http://www.nps.gov/archive/hobe/home/parkhistory.htm> (last visited Sept. 14, 2009).
66. ROBERT VINCENT REMINI, *THE LIFE OF ANDREW JACKSON* 121 (Harper and Row Publishers, Inc. 1988) (1988).
67. The most renowned Jackson biographers, while not altogether exonerative, are quite forgiving of Jackson. National Book Award-winner Robert Remini writes that Jackson had “humanitarian concerns—and they were genuine.” *Id.* at 219. He also writes that “[i]t was not greed or racism that motivated him. He was not intent on genocide. He was not involved in a gigantic land grab...” *Id.* at 114. Pulitzer Prize nominee Sean Wilentz writes that Jackson was “not overtly malevolent,” SEAN WILENTZ, *ANDREW JACKSON* 139 (2005), “not genocidal” and that he “may well have spared them [the Cherokees]...obliteration.” *Id.* at 142. Perhaps the most admiring recent biography is Jon Meacham’s Pulitzer Prize-winning *American Lion*. JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* (2008). His fawning treatment of Jackson is best summed up by Tina Brown in her blurb on its behalf: “Meacham argues that Jackson should be in the pantheon with Washington, Jefferson and Lincoln.” Tina Brown, *Blurb* for JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* (2008).
68. *Andrew Jackson* (History Channel television broadcast Nov. 18, 2007).
69. REMINI, *supra* note 66, at 114.
70. Taken from Andrew Jackson’s Second Annual Message to Congress in 1830. *Available at* <http://www.pbs.org/wgbh/aia/part4/4h3437t.html> 9-7-2009.
71. REMINI, *supra* note 66, at 214.
72. *Id.* at 213.
73. Many historians believe that the tripartite system of government of the U.S. Constitution is itself modeled after that of the Iroquois Confederacy. See Cynthia Feathers & Susan Feathers, *The Iroquois Influence on American Democracy*, 63 *GUILD PRAC.*, 28.
74. MILTON MELTZER, *SLAVERY: A WORLD HISTORY*, 73 (1993).
75. U.S. CONST. art. VI, § 2.
76. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
77. U.S. CONST. art. III, § 2.
78. GETCHES, *supra* note 39, at 111.
79. *Id.*
80. *Id.*
81. *M'Intosh*, 21 U.S. at 569.
82. *Cherokee Nation*, 30 U.S. at 17.
83. JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 517 (1996).
84. *Worcester v. Georgia*, 31 U.S. 515 (1832).
85. TIM ALAN GARRISON, *THE IDEOLOGY OF INDIAN REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 125 (2002).
86. RICHARD M. SWIDERSKI, *THE METAMORPHOSIS OF ENGLISH: VERSIONS OF OTHER LANGUAGES* 91 (1996).

87. *Worcester*, 31 U.S. at 559.
88. *Id.*
89. *Id.* at 561. Marshall writes as if the tribes entered freely into the trust relationship.
90. *Marbury v. Madison*, 5 U.S. 137 (1803).
91. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).
92. U.S. CONT. ART. II, § 1.
93. WILENTZ, *supra* note 67, at 141.
94. REMINI, *supra* note 66, at 219.
95. JOSEPHY, *supra* note 42 at 328-329.
96. THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS* 114 (2d ed.) (2004).
97. JOSEPHY, *supra* note 42 at 331.
98. *Id.*
99. JOEL H. SPRING, *THE CULTURAL TRANSFORMATION OF THE NATIVE AMERICAN FAMILY AND ITS TRIBE 1763-1995*, 83 (1996).
100. JOSEPHY, *supra* note 42 at 331.
101. *M'Intosh*, 21 U.S. at 585.
102. *Cherokee Nation*, 30 U.S. at 17.



Guild Notes

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THE STATUS OF RESTRICTIONS ON THE RIGHT TO TRAVEL FROM THE U.S. TO CUBA

Despite the multiple guarantees of individual rights contained in the U.S. constitution, the right of U.S. nationals to travel abroad to countries of their choosing, and to associate and learn from people of other nations, has repeatedly been restricted. The longest such restrictions have attempted to prevent the average U.S. person from visiting Cuba following the triumph of the 1959 revolution. This paper will present an overview of this legal situation, beginning with the treatment by the U.S. courts. Part Two will summarize the recent (and continuing) system of restrictions, Part Three will briefly review the struggle to assert these travel rights, and Part Four will discuss the prospects for change under the current administration. Appended at the end is a chronology prepared by the Venceremos Brigade, listing important events in the “Fight for the Right to Travel to Cuba.”

I. The (lack of) constitutional protection for the right to international travel

Although the United States constitution guarantees to its citizens and residents the rights to freedom of association and expression, when faced with claims that U.S. national security requires the right to travel to be restricted, a majority of the U.S. Supreme Court has not protected this right internationally in order to exercise these rights. This is not limited to times of war or countries with which the United States is at war. *E.g.*, two U.S. Courts of Appeals have recently upheld fines imposed against U.S. peace activists who visited Iraq in the months *prior* to the U.S.-led invasion in March 2003.¹

The case of Cuba is rather unique. First of all, Cuba is not only 90 miles away from the United States, but it was a frequent tourist destination prior to the triumph of the 1959 Cuban Revolution. Second, these restrictions have continued in force, with varying degrees of severity, for nearly 50 years, and are the only ones of this nature still remaining. Despite the fact that the CIA organized and sponsored an unsuccessful invasion of Cuba in April 1961, combined with a plan to assassinate Cuba’s top leadership at the time, as well as a comprehensive plan of terrorism and irregular warfare (called Operation Mongoose), there has been no state of war between the U.S. and Cuba since the Spanish-Cuban-American War of 1898 (when the U.S. entered as a supposed ally of Cuban independence fighters).²

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While the Cuban Missile Crisis of October 1962 brought the world to the brink of annihilation, as President John F. Kennedy demanded Soviet missiles aimed at the United States be dismantled, and threatened a naval blockade of Cuba which was lifted before major hostilities erupted, President Kennedy earlier had recognized that a military blockade of Cuba was an act of war, which lacked any legal justification. Instead, he accepted his advisors' suggestion to impose an economic blockade, believing it would have almost the same effect without being an obvious act of war in violation of the United Nations Charter.

The severe restrictions on the right of U.S. nationals to travel to Cuba was part of such "economic warfare," but it was also done to prevent people in the U.S. from experiencing the Cuban Revolution firsthand, and from exchanging ideas with the Cuban people.

Despite the rather obvious fact that restricting the rights of Americans to travel to other countries restricts their ability to gather information, and likewise severely restricts their ability to associate with people from other countries, a majority of the U.S. Supreme Court rejected First Amendment protection in the case of *Zemel v. Rusk*.³ Rather, the courts have held that there is only a conditional right or privilege to international travel, which can be restricted based on assertions of national security, or even a rational foreign policy consideration. This limited protection relies on the provision of the Fifth Amendment of the U.S. constitution which states that restrictions on "liberty" require "due process."

As indicated in a recent Court of Appeals decision concerning a peace activist who visited Iraq prior to the U.S. invasion, the burden imposed on the administration for imposing travel sanctions is rather low. While the Supreme Court under Chief Justice Earl Warren had declared that it was unconstitutional to deny passports to someone based on their political affiliation, such as membership in the Communist Party, this has not prevented travel bans by the U.S. government based on the specific countries to be visited, such as Cuba. In recent years, the government's claim has been that it is directly banning financial transactions related to travel, rather than the travel itself. Although the Bush Administration issued regulations which appeared to make any transaction with a Cuban national illegal, including accepting a gift from someone in Cuba, it never tried to enforce such a broad prohibition.⁴

In a March 2009 decision in an Iraq travel case, the U.S. Court of Appeals for the Seventh Circuit presented the following summary of the status of U.S. constitutional protections of the right to international travel, in *Clancy v. OFAC*:⁵

Right to Travel

Clancy argues that the regulations are invalid because they restrict his right to international travel, which he maintains is a constitutionally protected right. The freedom to travel outside the United States, unlike the "right" to travel within the United States, is "no more than an aspect of liberty protected by the Due Process Clause." *Haig v. Agee*, 453 U.S. 280, 306 (1981). The Supreme Court affords great deference to restrictions on international travel so long as

they are justified by a rational foreign policy consideration. See *Regan v. Wald*, 468 U.S. 222, 242 (1984) (regulations restricting travel to Cuba justified by foreign policy concerns); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996) (“Given the lesser importance of this freedom to travel abroad, the Government need only advance a rational, or at most an important, reason for imposing the ban.”). Responding to challenges similar to those brought by Clancy, the Supreme Court held that the Fifth Amendment right to travel, standing alone, is insufficient to overcome the foreign policy considerations justifying restrictions on travel to Cuba. *Regan*, 468 U.S. at 242; see also *Zemel*, 381 U.S. at 14 (upholding refusal by Secretary of State to validate the passports of United States citizens for travel to Cuba).

These regulations were issued pursuant to President Bush’s declaration of a national emergency with respect to Iraq, and were imposed to ensure that no benefit from the United States flowed to the Government of Iraq. 55 Fed. Reg. 31,803 (1990). We see no reason (and Clancy provides none) to find that these considerations are insufficient to justify the travel restriction imposed by the regulations. See also *Karpova*, 497 F.3d at 272 (travel restriction imposed by the Iraq Sanctions regulations does not violate liberty interest under the Fifth Amendment)....

Clancy responds that even if general travel restrictions are constitutional, this one is invalid because it is selectively enforced. It is true that government efforts to selectively restrict travel based on “the basis of political belief or affiliation” are not entitled to the same judicial deference as general bans on travel. See *Aptheker v. Sec’y of State*, 378 U.S. 500, 514 (1964) (rejecting Congress’ attempt to deny passports on the basis of an affiliation with the Communist Party); *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (Secretary of State did not have authority to inquire about affiliation with Communist Party before issuing passports). But the Supreme Court has distinguished “general bans on travel” that are imposed because of foreign policy considerations affecting all citizens from selective travel restrictions. *Regan*, 468 U.S. at 241 (distinguishing *Kent* and *Aptheker* on the ground that the “Secretary of State . . . made no effort selectively to deny passports on the basis of political belief or affiliation, but simply imposed a general ban on travel to Cuba following the break in diplomatic and consular relations with that country in 1961.”). The regulations here do not discriminate among people based on their political affiliation. Rather, they impose a “general ban” on travel to Iraq based on foreign policy considerations affecting all citizens. See *Regan*, 468 U.S. at 241....

First Amendment Rights

Clancy’s challenge to the regulations on First Amendment grounds faces the same hurdle as his Fifth Amendment right to travel claim. The Supreme Court has held that governmental restrictions on international travel inhibit action rather than speech. See *Haig*, 453 U.S. at 309 (“To the extent the revocation of [a] passport operates to inhibit Agee, ‘it is an inhibition of *action*,’ rather than of speech.”) (quoting *Zemel*, 381 U.S. at 16-17) (emphasis in original). Clancy attempts to distinguish *Zemel* on the basis of his motivation to travel. The plaintiff in *Zemel* wanted to travel to Cuba to learn more about the state of affairs in Cuba whereas Clancy maintains he traveled to Iraq to express his belief in

peace and his protest against government action that would harm innocent Iraqi citizens. This distinction is one without meaning; the Court has “rejected the view that ‘conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.’” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006) (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (internal quotation marks omitted)).

Clancy maintains that his travel was “manifestly symbolic” and therefore protected by the First Amendment, which extends to symbolic conduct. But the First Amendment protects only conduct that is “inherently expressive,” *Rumsfeld*, 547 U.S. at 65-67, and we do not agree that Clancy’s travel to Iraq is “inherently expressive.” A person observing Clancy’s travels to Iraq would have no way of knowing what message he intended to express unless Clancy explained it using speech. Compare, e.g., *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (burning the American flag is expressive conduct). This is strong evidence that international travel itself is not inherently expressive. See *Rumsfeld*, 547 U.S. at 66 (“If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.”).

In short, the federal courts have given great deference to administration claims of “national security” or even the extremely broad and vague concept of “a rational foreign policy consideration.” Although perhaps subject to potential challenge in the case of ongoing travel restrictions related to Cuba, where there appears to be no reasonable claim of a threat to U.S. national security, the language quoted above appears to accept even the latter vague basis as justifying this restriction on the “liberty” rights of U.S. citizens to international travel. This is not to mention the related interference with their rights of association, expression, and to gather information firsthand.

II. The system imposed by the U.S. government to prevent U.S. travel to Cuba

As stated above, the U.S. government has attempted to prevent unrestricted travel to Cuba, by banning unlicensed financial transactions related to such travel. However, the legislation which gave such authority reflected some conflicting interests within Congress. One example, referred to as the Berman Amendment, protected the importation of items expressing ideas, despite severe and even criminal sanctions for any other trade or transactions with Cuban nationals.⁶ Thus, books, newspapers, music or video recordings, and even expensive works of art were exempted from these restrictions, and art dealers could get U.S. government licenses to travel to Cuba to engage in such importation. Second, the government’s system to enforce the Cuba travel restrictions, provided for a right to a hearing, if requested by the person or company charged with a violation. (This right to a hearing was denied to Iraq travelers, as evident in *Karpova* and *Clancy*.)

However, for most of the decades of the Cuba travel ban, no such administrative hearings were actually provided. Criminal sanctions always existed, and

would naturally result in a trial, in which a jury would need to find “beyond a reasonable doubt” that the traveler violated the law. The U.S. government clearly did not trust presenting such issues to the American people, as reflected in the U.S. jury system, so such charges were almost never brought. The rare exceptions were for *organizing* travel, and within the Southern District of Florida, where a population that was either hostile to Cuba or was intimidated by anti-Castro elements, might be relied upon to help assist in obtaining a conviction. Even so, such prosecutions appeared to be election year ploys, and some were dismissed in the Courts, as, for example, the 2004 criminal charges brought against the two organizers of a regatta between the U.S. and Cuba.

Thus, lawyers advised U.S. persons accused of traveling to Cuba to ask for a hearing and for discovery related to a hearing, when administrative sanctions were raised. Until September 11, 2003, there was no provision for such hearings to be held, however, and the government also failed to respond to any discovery requests.

Under the George W. Bush administration, from September 2003 to 2006, the U.S. assigned administrative judges to hold special “trials for travel,” all of which were required to take place in the Washington, D.C. area. About one dozen such administrative trials took place, but *none* of those persons have had to pay any fines thus far. The government’s regulations, which asserted a presumption that U.S. visitors to Cuba spent money there, was struck down and rescinded. In cases where there was significant public organizing, such as the “Methodist 3” from Milwaukee, Wisconsin (a swing state in the presidential elections, in 2000 and 2004), the government agreed to dismiss its prosecutions without achieving any penalty, and in that situation it was also faced with counterclaims based on racial profiling/selective prosecution, and undue entanglement with religious practice.

Representation was provided in most cases by the Center for Constitutional Rights, based in New York City, and by a network of lawyers organized by the National Lawyers Guild’s Cuba Subcommittee. Based on numerous procedural and other defenses that were raised, these individual cases often outlasted the tenure of the judges assigned to hear the cases, and the results varied, from a reduction of the proposed penalty of only one-third, to a 90% reduction. It remains to be seen whether the Obama Administration will take any action to collect these fines, now that most of them have become administratively final.

It should be noted that the enforcement of the Cuba travel restrictions by the U.S. Department of Treasury’s Office of Foreign Assets Control (OFAC), seems clearly to have waxed or waned depending on election results in the U.S. For example, coinciding with the 2000 decision that George W. Bush would become president, OFAC greatly increased its enforcement actions, sending hundreds of letters demanding information from persons accused of traveling to Cuba, and proposing to assess fines against them, typically of \$7,500 a piece. Likewise, following the November 2006 Congressional elections in which the

Democrats made strong gains, there was almost no enforcement. Since then, no administrative hearings were commenced; nor are we aware of any initial steps taken by OFAC, in the form of letters demanding information, proposing penalties, or actually imposing penalties subject to a hearing request. (As seen below, there were also organized travel challenges; these had prior to the Fall of 2006 resulted in some threatening letters, but not in any administrative hearings or criminal prosecutions.)

According to OFAC's official enforcement reports since 2003, some 1,000 individuals paid penalties totaling \$1.8 million for Cuba travel offenses (these were either based on compromised settlements, usually about \$1,000 where the travelers feared worse consequences; or situations where they had failed to make timely requests for their right to a hearing). But even under the Bush administration, for the remaining two years after the November 2006 elections, OFAC reports collecting penalties from only five individuals in all of 2007 and 2008. The NLG and CCR are aware from their network of lawyers that OFAC enforcement actions had virtually ceased. There is no reason to believe that enforcement actions will be commenced at this point, whether or not a formal repeal is instituted.

III. The struggle to defend the right to travel to Cuba

Despite its decades of existence, the ban on U.S. travel to Cuba has never had broad popular support. This can be seen by the failure or refusal of most administrations to enforce it, whether pursuant to the criminal sanctions which continue to exist in U.S. law or even administrative trials which the Bush Administration attempted to pursue from late 2003 until 2006, with very limited results.

However, even though reliable reports from many sources, including both the U.S. and Cuban government, indicated that as many as 200,000 persons⁷ from the U.S. had visited Cuba on an annual basis, the majority of them Cuban-Americans, the deterrent effect of these restrictions has been very significant. This is especially true with the escalated enforcement actions under the last Bush Administration. In addition, there has been much direct action related to this issue, on both sides.

The author is indebted to the Venceremos Brigade for the chronology which is appended hereto. It documents organized travel by various organizations in defiance of these restrictions, notably the Venceremos Brigade since the late 1960s, and Pastors for Peace for nearly 20 years; they have both organized annual travel challenges as acts of open civil disobedience.

According to an official U.S. government report from the General Accounting Office (GAO), OFAC's attempt to strictly enforce the travel restrictions against Pastors for Peace and the Venceremos Brigade had resulted in a "public relations and enforcement dilemma," based on "lack of popular support for the embargo..."⁸ While initially some warning letters, followed by some prepenalty notices, and very few penalty notices were issued pursuant to the Bush crack-

down, not a single hearing request from any of these travel challenges was ever honored or pursued.

These challenges exposed the government's untenable position with its own populace: it asserted restrictions and threatened fines and prosecutions against its own people, but was afraid to actually put them on trial. At the same time, it was embarrassed to reveal that OFAC had assigned six times more personnel to enforce the Cuba travel ban and related restrictions than were assigned to investigate the finances of Osama bin Laden.⁹ The GAO reported that there was more attention paid by customs agents at airports with travelers with rum or cigars from Cuba, than to actual security concerns.

But it would be wrong to assume that those who fought to protect such travel rights did so without consequences. As set forth in the appendix, the "legal" sanctions were not the only measures taken to eliminate travel to Cuba.

By far the worst act of terrorism directed against travel to or from Cuba took place on October 6, 1976, when a civilian Cubana flight was bombed, killing all 73 people on board, in an operation planned by CIA-trained operators Orlando Bosch¹⁰ and Luis Posada Carriles,¹¹ both of whom reside in the U.S. currently. Posada is the subject of charges based on misrepresentation on his immigration papers, but Venezuela's extradition request for him to be tried for this mass murder has yet to be processed by the U.S. government.

Numerous other bombings took place, repeatedly destroying the offices of travel agencies handling trips to Cuba. Several individuals, including Cuban-Americans who sought dialogue with Cuba and defended family travel, were killed, including Carlos Muniz, president of the Viajes Varadero travel agency in Puerto Rico who was assassinated in 1979,¹² and Eulalio Negrin, who was assassinated in Union City, New Jersey that same year.¹³

The actions by President Jimmy Carter to grant general licenses for any Americans to travel to Cuba in 1977 reflected this popular sentiment, but by 1982 President Ronald Reagan re-imposed the travel restrictions.

IV. The prospects for change and what Obama can do

As of the end of September, 2009, President Obama has fulfilled his campaign pledge to recognize the unrestricted right of Cuban-Americans to visit their close relatives in Cuba, and to send remittances to them, but has done nothing further on this issue. This is a significant change but still a small one. President Obama still has the authority to greatly liberalize travel within the 12 categories recognized by Congress for "licensed" travel. He can also indicate support for a full repeal of the travel ban, as set forth in pending legislation in both the U.S. Senate (S. 478) and House of Representatives (HR 874). His Department of Justice can also indicate that they will take no further efforts to either prosecute or to collect fines imposed against U.S. persons who previously traveled to Cuba—or to other countries such as peace activists who traveled to Iraq shortly before the U.S. invasion.

Regarding the 12 existing categories for “licensed” U.S. travel, President Obama can and should indicate that all of these are available pursuant to “general licenses,” which have existed for certain categories and which are not really “licenses,” as the term is generally used. In reality, these are permissions pursuant to administrative regulation, as long as certain conditions are met, but there is no application process, and no document is reviewed or issued prior to the travel. *E.g.*, currently U.S. persons (almost always of Cuban origin) who wish to visit their family members in Cuba can again do so pursuant to a “general license,” which means that they can go and return without any need to apply for any special permission to do so. Theoretically, a traveler who did not meet the requirements of a “general license” might later on be pursued and possibly fined, but this is unlikely to actually occur as a practical matter.

As another example, currently, full-time regularly employed journalists who are on assignment can travel to Cuba pursuant to a so-called “general license,” but freelance journalists must apply in advance for a specific license in order for their trip to be deemed legal by the U.S. government. Allowing all journalists to travel to Cuba pursuant to a general license would allow many more writers, photojournalists, and others to travel there and report back on their observations—not just full-time career journalists (who are a shrinking breed in the U.S.).

Educational travel in the latter years of the Clinton Administration included person-to-person encounters which were not restricted merely to those sponsored by accredited schools or universities. Groups such as ElderHostels and the National Geographic Society sponsored such tours, but under the subsequent Bush Administration, regulations were issued which restricted educational travel so tightly that the vast majority of even college and university study tours were no longer able to comply (such as a requirement that these be at least 10 weeks in duration, and barring cooperation or sharing of programs between more than one college or university).

Similar expansion, in sharp contrast to the hyper-restrictive regulations left over from the last Bush Administration, could be done in most other areas, such as for religious trips and travel for professional research (which could include attendance at professional conferences as had been allowed previously).

Conclusion

In sum, the long and courageous struggle of people in the U.S. to exercise their right to travel to forbidden lands, most notably Cuba, but also in prior times other socialist countries, and to Iraq and others, has yet to be fulfilled. The continued restrictions on U.S. travel to Cuba are unique in both their duration and continued application, but they have very little popular support within the U.S. population. As Robert F. Kennedy wrote, shortly after his brother was assassinated, these restrictions embarrassed the U.S. and discredited its proclaimed example as a land of freedom.¹⁴ While these restrictions were partly successful in discouraging most Americans from traveling to Cuba, and in al-

lowing many of them to accept highly distorted portrayals of Cuban life, there now appears to be a substantial possibility that those restrictions will finally be ended. Recently a member of Obama's administration stated (on the condition that he or she would not be identified) that there is now a "steamroller" pushing for an end to the U.S. travel restrictions and economic blockade of Cuba.¹⁵ The Obama Administration had sought to "get ahead" of this wave in order to steer it, but also it risks being overrun by it, if it remains too cautious.

NOTES

1. *Karpova v. Snow*, 497 F.3d 262 (2d Cir. 2007) and *Clancy v. OFAC*, 559 F.3d 595 (7th Cir., 2009).
2. See generally HOWARD JONES, *THE BAY OF PIGS* (2008) and JANE FRANKLIN, *CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY* (1997).
3. 381 U.S. 1 (1965).
4. See 31 C.F.R. Part 515 (Cuban Assets Control Regulations).
5. *Clancy v. OFAC*, 559 F.3d at 19-22.
6. Section 2502(a) of the 1988 Omnibus Trade and Competitiveness Act, P.L. 100-418.
7. See NLG Cuba Subcommittee press release, *Judge slashes OFAC travel fine by 90%, citing the Administrative Judge's reliance on Congressional testimony by the head of OFAC, Richard Newcomb*, CUBA NEWS, Feb 1, 2005, at http://www.thefreelibrary.com/_print/PrintArticle.aspx?id=128783131.
8. GAO 08-80, "Agencies Face Competing Priorities in Enforcing the U.S. Embargo on Cuba," released December 2007, www.gao.gov/htext/d0880.html.
9. Nancy San Martin, *US Treasury OFAC Has 6 Times More Personnel on Cuba than Bin Laden*, MIAMI HERALD, May 01, 2004, at http://havanajournal.com/politics/entry/us_treasury_ofac_has_6_times_more_personnel_on_cuba_than_bin_laden/.
10. JANE FRANKLIN, *CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY* 269 (1997).
11. Simon Romero & Damien Cave, *Venezuela Will Push U.S. to Hand Over Man Tied to Plane Bombing*, N.Y. TIMES, Jan. 22, 2009, available at http://www.nytimes.com/2009/01/23/world/americas/23venez.html?_r=1.
12. Franklin, *supra* note 10 at 151.
13. *Id.* at 155.
14. See Robert F. Kennedy, Memorandum to Secty. of State Dean Rusk, December 12, 1963, National Security Archive Electronic Briefing Book 158. This was also cited by Kathleen Kennedy Townsend, daughter of the late Senator, in an Op-Ed urging President Obama to support the Free Travel to Cuba Act, *Washington Post*, April 23, 2009.
15. Ginger Thompson, *U.S. Plans Informal Meetings With Cuba*, N.Y. TIMES, Apr. 26/2009, at <http://www.nytimes.com/2009/04/27/world/americas/27cuba.html>. See also, *U.S. Plans Informal Meetings with Cuba*, N.Y. TIMES, Apr. 26, 2009, at <http://www.nytimes.com/2009/04/27/world/americas/27cuba.html>.

Fact Sheet: The Fight for the Right to Travel to Cuba—Chronology

The U.S. has had restrictions on travel to Cuba for most of the past 40 years. While the Constitutional right to travel was technically won in a 1958 Supreme Court decision, the U.S. government and others have tried to prevent us from traveling through a variety of legal, extra legal, and illegal means. Since the beginning, people have fought back vigorously and continuously for our right to travel to Cuba.

In the 1950s the U.S. government attempted to curtail our right to travel through passport controls (either by not issuing a passport to certain persons—Paul Robeson was the most famous) or—when that method failed to survive court challenges—by listing countries in the passport which were ‘invalid’ for travel. When this method also failed in court, the government switched from ‘travel controls’ to ‘currency controls.’ The current restrictions on travel to Cuba come under the Treasury Department—and not the State Department—because they have to do with the spending of money by U.S. citizens, residents, and corporations. Of course, these ‘currency controls’ are just a back door method to restrict our right to travel.

1958: *Kent v. Dulles*—Freedom to Travel established as a Fifth Amendment guarantee.

Jan 1, 1959: U.S.-backed dictator Batista flees. Victory of the Cuban Revolution

Oct, 1959: American Society of Travel Agents Convention takes place at Hotel Nacional in Havana. Plane piloted by CIA agents and originating in Florida strafes Havana killing 2 and wounding 45.

1961: U.S. restricts travel to Cuba via passport controls. African American journalist William Worthy challenges the passport controls and wins in 1964.

1963: U.S. restricts travel to Cuba via currency controls under the general U.S. economic blockade.

Student groups travel to Cuba 1962, 1963 and 1964. Leaders indicted and case goes to Supreme Court in 1967.

Attorney General Robert Kennedy secretly recommends ending the travel restrictions as ‘inconsistent with traditional American liberties.’”

1964: Supreme Court Justice William O. Douglas: “Freedom of movement is the very essence of our free society... Once the right to travel is curtailed, all other rights suffer.” From 1965: “The right to know, to converse with others, to consult with them, to observe social, physical, political, and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press.”

1969: Student and civil rights activists initiate an educational solidarity project to defy the restrictions and cut sugar cane side by side with Cuban workers. More than 8,000 people since then have traveled with the Venceremos Brigade in yearly contingents without ever requesting a license from the government.

1972: Center for Cuban Studies organized to bring academic and cultural groups to and from Cuba. Center is bombed in 1973.

1973: 1199 Hospital Workers union hall also bombed for exhibition called ExpoCuba and a worker is injured.

1975: Miami Airport bombed in response to U.S. policy change allowing third country subsidiaries of U.S. companies to do business with Cuba

Oct 6, 1976: Bomb explodes on Cubana civilian flight taking off from Barbados killing all 73 passengers. CIA-trained bomber Orlando Bosch is now an honored member of the Miami community openly supported by the first President Bush and his sons. CIA-trained bomber Luis Posada escaped from prison in Venezuela and later helped CIA efforts to supply Nicaraguan Contras in the 1980s. In the 1990s, Posada says he received funds from leaders of the Cuban American National Foundation to coordinate the bombing of hotels in Cuba. Sentenced in Panama for ‘arms violations’ related to a 2003 assassination plot against the Cuban President, currently in jail in El Paso, TX, for ‘illegal immigration’ violations.

1977: President Jimmy Carter lifts the restrictions on travel.

Young Cuban Americans in the Brigada Antonio Maceo travel to Cuba as an act of friendship and reconciliation.

1978: 600 young people from the U.S. attend the World Youth Festival in Havana

Meeting in Havana, representatives of Cubans living abroad in the United States, Spain, Puerto Rico, and Mexico establish a Dialogue with the Cuban Government. Cuban American leaders establish the Committee of 75 and travel agencies are initiated to coordinate the

travel of Cuban Americans to visit their relatives. 125,000 do so in the next year and regular charter service is established between Miami and Havana.

- 1979:** Carlos Muniz, president of Viajes Varadero travel agency in Puerto Rico, and member of the Committee of 75, is assassinated in San Juan. Eulalio Negrin, another member of the Committee of 75, is assassinated in Union City, NJ
- 1982:** President Ronald Reagan re-imposes the travel restrictions. Law firm of Rabinowitz, Boudin, Standard, Krinsky and Lieberman—which had originally litigated the *Kent v. Dulles* suit in 1958—brings suit on behalf of Professor Ruth Wald, the Center for Cuban Studies, and other plaintiffs to end the restrictions, a case finally lost by a 5-4 Supreme Court decision in 1984. The majority rule that foreign policy concerns of the executive branch could override our Fifth Amendment right to travel.
- 1985:** Subpoenas demanding the names of all Marazul Tours clients who had traveled to Cuba is fought and won by the Center for Constitutional Rights, the National Lawyers Guild, and the National Conference of Black Lawyers.
- 1986:** Marazul is bombed and would be bombed again in 1989 and 1996. Mackey International, Airline Brokers Company and other travel agencies in Miami are also bombed over these years.
- 1992:** Cuba Democracy Bill (Torricelli Bill) passed by Congress to further restrict travel and increase effects of the economic blockade as Cuba's economy bottoms out in the wake of the collapse of her trading partners in the socialist world.
- Pastors for Peace initiates the first of annual U.S.-Cuba Friendship Caravans demanding the right to travel to Cuba to deliver humanitarian supplies and refusing, on principal, to apply for 'permission' from the U.S. government. In 1993, Pastors for Peace mounts a 23 day hunger strike and world wide campaign which wins the release of a school bus and supplies. In 1996 participants risked their lives in a 94-day Fast for Life successfully demanding the release of 400 computers for the Cuban Ministry of Public Health.
- In a series of attacks coordinated by Luis Posada (see above) bombs explode at a number of Cuban hotels resulting in the death of an Italian tourist.
- 1993:** Global Exchange and other organizations launch the Freedom to Travel challenge sending eight delegations without licenses for the next three years. The government responds by freezing Global Exchange's account.
- The former head of the U.S. Interests Section in Havana, Wayne Smith, initiates a similar campaign bringing unlicensed academics to Cuba beginning in 1994.
- 1996:** *Freedom to Travel Campaign v. Newcomb*: 9th Circuit Court rules the court will not intervene in foreign policy decisions and maintains travel restrictions.
- 1996:** Helms Burton Bill tightens and codifies travel restrictions giving only Congress the power to eliminate them.
- 1997:** 900 unlicensed young people defy the restrictions to attend the World Youth Festival in Havana, in the largest single travel challenge. No one is fined.
- 1998:** Pope John Paul II visits Cuba and calls for an end to the restrictions and U.S. economic blockade.
- 5 Cuban agents who had been sent to the U.S. to monitor the activities of groups in Miami who were attacking Cuba—are convicted of being unregistered Cuban intelligence agents and conspiracy and one is also convicted of conspiracy to commit murder (re the shoot-down of 2 'Brothers to the Rescue' planes in 1996). Information passed on from the 5 to Cuba—and from Cuba to U.S. authorities—included imminent threats to the charter flights between Miami and Havana.
- 1999:** President Clinton modifies restrictions allowing increased travel—but only under licenses.
- 1982-2003:** Hundreds of universities, colleges and high schools, professional and cultural organizations, religious institutions and groups, and thousands upon thousands of individuals

flood the Treasury Department with applications for travel—many enlisting the aid of their congressional representatives. Over 750 universities and colleges receive licenses.

2000: Nethercutt Amendment allows limited food and medicine sales to Cuba, but also further codifies travel restrictions.

2001: The House of Representatives votes to withhold funds for the enforcement of the travel restrictions.

2002: OFAC (Office of Foreign Assets Control) fines more than 100 travelers \$1000 each. OFAC fines 74-year grandmother \$8500 for bicycling in Cuba. Hundreds of others have cases pending before OFAC.

350 Cuban Americans meet in Florida to demand a new Cuba policy and an end to the restrictions.

Over 150 citizens and elected officials representing 37 cities and 17 states met with their counterparts in Cuba as part of the U.S.-Cuba Sister Cities Association Conference. In response, OFAC sends Requirements to Furnish Information (subpoenas) to members of the U.S.-Cuba Sister Cities Association alleging they organized an “illegal” conference in Cuba.

Nobel Peace Prize recipient and former President Carter travels to Havana for discussions with the aim of a new Cuba policy and calls for ending the travel restrictions as a first step.

National Summit on Cuba—sponsored by the American Farm Bureau, Americans for Humanitarian trade with Cuba, the World Policy Institute, USA-Engage, and other conservative, centrist and liberal organizations —meets in Washington and calls for ending the restrictions.

2003: In 2003, approximately 210,000 people from the U.S. traveled to Cuba, 180,000 ‘legally’ under licenses (including 110,000 visiting relatives and 35-40,000 under now eliminated People to People Educational Exchange licenses) and around 30,000 without permission (i.e. licenses) from the government.

March 24: OFAC announces elimination of People to People Educational Exchange licenses, the second largest category (after family visits) of Americans traveling to Cuba—and affecting some 40,000 travelers annually.

Jul: 200 people travel to Cuba without a license in 1st Travel Challenge organized by Pastors for Peace Friendship Caravan and the Venceremos (We Shall Overcome) Brigade.

Aug: U.S. prevents Grammy-nominated Cuban musicians from traveling to the ceremonies.

Sep 9 + Oct 23: House votes 278 to 188 and Senate 59 to 36 to remove funding of the enforcement of travel restrictions.

Congressional leadership eliminates these amendments from final bill sent to the President.

UN votes 179 to 3 against the U.S. embargo of Cuba, the highest vote in the 12 years the resolution has been debated.

Oct 10: President Bush announces a further crack down on travel to Cuba: Between Nov 10 and Jan 10, over 500 agents of the Department of Homeland Security are specially trained to interrogate over 44,000 legally licensed passengers on flights to Cuba; several religious licenses revoked, many are denied.

Dec 29: Head of Cuba Desk at U.S. State Department says legal travel to Cuba must now be ‘focused and directed and aimed at U.S. policy goal to achieve a rapid transition’ in Cuba.

2004 Mar 3: OFAC declares ‘research’ cannot be conducted at Cuban conferences and requires special OFAC permission.

Apr 29: Associated Press story reveals OFAC has 2 agents assigned to track down money of Osama bin laden and 22 agents assigned to Cuban embargo violations. There were 93

enforcement investigations and \$9,425 in fines for terrorism financing violations since 1994; compared with 10,683 enforcement investigations and \$8 million in fines for Cuban embargo violations between 1990 and 2003.

May 6: “Commission for Assistance to a Free Cuba” 500 page report calls for peaceful overthrow of the Cuban government and economic system: <http://www.state.gov/p/wha/rt/cuba/commission/2004/c12237.htm>. The recommendations regarding new travel restrictions welcomed by the President and go into effect June 30th. They included:

- Limit family visits to once every 3 years and by individual application for a specific license only 3 years after prior trip. There is no provision included for travel in case of severe illness or accident.
- Limit definition of family members to immediate family only and limit visit to 14 days.
- Eliminate almost all college and university programs to Cuba
- Eliminate all high school programs
- Eliminate clinics and workshops provision
- Eliminate the ‘concept’ of ‘fully hosted travel’ (for persons who are fully hosted guests of Cuban institutions or organizations). This new provision directly eliminates the ‘right to travel’ by delinking the rationale of controlling the use of U.S. funds.

May 14: Largest march in Cuban history protests Commission report calling for Regime Change in Cuba

May 20: National Day of Protest against the new travel restrictions called by more than 20 national organizations. In Miami, 500 Cuban Americans attend a press conference to announce opposition to the new restrictions.

July 19: Two hundred U.S. citizens assert their Constitutional and democratic rights to travel to Cuba in Travel Challenges sponsored by the Venceremos Brigade, Pastors for Peace, and the African Awareness Association, crossing the border in McAllen, Texas and in Buffalo, New York). Unprecedented media coverage including articles in more than 300 newspapers, and dozens of TV and radio stations.

October: OFAC issues Requirement to Furnish Information demands to Venceremos Brigade and Pastors for Peace.

2005: Administrative Law Judges begin issuing financial penalties against unlicensed travelers to Cuba.

Conferences (March 5 NYC / April 26+27 DC / June 10+11 Mobile A) demand right to travel to Cuba.

July: Travel Challenges by Venceremos Brigade, Pastors for Peace, Cesar Chavez Labor Challenge + Seattle Women’s Challenge. Challengers cross the border into the U.S. (Buffalo NY + Texas) on Aug 1. Donated computers are seized by Customs + 130 Caravanistas and 60 Brigadistas receive OFAC letters demanding information + threatening fines.

Sep: U.S. judge decides CIA-trained terrorist Luis Posada (see above) will not be extradited to Venezuela to stand trial for the 1976 Cubana bombing.

\$1.5 million in fines are collected by OFAC against unlicensed travelers to Cuba in 2005.

2006: Feb: OFAC issues Penalty Notices to 8 brigadistas saying travel challengers do “substantial harm to the sanctions program”. U.S. denies visas for 55 Cuban scholars to attend LASA Congress in Puerto Rico.

June: Sec’y of State Rice releases second report from so-called Transition Commission. President agrees with all recommendations including formation of federal Task Force to investigate bringing criminal charges against those deemed to be organizers of travel challenges.

June 17-July 17: Pastors for Peace 17th U.S.-Cuba Friendship Caravan Travel Challenge

July 2-17: Venceremos Brigade 37th Contingent to Cuba Travel Challenge

Within weeks all Brigadistas and Caravanistas receive letters from OFAC demanding information and threatening fines. In four years, more than 600 people have participated in these travel challenges and more than 325 have received OFAC letters. Each challenger has refused to provide any information to OFAC and has demanded a public hearing.

Bush's policies are rejected at the polls and Democrats win control of House and Senate. Congressman Jose Serrano calls for change in national Cuba policy.

Between 2003 and through 2006, 1,000 individuals were fined \$1.8 million for travel to Cuba offenses.

Hearings before three Administrative Law Judges were held regularly in Washington for Cuba travel cases.

2007: Travel Challenges in July by Venceremos Brigade and IFCO Pastors for Peace

No OFAC letters sent to brigadistas or caravanistas.

The Justice Dept brought charges against 2 people who had obtained a religious license for a phony church and under which more than 6,500 Cuban Americans traveled from Miami under the 'watchful eye' of OFAC. No action has even been contemplated against the travelers.

Nov: Government Accountability Office publishes report on effects of Bush travel restrictions OFAC reports that attempt to strictly enforce the travel restrictions against Pastors and the Venceremos Brigade had resulted in 'a public relations and enforcement dilemma.'

2008 Dec: Government Accountability Office publishes report on effects of Bush travel restrictions

Travel Challenges in July by Venceremos Brigade and IFCO Pastors for Peace. Again, no OFAC letters sent to brigadistas or caravanistas.

Between 2003 and 2008, nearly 1,000 people have participated in the challenges. Between 2003 and through 2006, more than 400 received Requirements to Furnish Information (RFI's) letters from OFAC. OFAC determined that the travel challengers "do substantial harm to the sanctions program." Each challenger responded through an attorney that she/he would not answer any questions on the OFAC questionnaire and requested a hearing in DC.

In all of 2007 and 2008 only 5 individuals were fined by OFAC for travel violations to Cuba. No hearings have been held since 2006.

Nov: Barack Obama elected President.

2009: Congress passes Omnibus Spending Bill including amendment forbidding funds allocated for OFAC to be used for enforcement of Bush's restrictions on Cuban American travel to visit their immediate' relatives only once every three years. President Obama's OFAC responds by immediately issuing General License for Cuban American travel once every 12 months to visit 'close' relatives. This is the first action to broaden travel to Cuba in 10 years.

HR 874 and S 428 "Freedom to Travel to Cuba" bills introduced in the House and the Senate to eliminate all restrictions on travel to Cuba.

Justice Department indicts Luis Posada for lying to authorities about his role and knowledge of hotel bombings in Cuba—which killed an Italian tourist—in the 1990s.

Members of the Congressional Black Caucus led by Congresswomen Barbara Lee visit Cuba and meet with President Raul Castro and former President Fidel Castro. Call for an end to the embargo and the travel ban and respect for Cuba's sovereignty.

Federal Judge in Miami declares the Florida Travel Act unconstitutional. The state law sought to punish charter companies for arranging legal travel to Cuba. The court found that Florida had attempted to adopt its own foreign policy.

Prior to meeting with Latin American heads of state—excluding Cuba—President Obama announces 'new beginning' of U.S.-Cuba relations and orders opening of unrestricted travel by Cuban Americans to visit their close relatives.

April 17-19: Summit of the Americas meets in Trinidad. Every country of Latin America urges President Obama to end the embargo and travel ban to Cuba.

July-Aug: 40th Anniversary Contingent of the Venceremos Brigade and 20th Anniversary Pastors for Peace Caravan to Cuba scheduled to challenge the travel ban and demand the right for travel for all to Cuba.

Venceremos Brigade

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ALEXANDRA M. GONÇALVES-PEÑA

CHALLENGING THE “POLITICAL”:
U.S. ASYLUM LAW AND CENTRAL
AMERICAN GANG WARFARE

Introduction

Central America assumed worldwide attention in the late 1970s as political and social tensions heightened civil conflicts which persisted until the end of the Cold War. However, since that time many Central American countries have experienced an onslaught of post-war violence. Although likely stemming from many sources, much of this contemporary violence has been attributed to criminal street gangs, locally known throughout the Central American region as *maras*.¹

Since the late 1990s many Central Americans have immigrated to the United States. Many are fleeing the poverty and economic injustice as well as a new type of “social violence” that is characterized by rampant gang violence, corruption and an ineffective yet repressive state apparatus. Many of these individuals seek political asylum in the United States, only to be denied its benefits, because their cases do not fit comfortably into the paradigm of an asylum claim—one where the applicant is persecuted for his or her explicit political beliefs by a state government.

This paper addresses the Central American gang phenomenon in the context of U.S. Political Asylum Law, with particular focus on the “political opinion” ground for asylum. Part I will provide an introduction to the Central American gang phenomenon and discuss the evolution of Central American gangs into a de facto political entity. Part II will briefly introduce the fundamental framework of U.S. Asylum Law, describing the five enumerated grounds for political asylum claims and its intersection with gang persecution. And finally, with reference to case law, Part III will discuss the “political opinion” ground for asylum and will propose approaching the “political opinion” question using a reality-based definition of what is “political” within the context of a particular country.

I. The Central American Gang “Problem”

Beginning in the 1990s, Central American gangs have grown exponentially and become increasingly violent and well-organized. Current estimates place the number of gang members at more than 70,000 across Central America.² The scope of crimes committed by these gangs has grown into a broad array of criminal activities which includes the smuggling of drugs, arms, and people; kidnapping; robbery; home and community invasions; and murder. Murder rates have increased so dramatically over the past few years in El Salvador, Guatemala, and Honduras, that they have surpassed even those of Colombia, which

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was once considered the most violent country in the Western Hemisphere.³ According to a Council on Hemispheric Affairs report, in 2007 “the average annual number of murders per 100,000 in El Salvador is 55.5 followed by 46.2 in Honduras and 37.5 in Guatemala.”⁴ These numbers become staggering when compared to the annual murder rate in the United States at the time which was approximately 5.7 per 100,000 individuals.⁵

The origins of Central American gangs are commonly attributed to be the result of U.S. Immigration Laws enacted in the mid 1990s. These laws mandate the deportation of non-U.S. citizens convicted of certain crimes in the United States back to their home countries. However, it is insufficient to say that the Central American gang problem is the sole result of questionable U.S. immigration policies and the “exportation” of U.S. gang culture to Central America. Rather, the Central American gang problem should also be viewed as the direct legacy of post-war states that have long used violence as a means of exerting control over their citizenry.

Following the end of Cold War civil conflicts that plagued Central America, gangs have come to replace guerilla insurgents as public enemy number one.⁶ However, rather than address the more complex social issues underpinning the prevalence of gang activity, such as lack of employment, educational opportunities and income inequality, state governments have chosen the politically undemanding way of cracking down on the gang problem. State administrations are reviving Cold War counterinsurgency strategies and draconian zero tolerance laws such as the “Mano Dura” (“Iron Fist”) and “Super Mano Dura” (“Super Iron Fist”) laws in dealing with the gangs.⁷

These laws—largely similar to anti-terrorism tactics and legislation adopted by the recent Bush Administration’s war on terror—consist of sweeping arrests, retroactive applicability, refusals to negotiate, arbitrary detentions, torture, mandatory sentences simply for being affiliated with a gang and the unofficial sanctioning of extra-judicial executions.⁸ Although formidable in their breadth, these laws have not had the desired effect of curbing gang-associated violence. In fact, these governmental measures have proven highly unsuccessful, as evidenced by the fact that Central American gangs have grown to become efficient and well-organized transnational organizations.⁹ By fleeing the police in their own countries, gang members are crossing international borders and making ties with gangs in neighboring countries. This implies that, rather than eliminating the gangs, these hardlined “Iron Fist” laws are no panacea to the Central American gang problem, suggesting that even State governments themselves are unable to control the gangs.

Evidence that gangs have amassed de facto political power in the Central American landscape is illustrated by their ability to make demands and leverage power over the populous at large as well as over regional governments. In what is now considered a commonplace practice, gangs create virtual fiefdoms in neighborhoods, demanding that public transportation workers and residents pay

a “war tax” for protection as a means of extorting money.¹⁰ In addition, Central American prisons have become the epicenter of the gangs’ political actions and demands, where revolts are used to leverage political power.¹¹

These tactics, however, are only some of the activities that gangs use to leverage political power; they also threaten and kill high level authorities. In December of 2004, in Honduras, gang members machine-gunned a public passenger bus in which 27 civilians were killed, including four children. The assailants left behind leaflets threatening the president of Honduras and other politicians involved in the creation of the “*Mano Dura*” legislation. They also demanded that the government nullify the new law.¹² Most recently, in February of 2007, three Salvadoran Congressmen and their drivers were found brutally murdered along a dirt road in Guatemala. Although no one has been officially charged with the murders, local authorities claim that gangs with links to Guatemala and El Salvador and supported by local politicians were behind the killings, suggesting links between government officials and gang violence.¹³

The severity of the Central American gang phenomenon requires a sustained and holistic approach to addressing the root causes of the “gang problem.” Until this is done, gang violence will continue to swell. For those individuals who have chosen to challenge the gangs and their power by either by refusing to join their membership or refusing to adhere to their demands, the situation becomes all the more precarious as their lives and the lives of their families are put at risk. In many of these circumstances, the only real option is to flee their homes, leaving behind their families and livelihoods, and migrate north to the United States.

II. The Intersection of U.S. Asylum Law and Gang Persecution

Notwithstanding the all too real dangers posed by Central American gangs, grants of political asylum in the United States based on gang persecution are rare. Obstacles facing petitioners fleeing gang persecution are numerous and include: a lack of favorable legal precedent by the federal circuit courts and the Board of Immigration Appeals, fear among asylum adjudicators that a grant of relief in one case will trigger a torrent of similar claims, abstract legal provisions, bias against those applicants who may have participated in gang activity at some point in their lives or while under duress, and the asylum adjudicator’s own personal biases and opinions about the asylum petitioner.

To prove eligibility for a grant of political asylum in the United States, a petitioner must establish that he or she is a “refugee,” meaning a “person who is outside any country of such person’s nationality...and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion.”¹⁴

Under this standard, an asylum applicant must show: (1) that they have either suffered or have a well-founded fear of persecution, (2) that the characteristics

for which they were persecuted fit into one of the five enumerated grounds; and (3) that the persecution was on account of the protected characteristic.

Additionally, an asylum claim can prevail even if the alleged perpetrators are non-state actors, as are Central American gangs. “[P]ersecution may be inflicted . . . by persons or organizations which the government is *unable or unwilling to control*.”¹⁵

However, determining whether an asylum applicant has met the statutory requirements proves difficult as the provisions themselves do not define the elements of an asylum claim. Additionally, the law is ambiguous as to the intended scope of the statutorily protected grounds of “political opinion” and “membership in a particular social group.” Such legal abstractions are problematic for individuals bringing an asylum claim based on gang persecution as such claims may not neatly fit into an enumerated category. Therefore, in an attempt to allay these challenges, many legal advocates find it necessary to plead in the alternative with as many bases as possible when handling such claims.

III. Rethinking “Political Opinion”

For asylum seekers pursuing a “political opinion” claim, the crucial challenge is establishing that the harm inflicted, or threats received, stemmed from something more than a personal vendetta and was in fact on account of their political opinion (either manifest or implied). In *INS v. Elias-Zacharias*,¹⁶ the Supreme Court held that there must exist some evidence that the perpetrator acts in opposition to a specific political opinion held or believed to be held by the victim. When reviewing a petition by an applicant who fled Guatemala after guerilla members attempted to recruit him, the Court rejected the theory that forced recruitment, even to a politically motivated insurgency, was persecution per se of the unwilling recruit.¹⁷

What constitutes “political” persecution will vary according to the social and political realities of each country. For example, in *Desir v. Ilchert*,¹⁸ a Haitian applicant alleged that the Ton Ton Macoutes targeted him on account of his political opinion, expressed in his refusal to take bribes. At the time, the Macoutes were “an elaborate network of official and semi-official security forces, factions of which were fiercely loyal to the Duvalier family” who survived by engaging in “wide-spread corruption, extortion and violence.”¹⁹

The issue in *Desir* was whether a refusal to pay bribes to a facially criminal organization constituted an expression of political opinion. The Ninth Circuit held that it was, reasoning that the power wielded by the Ton Ton Macoutes transformed them into a political force so that the applicant’s opposition, expressed in his refusal to pay a bribe, could have been interpreted by the Macoutes as a political opinion opposing their authority.

The Ninth Circuit characterized the Haitian government at the time as a “kleptocracy or government by thievery” whose power stemmed from criminal activity.²⁰ In this environment, criminal activities achieved a political charac-

ter, so that extortion “may have directly benefited the Ton Ton Macoutes as individuals” and additionally benefited the ruling political regime.²¹ The Ton Ton Macoutes were thus not considered merely criminals, but an entity that engaged in crime in order to exercise control over the population. This categorization allowed the Ninth Circuit to conclude that the persecution endured by the applicant “was more properly understood as motivated by ‘political’ rather than ‘personal’ interests.”²²

In finding evidence of a politically motivated crime, the court in *Desir* emphasized the criminals’ desire to obtain power through unlawful actions. The court concluded that the Ton Ton Macoutes acted “politically” because they operated against, and with the intent of controlling, those subject to the governing party’s rule.²³ In contrast, the court further opined that political opinion is lacking, and asylum is inappropriate, where the criminal activity does not seek to achieve power over other members of society. To draw this distinction, the court pointed to another asylum claim based upon fear of reprisals following a refusal to participate in unlawful activity, *Zayas-Marini v. INS*.²⁴

In *Zayas*, the applicant described a fear of reprisal stemming from his refusal to participate in a smuggling scheme. The Ninth Circuit denied his claim as a mere personal dispute because the actors were all members of the same class (here the Paraguayan social elite) and thus engaged in “personal hostility” that aspired to increase their control or any such quasi-political aims.²⁵ Thus, in distinguishing between criminal actors that seek solely personal gain and those who seek political aims, courts should look to whether or not the crime is perpetrated in furtherance of consolidating power.

The Second Circuit has also insisted on a reality-based definition of the term “political” in deciding asylum claims. In *Osorio v. INS*,²⁶ the court held that the persecution of union leaders was political because their union activities threatened the government’s control over Guatemalan society. In rejecting the Board of Immigration Appeals’ characterization of the dispute as purely economic in nature, the court criticized the BIA’s “summarily dismiss[ing] the underlying political motives” and “ignore[ing] the political context of the dispute.”²⁷ The BIA’s failure to specifically examine the contours of Guatemalan society and assess the nature of the political therein “betrays an impoverished view of what political opinions are, especially in a country like Guatemala where certain democratic rights have only a tenuous hold.”²⁸

In Central America, a power vacuum exists that is filled by non-state actors (including death squads, gangs, and vigilante groups) which the state either cannot or does not wish to control. That these groups may have some non-political goals such as stealing or inflicting personal vengeance on members of the civilian population and former gang members does not necessarily negate the prospect that such groups also have political goals. Because of this reality, asylum adjudicators should more properly focus on what is considered “political” within a particular country or context.

A nuanced examination of a society may support the conclusion that criminal activity, such as the activity engaged in by Central American gangs, may also be viewed as political. While the political goals of the gangs may be ill-defined at this point and seem to be no more than to terrorize civil life in Central America, the fact that they exercise political power, however crude, cannot be denied. Anyone who resists the gangs' influence, either by actively refusing to join, attempting to disassociate with them, or by reporting their activities to law enforcement officials, faces the very real possibility of death or severe bodily harm.

Conclusion

With a goal that is humanitarian in purpose, asylum law is intended to be flexible, adapting to the various forms of persecution that prevail in different societies around the world. Who does and does not have a "right" to political asylum depends upon how "political" and therefore "political persecution" is defined. In advancing political asylum claims for persons fleeing gang persecution, it is important to remember that simply because these gangs are not fully institutionalized state actors does not mean that they are not political. In countries emerging from decades of authoritarian rule, power does not present itself in a structured and institutionalized form but is often exercised in a more brutal and extra-judicial fashion.

The crucial issue for legal advocates has become convincing asylum officers and the Immigration Courts that our immigration laws were intended to protect, not keep out, those who risk persecution and even death when they resist the gangs. For the countless individuals fleeing this persecution, until favorable precedent exists to reassure adjudicators that gang-based asylum claims are meritorious, applicants with meritorious claims will continue to be unjustly excluded from the benefits embedded within U.S. asylum law.

NOTES

- 1 The name Mara refers to "Marabunta" ants, similar to army ants that swarm and eat live prey. See World Vision, *Faces of Violence in Latin American and the Caribbean* (2002). The most notorious and influential gangs include the Mara Salvatrucha (M-13) and the Mara 18 (Barrio 18), whose membership appears throughout Central America, Mexico, and the United States. See USAID Report, *Central America and Mexico Gang Assessment*, April 2006, at http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.
- 2 Congressional Research Service Report for Congress, *Gangs in Central America*, updated August 2, 2007 at 3, <http://fpc.state.gov/documents/organization/47140.pdf>.
- 3 *Id.*
- 4 Christopher A. Araujo, Council on Hemispheric Affairs Report: *Central America's Increasing Gang Problem: A Comforting Handshake Needed as Much as a Tough Fist to Fight Crime Epidemic*, July 23, 2007.
- 5 *Id.*
- 6 *Shuttling Between Nations, Latino Gangs Confound the Law*, N.Y. TIMES, Sept. 26, 2004.

7. USAID Report, Central America and Mexico Gang Assessment, April 2006, http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.
8. USAID Report, Central America and Mexico Gang Assessment, Annex 1: El Salvador Profile, April 2006, at http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.
9. *Id.*
10. *Id.*
11. Key demands from rioting prisoners include that Central American governments change the “Iron Fist” legislation and allow gang leaders to switch prisons. Partially a result of a prison system pushed beyond its limits due to severe overcrowding (more than 18,000 inmates in a system built to hold fewer than 7,000), prison battles have consistently erupted in El Salvador, Honduras and Guatemala since 2004. In that year alone there were 4 riots within 20 months in Central America resulting in the deaths of over 200 inmates. Most recently, in January 2007 a prison riot in El Salvador resulted in the deaths of 21 inmates. *See Central America’s Gang Crisis: Prison Riots Reflecting Widening Violence in Poor Nations*. WASHINGTON POST FOREIGN SERVICE. September 17, 2004.
12. *Twenty-seven Dead in Honduran Bus Massacre*, Dec. 24, 2004, at http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x1097188.
13. *Guatemala Moves Against Politician in Murder Case*, Jan. 2, 2008, at <http://www.reuters.com/article/latestCrisis/idUSN02149015>.
14. Immigration and Nationality Act § 101(a)(42)(A).
15. Matter of McMullan, 17 I&N 542 (BIA 1980) (asylum available to victim of IRA persecution). In *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004), the Fourth Circuit explicitly recognized the Mara 18 as “an organization which the government is unable to control.”
16. *INS v. Elias-Zacharias*, 502 U.S. 478, 482 (1992).
17. *Id.*
18. *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988).
19. *Id.* at 727.
20. *Id.* at 728.
21. *Id.*
22. *Id.*
23. *Id.* at 728.
24. *Zayas-Marini v. INS*, 785 F.2d 801 (9th Cir. 1986).
25. *Id.*
26. *Osorio v. INS*, 18 F.3d 1017, 1029-30 (2d Cir. 1994).
27. *Id.* at 1029.
28. *Id.* at 1030.



Introduction

Fundamental rights and freedoms under capitalism, from the Marxist perspective, are determined in terms of their efficiency to exploit workers.¹ To Marx, freedoms in liberal democracies are illusory, in that the freedoms advocated by liberal regimes are *market* values and are not centered on protecting basic human dignity.²

Determining whether socialist or capitalist systems meet human needs better depends on an axiological choice of distributive justice—individual procedural freedoms (processes) in capitalism versus collective egalitarian solidarity rights (claims) in socialism. The distributive principles in socialism are collectivization, socialization, solidarity and equality. The distributive principles in capitalism are individualism, independence, self sufficiency and liberty/freedom. There are good arguments for both values and any system likely draws on both the idea of liberty and the idea of equality.³ In Marxist terms, the interplay between freedom and equality is dialectical⁴—each of those opposites is linked to and influences the other, though one predominates. In capitalism, in contrast, the abstract principle of “freedom” predominates and few egalitarian arguments hold much force in contemporary legal thought outside the context of formal (as opposed to substantive) equality. In socialist systems the abstract principle “equality” tends to dominate; not merely procedural equality but also substantive equality. This analysis will consider the Marxist critique of the liberal concept of human rights. The principal Marxist critique of human rights is the fact that human rights are used to legitimate and justify the inequalitarian capitalist system.

A. The Marxist critique of liberal capitalist human rights

The Marxist critique of liberal human rights is radical.⁵ Only fascism has posed a comparable challenge to the idea of fundamental rights of individuals.⁶ Yet it would be inaccurate and unfair to equate Marxism to fascism, even though they are both deterministic ideologies.⁷ For Marx, history is determined by dialectical materialism⁸—the forces of economic production, which determine social structures - and class struggle; to fascists, history is determined by a struggle between races, rather than classes, and dialectical materialism is an illusion. Fascism is based on an assumption of racial inequality. In contrast, Marxism is egalitarian. So there are very real differences which explain why it is unfair to equate Marxism and fascism. The Marxist critique of liberal states is that capitalist regimes fail to respect the basic rights and dignity of the poor. Fascism is also critical of the liberal state, but because liberalism does not assert martial virtues.

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Marxism affirms human rights not as absolute formal procedural niceties (which is what liberal capitalism does) but as substantive claims in the material world (unlike liberal capitalism), relativized by real world facts (like liberal capitalism). Marxist human rights are relativized for example by class struggle and history, that is, by historical materialism.

The Marxist critic of human rights asserts that the rights and freedoms of bourgeois democracies are purely formal and at most procedural⁹ and thus are illusions.¹⁰ To Marxists the working class (who today live largely in the Third World due to outsourcing), lack the economic means and intellectual formation to enforce its rights. Thus, for Marxists, workers are a victim of “the shell game”.¹¹ *Formal* equality and legality mask *de facto substantive* inequalities. For Marxism, social inequalities are reflections of the struggle between different social classes. Thus, according to Marx, eliminating class differences is the first step to ending inequality and attaining the full realization of all persons. Marx’s criticism refers specifically to the French example:

Above all, we find that the so-called rights of man, human rights versus the rights of citizens, are nothing other than the rights of member of bourgeois society, that is to say selfish man, man separated from man and the community.

(...) Equality, taken here in its apolitical signification, is nothing other than the equal freedom described above, namely that every man is considered as equivalent like such a monad reposing on itself. The Constitution of 1795 defines the concept of equality, in accordance with its importance, as follows:

Art. 3. (Constitution of 1795). “Equality is that the law is the same for everyone, either because it protects or punishes.”

Security

Art. 8. -- (Constitution of 1795). -- “Security is the protection afforded by society to each of its members for the conservation of his person, his rights and property.”

Security is the supreme social concept of bourgeois society, the concept of the police, that any society exists only to ensure to each of its members the conservation of his person, his rights and his property. In this sense Hegel called bourgeois society a “state of necessity and understanding.”¹²

Thus, Marx presents a universal criticism of liberal regimes.¹³ For him, the state is concerned about the protection of capitalist interests and ignores those of workers.¹⁴ For Marxists, the idea of freedom is a social construct, created by society and for society. That social construct arises under certain historical conditions.

Hegel was the first to accurately represent the relationship of freedom and necessity. For him, freedom is the intellection of necessity. Need is blind only to the extent that it is not understood. “Freedom is not in a dream of independence from the laws of nature, but in the knowledge of these laws and the possibility thereby to implement them methodically for those purposes. This is true both of the exterior laws of nature as well as of those that internally govern the physical and mental existence of man himself—two classes of laws that we can more

or less separate in representation, but not in reality. Freedom of the will does not therefore mean something other than the ability to make more informed choices. So, the more the judgment of a man is free on a specific question, the greater the need that determines the tenor of that judgment.

Freedom is therefore in the empire of ourselves and over the external natural world, based of knowledge of natural necessities, so it is necessarily a product of historical development, but any progress of civilization is a step towards freedom.¹⁵

Thus, the Marxist critique is relative, recognizing that, in terms of historical development, the limited protection of human rights in the capitalist system of production is still higher than the previous feudal stage.¹⁶ However, according to Marx, to achieve the next step forward in civilization, all proprietary relations must be progressively suppressed and replaced with human relations.

The Marxist critique of human rights is in large part a criticism of property and its consequences. Liberalism argues that property is the means by which freedom is exercised. Marxism, in contrast, sees private property as the final mechanism of oppression and a source of separation (i.e. alienation) between people.¹⁷ The resolution of social inequalities reflected in property would occur, for Marx, via a revolution aimed at the implementation of a *temporary* dictatorship of the proletariat¹⁸ as a step towards the abolition of the state and its replacement by civil society.¹⁹ The failure to determine methods to control the dictatorship of the proletariat was one of the causes of the excesses and dysfunctions of the Soviet regime.

The Marxist criticism of human rights in capitalism is that they are purely formal and empty of substantive meaning in practice, concealing inequality by way of a superficial and illusory procedural equality.²⁰ To understand the validity of the Marxist critique of liberal human rights as being merely formal procedural equality, one must understand some basic concepts of Marxism and then define the concept of fundamental rights in Marxist theory.

B. The Marxist concept of human rights in theory

A central idea of Marxism is that history follows progressive development through successive stages. This progress leads to an improvement in people's lives through the development of new technologies (improved forces of production). The driving force behind this dialectical process²¹ between the past and the future is social struggle, particularly class struggle. Progress, rather than aiming at vague ideals (Hegel's erroneous view), is driven by material facts—the mode of production, whether feudal, agrarian, capitalist, or socialist.

Historical materialism²² implies abandoning a “metaphysics” of an inevitable “human nature”.²³ For Marxists, social reality is malleable. Thus, Marxist law is the command of the state during the capitalist and socialist eras (late modernity), but law would disappear as anarchic communism becomes established in the future and the state withers away to be replaced by civil society (the end of

history). With this foundation, we can analyze the legal regimes constructed by this antinomian²⁴ thought aimed to aid the transition from capitalist imperialism toward communism.

C. The Marxist concept of human rights in practice

The analysis now turns to the historical practice of human rights in Marxist countries. We will examine a surprising number of parallels between Marxist and capitalist systems on human rights. These parallels result in part from the fact that the economic progress is a common value to both systems.

Human rights in the proletarian dictatorships and liberal capitalist states are relativized²⁵ and subject to the principle of legality.²⁶ Similarly, in liberal democracies, rights imply reciprocal duties.²⁷ However, unlike liberal thought, Marxism is collectivist, so the practice of Marxist regimes respects collective rights more than individual rights²⁸—individual rights were more often relativized by and subordinated to collective needs in the proletarian dictatorships.²⁹

Thus, symmetrical legal mechanisms, but guided by a different teleology, were implemented in the proletarian dictatorships in order to guarantee standards of a general and abstract nature—the capitalist and Marxist legal regimes basically paralleled each other structurally. These standards, in turn served to legitimate the system by respecting different yet perfectly admissible basic values such as the right to work, the right to housing, the right to food, education, and medical care.

These parallels show that the issues of voluntarism and relativism go beyond the economic system. Totalitarianism can be erected on behalf of the people, a dictator, or a wealthy oligarch(y). For this reason, as well as due to the exhaustion of millennial visions after two global wars, there is a contemporary scepticism as regards universal narratives, universal projects of political and economic transformation. Utopian ideas seem to be exhausted. This scepticism toward universal narratives is most evident in post modernism.

D. Conclusion: The liberal critique of Marxist regimes

The liberal democracies can claim to have protected “freedom” more than the proletarian dictatorships. In contrast, the self described socialist democracies can claim to have better protected “equality” as a human right. In the end, the struggle between these two systems involves the basic difference between economic freedom from state intervention in individual affairs versus the egalitarian right of all to a claim in at least the necessities of a decent life. The conflict, ideologically speaking, is between procedural-individual-“freedoms-from” versus substantive-collective-“rights-to.”

At the level of practice, a valid liberal criticism of Marxism is the fact that the Marxist states indefinitely prolonged the proletarian dictatorship which in fact had been intended only to be a temporary transitory phase,³⁰ ultimately degenerating back into capitalism through the rise of a capitalist class within the communist party itself. Of course, Marxists can rightly reply that capitalism

forced Marxist states to organize themselves as authoritarian states and that the proletarian dictatorships succeeded, despite fascist invasion, at implementing a formal rule of law state, (formeller Rechtsstaat) known as socialist legality.³¹ However, Marxists must take into account the corruption in the communist party which led to capitalist restoration. The historical problem for Marxism is not the excesses of Stalin, who ended illiteracy and famine and doubled the average life expectancy in Russia despite a genocidal war of aggression waged by fascism against Russia. Stalin's excesses were in fact necessitated by the fact of the imminent genocidal Nazi invasion and justified by the fact that of the countries invaded by Hitler only the USSR led by Stalin successfully resisted. The historical problem facing Marxists is not justifying Stalin. It is the fact that the temporary dictatorship of the party (not the proletariat) became permanent, and that the communist party became corrupted and ultimately restored capitalism.

Another two criticisms of Marxism³² are its subordination of freedom to ideology and the Communist Party's monopoly on power.³³ The fetishization of the vanguard party—an elite conspiratorial party following the principle of democratic centralism³⁴—indeed set the stage for the corruption of the party elite (the nomenklatura). However, absolute freedom does not exist. The valid critique is not the lack of 'freedom' but rather the presence of an all powerful party and an elite dictatorship which, rather than serving the people, aggrandized power for itself and ultimately restored capitalism to serve its own interests.

The economic critique of Marxist is that a collectivist vision³⁵ ignores the profit motive and is not realistic about the role of self interest in human affairs and thus underperforms. The state as producer of economic goods could not wither away in the face of capitalist regimes, nor could it depend on the idealism of workers (Stakhanovism) or on their (forced) labor to compensate for the lack of incentive based labor. However, Marxists could meet those critiques by pointing out that their system was not based on the exploitation of Third World labor, unlike capitalism, and industrialized an illiterate famine plagued inegalitarian society more rapidly than would have occurred under imperialism.

The turning point for Marxism was the calcification of the communist party. When Marxism in practice became seen as the collective oppression of the individual, rather than as a force for liberation, the moral force of legitimation of that ideology was lost and thus its capacity for expansion was also lost. Indeed, a universalist ideology of liberation that does not in fact liberate, but instead stagnates and oppresses, as happened in the U.S.S.R. after Khrushchev, loses all power of legitimation. Soviet history shows that one of the functions of human rights is political legitimation as well as protection of the weak. Legitimation and justice are mutually reinforcing. When the Soviet system degenerated into rule by the party, for the party, that system was doomed thereby.

This study of a seemingly outdated legal system is justified because Soviet history and Marxist theory can as inspiration for our actions in the world we

live in today. Understanding that Marxism went too far by enabling a perpetual dictatorship of the party which then mutated into a corrupt self-serving clique which ultimately restored capitalism is a first step to developing a Marxism, or post-Marxism, that can attain the valid dream of peace and prosperity for all people. Hopefully this work contributes to a dispassionate, objective understanding of the ideological and legal struggles to attain basic human rights for all persons.

NOTES

1. "Already in his 'On the Jewish Question' Marx had proven that the so called Human rights are class rights—political emancipation is a great step forward but only progress within the exploitative society." PHILOSOPHISCHES WÖRTERBUCH 780 (Georg Klaus & Manfred Buhr eds.) (1974). "The goal of socialist civil rights is neither absolute individualism or the loss of the individual within the masse. Rather, fundamental rights contribute to the formation of all-round developed harmonious persons." *Id.* at 783.
2. "The withering of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law, just as the withering away of the categories of value, capital, profit and so forth in the transition to fully-developed socialism will not mean the emergence of new proletarian categories of value, capital and so on. The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations." EVGENY PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 61 (Barbara Einhorn, trans.) (1978).
3. "The goal of socialist civil rights is neither absolute individualism or the loss of the individual within the masse. Rather, fundamental rights contribute to the formation of all-round developed harmonious persons." PHILOSOPHISCHES WÖRTERBUCH, *supra* note 1, at 783.
4. Dialectics is the idea that truth is obtained through the comparison of different viewpoints, via a dialogue. Aristotle, Hegel, and Marx were all dialecticians, it is very likely Heraclitus was as well and taoism too appears dialectical. Dialectical materialism argues that the dialectic is between material forces.
5. "Marx and Engels make what must be the most virulent criticism against the theory of natural rights of the person. The Marxist doctrine (see in particular the Communist Manifesto of 1847) absolutely and categorically rejects the notion of individual rights considered as limits on state power. Based on the class struggle which is the driving force of history, Marxist doctrine asserts that the concept of individual rights marks the abstract power of the dominant class on classes dominated ... collectivist regime only allows for Marxist authors, made available to citizens of means to achieve freedom." CLAUDE LECLERCQ, *LIBERTÉS PUBLIQUES* (1994).
6. JEAN RIVERO, *THE PUBLIC FREEDOMS* 126 (1974).
7. "Determinism not only does not presuppose fatalism, on the contrary it gives a basis for intelligent activity." 1 VLADIMIR LENIN, *WORKS* 92 (1894).
8. Dialectical materialism asserts that change occurs through the conflict of opposites; that opposites are united in mutual struggle; that change occurs cyclically as an upward spiral; that a long series of quantitative changes leads to sudden, unexpected qualitative changes. The union and conflict of opposites is a basic principle of dialectics. *See*, MAO ZEDONG, *DIALECTICAL MATERIALISM* (1938) *available at*: http://www.marxists.org/reference/archive/mao/selected-works/volume-6/mswv6_30.htm.
9. "For Marxists, these freedoms are essentially 'formal' in the sense that they would be empty of any real substance, and therefore, pure form." JEAN JACQUES VINCESINI, *LE LIVRE DES DROITS DE L'HOMME* 186 (1985).

10. "Civil rights are merely the rights of the bourgeoisie." PHILOSOPHISCHES WOERTERBUCH, *supra* note 1, at 780.
11. JEAN ROCHE & ANDRÉ APULIA, PUBLIC FREEDOMS 11 (1997).
12. KARL MARX 1844, LA QUESTION JUIVE, 109 (Simon trans., 1971) (1844).
13. CLAUDE ALBERT COLLIARD, PUBLIC FREEDOMS 39 (1989); VINCESINI, *supra* note 9, at 188.
14. ROCHE & APULIA, *supra* note 11, at 26.
15. F. ENGELS, ANTI -DÜHRING, PARIS, ÉD. ENGELS, ANTI-DÜHRING 146 (Bottigelli trans., 1963) (1877).
16. "In the dialectical perspective ... [capitalist] human rights represent an improvement over the previous period." RIVERO, *supra* note 6, at 88.
17. JEAN-MARIE PONTIER, LIBERTÉS PUBLIQUES 136 (1997).
18. "The DoP [dictatorship of the proletariat] was to be a necessary, rigorous, and rapid conquest of political power by the revolutionary forces so as to prevent the restoration of the old order. In this sense, it was to be an exceptional, temporary phase, quasimilitary in nature, needed to secure the complete defeat of the previous regime but not in itself constitutive of the new socialist order. Second, the DoP was to involve Lenin's demand that the bourgeois state machinery be smashed." Piers Beirne & Alan Hunt, *Law and the Constitution of Soviet Society: The Case of Comrade Lenin*, 22 LAW & SOC'Y REV. 575, 577 (1988).
19. The freedoms of 1789 are linked to the capitalist regime, the freedoms of the rich. ROCHE & APULIA, *supra* note 6, at 26.
20. "There is probably an element of truth in the criticism by Soviet authors of the abstract nature of public freedoms of traditional liberal regimes." COLLIARD, *supra* note 13, at 37.
21. "In addition, Marxism is historical materialism. It believes that man and society are at every moment, a reflection and product of history and of the dialectical movement behind it. In this perspective the existence of permanent rights, given once and for all, and removed the movement of history, is obviously unacceptable. Like all the laws, 'human rights' are only a reflection of the economic infrastructure. The expression of the power of the ruling class, and the means for it to impose its domination the exploited classes." RIVERO, *supra* note 6, at 87-88.
22. Historical materialism argues that history can only be understood in terms of material facts and not by abstractions from facts. See, Preface, KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY, (1859) available at: <http://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm>.
23. "Marxism is materialism. Therefore, the existence of a 'human nature', 'transcendent, abstract and metaphysical', necessarily is refused, insofar as it escapes any scientific findings." RIVERO, *supra* note 6, at 87-88.
24. Antinomianism is the idea that law is per se illegitimate due to coercion; an antinomian view seeks to establish a world where law does not exist and is not necessary.
25. "Rights and freedoms are subject to a certain finality that defines their limits. ... The freedom of speech, the press, meetings ... is guaranteed to consolidate and develop the socialist regime." RIVERO, *supra* note 6, at 92.
26. "The Soviet freedoms can be exercised only within and serving the order imposed by the power." *Id.* at 93.
27. "[R]ights and freedoms are" inseparable from the performance of duties of citizens." *Id.* at 92.
28. "The Marxist doctrine rejects the existence of individual rights considered as inviolable limits of state power over the individual. Dominé à son tour par une conception communautaire [plutôt qu'individualiste], le régime collectiviste rejette la notion de droits de l'individu pour le plus grand intérêt de la masse toute entière." COLLIARD, *supra* note 13, at 36.

29. "The constitution of 1977 (following that of 1936) outlined in its chapter 7 the fundamental rights and duties of citizens[:] In accordance with Marxist theory, economic and social rights came in first place (right to work, rest, social security, education ...). Then came the intellectual freedoms: freedom of expression, assembly demonstration, association and finally, freedoms of the individual." Roche & Apulia, *supra* note 11, at 29-30.
30. There are authoritarian democracies in which civil liberties are not guaranteed . . . The history of political institutions, their study in comparative law show the existence of these various regimes. The first French Republic was an example of an authoritarian democracy that repudiated civil liberties . . . It is a similar formula that can be found in contemporary times in the experience of Lenin. Leninist Democracy, as it first appears as the "dictatorship of the proletariat." It is an authoritarian democracy and anti-egalitarian. In Lenin's thought, this is a transitional time indeed non-specified, an intermediate stage for the birth of true communist society. And he wrote: "The dictatorship of the proletariat makes a series of restrictions on the freedom of oppressors and exploiters capitalists Those, we have to oppress to free mankind from wage slavery, we must break their resistance by force . . . This authoritarian democracy is exclusive of freedom, less free immediately, but it claims to be the medium and the only way to achieve a future of true freedom, a prerequisite for achieving future of freedom" COLLIARD, *supra* note 13, at 39-40.
31. See Lewis Siegelbaum, 1924: *Socialist Legality*, at <http://soviethistory.org/index.php?page=subject&SubjectID=1924legality&Year=1924&Theme=4c6177202620536f6369657479&navi=byTheme>; also CHRISTINE SYPNOWICH, *THE CONCEPT OF SOCIALIST LAW (1990)* available at: <http://books.google.com/books?q=Christine+Sypnowich&btnG=Search+Books>.
32. "To take the letter to the constitutions of the USSR in 1936 and 1937, Soviet citizens enjoy more guarantees than those who live in western democracies. The reality is quite different. It shows clearly that in popular democracies, the exercise of political rights such as social rights has neither legal force nor real effectiveness." VINCESINI, *supra* note 9, at 201-202.
33. "The intellectual freedoms and the right of association were directed immediately set out 'in accordance with the interests of workers and to strengthen the socialist regime' . . . The monopoly of the Communist Party was guaranteed." ROCHE & APULIA, *supra* note 6, at 29-30.
34. See VLADIMIR LENIN, *WHAT IS TO BE DONE?* (1902), available at: <http://www.marxists.org/archive/lenin/works/1901/witbd/>



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EDITOR'S PREFACE *continued*

play when a white scholar lectures (or presumes to lecture) on the subject of Federal Indian Law before a Native American audience.

The remaining four writings are more research-based and scholarly in nature. In “The Marshall Trilogy and the Constitutional Dehumanization of American Indians,” I argue that the trio of early 19th century cases decided by Chief Justice John Marshall that greatly limited tribal sovereignty should be seen within the context of the Supreme Court’s tendency to periodically play amateur anthropologist and hear cases that require it to determine whether a particular sector of the American population is fully human under our law. Unlike some of the other groups the Court has sought to legally dehumanize, most notably African Americans under *Dred Scott v. Sandford*, the basic holdings of the Marshall Trilogy have never been overturned and the blatant racism at the heart of these cases has never been adequately redressed.

Two articles examine legal issues developing out of post-Cold War Latin America. In “The Status of Restrictions on the Right to Travel from the U.S. to Cuba,” Arthur Heitzer, Chair of the NLG’s Cuba Subcommittee, explains the tension that exists between the legal rights of U.S. citizens and residents to travel abroad and the U.S. government’s abiding determination not to let its people freely visit Cuba. In “Challenging the Political: U.S. Asylum Law and Central American Gang Warfare” Alexandra M. Gonçalves-Peña, a New York-based immigration attorney, explains some of the legal obstacles those fleeing from increasingly powerful organized criminal gangs in Central America experience when seeking asylum in the U.S. As Ms. Gonçalves-Peña explains, these gangs, often strong and politically connected, constitute a very real source of terror and persecution that does not fit neatly within the categories of U.S. Asylum Law as they presently exist.

Eric Engle’s “Human Rights According to Marxism” is a philosophical—or “critical”—analysis of how rights function within a liberal capitalist legal and economic system. Mr. Engle is presently a research aide to Harvard Law Professor Duncan Kennedy, one of the founders of the Critical Legal Studies movement and a longtime NLG member. In this article Mr. Engle shows the interconnectedness of economic power and law by examining how individual rights, thought of as prerequisites to liberty by those supporting liberal capitalist regimes, can in truth function to support economic domination and social control.

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—Nathan Goetting, Editor-in-Chief, Issue editor

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