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## **Rebellious Lawyering in the Courts of the Conqueror: The Legacy of the *Hirabayashi Coram Nobis* Case<sup>1</sup>**

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Natsu Taylor Saito<sup>2</sup>

### I. INTRODUCTION

It is an honor to participate in this tribute to the late Gordon Hirabayashi and those who worked for many decades to ensure that his commitment to upholding constitutional principles, regardless of personal cost, would be recognized in the courts of law and history.

Like many others in the Japanese American community, I must acknowledge a personal debt to those who resisted, from inside and outside the camps, the forced relocation and mass internment of our families, as well as my appreciation for those who worked for many decades to challenge the mainstream legal and historical narratives of that internment. Their willingness to engage in a classic “lost cause”—confronting the conclusions not only of the executive and legislative branches of government and the military, but the United States Supreme Court as well—allowed our internee parents and grandparents to hold their heads high, and our children to be proud of their histories.

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<sup>1</sup> This article originates in Natsu Taylor Saito’s February 2012 presentation at The 25th Anniversary of the *United States v. Hirabayashi Coram Nobis* Case: Its Meaning Then and Its Relevance Now, a conference hosted by Seattle University School of Law’s Fred T. Korematsu Center for Law and Equality.

<sup>2</sup> Natsu Taylor Saito is a law professor at Georgia State University College of Law. The author is grateful to all of the Hirabayashi conference organizers, supporters, and participants, and to the staff and editors of the *Seattle Journal for Social Justice*. Special thanks to Lori Bannai, Peggy Nagae, and Eric Yamamoto for their always inspirational work for social justice, and to Roger Daniels for making so much Japanese American internment history accessible.

Before considering the role of the *Hirabayashi* coram nobis case<sup>3</sup> in the context of this legacy, I would like to acknowledge that, in Seattle, Washington, we are on or near lands of—among others—the Suquamish, Duwamish, Nisqually, and Puyallup peoples who have been dispossessed, forcibly “evacuated,” and interned by the United States.<sup>4</sup> They have received no meaningful redress for these wrongs, and their histories cannot be relegated to an abstract “past” any more than those of the Japanese American community. Discussing the injustices suffered by American Indians when the US government arbitrarily placed the Poston internment camp on the Colorado River Reservation, the late professor Chris Iijima observed, “The ironies . . . [of] a concentration camp for citizens imprisoned as foreign aliens built on land that served as a prison for original inhabitants created by conquering invaders . . . would be poetic if not so tragic.”<sup>5</sup> I believe that the effectiveness of our challenges to the Japanese American internment is best measured by the extent to which they further

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<sup>3</sup> *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (vacating Gordon Hirabayashi’s conviction for violating the wartime curfew and evacuation orders). See also *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (vacating Fred Korematsu’s conviction for violating the evacuation order). For background on the *Korematsu* coram nobis case, see generally Marilyn Hall Patel et al., *Justice Restored: The Legacy of Korematsu II and the Future of Civil Liberties*, 16 ASIAN AM. L.J. 215 (2009). The conviction of a third resister, Minoru Yasui, was also vacated, but without the court addressing his claim of prosecutorial misconduct. His appeal on this issue was mooted by his death in 1986. See *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985), cert. denied, 484 U.S. 831 (1987); see also Peggy Nagae, *Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity*, 81 OR. L. REV. 1133, 1138–42 (2002). For background, see Kerry S. Hada, Andrew S. Hamano, *Minoru Yasui*, 27 COLO. LAW. 9 (1998).

<sup>4</sup> See AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP AND NISQUALLY INDIANS 3–40 (1970); see generally VINE DELORIA, JR., INDIANS OF THE PACIFIC NORTHWEST: FROM THE COMING OF THE WHITE MAN TO THE PRESENT DAY (1977).

<sup>5</sup> Chris K. Iijima, *Reparations and the “Model Minority” Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 387 (1998). He went on to note his realization that “this sad story of the past was a metaphor for an equally sad future if the lessons of internment and redress were not heeded.” *Id.*

the struggles of other peoples subjected to violations of fundamental human rights.

This essay is a reflection on what the coram nobis cases, which overturned the convictions of those who resisted internment, can teach us as we engage in contemporary struggles to further social justice. Section II considers the impact of Gordon Hirabayashi's legal victory on the protection of fundamental human rights in the United States, and Section III assesses the ruling in terms of the broader purposes of legal redress. Two lessons I have learned from the *Hirabayashi* case are outlined briefly in Section IV. The first is that engaging in community-based lawyering can help us creatively expand the options for attaining social justice within the parameters of our domestic legal system. The second is that if we allow ourselves to think outside the box, emerging international human rights norms can help us envision a much broader array of options that further human dignity and justice.

## II. ASSESSING THE IMPACT OF THE CORAM NOBIS DECISIONS

In 1987, the Ninth Circuit Court of Appeals vacated Gordon Hirabayashi's conviction for violating the curfew and evacuation orders imposed upon all persons of Japanese ancestry on the West Coast during World War II.<sup>6</sup> Judge Mary Schroeder's opinion concluded that the Supreme Court upheld Hirabayashi's conviction in 1943 because it had been misled by the government. In reaching this conclusion, Judge Schroeder acknowledged the significance of the revised historical narrative that, as a result of the insistence of lawyers, scholars, and Japanese

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<sup>6</sup> *Hirabayashi*, 828 F.2d 591. The action was initiated as a petition for a writ of coram nobis, a rarely used avenue for challenging a criminal conviction based upon newly discovered evidence. See Eric W. Scharf & Wayne R. Atkins, *Coram What? An Introduction to Federal Special Writs*, 85 FLA. B.J. 89, 91 (2011).

American activists, had replaced the prevailing myth that the government's action had been based on military necessity.<sup>7</sup>

Of course, the Ninth Circuit could not overturn the precedent established by the Supreme Court's wartime internment decisions.<sup>8</sup> Nonetheless, the *Hirabayashi* coram nobis opinion, together with a district court decision vacating Fred Korematsu's conviction,<sup>9</sup> seemed to signify that the judiciary would no longer simply accept the government's word that national security required draconian measures based upon race or national origin. As the court stated in the *Korematsu* coram nobis case, the Supreme Court's decision in *Korematsu*, as historical precedent, "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees."<sup>10</sup>

The legal and political developments of the post-9/11 "war on terror" have forced us to reconsider this assessment. Some of the more troubling developments include the disappearance and arbitrary detention of Muslims and Arab Americans in the months immediately after September 11, 2001,<sup>11</sup> as well as their continued detention at the Guantánamo Bay naval base,<sup>12</sup> the increase in the use and apparent acceptability of racial and ethnic profiling,<sup>13</sup> as well as increasingly harsh immigration policies,<sup>14</sup> the

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<sup>7</sup> *Hirabayashi*, 828 F.2d at 593.

<sup>8</sup> See *Hirabayashi v. United States*, 320 U.S. 41 (1943) (upholding the curfew); *Yasui v. United States*, 320 U.S. 115 (1943) (upholding the curfew); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the evacuation); *Ex parte Endo*, 323 U.S. 283 (1944) (holding that citizens found to be "loyal" could not continue to be detained). For an excellent contemporaneous analysis of these cases, see generally Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

<sup>9</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

<sup>10</sup> *Id.* at 1420.

<sup>11</sup> See BARBARA OLSHANSKY, *DEMOCRACY DETAINED: SECRET UNCONSTITUTIONAL PRACTICES IN THE U.S. WAR ON TERROR* 13–45 (2007).

<sup>12</sup> See *id.* at 85–149.

<sup>13</sup> See Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, in *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 91–111 (Cynthia Brown, ed. 2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–82 (2002).

invocation of national security to constrict civil rights and liberties<sup>15</sup> and to justify the use of military force in violation of international law;<sup>16</sup> the legitimization of secret renditions and torture;<sup>17</sup> and the recent authorization of not only the indefinite detention, but also the assassination of American citizens.<sup>18</sup>

Many scholars have referenced the Japanese American internment as a dangerous precedent of these post-9/11 practices.<sup>19</sup> Federal courts have imposed some limitations on the detention of “enemy combatants.”<sup>20</sup>

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<sup>14</sup> See Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1396–1403 (2007); see generally M. Isabel Medina, *Immigrants and the Government’s War on Terrorism*, 6 CENTENNIAL REV. 225 (2006).

<sup>15</sup> See Nancy Chang, *How Democracy Dies: The War on Our Civil Liberties*, in LOST LIBERTIES, *supra* note 13, at 33–51.

<sup>16</sup> See, e.g., Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 122–26 (2010) (arguing that US drone attacks in Pakistan violate international law); Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201 (2009).

<sup>17</sup> See generally THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE (Marjorie Cohn, ed. 2011).

<sup>18</sup> See Jonathan Turley, Op-Ed., *10 Reasons The U.S. is No Longer the Land of the Free*, WASH. POST, Jan. 15, 2012, [http://www.washingtonpost.com/opinions/is-the-united-states-still-the-land-of-the-free/2012/01/04/gIQAvd1wP\\_story.html](http://www.washingtonpost.com/opinions/is-the-united-states-still-the-land-of-the-free/2012/01/04/gIQAvd1wP_story.html); Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 35–41 (2012) (discussing the administration’s argument against judicial review of its killing of US citizen Anwar al-Aulaqi).

<sup>19</sup> See, e.g., Evelyn Gong, *A Judicial “Green Light” for the Expansion of Executive Power: The Violation of Constitutional Rights and the Writ of Habeas Corpus in the Japanese American Internment and the Post-9/11 Detention of Arab and Muslim Americans*, 32 T. MARSHALL L. REV. 275 (2007); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006); Roger Daniels, *The Japanese American Cases, 1942–2004: A Social History*, 68 LAW & CONTEMP. PROBS. 159 (2005); Chris K. Iijima, *Shooting Justice Jackson’s “Loaded Weapon” at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109 (2004).

<sup>20</sup> See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal district courts have jurisdiction to hear habeas corpus petitions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that an American citizen captured overseas in combat has some procedural rights).

Nonetheless, as Professor Jerry Kang observes, these and other detainee cases have misconstrued *Ex parte Endo* and resurrected the 1943 *Hirabayashi* opinion without acknowledging the significance of the coram nobis decision.<sup>21</sup> Some of us have argued that the Supreme Court's recent national security jurisprudence is consistent not only with the internment cases, but also with its longstanding support for the exercise of plenary power by the executive and legislative branches of government.<sup>22</sup> Thus, for example, the *Chinese Exclusion Cases* laid the foundation for the indefinite detention of non-citizens<sup>23</sup> and the *Insular* cases held that constitutional protections need not be extended to "unincorporated" territories like Puerto Rico.<sup>24</sup> When added to the Japanese American internment cases, there is ample precedent for the indefinite detention of "enemy combatants" at the US naval base in Guantánamo Bay, Cuba.<sup>25</sup> The question we confront today is how we assess the *Hirabayashi* and *Korematsu* coram nobis cases in light of the political and legal developments of the past decade.

I do not have an easy answer to this question. On the one hand, everything I know about Supreme Court jurisprudence confirms Chief Justice John Marshall's frank acknowledgement in *Johnson v. McIntosh* that these are the "courts of the conqueror,"<sup>26</sup> and we would be fools to expect them to act any differently. In *McIntosh*, the question was whether a

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<sup>21</sup> See Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255, 264–78 (2005).

<sup>22</sup> See generally NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE (2007) [hereinafter SAITO, FROM CHINESE EXCLUSION].

<sup>23</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). See generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

<sup>24</sup> See *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922). See generally Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U. P.R. 225 (1996).

<sup>25</sup> See generally Kristine A. Huskey, *Guantánamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention*, 9 U. N.H. L. REV. 183 (2011).

<sup>26</sup> *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823).

tract of land in Illinois rightfully belonged to one white settler who traced his title to a grant from the British Crown, or another who traced his title to the same land to a purchase from the indigenous owners.<sup>27</sup> This forced the Court to address the underlying validity of the United States' claim to the lands it occupies.

Rejecting American Indians' rights under natural law to territories where they had lived since time immemorial,<sup>28</sup> Justice Marshall concluded that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."<sup>29</sup> He continued, "[a]lthough we do not mean to engage in the defence of those principles . . . they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."<sup>30</sup> The opinion then describes the "Indians inhabiting this country" as "fierce savages, whose occupation was war."<sup>31</sup> While the rhetoric has softened a bit, this decision and its race-based reasoning still undergirds federal law governing American Indian nations today.<sup>32</sup> Race-based fears were similarly invoked by the Supreme Court in its 1944 *Korematsu* opinion,<sup>33</sup> and we continue to see racial and ethnic stereotypes employed to justify a wide range of otherwise unconstitutional

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<sup>27</sup> *Id.* at 543. For analysis, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 308–17 (1990).

<sup>28</sup> WILLIAMS, *supra* note 27, at 309.

<sup>29</sup> *McIntosh*, 21 U.S. at 588.

<sup>30</sup> *Id.* at 589.

<sup>31</sup> *Id.* at 590.

<sup>32</sup> See generally ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) [hereinafter WILLIAMS, *LOADED WEAPON*].

<sup>33</sup> See *Korematsu*, 323 U.S. at 233–42 (Murphy, J., dissenting); see also WILLIAMS, *LOADED WEAPON*, *supra* note 32, at 22–30.



measures and to preserve a status quo founded on countless injustices.<sup>34</sup> It is difficult to contest the theory that subordinated groups only achieve legal victories to the extent that their interests converge with those of the powerful.<sup>35</sup>

Nonetheless, I could not function as a lawyer and law professor if I did not believe that the rule of law really is a foundational principle, accepted (in principle) even by those whose aim is to maintain the status quo. I always begin my Professional Responsibility course with *Justice at Nuremberg* (the Spencer Tracy film about the trial of German judges)<sup>36</sup> because it brings home the extraordinarily important precept that, as lawyers, we have a particular responsibility to further the rule of law and ensure that law enforcement is not just about might (or political expediency) making right.<sup>37</sup>

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<sup>34</sup> See generally Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 24 COLUM. HUM. RTS. L. REV. 1 (2002).

<sup>35</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

This principle of ‘interest convergence’ provides: The interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior social status of middle and upper class whites.

*Id.*

<sup>36</sup> JUDGMENT AT NUREMBERG (United Artists 1961). For an excellent description of this film, see Major Ann B. Ching, *Lessons from the Silver Screen: Must-See Movies for Military Lawyers* ARMY LAW., Jan. 2010, at 108, 108–10.

<sup>37</sup> See Henry T. King, Jr., *Robert Jackson’s Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421, 2427 (2000) (reviewing DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT* (1999)). “The trial[s] weighed, for the first time in a truly international forum, the substitution of law for force in governing human relationships.” *Id.* See also Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488 (1955). On the trial of the judges, see generally Christiane Wilke, *Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case*, 24 CAN. J.L. & SOC’Y 181 (2009).

### III. CONSIDERING REMEDIAL OPTIONS

With this dilemma in mind, what do the coram nobis cases teach us about working for social justice? The answer may well depend upon how we define success. Legal and political systems can provide a variety of remedies, and we may gain some insight into this issue by looking at the remedies obtained in the struggle to vindicate the rights of Japanese Americans.

In 1947, those who resisted the draft from inside the camps were pardoned by President Truman.<sup>38</sup> The coram nobis cases did not reverse the Supreme Court's precedent upholding the Japanese American internment, and they came too late to alleviate the harm suffered by internment resisters Gordon Hirabayashi, Fred Korematsu, and Min Yasui.<sup>39</sup> Yet they were real legal victories. Most immediately, they overturned the convictions at issue. Additionally, they helped lay the foundation for passage of the Civil Liberties Act of 1988, which provided an official apology, payments of \$20 thousand to surviving internees, and a public education fund to help correct the historical record.<sup>40</sup> All of this meant a great deal to the individual petitioners, to the Japanese American community, and to those who helped fight this battle to restore constitutional rights.

The coram nobis decisions and the redress legislation also had significant symbolic value. In 1942, Gordon Hirabayashi wrote, "[h]ope for the future is exterminated."<sup>41</sup> He went on to explain that he could maintain his

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<sup>38</sup> ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II 182 (2001); see also Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. FOR SOC. JUST. 1, 15–31 (2005).

<sup>39</sup> See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985), cert. denied, 484 U.S. 831 (1987).

<sup>40</sup> Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (1988). For a brief history of the movement leading to its passage, see John Tateishi & William Yoshino, *The Japanese American Incarceration: The Journey to Redress*, HUM. RTS., Spring 2000, at 10.

<sup>41</sup> Gordon Hirabayashi, "Why I refused to register for evacuation," May 13, 1942, quoted in Conference Brochure, Fred T. Korematsu Center for Law and Equality, The

principles and those expressed in the Constitution, as well as his own “incentive to live,” only by refusing to comply with the curfew and evacuation orders.<sup>42</sup> The *coram nobis* decisions and the provisions of the Civil Liberties Act did much to restore this hope, not only to Gordon Hirabayashi, but to the Japanese American community more generally. But we are still left with the question of their seemingly limited ability to protect the rights of others going forward.

When large-scale human rights violations are at issue, the first step is often truth and acknowledgement. The *Hirabayashi* *coram nobis* opinion acknowledged historical realities that had, to that point, been distorted or omitted from the dominant narrative.<sup>43</sup> Moreover, without this and the *Korematsu* *coram nobis* decision, we would have no official recognition that the curfew, evacuation, and internment processes were unlawful. As human rights activists and critical race theorists have discussed, correcting the narrative, and thereby ensuring that the historical record reflects accurately the lived experiences of those whose rights have been violated, is of tremendous significance.<sup>44</sup>

Acknowledgment is most powerful when it comes from the perpetrator of the wrong, and not simply from the court. We know, for example, how meaningful the US government’s apology was for many Japanese American

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25th Anniversary of the *United States v. Hirabayashi Coram Nobis* Case: Its Meaning Then and Its Relevance Now, available at <http://www.law.seattleu.edu/Documents/korematsu/2012HirabayashiProgram.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> On the significance of narrative to all law, see generally Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>44</sup> See, e.g., Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 804 (1994); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1268–69 (1993); see generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

internees.<sup>45</sup> This is why it is significant that in May 2011, Acting Solicitor General Neal Katyal issued a “confession of error” on behalf of the Solicitor General’s Office, acknowledging its failure to disclose evidence to the Supreme Court that contradicted the government’s position that Japanese Americans posed a threat to the national security.<sup>46</sup> The changes we have seen in how internment history is now taught probably would not have occurred without the courts’ holdings in the *coram nobis* cases or the Civil Liberties Act.

But correcting the historical record is just one piece of the puzzle. After a wrong has been acknowledged, we get to the questions of what remedies would come closest to righting that wrong, and what actions would most effectively prevent recurrence of the injustice.<sup>47</sup> Material compensation is a significant remedy, of course, but the \$20 thousand payments to surviving internees did almost nothing to offset their actual losses and, thus, were largely symbolic.<sup>48</sup> With respect to deterrence, it seems unlikely that Japanese Americans will be incarcerated en masse again, but it is not clear that other groups are less likely to be interned.

This may be, at least in part, because no one has been held accountable. Even in *Ex parte Endo*, which held in December 1944 that there was no longer any legitimate reason to keep Japanese Americans incarcerated,<sup>49</sup> “the Supreme Court placed all blame on a little-known agency instead of on the actual political actors responsible.”<sup>50</sup> The message of the Nuremberg

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<sup>45</sup> See, e.g., Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT’L L. & POL’Y 223, 227 (1992).

<sup>46</sup> Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, JUST. BLOG (May 20, 2011), <http://blogs.justice.gov/main/archives/1346>.

<sup>47</sup> See M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203 (2006).

<sup>48</sup> See SAITO, FROM CHINESE EXCLUSION, *supra* note 22, at 66–67 (noting the extent of uncompensated material losses).

<sup>49</sup> *Ex parte Endo*, 323 U.S. 283 (1944).

<sup>50</sup> Kang, *Watching the Watchers*, *supra* note 21, at 269 (quoting Justice Roberts’ assessment that “[i]t is to hide one’s head in the sand to assert that the detention of

and Tokyo Tribunals was that where there are violations of fundamental human rights, the rule of law requires perpetrators to be held accountable.<sup>51</sup> Nonetheless, those who advocated and implemented the Japanese American internment were, in essence, rewarded for their actions through promotions and appointments to positions of greater influence and authority.<sup>52</sup>

Another reason for the minimal deterrence resulting from social and legal acknowledgement that the Japanese American internment was unjust may be the mixed messages sent by the redress bill. As Chris Iijima observed, in the congressional debates over the Civil Liberties Act, the injustice of the internment was acknowledged, but

all the glowing historical references centered around . . . political and ideological positions that justified and accommodated the decision to intern Japanese-Americans. Those who at the time of internment saw it for the injustice and outrage that it was and chose to dissent continue to be silenced and unheralded. . . . In essence, what Americans were being told [was that] the kind of patriotism that does not resist injustice . . . gets rewarded.<sup>53</sup>

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[Endo] resulted from an excess of authority by subordinate officials.” 323 U.S. at 309 (Roberts, J., concurring)).

<sup>51</sup> See Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg’s Trials’ Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 326 (2008).

<sup>52</sup> For example, Karl Bendetsen, primary author of DeWitt’s *Final Report* became Undersecretary of the Army; Attorney General Francis Biddle represented the United States at the Nuremberg trials; Assistant Secretary of War John McCloy was appointed founding president of what became the World Bank; Tom Clark, the Justice Department liaison to the War Relocation Authority became the US Attorney General and then a Supreme Court justice; and Earl Warren, a strong proponent of internment, was elected governor of California and appointed Chief Justice of the Supreme Court. See SAITO, FROM CHINESE EXCLUSION, *supra* note 22, at 304 n.319.

<sup>53</sup> Chris K. Iijima, *Political Accommodation and the Ideology of the “Model Minority”*: *Building a Bridge to White Minority Rule in the 21st Century*, 7 S. CAL. INTERDISC. L.J. 1, 10–11 (1998). See also Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1 (2001). On the complex legacy of redress, see generally Victor Bascara, *Cultural Politics of Redress: Reassessing the Meaning of the Civil Liberties Act of 1988 after 9/11*, 10 ASIAN L.J. 185 (2003).

Such messages, of course, are unlikely to deter future wrongdoing or encourage resistance to injustice.

#### IV. MOVING FORWARD

This returns us to the tension between a theoretical commitment to the rule of law and the realities of power. In considering how we move forward, I would like to focus on two points.

The first is that lawyering grounded in and responsive to community-based social and political movements can inspire us to develop creative options, to push the edges of the legal envelope.

The second is that we do not need to limit our thinking to currently available options, even those at the edges. Nothing prevents us from envisioning rights and remedial options outside the box. In expanding our vision of the possible, we can learn much from the dynamic and emerging field of international human rights law. Thoughtful legal experts from around the world have spent the last half-century articulating broad understandings of rights and responsibilities, and means for their implementation. This body of law is not necessarily enforceable in US courts today, but it illustrates the potential for creative thinking about the relationship of law to justice and human dignity.

##### *A. Creative Use of Domestic Legal Options*

One of the central messages of the trial of the judges at Nuremberg was that the form of law must not be allowed to undermine the substance of the law, and this substance, in turn, should be rooted in an international norm of “humanity.”<sup>54</sup> If we are to implement this mandate, we cannot let the prospect of losing in court deter us. The Supreme Court had given its stamp of approval to the internment by upholding the convictions of Gordon

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<sup>54</sup> See Wilke, *supra* note 37, at 182–83 (referencing *United States v. Altstoetter* (the “Justice Case”), TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, vol. 3 (1951)).

Hirabayashi, Fred Korematsu, and Min Yasui in the 1940s,<sup>55</sup> and their coram nobis legal teams were confronted with what, to all appearances, was a legal dead end. But these individuals and the Japanese American community knew not only that an injustice had occurred, but also that it had set a dangerous legal precedent. They recognized all too clearly that, as Justice Robert Jackson observed, the Court had left the government a “loaded weapon” with which to deprive others of their constitutional rights in the future.<sup>56</sup>

Refusing to accept the finality of this particular legal status quo, the coram nobis teams came up with creative options. Gerald Lopez has discussed at some length how we can transform the practice of law from “regnant lawyering” to “rebellious lawyering,” which is more directly responsive to the needs of our clients and communities.<sup>57</sup> Building on this framework, Angelo Ancheta has addressed how we can be more rooted in our communities, serving as lawyer-educators and lawyer-organizers as well as strictly legal representatives.<sup>58</sup> The coram nobis cases are a great example of such “rebellious” lawyering.

Community lawyering recognizes the overlapping, interconnected—indeed organic—relationship between legal work and broader, community-based movements; it is essential to furthering justice.<sup>59</sup> In other words, if we are to do more than grease the wheels of the conqueror’s courts, our work

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<sup>55</sup> See *Hirabayashi v. United States*, 320 U.S. 41 (1943) (upholding the curfew); *Yasui v. United States*, 320 U.S. 115 (1943) (upholding the curfew); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the evacuation); *Ex parte Endo*, 323 U.S. 283 (1944) (holding that citizens found to be “loyal” could not continue to be detained).

<sup>56</sup> *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

<sup>57</sup> See GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO LAWYER’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

<sup>58</sup> Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363 (1993) (reviewing LOPEZ, *supra* note 57).

<sup>59</sup> See generally LOPEZ, *supra* note 57; Ancheta, *supra* note 58. For an overview of the evolution of community-based lawyering, see generally Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

must be rooted in and reflective of the needs, aspirations, and agency of the communities we represent.

A critical element of this process is the creation of public space for the perspectives of our clients and their communities. As the late professor Derrick Bell summarized:

The narrative voice, the teller is important . . . in a way not understandable by those whose voices are tacitly deemed legitimate and authoritarian. The voice exposes, tells and retells, signals resistance and caring, and reiterates what kind of power is feared most—the power of commitment to change.<sup>60</sup>

Another critical element is sharing with these communities our understandings of what has, historically, made for successful legal challenges—debunking the myth that a good lawyer just needs to get a case into court, and illustrating how the underlying educational efforts, social awareness, and political pressure were critical to the successes that are held out as proof that the system “works.”

Innovative, humanity-focused lawyering helps us stretch common understandings of what falls within the realm of legal remedies. The *coram nobis* cases took a remedy at the “edge” of the box and infused it with new life and meaning. Similarly, the human rights cases that have been brought under the Alien Tort Claims Act illustrate the importance of utilizing remedies that are theoretically available within our legal system, but rarely utilized.<sup>61</sup> In turn, this kind of rebellious lawyering can open up space for effective community mobilizing.

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<sup>60</sup> Derrick A. Bell, Jr., *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 907 (1995). For a delightful explanation of this point in the context of effective legal education see Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

<sup>61</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (2012); *see, e.g.*, *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (allowing relatives of a torture victim to sue Paraguayan officials in federal district court). Such claims were limited but not eliminated by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). On the evolution of this avenue of redress, see PETER



A symbiotic relationship of this sort seems to have been missing in our efforts to protect constitutional rights in the so-called war on terror. Many lawyers and legal scholars have criticized government policies as unwise and often unconstitutional,<sup>62</sup> but my impression is that we have relied on legal challenges and rhetorical critiques in something of a vacuum, rather than being rooted in social movements opposing the practices at issue.<sup>63</sup> Contrast, for example, the Occupy movement with the fairly intellectual realm of war on terror critiques.<sup>64</sup> The Occupy movement illustrates that large sectors of the American people are quite capable of mobilizing when they believe their well-being is at stake, and the lack of a similar response to post-9/11 injustices says a lot about their perceptions of their interests. The same was true, of course, at the time of the Japanese American internment. There was widespread discomfort, at least among those who considered themselves liberals, but not enough to warrant social mobilization.<sup>65</sup>

The lesson here could be that we need to think about the structural deficiencies in American politics and education. Perhaps a more accurate understanding of history would lead to wider awareness that the loss of constitutional rights is never limited to one target group. My take, however, is that those who are truly affected are perfectly clear about what is

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HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS 23–88 (2009).

<sup>62</sup> See, e.g., DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2d ed., 2002); NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* (2002).

<sup>63</sup> See generally Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 *LAW & CONTEMP. PROBS.* 285 (2005).

<sup>64</sup> See generally Bruce van Voorst, *What Occupy has Taught America*, *HOLLAND SENTINEL*, Jan. 30, 2012, available at 2012 WLNR 2167667; Heather Maher & Nikola Krastev, *In United States, "Occupy Wall Street" Movement Gains Supporters*, *RADIO FREE EUR. DOCUMENTS*, Oct. 5, 2011, available at 2011 WLNR 20389765.

<sup>65</sup> See, e.g., PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* 128–34 (1983) (noting the reluctance of the American Civil Liberties Union to challenge the internment).

happening, but they do not see a meaningful way to bring their collective power to bear on the system. If this is correct, being rooted in the communities we hope to serve is necessary but insufficient. In order to serve as catalysts for meaningful legal justice, we must also help create a legal system that more broadly encompasses community concerns. In this effort, the emerging body of international human rights law and institutions can play a vital role. This is not because international law is creating new rights, but because it articulates and, therefore, lends weight to basic concepts so often excluded from the legal arena. This body of law can help us not only in pushing the edges of the legal envelope, but in expanding the framework of legal options in substantive ways.

*B. Utilizing International Human Rights Law*

American jurisprudence has been carefully honed to ensure that these remain the courts of the conqueror. The odds are weighted against those who advocate for fundamental social change.<sup>66</sup> As a result, if we are to engage in rebellious lawyering rather than serve as functionaries of the status quo, we need to assess the significance of a legal victory not simply in terms of whether our clients are the “prevailing” party, but in terms of the justice that has (or has not) been achieved. This requires expanding our vision of both rights and remedies.<sup>67</sup>

Our domestic legal system provides a limited array of remedies for acknowledged violations of law, and these are usually highly individualized. In criminal cases, convictions may be overturned, as they were in the *coram nobis* cases. Correcting wrongful convictions is extremely important, but it does not address the months, years, or decades

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<sup>66</sup> See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 3–6 (1993) (noting problems with the tendency of the Supreme Court to uphold the status quo).

<sup>67</sup> For a helpful overview of the evolution of reparations theory and a proposed reparations-as-repair model, see Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007) [hereinafter Yamamoto et al., *American Reparations*].

lost to legal battles or incarceration, or the time, energy, money, and damage to health or reputation, incurred in the process. Substantive remedies must be sought in civil suits, where it is generally presumed that money is the best and most adequate compensation. Only rarely have the political branches of government intervened to provide restorative justice.

International human rights law expands our options by recognizing a wider range of remedies. Among other things, it articulates the right to a remedy, acknowledges collective as well as individual rights and remedies, recognizes that financial compensation is often inadequate to fully address human rights violations, and emphasizes the importance of the victims' assessment of the adequacy of remedial options.<sup>68</sup> Moreover, it expands our substantive ability to achieve justice through law by acknowledging that we have a responsibility to resist unlawful state action, and by incorporating a liberatory perspective grounded in the notion of human dignity and the right to self-determination.<sup>69</sup>

International law thus provides us a realistic vision—though by no means the only one—of what could be. It is a complex and evolving system, hammered out by hundreds of legal experts meeting over many decades to consider how aspirational norms can be implemented. Even when not immediately enforceable, human rights law can “slowly change attitudes in large populations, leading to shifts in ideas of appropriate state behavior,” and “international legal norms may well empower constituencies within a domestic polity and provide them with a language for influencing state policy.”<sup>70</sup> International perspectives have the potential to “illuminate . . . the significance of human rights redress litigation”; to help achieve acceptance of responsibility for historic injustices; “offer insights into the

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<sup>68</sup> See *infra* notes 71–87 and accompanying text.

<sup>69</sup> See *infra* notes 88–102 and accompanying text.

<sup>70</sup> Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1266 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

reconstruction dimension of social healing”; and “engage and mobilize new constituencies” through “cross-border alliances.”<sup>71</sup> To illustrate this potential, I would like to point out a few salient features about remedies and rights in international law.

First, international law recognizes that remedies must be provided.<sup>72</sup> As Dinah Shelton summarizes, there are some one hundred global and regional human rights treaties, most providing for “both the procedural right of effective access to a fair hearing and the substantive right to a remedy.”<sup>73</sup> The International Covenant on Civil and Political Rights (ICCPR), for example, does not mandate specific remedies for violations of the rights it articulates, but it requires parties to provide remedies that are “effective, of a legal nature and enforceable.”<sup>74</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires states to ensure effective protection from acts of racial discrimination violating fundamental rights, as well as the right to seek “just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”<sup>75</sup> Even when treaties do not explicitly articulate the right to a remedy, it has long been established, as the Permanent Court of International Justice stated in 1927, “that the breach of an engagement involves an obligation to make reparations in an adequate form.”<sup>76</sup>

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<sup>71</sup> Yamamoto et al., *American Reparations*, *supra* note 67, at 51–52. For an examination of such benefits in the context of Puerto Rico and other US colonies, see generally Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369 (2002).

<sup>72</sup> This is also a foundational premise of US law. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (stating the United States will cease to be a government of laws “if the laws furnish no remedy for the violation of a vested legal right”).

<sup>73</sup> DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 14–15 (1999). For more details on particular treaties, see *id.* at 15–37. See also Bassiouni, *supra* note 47, at 215 n.47. On the right to reparations for violations of international humanitarian law, see *id.* at 217 n.61.

<sup>74</sup> Bassiouni, *supra* note 47, at 214 (explaining the provisions of ICCPR Art. 2(3)).

<sup>75</sup> ICERD, Art. 6. See also Bassiouni, *supra* note 47, at 215.

<sup>76</sup> *Factory at Chorzów (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

Second, international human rights law recognizes that groups, as well as individuals, have legally cognizable rights to remedies for collective injustices. This allows for remedies that address structural dynamics, including the intergenerational harm that often accompanies large-scale trauma.<sup>77</sup> This concept is explained in more detail by Yamamoto, Kim, and Holden’s description of “social healing through justice,” a construct that not only incorporates the need for material compensation, but understands that serious harms damage not just individuals but communities, and that “[g]roup healing requires some combination of recognition, responsibility, reconstruction, and reparation.”<sup>78</sup>

Third, international law recognizes that financial compensation, while often critical, is generally insufficient. In 2006, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>79</sup> Recognizing that “victims often desire that their suffering be acknowledged, their violators condemned and their dignity restored through some form of public remembrance,”<sup>80</sup> this document spells out steps for implementing the right to equal and effective access to justice, the right to adequate, effective, and prompt reparations for the harm suffered, and the right to truth.<sup>81</sup>

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<sup>77</sup> See Yael Danieli, *Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law*, 27 CARDOZO L. REV. 1633, 1635–37 (2006).

<sup>78</sup> Yamamoto et al., *American Reparations*, *supra* note 66, at 48–49. See also ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 153–70 (1999).

<sup>79</sup> G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); see generally Bassiouni, *supra* note 47, at 247–58.

<sup>80</sup> Bassiouni, *supra* note 47, at 231. For an application of this precept to post-9/11 torture victims, see generally Kim D. Chanbonpin, “*We Don’t Want Dollars, Just Change*”: *Narrative Counter-Terrorism Strategy, An Inclusive Model for Social Healing, and the Truth about Torture Commission*, 6 NW. J. L. & SOC. POL’Y 1 (2011).

<sup>81</sup> Bassiouni, *supra* note 47, at 260. For a more detailed explanation, see *id.* at 260–76.

The Basic Principles further articulate four dimensions of reparations: (1) restitution, designed to restore the victim as nearly as possible to the position they occupied prior to the harm; (2) compensation for damages that can be economically redressed; (3) rehabilitation, encompassing medical, psychological, social, and legal services; and (4) guarantees that the wrong will not be repeated.<sup>82</sup> This comprehensive approach is reflected in the 2007 UN Declaration on the Rights of Indigenous Peoples which, among other things, recognizes that when their traditional lands, territories, or resources have been unlawfully taken or damaged, indigenous peoples have a right to redress that includes restitution, not simply monetary damages.<sup>83</sup>

The final point I would like to make with respect to remedies is that international human rights law is much more open than US law to the perspectives of those whose rights have been violated (the “victims”).<sup>84</sup> In the context of hate speech, Professor Mari Matsuda has noted that “[t]he failure to hear the victim’s story results in an inability to give weight to competing values of constitutional dimension.”<sup>85</sup> International law emphasizes the importance of victims’ perspectives, not only with respect to hate crimes but to all human rights violations.<sup>86</sup> Thus, the 2006 Basic Principles and Guidelines were “drafted from a ‘victim-based perspective.’”<sup>87</sup> This perspective recognizes that if remedies are actually meant to make the victims “whole,” those whose rights have been violated, not the perpetrators, must have the primary say over what constitutes

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<sup>82</sup> *Id.* at 267–75. See also Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT’L L. 257, 260–66 (2009) (discussing beneficial and detrimental aspects of these options); Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475, 475–77 (2003) (distinguishing compensatory and rehabilitative reparations).

<sup>83</sup> G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), Arts. 26, 28.

<sup>84</sup> See generally Danieli, *supra* note 77.

<sup>85</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2376 (1989) [hereinafter Matsuda, *Public Response*].

<sup>86</sup> On hate speech, see *id.* at 2341–48.

<sup>87</sup> Bassiouni, *supra* note 47, at 251.

meaningful redress. Otherwise, as Carlton Waterhouse reminds us, “[e]fforts to redress past harms can actually be counter-productive, cruel, or insulting when they are not accompanied by actions that attend to both the needs and agency of the injured group.”<sup>88</sup>

In addition to broadening remedial options, international law is significant to any quest for social justice because it reframes our collective understanding of rights and responsibilities. First, in accordance with the underlying premise of the Nuremberg trials, it acknowledges that we have not just a right but a duty to oppose governmental actions that violate the most fundamental of human rights.<sup>89</sup> But human rights law is not just about deterring crimes against humanity or limiting the repressive powers of government. Its real significance lies in its vision of liberating human potential.

The most important precept of human rights law is that human dignity must be recognized and protected. The preamble to the Universal Declaration of Human Rights begins by stating that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>90</sup> It was this dignity for which Gordon Hirabayashi fought, and this dignity that Mari Matsuda invokes when she notes that “[r]eparations recognizes the personhood of victims. Lack of legal redress for racist acts is

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<sup>88</sup> Carleton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972, and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 222 (2006).

<sup>89</sup> See Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 414–16 (1989) (discussing the “Citizen’s Duty” defense).

<sup>90</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The ICESCR and ICCPR preambles incorporate this language, “recognizing that these rights derive from the inherent dignity of the human person.” G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 49, 52 U.N. Doc. A/RES/21/2200. See generally Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

an injury often more serious than the acts themselves, because it signifies the political non-personhood of victims.”<sup>91</sup>

Human dignity encompasses not only the notion that individuals should be respected and treated equally, but that we have the collective right—some would say responsibility—to create social, political, cultural, educational, and legal systems that allow our communities to survive and flourish. For some of us old enough to remember the 1960s and early 1970s, the spirit of “the movement” still has resonance because it embodied a collective energy and hope based not just on the prospect of equal rights and equal access, but of liberation, self-determination, and community empowerment.<sup>92</sup>

In turn, these efforts to address domestic inequities were inspired by the wave of decolonization movements sweeping Africa and Asia,<sup>93</sup> and the massive opposition to military dictatorships in Latin America.<sup>94</sup> The potential we saw for restructuring whole societies—economically, politically, and socially—allowed us to consider what real social justice

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<sup>91</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 390 (1987).

<sup>92</sup> See generally, e.g., LAURA PULIDO, BLACK, BROWN, YELLOW, AND LEFT: RADICAL ACTIVISM IN LOS ANGELES 89–122 (2006); George Katsiaficas, *Organization and Movement: The Case of the Black Panther Party and the Revolutionary People's Constitutional Convention of 1970*, in LIBERATION, IMAGINATION, AND THE BLACK PANTHER PARTY 141–55 (Kathleen Cleaver & George Katsiaficas eds., 2001); Students for a Democratic Society, *The Port Huron Statement*, in THE SIXTIES PAPERS: DOCUMENTS OF A REBELLIOUS DECADE 176–196 (Judith Clavir Albert & Stewart Edward Albert eds., 1984).

<sup>93</sup> See, e.g., Stokely Carmichael, *Pan Africanism*, in STOKELY SPEAKS: BLACK POWER BACK TO PAN-AFRICANISM 183–220 (1972); see generally Christopher O’Sullivan, *The United Nations, Decolonization, and Self-Determination in Cold War Sub-Saharan Africa, 1960–1994*, 22 J. OF THIRD WORLD STUD., 103, 103 (2005), available at <http://cuwhist.files.wordpress.com/2011/10/un-and-decolonization-in-africa.pdf>.

<sup>94</sup> See generally Thomas C. Wright, *Human Rights in Latin America: History and Projections for the Twenty-First Century*, 30 CAL. W. INT’L L.J. 303, 308–13 (2000); Mikel Delagrange, *Latin America: The Next Frontier for the ICC?*, 5 FIU L. REV. 293, 296–303 (2009).



might look like. As a result, there was a great deal of creative thinking, not just about the problems, but also about the solutions.

I am oversimplifying here, but many of us shared a belief that if our children were not getting decent educations, the solution was not bussing or affirmative action (alternatives proffered by those who wished to maintain the status quo), but community-run schools.<sup>95</sup> If the local hospital was closed, it could be taken over, and run by volunteers.<sup>96</sup> Even Dr. King, in preparation for the Poor People's Campaign, did not talk about maintaining a vigil at the Washington Monument, but about bringing business as usual to a halt.<sup>97</sup> The goal was to effect change, not simply to register dissent.

International law articulates rights that encompass such potentially liberatory options. The two foundational human rights treaties, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), begin with a common article: "All peoples have the right of self-determination. By virtue of that right they freely determine their political

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<sup>95</sup> See, e.g., Erika Huggins, *The Liberation Schools, the Children's House, the Intercommunal Youth Institute and the Oakland Community School*, BLACK COMMENTATOR, June 19, 2008, [http://www.blackcommentator.com/282/282\\_iss\\_oakland\\_community\\_school\\_huggins\\_guest.html](http://www.blackcommentator.com/282/282_iss_oakland_community_school_huggins_guest.html); Mumia Abu-Jamal, *A Life in the Party: An Historical and Retrospective Examination of the Projections and Legacies of the Black Panther Party*, in IMAGINATION, AND THE BLACK PANTHER PARTY 40, 47 (discussing liberation schools run by the Black Panther Party); THE YOUNG LORDS: A READER 125–32 (Darrel Enck-Wanzer ed., 2010) (discussing community schools in the Puerto Rican community in New York).

<sup>96</sup> See, e.g., THE YOUNG LORDS, *supra* note 95, at 188–201 (on health care initiatives); Jennifer 8. Lee, *The Young Lords' Legacy of Puerto Rican Activism*, N.Y. TIMES, Aug. 24, 2009, <http://cityroom.blogs.nytimes.com/2009/08/24/the-young-lords-legacy-of-puerto-rican-activism/> (describing short-lived takeover of Lincoln Hospital in Brooklyn in 1970).

<sup>97</sup> See "King's Last March," available at [http://www.blackcommentator.com/282/282\\_iss\\_oakland\\_community\\_school\\_huggins\\_guest.html](http://www.blackcommentator.com/282/282_iss_oakland_community_school_huggins_guest.html) (last visited June 19, 2012) (noting Dr. King's plan for the Poor People's Campaign to "disrupt the daily functioning of the capital"); see generally Martin Luther King, Jr., *Showdown for Nonviolence*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 64–72 (James M. Washington ed., 1990).

status and freely pursue their economic, social and cultural development.”<sup>98</sup> These and other treaties go on to articulate rights to adequate healthcare, housing, education, working conditions, and participation in government, as well as freedom from all forms of discrimination or political oppression.<sup>99</sup>

The right to self-determination is also the centerpiece of the UN Declaration on the Rights of Indigenous Peoples.<sup>100</sup> This declaration begins by affirming “that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.”<sup>101</sup> Among other provisions, it reiterates that indigenous peoples have collective rights, among them “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” and “the right not to be subjected to forced assimilation.”<sup>102</sup>

This emerging framework of the rights of *peoples* to determine, for themselves, what kind of government they want, and how social, cultural, economic, and educational institutions should be organized applies to all of us.<sup>103</sup> It gives us opportunities to break out of the narrow parameters of due process and equal protection jurisprudence in which we so often find

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<sup>98</sup> ICCPR, art. 1; ICESCR, art. 1. On the evolving concept of self-determination, see Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.N. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMPLE INT’L & COMP. L.J. 443, 447–78 (2006). For a more orthodox summary, see generally Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1 (1993).

<sup>99</sup> See, e.g., ICESCR art. 2(2) (non-discrimination), arts. 6–8 (working conditions), art. 11 (adequate food, clothing, and housing), art. 12 (health), arts. 13–14 (education); ICCPR art. 2(1) (non-discrimination), art. 9 (liberty and security of person), arts. 18–19 (freedom of thought, conscience, religion, and expression).

<sup>100</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), esp. arts. 3–4, available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>101</sup> *Id.* at art. 1.

<sup>102</sup> *Id.* at arts. 5, 8.

<sup>103</sup> See, e.g., Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 SOUTHERN U. L. REV. 25 (2001).

ourselves mired, and to envision systems of governance and law truly reflecting the will of the people.

## V. CONCLUDING THOUGHTS

It may be that the legacy of the coram nobis cases is difficult to pin down because we are still creating it. These cases inspired us with the potential of creative, community-based lawyering that can be a springboard to thinking beyond the options presented to us, and to implementing community-based processes of meaningful justice. They encourage us to assess the adequacy of the “remedies” offered by the perpetrators of wrongs, rather than reinforcing the belief that those perpetrators have the ultimate say over what is possible.

In our legal work, the coram nobis cases encourage us not only to represent our communities, but also to work with them towards liberatory visions of what could and should be available through law. It is easy to dismiss this notion as “unrealistic.” But the history of the courts of the conqueror illustrates all too realistically that the current legal framework is inadequate to ensure real justice. Mari Matsuda reminds us that “the limits of lawmaking imagination” can be “a disability, a blindness.”<sup>104</sup> To get beyond these limits, we do not need to have success within reach; we only need to initiate the process. Encouraging us to “stand in the place where persons of courage have always stood, uncertain of victory but unafraid of defeat,” Derrick Bell recounted, “As the old black farmer who had left his fields to march from Selma to Montgomery said when asked whether they would win: ‘We won when we started.’”<sup>105</sup>

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<sup>104</sup> Matsuda, *Public Response*, *supra* note 85, at 2375.

<sup>105</sup> E-mail from Derrick Bell to author (Jan. 6, 2007) (on file with author).