

# LIFE AND LEGAL FICTIONS: REFLECTIONS ON MARGARET MONTOYA'S *MÁSCARAS, TRENZAS, Y GREÑAS*

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*The choice is one that cannot be avoided; because of the social realities, the very act of writing, done by any person of color, necessarily becomes either a threat or an appeasement.*

—Nancy L. Cook<sup>1</sup>

Professor Margaret Montoya published *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*<sup>2</sup> in 1994. It was a bold move. There were not many legal scholars of color in the United States at that time, and probably less than one hundred Latina/o faculty in tenure track positions.<sup>3</sup> Our families and communities counted on us to succeed, while many of our colleagues and students presumed we were affirmative action hires and, therefore,

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\* Professor of Law, Georgia State University College of Law. This essay is based on a presentation made as part of “Un/Masking Power: The Past, Present, and Future of Marginal Identities in Legal Academia,” a symposium sponsored by the UCLA *Chicana/o-Latina/o Law Review*, April 5, 2013. Special thanks are due the organizers of that symposium and the editorial staff of this journal, especially Daniel Borca, and to professors Margaret Montoya and Mari Matsuda, whose work inspired this tribute as well as the symposium held simultaneously by the *Asian Pacific American Law Journal*. While I take sole responsibility for the content of this essay, I would not have had the analytical framework reflected herein, nor the space in which to express it, without the groundwork laid by so many scholars, including but certainly not limited to professors Derrick A. Bell, Jr., Paulette Caldwell, Kathleen Cleaver, Ward Churchill, Richard Delgado, Cheryl I. Harris, Charles Lawrence III, Terry Smith, Jean Stefancic, Rennard Strickland, Patricia J. Williams, and Robert A. Williams, Jr. I am also indebted to all those who investigated, documented, and provided legal representation in the cases discussed below, to Ward Churchill for his support and feedback, and to the Georgia State University College of Law for its research support.

<sup>1</sup> Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CIN. L. REV. 95, 110 (1994).

<sup>2</sup> Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994); 17 HARV. WOMEN'S L.J. 185 (1994).

<sup>3</sup> See Michael A. Olivás, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 129-30 (1994) (noting 94 Latina/o law faculty in the United States proper in 1992-1993, out of some 5700 law teachers).

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questionably qualified. As professors Derrick A. Bell, Jr. and Richard Delgado observed, “[W]e entered our classrooms . . . without the presumption of competence enjoyed by our white colleagues.”<sup>4</sup>

Having been given the rare opportunity to become not only lawyers but also law teachers, it was incumbent upon us to be accepted by the legal academy on its terms—i.e., to assimilate—and to excel according to its standards.<sup>5</sup> These standards included producing *real* legal scholarship, of the 100-page, 400-footnote variety, preferably published in “top ten” law reviews.<sup>6</sup> Our articles were expected to replicate “traditional” scholarship, reliant on case law and demonstrating, in Professor Rob Williams’ terms, “a strong, well-reasoned, objective, neutral, neutered, ‘policy-oriented’ analysis.”<sup>7</sup> Narrative was frowned upon or curtly dismissed as mere storytelling.<sup>8</sup>

*Máscaras* comported with none of these “traditional” standards. It was not published in a “top ten” law review, but as a groundbreaking collaboration between two specialized journals.<sup>9</sup> Its focus was not case law or legal policy, but masks and hair. It addressed the taboo subject of race—by definition a non-neutral topic,<sup>10</sup> employed autobiographical narrative, criticized the legal academy, and exposed the destruction wrought by assimilationist policies and aspirations.<sup>11</sup> According to then-prevailing expectations, *Máscaras* should have faded into obscurity.

Instead, we are celebrating the impact this piece and its author have had on legal scholarship for two decades. It is an honor and a joy to participate in this symposium honoring Professor Margaret Montoya, as well as a companion event featuring the work of Professor Mari Matsuda,<sup>12</sup> because it allows us to converse with so many scholars and activists

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<sup>4</sup> Richard Delgado & Derrick Bell, *Minority Law Professors’ Lives: The Bell/Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

<sup>5</sup> See generally Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

<sup>6</sup> See *id.* at 740-750.

<sup>7</sup> *Id.* at 753.

<sup>8</sup> The perspective prevalent at the time is reflected in and well summarized by Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narrative*, 45 STAN. L. REV. 807 (1993).

<sup>9</sup> Montoya, *supra* note 2, at 1 n.aa.

<sup>10</sup> See Williams, *supra* note 5, at 751; see also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 47-48 (1991).

<sup>11</sup> See generally Montoya, *supra* note 2.

<sup>12</sup> “Only We Can Free Ourselves: Reflections on the Works of Mari Matsuda,” Symposium sponsored by the UCLA Asian Pacific American Law Journal, April 6, 2013.

who have broken ground for us, in a space that allows us to consider the liberatory potential of critical legal scholarship.

It is a space in which we can have a discussion that is—very literally—grounded, beginning with an acknowledgement that this university campus sits on occupied Tongva land, land that was also illegally taken from Mexico in 1848.<sup>13</sup> I first heard Margaret Montoya speak publicly at a critical race theory conference in the 1990s where, in my recollection, the first words out of her mouth were: “We cannot talk about race in this country without talking about genocide.” With that simple statement, Professor Montoya created a space in which many of us felt that, finally, we could breathe freely. Our communities’ histories and realities were not taboo subjects and we could have a real discussion.<sup>14</sup> She created a bridge between our personal and professional lives, enabling us to set aside, temporarily, the masks we use to protect ourselves when dealing with mainstream law and “civilization.”<sup>15</sup>

*Máscaras* has had such a vital life in legal scholarship and teaching, and resonates with so many of us, because it creates a similarly liberated zone. Shortly after re-reading *Máscaras* in anticipation of this symposium, I learned that one of my students, a young black man with a background in African American Studies, was disheartened by the icy response he got when attempting to introduce some racial realities into his criminal law class. Thinking of Professor Montoya’s story about the impact that the Josefina Chávez case had on her,<sup>16</sup> I found it a little depressing that *Máscaras* is, apparently, as relevant today as it was nearly twenty years ago. Nonetheless, it was a wonderful way to let this student know that he was not alone and to expose an intersection between his experiences and those of a Chicana at Harvard forty years earlier. I later

<sup>13</sup> On Tongva history and culture, see generally CLAUDIA K. JURMAIN & WILLIAM MCCAWLEY, *O, MY ANCESTOR: RECOGNITION AND RENEWAL FOR THE GABRIELINO-TONGVA PEOPLE OF THE LOS ANGELES AREA* (2009). On the illegal annexation of northern Mexico, see RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 41-55 (4th ed. 1988).

<sup>14</sup> Space was also created in which we could be silent without having been silenced, a liberatory experience that is often overlooked. See generally Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847 (2000).

<sup>15</sup> On the “persistent and pernicious separation between the personal and professional lives of the lawyer,” law professor and law student, see Melissa Harrison & Margaret Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 391 (1996).

<sup>16</sup> See Montoya, *supra* note 2, at 18-22.

learned that he passed the piece along to some of his Latina classmates, illustrating *Máscara's* ongoing ability to generate shared space.

This essay begins with a few reflections on the powerful imagery Professor Montoya deploys in her discussion of the braiding of hair and, more generally, the cultural significance we attach to hairstyles.<sup>17</sup> I tell these stories in Section I in the hope of illustrating that by venturing beyond prescribed boundaries, Professor Montoya has exposed common ground from which we can begin to assess the intersections of our cultures and our legal analyses. Section II discusses this intersection more generally, considering the impact that consideration—or exclusion—of cultural and historical context has had on four politically-charged trials. Section III expands on the backdrop of these cases to demonstrate that the exclusion of lived realities from legal processes can mask the dangers of assimilation and the reality that, as Margaret Montoya observed, we cannot discuss race in this country without acknowledging genocide. Section IV argues that the legitimacy of the legal system itself rests on our ability to expand the concept of “thinking like a lawyer” to incorporate the lived experiences and socio-historical realities of all peoples subject to its jurisdiction.

## I. TRENZAS Y GREÑAS

Hair is a central theme of *Máscaras*: the time we spend on hair; the stories we learn; the values we absorb as we braid the hair of our loved ones or have ours braided by them; and the significance of the distinction between neat, orderly *trenzas* and the unkempt, disheveled look implied by *greñas*.<sup>18</sup> It is a medium brilliantly employed by Professor Montoya to bridge the divide between our public, professional selves and that which is intensely personal.

Hair can serve this function because it is a physical attribute over which we exercise considerable discretion. Hair is inextricably linked to our identities; what one chooses to do with one's hair inevitably communicates something about one's racial, cultural, and/or political identity as well as individual personality. It signals something very significant about how we see ourselves relating to the broader cultural contexts that surround us.<sup>19</sup>

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<sup>17</sup> See *id.* at 2-4.

<sup>18</sup> See *id.*

<sup>19</sup> See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

Re-reading *Máscaras* evoked many images for me. I remembered my mother braiding my hair throughout my whole childhood, and my braiding of my daughter's hair. Just as Professor Montoya's *trenzas* "announced that [she] was clean and well-cared-for at home,"<sup>20</sup> it was critical to me for my child—who is of African, Native, Asian, and European descent but presumed black in this society—to be perceived by the outside world as cherished. Her father had grown up in the Jim Crow South, and his child was not leaving the house without impeccably ironed clothing and neatly braided hair. Her appearance *would* convey that watchful parents lurked just a few steps behind this vulnerable little girl. Seeing my child from this perspective I wondered, for the first time, what my white mother, raised in South Georgia, thought about as she prepared her Japanese American child to go out into the world.

*Máscaras* reminded me of my first husband's dreadlocks—always neatly groomed, but nonetheless prototypically *greñudo*.<sup>21</sup> An African American activist in Atlanta in the 1970s, Chimurenga, like Professor Montoya's cousin Sonny, was one who, ultimately, "didn't survive 'la vida loca.'"<sup>22</sup> He wore locks when they were a political symbol, not a fashion statement. Frequently arrested for his political activity, Chimurenga laughed about the time he had been put in a cell with six or seven other black men, all complaining about being locked up for no reason. As it dawned on him that each of them had cornrows or braids, he hoped we would bail him out quickly, before his cellmates realized that they had been arrested only because of the superficial resemblance between their hair and his.<sup>23</sup>

During those years I used to wonder whether I would make a similar political statement with my hair if I were black. I was doubtful until I got to Yale Law School, where the term "alienated" took on new meaning for me. Truly, I felt like a visitor from another planet. Like the Harvard described by Professor Montoya,<sup>24</sup> Yale in the early 1980s was

<sup>20</sup> Montoya, *supra* note 2, at 4.

<sup>21</sup> See Montoya, *supra* note 2, at 24. On the term "dreadlocks," as well as its various spellings and connotations, see D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . In the Workplace*, 14 J. GENDER RACE & JUST. 405, 415 n.54 (2011).

<sup>22</sup> Montoya, *supra* note 2, at 11.

<sup>23</sup> On the conflation of such hairstyles, see *Pitts v. Wild Animal Adventures, Inc.*, 2008 WL 1899306 at 1 (M.D. Ga. 2008) (unreported opinion granting summary judgment for defendant in a challenge to a policy prohibiting uncovered "dreadlocks, cornrows, beads, and shells"); for analysis, see Greene, *supra* note 21, at 414-16.

<sup>24</sup> Montoya, *supra* note 2, at 24.

infused with the presumptions of white privilege; a strangely contradictory place where people of color were rendered invisible while simultaneously having presumptive identities imposed upon us. Professor Montoya talks about arriving at law school intent on “proclaim[ing]” her politics;<sup>25</sup> likewise, it was only after I began law school that I realized I needed to employ every means available to subvert the presumption that I was there to assimilate into their world.

Re-reading *Máscaras* more recently, I had to consider how these dynamics continue to affect me, even as a tenured professor with no ambitions beyond doing work that I find meaningful. I had to admit occasionally being discomfited by the fact that I do not “look like” a lawyer or law professor because I wear my hair long and graying, while simultaneously knowing that this is a choice I make, in part, because it keeps me grounded. Being visibly different makes it more difficult to slip into an assimilationist mode. It reminds me of my Cree sister-in-law’s admonitions about the spiritual significance of hair. Raised very traditionally by her grandmother, she is currently a brilliant litigator and negotiator for indigenous rights in Canada.<sup>26</sup> When I think of her, I’m reminded that it’s possible to make forays into the courts of the conqueror by day and still come home at night; that our struggles for racial justice are but a small part of a 500-year resistance to colonization, enslavement, and genocide.

I tell these stories, in part, because I believe they demonstrate how Professor Montoya’s autobiographical account of her experiences as a Chicana can resonate with and open doors across a wide spectrum of experience. But the power of *Máscaras* goes far beyond the liberating effect it has at this very significant but nonetheless personal level. One way in which it does this is by emphasizing the importance of the human context to our work as lawyers and law professors.

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<sup>25</sup> *Id.* at 8.

<sup>26</sup> For some of her published work, see generally ISLANDS IN CAPTIVITY: THE RECORD OF THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (WARD CHURCHILL & SHARON H. VENNE EDs., 2004); Sharon Helen Venne, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS PEOPLES (1998); INDIAN ACTS AND AMENDMENTS, 1868-1975: AN INDEXED COLLECTION (SHARON HELEN VENNE ED., reprinted 1998) (1981); Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, in WITHOUT PREJUDICE: THE EAFORD INT’L REV. OF RACIAL DISCRIMINATION, Vol. II, No. 2 at 53 (1990).

## II. CONTEXT

Legal cases turn on principles of law as applied to “the facts.” Clients come to lawyers to tell their stories and, as lawyers, we know that one of our most significant functions is to cull the legally relevant facts from their narratives. In turn, as law professors, we spend a great deal of time teaching our students this analytical skill.<sup>27</sup> Margaret Montoya’s retelling of her encounter with the Josefina/Josephine Chávez case exposes this dynamic and illustrates ways in which we are socialized to suppress context in order to be considered legitimate participants in the legal process.

Professor Montoya describes the case, decided in 1947, of a young Chicana convicted of manslaughter after giving birth over the toilet in her family’s home and leaving the baby’s body wrapped in newspaper under the bathtub.<sup>28</sup> Margaret Montoya describes how, as the class debated the legal issue of “whether the baby had been born alive for purposes of the California manslaughter statute,” she finally had to ask, “What about the other facts? What about [Josefina’s] youth, her poverty, her fear over the pregnancy, her delivery in silence?”<sup>29</sup> “Why,” she reflected, “did the facts relating to the girl-woman’s reality go unvoiced? Why were her life, her anguish, her fears rendered irrelevant?”<sup>30</sup> Would the application of a legal analysis that truly incorporated Josefina’s reality have produced a different outcome? We will never know whether the verdict would have been different, but I am certain it would have made a difference in her life and her community’s perceptions about the legal system.

Jury trials dramatically illustrate the impact historical cultural context can have on legal proceedings. I have chosen the following examples to demonstrate this point not because they are particularly distinctive but because they have affected my life. These involve trials related to missing and murdered children in Atlanta, protests of Columbus Day

<sup>27</sup> See Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 16-19 (2004). On the exclusion of narrative from analyses of corporate law, see generally Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007).

<sup>28</sup> See Montoya, *supra* note 2, at 18 (referencing *People v. Josephine Chávez*, 176 P.2d 92 (Cal. Ct. App. 1947), a case Professor Montoya recalled as having been titled *People v. Josefina Chávez*).

<sup>29</sup> *Id.* at 18.

<sup>30</sup> *Id.* at 18-19.

celebrations in Denver, and the convictions of political activists Leonard Peltier and Jamil Al-Amin.

The legal significance of social realities was first brought home to me in connection with a highly publicized series of murders of young black children in Atlanta in the late 1970s and early 1980s.<sup>31</sup> As children disappeared or were found dead, their parents and neighbors began to organize, and to pressure city officials to acknowledge the problem and provide them with some kind of protection. When this proved futile, a coalition of tenants' associations in the city's housing projects organized neighborhood patrols, each of which was to include someone who was had firearms training and would be armed. At that time, under Georgia law, one could carry an unconcealed pistol or rifle without a permit, as the city attorney publicly stated to the patrols and the media. His explanation, however, did not stop the police from arresting the armed members of the first patrol, one of whom was Chimurenga.<sup>32</sup>

At trial, we were able to introduce evidence concerning the climate of fear in these communities and why the adults felt obligated to protect their children. The city attorney admitted that he had advised us, immediately prior to the arrests, that our approach was legal.<sup>33</sup> Nonetheless, the judge would not let the jury consider this information. Was the defendant armed? Did he have a permit? These were the only questions the jury was allowed to consider and—those being uncontested facts—the jurors felt obliged to convict. Afterwards, several jurors spoke with us, some in tears, explaining how unfair they considered the process.

But the more interesting part of the story occurred several years later when a different judge was considering what to do about the fact that Chimurenga had left the state (so that I could go to law school)

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<sup>31</sup> For background, see generally JAMES BALDWIN, *THE EVIDENCE OF THINGS NOT SEEN* (Revised Ed., 1995); CHET DETLINGER & JEFF PRUGH, *THE LIST* (1984). A young black man, Wayne Williams, was eventually convicted of killing two young men, and the cases of twenty-two other victims, most much younger children, were declared "cleared"—i.e., "no further investigations would be undertaken"—without any further prosecutions. *Napper v. Georgia Television Co.*, 257 Ga. 156, 158 (1987). The effects of these kidnappings and murders are perhaps best depicted in Toni Cade Bambara's last novel. See generally TONI CADE BAMBARA, *THOSE BONES ARE NOT MY CHILD* (1999).

<sup>32</sup> See Eugene Robinson, *Atlanta Police Arrest Two in Citizens' Patrol: 'We Are Not Vigilantes,' Says One*, WASH. POST, Mar. 21, 1981, available at 1981 WLNR 459008.

<sup>33</sup> See *Around the Nation: 2 in Atlanta Citizens Patrol Seized on Weapons Charges*, N.Y. TIMES, Mar. 21, 1981, available at 1981 WLNR 225485. As this news article reports, it was unlawful to carry deadly weapons at a public gathering. However, this charge was dismissed on the grounds that the crowd at issue consisted primarily of police and reporters.

without completing the community service portion of his sentence. As it happened, we had the same bailiff; one who, in terms of appearance, could easily have been central casting's top choice to portray a classic potbellied, redneck sheriff. This bailiff, who remembered the contextual evidence that had been introduced at trial, muttered, "This man has done more community service than anyone in the county." Everyone around us started laughing, and the judge barked, "What did you say?" After the bailiff reluctantly repeated his statement, the judge threw up his hands and dismissed the case. My point, of course, is that both the jury and the bailiff simply needed to be exposed to the realities underlying the arrests to see that the formalistic application of law had little connection to justice.

My second example comes from Denver where, during the 1990s and early 2000s, the American Indian community and a broad coalition of their allies made concerted efforts to stop an annual parade celebrating Columbus Day. Until the city enacted special ordinances directly intended to preclude these actions,<sup>34</sup> juries consistently acquitted those arrested at the protests because they were allowed to hear evidence about what Columbus symbolizes, as well as the harm done to Indian children by the glorification of conquest and genocide.<sup>35</sup> In 2004, over 240 people were arrested and by the end of the trial of "ringleaders," the jurors themselves were asking how they could join the protest the following year.<sup>36</sup>

Another illustration of the importance of social context can be found in the trial of Leonard Peltier, who is still in prison more than 35 years after his conviction for murder in connection with the deaths of two FBI agents on the Pine Ridge Reservation in 1975. While Peltier's case is quite well known, we often forget that his co-defendants, Darrelle

<sup>34</sup> See Editorial, *New Law Sets A Fine Line on Parade Protest; Parade organizers and protesters continue their angry impasse over the disputed legacy of Christopher Columbus; Police have new laws to enforce*, DENVER POST, Oct. 6, 2005, at B6, available at 2005 WLNR 16228479.

<sup>35</sup> See Charlie Brennan, *Parade Protest Trial Starts; Opening Statements Draw on History, Rights of Citizens*, ROCKY MTN. NEWS, Jan. 19, 2005, at 23A, available at 2005 WLNR 752934 (noting that "at times the proceedings sounded more like a civics lesson than a legal process"); *Denver's 1st Columbus Day Parade in 9 Years Goes on Amid Protests; Holiday: Police arrest about 150 activists, including Native American leaders, who said the explorer was a slave trader who committed genocide*, L.A. TIMES, Oct. 8, 2000, at 24, available at 2000 WLNR 8374630.

<sup>36</sup> See Charlie Brennan, *Columbus Day Parade Activists Acquitted; Verdict May Bode Well for 200 Others Arrested at Protest*, ROCKY MTN. NEWS, Jan. 21, 2005, at 6A, available at 2005 WLNR 875744.

(Dino) Butler and Robert Robideau, were acquitted in an earlier trial.<sup>37</sup> A key difference in the proceedings was that Butler and Robideau were allowed to introduce evidence about the violence and fear pervading the Pine Ridge Reservation at the time.

Peltier, Robideau and Butler were members of the American Indian Movement (AIM), which had been targeted by the FBI and its surrogates on the reservation.<sup>38</sup> In the Butler/Robideau trial, witnesses were allowed to testify about being coerced by the FBI, a broader history of FBI misconduct was introduced, and the jury heard about the numerous unsolved murders of AIM members and supporters on the Pine Ridge Reservation.<sup>39</sup> According to historian Peter Matthiessen, “A determining factor, as it turned out, was the testimony . . . about the constant dread that pervaded the atmosphere,” including that of William Muldrow of the U.S. Commission on Civil Rights.<sup>40</sup> After hearing this, as well as the testimony about FBI misconduct, an all-white Cedar Rapids, Iowa jury concluded that Butler and Robideau may well have been acting in self-defense.<sup>41</sup>

Subsequently Leonard Peltier was extradited from Canada on the basis of perjured affidavits,<sup>42</sup> and his trial was moved to Fargo, North Dakota, where it was assigned to a different judge. There were many problems with the trial, including the government’s introduction of perjured testimony and falsified evidence, but the most damaging may have been the new judge’s exclusion of the contextualizing evidence that had allowed the Cedar Rapids jury to understand Bob Robideau and Dino Butler’s actions.<sup>43</sup> Not surprisingly, Peltier was convicted. “In the end, it

<sup>37</sup> See PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE: THE STORY OF LEONARD PELTIER AND THE FBI’S WAR ON THE AMERICAN INDIAN MOVEMENT* 279-315 (1992); Joseph C. Hogan, III, *Guilty Until Proven Innocent: Leonard Peltier and the Sublegal System*, 34 B.C. L. REV. 901, 907-08 (1993).

<sup>38</sup> See WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI’S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 179-233 (Classics Ed. 2002).

<sup>39</sup> JIM MESSERSCHMIDT, *THE TRIAL OF LEONARD PELTIER* 40-41 (1983); for an excellent summary, see Randall Coyne, *Defending the Despised: William Moses Kuntzler*, 20 AM. IND. L. REV. 257, 269-73 (1995-1996).

<sup>40</sup> MATTHIESSEN, *supra* note 37, at 313.

<sup>41</sup> *Id.* (quoting jury foreperson).

<sup>42</sup> For background on the extradition, see AMNESTY INTERNATIONAL, *PROPOSAL FOR A COMMISSION OF INQUIRY INTO THE EFFECT OF DOMESTIC INTELLIGENCE ACTIVITIES ON CRIMINAL TRIALS IN THE UNITED STATES OF AMERICA* 41-46 (1981).

<sup>43</sup> See Coyne, *supra* note 39, at 273-75; MATTHIESSEN, *supra* note 37, at 316-72; MESSERSCHMIDT, *supra* note 39, at 40.

was [the trial judge's] determination of what the jury should or should not see and hear that became the deciding factor in the trial."<sup>44</sup>

One final illustration is the case of Imam Jamil Al-Amin, the black activist formerly known as H. Rap Brown, who was convicted in 2002 of killing a Georgia sheriff's deputy on the basis of highly contested evidence.<sup>45</sup> During the 1960s, Al-Amin was a prominent target of FBI COINTELPRO (counterintelligence) operations, and was repeatedly arrested and jailed.<sup>46</sup> Even after decades as a respected imam and community leader in Atlanta, he continued to be harassed throughout the 1990s. Consequently, many people, including Al-Amin, questioned his indictment for the shooting of two deputy sheriffs serving a warrant on him for failure to appear in connection with a traffic offense.<sup>47</sup> As Ekwueme Michael Thelwell asks, during a period when "working-class African-American communities . . . had been traumatized by a series of shootings of unarmed black men [including Amadou Diallo] at the hands of police," why would the Atlanta authorities "send into a Muslim community, under cover of darkness, heavily armed men wearing flak jackets to bring in a respected and beloved religious leader, a figure of fixed address and regular and predictable habits?"<sup>48</sup>

Nonetheless, the judge consistently excluded evidence of Al-Amin's political history and the numerous documented attempts to frame him for other crimes.<sup>49</sup> At one point she simply decreed race to be irrelevant.<sup>50</sup> While the jury was predominantly black, what struck me, sitting in that courtroom, was how young the jurors were. I could not help but

<sup>44</sup> MATTHIESSEN, *supra* note 37, at 359.

<sup>45</sup> See Steve Visser, *Al-Amin Trial: King Widow Angers Kinchen Kin*, ATLANTA J. & CONST., Feb. 24, 2002, at C3, available at 2002 WLNR 4683662 (noting Coretta Scott King's concerns about inconsistencies in the evidence).

<sup>46</sup> On COINTELPRO operations targeting black activists, see generally CHURCHILL & VANDER WALL, *supra* note 38; on the targeting of Al-Amin, see *id.* at 50, 58. See also Ekwueme Michael Thelwell, *H. Rap Brown/Jamil Al-Amin: A Profoundly American Story*, NATION, Mar. 18, 2002, at 6-7, available at 2002 WLNR 14068223.

<sup>47</sup> See, e.g., Dahleen Glanton, *Backers: Al-Amin victim of vendetta; Ex-Black Panther no killer, they say*, CHI. TRIB., Mar. 11, 2002, at 8, available at 2002 WLNR 12634817; David Firestone, *60's Firebrand, Now Imam, Is Going on Trial in Killing*, N.Y. TIMES, Jan. 6, 2002, available at 2002 WLNR 4098344.

<sup>48</sup> Thelwell, *H. Rap Brown*, *supra* note 46, at 10-11.

<sup>49</sup> See Lateef Mungin & Steve Visser, *Al-Amin Trial: Judge Bars Questions on Racial Motivations* ATLANTA J. & CONST., Feb. 28, 2002, at D3, available at 2002 WLNR 4689469. See also James Curry Woods, *The Third Tower: The Effect of the September 11<sup>th</sup> Terrorist Attacks on the American Jury System*, 55 ALA. L. REV. 209, 213-14 (2003).

<sup>50</sup> See Mungin & Visser, *supra* note 49.

wonder how much they knew about the history of resistance to racism in this country, whether they had any clue about the extent to which federal officials, with the cooperation of state and local police, have been willing to go to eliminate those they see as threats to the status quo.<sup>51</sup> I had to conclude that the prosecutor, too, believed in their naïveté when I heard him argue that Dr. Martin Luther King, Jr., would have wanted the jurors to sentence Jamil Al-Amin to death. Ultimately Al-Amin was sentenced to life without parole<sup>52</sup> and, despite the fact that he was convicted in state court on state charges, he is now being held underground in the federal supermax prison in Florence, Colorado.<sup>53</sup> I often ponder the effect that some exposure to the political and historical context of this case might have had on the jury's verdict.

### III. ASSIMILATION AND GENOCIDE

Throughout *Máscaras*, Margaret Montoya highlights the pressure placed on people of color in this country to assimilate and questions the presumption that assimilation is something to which we should aspire. The lasting impact of this work can be attributed in large measure, I believe, to this aspect of the piece. In her first paragraph, Professor Montoya tells us that the article will “unbraid[] the stories” she provides “to reveal an imbedded message: that Outsider storytelling is a discursive technique for resisting cultural and linguistic domination through personal and collective redefinition.”<sup>54</sup> “Resisting cultural and linguistic domination” is not simply a matter of feeling better about ourselves or our families and cultures. It is, quite literally, about resisting genocide.

The term “genocide” was coined by the Polish Jewish jurist Rafaël Lemkin in 1944 to describe not just mass murder—that already had a name and was already recognized as a crime—but coordinated efforts to annihilate national, racial, or religious groups through actions that undermined the survival of the group *qua* group. As summarized by Ward Churchill, Lemkin’s “definition included attacks on political and social institutions, culture, language, national feelings, religion, and the economic existence of the group. Even nonlethal acts that undermined the liberty, dignity, and personal security of members of a group constituted

<sup>51</sup> See *infra* notes 84-104 and accompanying text.

<sup>52</sup> Lateef Mungin & Steve Visser, *Al-Amin Sentenced: Life Without Parole for Killing of Deputy*, ATLANTA J. & CONST., Mar. 14, 2002, at A1, available at 2002 WLNR 4658046.

<sup>53</sup> Bill Rankin, *Whatever Happened to . . . Jamil Abdullah Al-Amin: Supermax prison gets new inmate*, ATLANTA J. & CONST., Oct. 22, 2007, at B4, available at 2007 WLNR 20688845.

<sup>54</sup> Montoya, *supra* note 2, at 1.

genocide, if they contributed to weakening the viability of the group.”<sup>55</sup> Lemkin’s definition initially articulated physical, biological, and cultural forms of genocide<sup>56</sup> but was watered down by the drafting committee for the Convention on the Prevention and Punishment of the Crime of Genocide (1948).<sup>57</sup> Even so, the Convention is clear that genocide encompasses acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>58</sup>

Examples of genocide provided by the Convention include “forcibly transferring children of the group to another group.”<sup>59</sup> The children at issue are not being killed—they are being removed from their families and communities so that their cultures will not be able to survive and, therefore, the “group, as such” will no longer exist.<sup>60</sup> That is the explicit aim of “colorblind” assimilationism and why struggles to maintain our cultures, histories, languages, religions, and other traditions are not just about what is comfortable to us—or our “identity” in some superficial sense—but about our survival as peoples.<sup>61</sup>

<sup>55</sup> Ward Churchill, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT’L L. 3, 11 (2000). See Rafael Lemkin, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79-82 (1944).

<sup>56</sup> Churchill, *Defining the Unthinkable*, *supra* note 55, at 15.

<sup>57</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter “Genocide Convention”]. For background on the compromises struck during the drafting process, see Kurt Mundorff, *Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARV. INT’L L.J. 61, 75-77 (2009). See also Daphne Anayiotos, *The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?* 22 N.Y. INT’L L. REV. 99, 113-14 (2009); Churchill, *Defining the Unthinkable*, *supra* note 55, at 13-15.

<sup>58</sup> Genocide Convention, art. II.

<sup>59</sup> Genocide Convention, art. II (e).

<sup>60</sup> See Genocide Convention, art. II; see generally Mundorff, *supra* note 57.

<sup>61</sup> See generally Anayiotos, *supra* note 57. This was recognized by the Australian Human Rights and Equal Opportunity Commission, which concluded that “[t]he policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labeled ‘genocidal’ in breach of binding international law.” Quoted in Mundorff, *supra* note 57, at 62. See also Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMP. L. 1017 (2001) (noting the genocidal impact of assimilationist policies). On the effects on individuals of the group, see Larry May, *How Is Humanity Harmed by Genocide?* 10 INT’L LEGAL THEORY 1, 18-19 (2004) (noting that genocide “devalues individuals by depriving them of membership in social groups in such a way that it renders impossible the promise of equality to all humans” and that assimilation leaves “the individual stand[ing] to the new group as an outsider”).

The admission or exclusion of context in the jury trials referenced above was critical to the functioning of law as an instrument of justice not only because context allows decisionmakers to understand individuals' motivations, but because it situates those individuals' actions within the social dynamics and institutions that define their realities. Law, in the abstract and as applied, can only function legitimately when there is room within its structures to acknowledge and address the actual conditions of life encountered by those it governs.

To the extent the law presumes that we have all been, desire to be, or should be assimilated into the dominant society, an irreconcilable conflict arises because these presumptions are at odds with what we must do, collectively, to maintain our identities and, thereby, our existence as distinct peoples. Expanding the terrain of legally relevant facts to include a broader context is an integral part of resisting genocide because we cannot expect those who have not been exposed to the conditions of life in poor communities and communities of color to understand the myriad ways in which daily life can be a struggle to survive or the extent to which resistance to assimilation is a necessary component of this struggle.

Professor Montoya identifies numerous factors that may have influenced Josefina Chávez's actions—particularly the expectations surrounding sexuality and the issues of respect and shame that may have been critical to her survival in her family and community. Young and poor, living with her mother and sisters in a two bedroom house with a bathroom off the porch, what options did she have? What options did she perceive?<sup>62</sup> Even more significantly, why was everything most important to Josefina—"her life, her anguish, her fears"—irrelevant to a legal analysis of the case?<sup>63</sup> The issue Professor Montoya raises is not whether these factors justify the possible preclusion of a baby's life, but whether real justice for such young women *and* their babies can be achieved without their consideration. Some backdrop to the cases discussed above helps illustrate this point.

From the perspective of those who formed armed community patrols during the Atlanta child murders, the central question was how the adults in neighborhoods where children were disappearing could fulfill their responsibilities to protect the next generation. Between 1979 and 1981, more than twenty young black children in Atlanta were

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<sup>62</sup> See Montoya, *supra* note 2, at 18-19.

<sup>63</sup> *Id.*

murdered, as were more than fifty others in their twenties.<sup>64</sup> The scenarios were terrifying—a seven-year-old snatched from her bed in the night, her remains discovered four months later just down the street from her home;<sup>65</sup> a nine-year-old who never made it home from an errand for a neighbor, his strangled body later discovered at an abandoned school;<sup>66</sup> small, decomposed bodies of missing children being discovered, apparently at random.<sup>67</sup> They were terrifying in the present and in their ability to evoke the memories and despair associated with the South's bloody history of slavery, lynching, rape, and children being snatched from their parents. As James Baldwin observed:

[T]he missing children begin turning up, dead—in the weeds, by the roadside, in abandoned sites, in the river. It is very clear that whoever is murdering the children *wants* them to be found as they are found: this brutally indifferent treatment of the child's corpse is like spitting in the faces of the people who produced the child.<sup>68</sup>

Whatever the motivations of the actual killer(s),<sup>69</sup> a climate of fear pervaded the communities on Atlanta's south side. We all knew a child who had disappeared, or her parents, or some of his friends; worse yet, the children were afraid, always. Appeals to the police had failed to protect the children; indeed they took every opportunity to blame the parents.<sup>70</sup> City officials made it clear that Atlanta's national and international reputation as a "city too busy to hate," i.e., an appealing destination for tourists and convention business, trumped any responsibility they felt to the local residents.<sup>71</sup> As reported in the *New York Times* in March 1981:

<sup>64</sup> DETTLINGER & PRUGH, *supra* note 31, at 21-22. For a map, see *id.*, unnumbered pages following 93.

<sup>65</sup> See *id.* at 178.

<sup>66</sup> See *id.* at 55-58.

<sup>67</sup> See generally *id.*

<sup>68</sup> BALDWIN, *supra* note 31, at 5-6.

<sup>69</sup> This is not the forum for a detailed critique of the evidence used to convict Wayne Williams for the murders of two adults, and the City's rapid closing of all possibly related cases. The problems are aptly summarized, however, by James Baldwin's observation that "[t]he case against Wayne Williams contains a hole so wide that the indisputably alert Abby Mann has driven one of his many tanks through it." *Id.* at xv (also noting his disagreement with many aspects of Mann's docudrama on the case).

<sup>70</sup> See BAMBARA, *supra* note 31, at 5-6.

<sup>71</sup> For an incisive analysis of the atmosphere in Atlanta, and the official responses to the murders, see generally BALDWIN, *supra* note 31.

In the past 19 months 20 black children between the ages of 7 and 16 have been murdered and two others are officially listed as missing. Mayor Jackson asked residents yesterday to “lower their voices” about the possibility that the slayings were the work of a racist.<sup>72</sup>

Because these realities were introduced at the trial of members of the community patrol, the jurors and the bailiff understood that our choice was to abdicate our most fundamental responsibility to protect the children and, thereby, our own humanity, or to resist the terror being inflicted, again, on our communities.

In Denver, resistance to the glorification of Columbus and his legacy has been rooted in a similar need to ensure the survival of American Indian children. The fundamental right—indeed, responsibility—to oppose the advocacy of genocide was the centerpiece of the defense in each of the trials arising from the mass demonstrations against the celebration of Columbus Day as an official holiday. Members of the American Indian Movement of Colorado, as well as some sixty allied organizations, worked tirelessly to educate the public and the juries about Columbus’ policies of slavery and systematic extermination of indigenous peoples, and the evolution of this legacy through some five centuries of illegal warfare, massacres, and policies such as scalp bounties that promoted the outright murder of American Indians.<sup>73</sup>

These educational efforts also highlighted federal policies that resulted in the involuntary sterilization of more than forty percent of Native women of childbearing age, the forcible removal to boarding schools of approximately half of all indigenous children for several generations in succession, and a widespread program to place Indian children with non-Indian families for adoption. As noted by the defendants in one case, “The stated goal of such policies has been to bring about the ‘assimilation’ of native people into the value orientations and belief system of their conquerors. Rephrased, the objective has been to bring about the

<sup>72</sup> *Around the Nation: Activists in Atlanta Vow to Begin Armed Patrols*, N.Y. TIMES, Mar. 19, 1981, at A14, available at 1981 WLNR 228989.

<sup>73</sup> See Ward Churchill, *Bringing the Law Home: Application of the Genocide Convention in the United States*, in WARD CHURCHILL, *INDIANS ARE US? CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA* 28-42 (1994) (essay adapted from a brief submitted by defendants in 1992). For historical background, see generally WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT* (1997). On Columbus, see generally KIRKPATRICK SALE, *THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY* (1990).

disappearance of indigenous societies as such, a patent violation of . . . the Genocide Convention.”<sup>74</sup>

The heart of the matter, however, was the impact this largely untold history continues to have on American Indian communities, and the devastating effect that glorifying its perpetrators has on Indian children. I was privileged to be among those who went to trial following a 2004 protest in which some 244 people were arrested. While the jurors were clearly disconcerted by the historical truths confronting them, I believe they were most deeply moved by the testimony that linked these governmental policies to the realities of life in so many Indian communities today—the devastating poverty, widespread unemployment, substandard housing, endemic disease and truncated life expectancy, and the high rates of depression, alcoholism, and violence that accompany these conditions of life.<sup>75</sup>

The jurors heard about the extraordinarily high rates of suicide amongst Indian youth and how difficult it is for parents to prevent their children from internalizing the negative messages they receive about themselves on all fronts, even from their elementary school teachers who ridicule and punish them for contesting the Columbus myth. The prosecution countered with a narrow legal argument: those participating in the Columbus Day parade had a right to exercise their First Amendment rights. In other words, we had the right to stand on the sidewalk and express contrary opinions but not a right, much less an obligation, to prevent the advocacy of genocide. Ours was a world about which the jurors knew precious little, but just a few days of exposure to the devastating realities of life in native North America allowed them to understand that we were not defending abstract principles but the survival of the people.<sup>76</sup>

<sup>74</sup> Churchill, *Bringing the Law Home*, *supra* note 73, at 39.

<sup>75</sup> For background, see generally Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63 (2012-2013).

<sup>76</sup> On the impact of federal policies on American Indian children, see Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 68-70 (2008); see generally WARD CHURCHILL, *KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS* (2004). On the dangers of assimilationist policies, see Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. Kan. L. Rev. 713, 722-23 (1985-1986); John W. Ragsdale, Jr., *The Chiricahua Apaches and the Assimilation Movement, 1865-1886: A Historical Examination*, 30 AM. INDIAN L. REV. 291, 309 (2005-2006) (noting that both military extermination policies and the establishment of reservations were genocidal).

The context provided to the jury in the Columbus Day trials also formed, in general terms, the backdrop to the trials of AIM members Dino Butler, Bob Robideau, and Leonard Peltier who were on the Pine Ridge Reservation in 1975 at the request of local elders. This reservation was one of the most destitute locations in the country and remains so today.<sup>77</sup> In the mid-1970s, 88% of the homes on Pine Ridge were classified as substandard; many did not even have plumbing.<sup>78</sup> In 1973, the median annual income of Lakota families on the reservation was under \$2,000.<sup>79</sup> Unemployment reached into the eightieth and ninetieth percentiles, especially in the harsh winter months,<sup>80</sup> and male life expectancy on Pine Ridge was 44 years, some 30 years less than that of the general population.<sup>81</sup>

Traditional Oglala Lakota residents on the Pine Ridge Reservation were deeply concerned not only about these devastating conditions of life, but also the willingness of the fraudulently elected tribal chairman Richard Wilson to transfer Lakota lands to non-Indians and to the federal government.<sup>82</sup> Losing their land would preclude their ability to maintain their culture and spiritual traditions and, thus, their survival as a people. Wilson, determined to suppress the growing resistance to his policies, deployed “a private army, called the GOONS (Guardians Of the Oglala Nation), equipped and funded by the U.S. government,” which engaged in “a campaign of terrorism directed against traditionals and activists. . . .”<sup>83</sup>

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<sup>77</sup> In 2010, Shannon County, home to Pine Ridge Reservation, “had the lowest per capita income in the entire United States.” Nicolas D. Kristof, *Poverty’s Poster Child*, N.Y. TIMES, May 10, 2012, at A1, available at 2012 WLNR 9811368. See also Peter T. Kilborn, *Life at the Bottom—America’s Poorest County/A special report; Sad Distinction for the Sioux: Homeland is No. 1 in Poverty*, N.Y. TIMES, Sept. 20, 1992, at 11, available at 1992 WLNR 3348945.

<sup>78</sup> See Rennard Strickland, *Indian Law and the Miner’s Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483, 488 (1991) (citing THOMAS B. WILLIAMS & ROBERT D. LEATHERMAN, INDIAN HOUSING IN THE UNITED STATES 31-32 (1975)).

<sup>79</sup> MESSERSCHMIDT, *supra* note 39, at 5.

<sup>80</sup> See Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 420-421 (1998). Generally, these statistics reflect the realities in the 1970s and currently. See *supra* note 77 and accompanying text.

<sup>81</sup> *Id.* It is now reported to be 58 for men and 66 for women in Pine Ridge, approximately 20 years shorter than the national average. See Astrid Rodrigues, Stuck in ‘Food Desert,’ Pine Ridge Locals Look to Subway to Meet Nutrition Needs (Oct. 14, 2011), available at <http://abcnews.go.com/US/stuck-food-desert-pine-ridge-locals-subway-meet/story?id=14732285> (last visited Aug. 15, 2013).

<sup>82</sup> See MESSERSCHMIDT, *supra* note 39, at 3-5.

<sup>83</sup> Jim Vander Wall, *A Warrior Caged: The Continuing Struggle of Leonard Peltier*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 292 (M. ANNETTE JAIMES,

The American Indian Movement presence on the reservation, at the request of the traditional Oglalas, was countered by ever-increasing violence on the part of the GOONS. From mid-1973 through mid-1976, nearly 70, perhaps more, AIM members or supporters were murdered (and many others assaulted) on Pine Ridge.<sup>84</sup> During this period, the FBI, which had criminal jurisdiction on the reservation, failed to convict a single person for these murders.<sup>85</sup> Instead, federal resources were poured into attempts to destroy AIM through the use of infiltrators and agents provocateurs, the prosecution of unfounded charges against AIM members, and the arming of the GOONS.<sup>86</sup>

The traditional Oglalas and their supporters were very literally under siege, resisting yet another U.S. government campaign to eliminate their existence as a people capable of maintaining their own history, culture, language, and religion. Pine Ridge is, of course, the site of the 1890 Wounded Knee massacre, in which some 300 Lakotas, including women, children and elders, were slaughtered by the U.S. Army.<sup>87</sup> Two years before the incident at issue in the Peltier trial, AIM members and supporters had been subjected to a 71-day siege by U.S. federal agents, who fired “hundreds of thousands of rounds of ammunition” into the tiny village of Wounded Knee and, subsequently, arrested 562 people on charges that overwhelmingly proved groundless.<sup>88</sup> It was against this backdrop that two federal agents—allegedly serving a warrant for the theft of a pair of used cowboy boots—instigated a fire in which they and a young American Indian were killed.<sup>89</sup> Understanding this context led the Cedar Rapids jury to acquit Butler and Robideau; its exclusion may well have resulted in Peltier’s conviction.<sup>90</sup>

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ED., 1992).

<sup>84</sup> Ward Churchill with Jim Vander Wall, *AIM Casualties on Pine Ridge, 1973-1976*, in CHURCHILL, *INDIANS ARE US?*, *supra* note 73, at 197. This gave the reservation a murder rate more than eight times higher than Detroit, then known as the “murder capital” of the United States. *Id.* at 204.

<sup>85</sup> Vander Wall, *A Warrior Caged*, *supra* note 83, at 294.

<sup>86</sup> See CHURCHILL & VANDER WALL, *AGENTS OF REPRESSION*, *supra* note 38, at 179-233.

<sup>87</sup> See Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 797-799 (1997).

<sup>88</sup> Vander Wall, “A Warrior Caged,” *supra* note 83, at 293 (noting that the government ultimately obtained fifteen convictions, mostly for minor offenses).

<sup>89</sup> See CHURCHILL & VANDER WALL, *AGENTS OF REPRESSION*, *supra* note 38, at 236-246.

<sup>90</sup> See *supra* notes 37-41 and accompanying text.

Just as the American Indian Movement had been targeted for destruction by federal agencies,<sup>91</sup> virtually every African American organization active in the 1960s and 1970s was the focus of counterintelligence operations by the FBI and numerous other governmental entities.<sup>92</sup> Persons of African descent in the Americas have been resisting slavery, lynchings, legally mandated political exclusion and social segregation, dispossession of their lands, mass incarceration, and forced cultural assimilation for nearly 500 years.<sup>93</sup> The resources of state power have been consistently used to suppress these movements, and the government's response to the political activism of the civil rights and black liberation movements of the 1960s was no exception.<sup>94</sup>

Beginning in 1964, Jamil Al-Amin, then known as H. Rap Brown, worked with the voter registration projects of the Student Nonviolent Coordinating Committee (SNCC) in Mississippi and Alabama. He was just twenty-three years old when he succeeded Stokely Carmichael, later known as Kwame Ture, as SNCC chairman in 1967.<sup>95</sup> Al-Amin also served briefly as the honorary Minister of Justice of the Black Panther Party.<sup>96</sup> SNCC was a major target of the FBI, as, of course, was the Black Panther Party.<sup>97</sup> In the FBI's memorandum initiating its Black Liberation

<sup>91</sup> See generally CHURCHILL & VANDER WALL, *AGENTS OF REPRESSION*, *supra* note 38.

<sup>92</sup> See Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1094-96 (2002).

<sup>93</sup> See generally JOHN HOPE FRANKLIN & EVELYN HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (9th Ed. 2010); VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* (1981); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); EUGENE D. GENOVESE, *FROM REBELLION TO REVOLUTION: AFRO-AMERICAN SLAVE REVOLTS IN THE MAKING OF THE MODERN WORLD* (1979). On efforts to preserve cultural identity, see generally *BLACK NATIONALISM IN AMERICA* (JOHN H. BRACEY ET AL., EDs., 1970).

<sup>94</sup> See generally MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945-2006* (2007); JEFFREY O.G. OGBAR, *BLACK POWER: RADICAL POLITICS AND AFRICAN AMERICAN IDENTITY* (2004); KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972 (1989). For the findings of a Senate investigation of such programs, see generally SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *FINAL REPORT, BOOKS II AND III* (1976).

<sup>95</sup> See Ekwueme Michael Thelwell, *Foreword to H. RAP BROWN, DIE NIGGER DIE! A POLITICAL AUTOBIOGRAPHY* xiv-xvi (2002).

<sup>96</sup> See WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* 126 (Classics Ed., 2002).

<sup>97</sup> See *id.* at 111 (reproduction of FBI memorandum of Mar. 4, 1968). See also MARABLE, *supra* note 94, at 109 (noting that SNCC was the first radical black group targeted, and that the Black Panther Party had been the subject of some 233 separate COINTELPRO operations by

Movement COINTELPRO operation, J. Edgar Hoover stated explicitly that its purpose was “to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist, hate-type organizations and groups, their leadership, spokesmen, membership, and supporters. . . .”<sup>98</sup> In August 1967, Brown was listed, along with Stokely Carmichael, Elijah Muhammed, and Maxwell Stanford, as an “extremist” who should be afforded “[i]ntensified attention.”<sup>99</sup> That month, he was charged with incitement to riot and eventually imprisoned for five years for carrying a rifle across state lines while under indictment.<sup>100</sup>

The FBI’s COINTELPRO operations targeting “black nationalist-hate groups”<sup>101</sup> involved not only surveillance but also infiltration by informants and agents provocateurs, the distribution of disinformation intended to discredit the organizations and to create rifts both within and among groups, repeated arrests on pretextual charges, convictions obtained on the basis of perjured testimony and falsified evidence, and even assassinations.<sup>102</sup> Many of these tactics continued to be utilized against Jamil Al-Amin through the 1990s. Thus, for example, Al-Amin was arbitrarily detained and interrogated by federal agents immediately after the 1993 bombing of the World Trade Center, without any evidence tying him to the attack.<sup>103</sup> Two years later he was arrested by FBI and ATF agents who claimed that the victim of a shooting in his Atlanta neighborhood had identified him as the gunman, but the charges had to be dropped when the victim “told the press that he had not seen his assailant but had been threatened by the authorities with jail if he did not implicate Imam Al-Amin.”<sup>104</sup>

Jamil Al-Amin always struggled in ways he believed necessary for the survival of the black community. In 1969 he wrote that “[t]he repeated attempts that the government has made to silence me represent just one level of genocide that is practiced by america,” going on

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July 1969).

<sup>98</sup> CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 96, at 92 (reproduction of FBI memorandum of Aug. 25, 1967).

<sup>99</sup> *See id.* at 93 (reproduction of FBI memorandum of Aug. 25, 1967).

<sup>100</sup> *See* MARABLE, *supra* note 94, at 109.

<sup>101</sup> *See* CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 96, at 111 (reproduction of FBI memorandum of Mar. 4, 1968).

<sup>102</sup> *See* CHURCHILL & VANDER WALL, AGENTS OF REPRESSION, *supra* note 38, at 37-62; Saito, *supra* note 92, at 1081-88.

<sup>103</sup> Thelwell, *H. Rap Brown*, *supra* note 46, at 8-9.

<sup>104</sup> *Id.* at 9 (also discussing irregularities concerning this incident noted by the Council on American-Islamic Relations and other national Muslim organizations).

to explain the many ways in which he believed black Americans to be the targets of genocidal policies and practices.<sup>105</sup> He concluded by noting that, although his attorney had recently secured his release from custody, “one day . . . I will be arrested and there will be no legal procedure any lawyer will be able to use to secure my release.”<sup>106</sup> This proved true in 2002, when Al-Amin’s future was placed in the hands of a jury that had little if any understanding of this country’s history of repressing political dissent and a judge who ensured that the jury learned nothing about the federal government’s on-going attempts to indict and convict him. Not surprisingly, the jury was unable to fathom why one might question the veracity of the government’s evidence, much less place the case in the context of genocidal policies and practices.

#### IV. REPRESSION AND DENIAL (OR, THINKING LIKE A LAWYER)

As these examples illustrate, the conditions of life affecting individuals whose actions are being judged by the law differ dramatically with respect to cultural and historical context. While no one seriously contests the nexus between legal justice and the realities of life, it is also clear that the legitimacy of law depends on the consistency and predictability of its application.<sup>107</sup> This principle is often cited as the basis for distinguishing those facts accepted as legally relevant from those deemed sociological.<sup>108</sup> As lawyers, we are supposed to erase the personalities at issue, and objectively apply neutral principles to facts. However, this formulation disregards the extent to which context is routinely taken into consideration, and the presumptions about context that are routinely applied to individuals, regardless of their actual circumstances. As summarized by Robert Cover, “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning . . . In this normative world, law and narrative are inseparably related.”<sup>109</sup>

There are many situations in which a judge or jury considers a defendant’s actions or intent from the perspective of a “reasonable” person, but this hypothetical reasonable person is rarely situated within the

<sup>105</sup> BROWN, *supra* note 95, at 107 (deliberately spelling “america” without a capital).

<sup>106</sup> *Id.* at 108.

<sup>107</sup> While definitions of “the rule of law” vary considerably, these elements are undisputed. For a useful summary of key formulations of the rule of law, see Berta Esperanza Hernandez-Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT’L L. 167, 168-176 (2004).

<sup>108</sup> See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 MICH. L. REV. 2099, 2110-2116 (1989).

<sup>109</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

defendant's social, cultural, or historical framework.<sup>110</sup> Instead, what is "reasonable" is determined by the worldview of the decisionmakers. This is a society in which the histories, perspectives, and contemporary realities of subordinated or marginalized peoples are routinely excluded from or distorted by the mainstream education and media, and in which social segregation results in a very limited range of personal interaction across racial, ethnic or class boundaries. As a result, those making decisions about legally relevant context inevitably, and understandably, project their own experiences and beliefs.

The abstract directive of legal "neutrality" fails to take into account that the histories and contemporary realities of subordinated peoples in this society are simply erased from the dominant paradigm. This is why the "storytelling" exemplified by *Máscaras* is a necessary component of justice. As Charles Lawrence puts it, "We tell our stories because other scholars have not told them, leaving us largely invisible in the discourses of law and social science."<sup>111</sup>

The jury system is intended to bring a wider spectrum of lived experience to the decision-making process, but judges limit the evidence that can be considered by juries in accordance with their own assessment of what is legally relevant.<sup>112</sup> Judges, for the most part, are "successful" lawyers—educated in a system that imposes narrow constraints on legal relevance and selected on the basis of their compliance with established rules and dominant cultural norms. They rarely have personal experiences that would motivate them to act outside of these parameters and, even when tempted to do so, it is painfully clear that deviation from *stare decisis* is only likely to result in their decisions being overturned and their careers short-circuited.<sup>113</sup>

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<sup>110</sup> For a critique of the "reasonable person" standard, see André Douglas Pond Cummings, "Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on *McBride v. Utah State Tax Commission*, *Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 26-31 (1999).

<sup>111</sup> Charles Lawrence III, *Listening for Stories in All the Rights Places: Narrative and Racial Formation Theory*, 46 LAW & SOC'Y REV. 247, 251 (2012).

<sup>112</sup> For examples of the exclusion of relevant evidence in criminal trials, see generally John H. Blume, Sheri L. Johnson, & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069 (2007).

<sup>113</sup> Such limitations also impact the ability of judges to formulate appropriate policies concerning the assessment of relevance. One glaring example is the requirement that only intentional, rather than institutional, discrimination is actionable. See generally David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285 (1998).

The constraints placed on judges are illustrated in a case filed in 1996 by Elouise Cobell against the Secretary of the Interior for the failure to properly manage, account for, or provide lawful benefits to 300,000–400,000 American Indians on whose behalf perhaps as much as \$137 billion had been placed, by government fiat, in individual trust accounts controlled by the Interior Department.<sup>114</sup> Three years later, following a six-week bench trial, district judge Royce Lamberth ordered the defendants to comply with their trust duties and, based on “the defendants’ recalcitrance toward remedying their mismanagement despite decades of congressional directives,” retained jurisdiction over the matter.<sup>115</sup> After another six years of bureaucratic intransigence that he described as “a nightmare,”<sup>116</sup> Judge Lamberth ordered the Department of the Interior to include a notice with all written communications to Indian trust beneficiaries warning them that “the government is currently unable to provide . . . an accurate and complete accounting of their trust assets.”<sup>117</sup>

As a former Judge Advocate General at the Pentagon, appointed to the federal bench by Ronald Reagan and named Presiding Judge of the Foreign Intelligence Surveillance Court by then-Chief Justice William Rehnquist,<sup>118</sup> it is doubtful that Judge Lamberth has ever been characterized as a bleeding heart liberal or a critical race theorist. However, by 2005, he had apparently gained some insight into what it meant to be treated like an Indian in contemporary America:

The case is nearly a decade old, the docket sheet contains over 3000 entries. . . . But when one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom:

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<sup>114</sup> See Complaint to Compel Performance of Trust Obligations, *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998) (No. 1:96CV01285), 1996 WL 34443583 (D.D.C.). On the number of plaintiffs and their losses, see T.S. Twibell, *Rethinking Johnson v. M’Intosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J. 129, 131 (2008). For background on the case and its purported settlement, see generally Dennis M. Gingold & M. Alexander Pearl, *Tribute to Elouise Cobell*, 33 PUB. LAND & RESOURCES L. REV. 189 (2012).

<sup>115</sup> *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999).

<sup>116</sup> *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005).

<sup>117</sup> See *Cobell v. Kempthorne*, 455 F.3d 317, 320 (D.C. Cir. 2006), cert. denied, 549 U.S. 1317 (2007).

<sup>118</sup> See *Senior Judge Royce C. Lamberth*, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, <http://www.dcd.uscourts.gov/dcd/lamberth> (last visited Aug. 17, 2013).

After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few.<sup>119</sup>

Citing this and other portions of Judge Lamberth's 2005 opinion, as well as the many occasions on which it had reversed his rulings, the Court of Appeals removed him from the case in July 2006.<sup>120</sup> The appellate judges were particularly troubled by Judge Lamberth's "apparent belief that racism at Interior is not just a thing of the past," as well as his failure to recognize that even had the Department's motives been relevant, "as they would be in a discrimination case," such motivation "had nothing to do with the issue [of notice] pending" before the court.<sup>121</sup>

As the Court of Appeals decision to remove Judge Lamberth demonstrates, sometimes the drive to exclude relevant evidence and historical context is attributable not simply to a lack of understanding or exposure to certain realities but to fear about the implications of admitting or

<sup>119</sup> *Cobell*, 229 F.R.D. at 7. See also Twibell, *supra* note 114, at 131.

<sup>120</sup> *Cobell*, 455 F.3d at 326-335.

<sup>121</sup> A disturbing parallel is seen in the recent removal of a federal judge from a case involving racial bias in the New York City Police Department (NYPD). In August 2013, after a 10-week trial, federal district judge Shira Scheindlin ruled that the constitutional rights of black and Latino plaintiffs had been violated by the NYPD's stop-and-frisk policies. See *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013). The Second Circuit Court of Appeals not only stayed Judge Scheindlin's order regarding remedial measures pending appeal, but also removed Judge Scheindlin from the case for failing to maintain the "appearance of impartiality." *Ligon v. City of New York*, 538 Fed.Appx. 101 (2d Cir. 2013) (unpublished opinion). The disqualification of the judge was upheld in *Ligon v. City of New York*, 736 F.3d 118 (2d Cir. 2013). According to the Center for Constitutional Rights, "That, unprompted, they should reassign the case from a judge deeply steeped in the issues for the last 14 years, who gave the city every opportunity to defend itself in the course of this litigation, is troubling and unprecedented." Alana Semuels, *Court blocks ruling that halted N.Y.'s stop-and-frisk*, CHI. TRIB., Nov. 1, 2013, available at 2013 WLNR 27479280.

exposing the real history of this country and the ongoing consequences of its genocidal policies.<sup>122</sup> Following Leonard Peltier's conviction, he attempted to escape from prison because he had been informed of a government-sponsored plan to have him assassinated by a fellow inmate.<sup>123</sup> An attorney in a subsequent hearing concerning this escape attempt characterized the judge's reaction to Peltier's defense as follows: "It's impossible that this could ever happen, and therefore I don't want to hear anything about it, and I don't want any witnesses talking about it."<sup>124</sup>

A similar dynamic was evident when my husband Ward Churchill, former Chair of the Ethnic Studies Department at the University of Colorado-Boulder, was fired in 2007 following a media firestorm and intense political pressure concerning his explanation of why the United States' long history of genocidal policies might generate the sort of anger and desperation underlying the September 11, 2001 attacks on the World Trade Center and Pentagon.<sup>125</sup> University officials contended that Ward had been fired not for his political opinions, but rather for research misconduct.<sup>126</sup> Tellingly, however, a significant number of the alleged research misconduct charges devolved upon his documentation of the U.S. Army's deliberate infliction of smallpox on American Indian nations.<sup>127</sup>

At the time he was fired, Ward Churchill was one of the most frequently cited American Indian Studies scholars in the country, having

<sup>122</sup> I have summarized some of this history in NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW* (2010).

<sup>123</sup> MATTHIESSEN, *supra* note 37, at 374-404.

<sup>124</sup> *Id.* at 400, quoting attorney Lewis Gurwitz.

<sup>125</sup> His initial essay and extensive documentation of this history can be found in WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY* (2003), a book which received a Gustavus Myers Award for Outstanding Books on Human Rights. See generally Richard Delgado, *Shooting the Messenger*, 20 AM. INDIAN L. REV. 477 (2005-2006) (reviewing WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY* (2003)).

<sup>126</sup> For background on the political response, see Henry A. Giroux, *Academic Freedom Under Fire: The Case for Critical Pedagogy*, C. LITERATURE, Oct. 1, 2006, 1, available at 2006 WLNR 19699177; Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. LAW 313, 342-43 (2007). For a detailed assessment of the University's claims and the processes employed to terminate Churchill's employment, see generally Ward Churchill, *The Myth of Academic Freedom: Experiencing the Application of Liberal Principle in a Neoconservative Era*, WORKS AND DAYS 51/52, 53/54: Vols. 26 & 27 (2008-09) at 139-230.

<sup>127</sup> For a deconstruction of the charges by an expert in American Indian Studies, see generally Eric Cheyfitz, *Framing Ward Churchill: The Political Construction of Research Misconduct*, WORKS AND DAYS 51/52, 53/54: Vols. 26 & 27 (2008-09) at 231-252.

published more than twenty books and 120 articles, most of which highlighted the genocidal destruction of American Indian peoples and the political repression of those who resisted such actions.<sup>128</sup> From the beginning, it was clear to us that while the attacks on Ward and his scholarship were framed in very personal terms, the underlying motivation was to discredit this trajectory of historical documentation and interpretation. As stated in a 2006 resolution from an Emergency Summit of Scholars and Activists Defending Critical Thinking and Indigenous Studies, “[T]he attacks on Ward Churchill . . . are being used to chill the expression of counterhegemonic truths, to re-impose a ‘consensus’ history dictated by the perspective of the colonizers, and to fuel racist attacks on students and scholars of color.”<sup>129</sup> The resolution went on to recognize the attacks as “part of a . . . movement to undermine the disciplines of Indigenous, Ethnic, and Gender studies which emerged as a result of protracted community-based struggles in response to the failures of mainstream disciplines to accurately reflect our collective histories and realities.”<sup>130</sup>

Similarly, in 2007, law professor Deborah Post wrote, “One suspects that the criticism of Churchill’s scholarship is not simply about evidence or omissions or erroneous statements of facts. It may be a visceral reaction to the use of the term ‘genocide’ and to the assignment of blame to the U.S. government or military.”<sup>131</sup> A Colorado professor who was part of the university committee that accused Ward Churchill of research misconduct unwittingly confirmed this point. After being fired, Ward sued the University for retaliatory termination and, at trial, this committee member testified that one of the dangers of his scholarship was that it might “caus[e] some young man to become incredibly bitter to where he picks up an AR-15 some day and kills a bunch of people.”<sup>132</sup> This com-

<sup>128</sup> See Cheri J. Deatsch & Heidi Boghosian, *Brief of Amicus Curiae in Support of Ward Churchill*, 68 NAT’L L. GUILD REV. 174 (2011).

<sup>129</sup> *Resolution from the Emergency Summit of Scholars and Activists Defending Critical Thinking and Indigenous Studies*, Lawrence, KS, September 29-30, 2006, UNCUT CONSCIENCE 1, [http://archived.wardchurchill.net/indig\\_conf\\_resol.pdf](http://archived.wardchurchill.net/indig_conf_resol.pdf) (last visited Aug. 17, 2013).

<sup>130</sup> *Id.* These observations are detailed in a Petition to the Inter-American Commission on Human Rights submitted on behalf of Ward Churchill against the United States of America, September 30, 2013, available at [http://wardchurchill.net/wp-content/uploads/2013/10/PETITION\\_WARD-CHURCHILL-V.-UNITED-STATES.pdf](http://wardchurchill.net/wp-content/uploads/2013/10/PETITION_WARD-CHURCHILL-V.-UNITED-STATES.pdf) (last visited Oct. 18, 2013).

<sup>131</sup> Deborah Waire Post, *Academic Freedom as Private Ordering: Politics and Professionalism in the 21<sup>st</sup> Century*, 53 LOY. L. REV. 177, 208 (2007).

<sup>132</sup> Testimony of Donald Dean Morley, Professor of Communications at the University of Colorado at Colorado Springs and member of the Privilege and Tenure Committee, *Churchill v. University of Colorado*, Trial Transcript, March 27, 2009, 3422, lines 10-15 (on file with

mittee member, charged with judging the veracity of Ward's scholarship, had no background or expertise in American Indian Studies<sup>133</sup> but it was clear that, like the judge in the Peltier case, he did not believe it possible for the U.S. government to have acted as depicted in Ward's writings, did not want to hear about it, and did not want anyone talking about it.<sup>134</sup>

Apparently this professor believed that if the history of the genocidal policies and practices employed by the U.S. government against indigenous peoples could be suppressed, Indian youth would not act on this knowledge. The problem with his approach, of course, is that this history is well known to the communities that have been directly affected, and the refusal of mainstream institutions, legal or educational, to acknowledge its reality fuels the anger the professor feared.<sup>135</sup> Willful denial by those controlling the dominant narrative produces anger compounded by frustration and despair, and while such anger may manifest as the professor fantasized, it is more likely to become self-destructive, bringing us back to the high rates of depression, alcoholism, and teen suicide referenced in the context of the Columbus Day protests.<sup>136</sup> Reflecting on the media's characterizations of Ward Churchill's statements in the context of a 2005 school shooting on the Red Lake Reservation that left the teenage shooter, his grandfather, and six others dead, professor Jodi Byrd of the Chickasaw Nation of Oklahoma concludes:

For the mainstream media, it was ultimately easier to counterpoint Churchill's critique of U.S. domestic and foreign policies with a simple, superior twist of irony that places responsibility for atrocities firmly back onto the shoulders of Indians. And as Indians, we are left to grapple with the psychic [breach] wrought through centuries of violence within the lands that the United States now occupies and with the ongoing commitment to survive.<sup>137</sup>

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author).

<sup>133</sup> See *id.* at 3423, lines 5-7. For an excellent analysis of the role played by race and ethnicity in the University's internal review processes, see Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 550-57 (2008).

<sup>134</sup> See *supra* note 124 and accompanying text.

<sup>135</sup> See, e.g., *Resolution*, *supra* note 129.

<sup>136</sup> See *supra* notes 35, 73-76 and accompanying text.

<sup>137</sup> Jodi A. Byrd, "Living My Native Life Deadly": Red Lake, Ward Churchill, and the Discourses of Competing Genocides, 31 AM. INDIAN Q. 310, 329 (2007).

In Ward Churchill's lawsuit against the University of Colorado, the judge excluded much relevant history and context, but the jury learned enough from enough actual experts in American Indian Studies to determine that the University's allegations of research misconduct had been employed pretextually to fire him in violation of the First Amendment.<sup>138</sup> The trial judge, however, subsequently vacated their verdict by retroactively granting the University absolute immunity for its unconstitutional conduct.<sup>139</sup> The underlying realities of genocidal conduct and the jury's unanimous verdict in Ward's favor had been placed on the record, but they would not be allowed to have any legal impact.

In each of the stories I have invoked in this essay, what was excluded from legal consideration was not simply personal narrative, but the collective histories that form the foundation of our understandings of ourselves as peoples. These histories are consistently suppressed and often, when exposed, vigorously denied. Thus, for example, Vine Deloria, Jr., an American Indian (Nakota) theologian and historian, noted that the Butler/Robideau defense team obtained a Justice Department memo attributing, in part, the government's failure to obtain convictions in most of the cases following the 1973 siege at Wounded Knee to the testimony of two "revisionist historians," Dee Brown and Vine Deloria. According to Deloria, their testimony, which concerned an 1868 treaty, reflected "what is already recorded in numerous government documents. . . . [W]e were 'revisionists' [only] in the sense that we introduced into the record materials that had not previously been used to understand that period of history."<sup>140</sup>

The status quo is maintained not only by excluding underlying realities from legal processes, but also by circumscribing what we teach about the law. Despite the fact that much documentation is available, there is very little in the legal literature, and almost nothing taught in law school, about cases like the ones I have discussed above. Political prisoners and governmental misconduct are, by and large, taboo subjects. The cases foundational to the ongoing subordination of people of

<sup>138</sup> See Trial Order, *Churchill v. University of Colorado*, 2009 WL 2704509 (Colo. Dist. Ct. July 7, 2009). The trial court's ruling was upheld on appeal. See *Churchill v. University of Colorado*, 285 P.3d 986 (Colo. 2012); *cert. denied*, 133 S.Ct. 1724 (2013). See also Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 135 n.62 (2009).

<sup>139</sup> See generally Deatsch & Boghosian, *supra* note 128.

<sup>140</sup> Vine Deloria, Jr., *Revision and Reversion*, in READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL 146 (JO CARILLO, ED., 1998).

color in this country—*Dred Scott*,<sup>141</sup> the *Cherokee* cases,<sup>142</sup> the *Insular* cases,<sup>143</sup> the *Chinese Exclusion* cases<sup>144</sup>—are taught in snippets, without historical context, and without explanation of how they live on as precedent for their sanitized contemporary counterparts.<sup>145</sup> All of this, of course, compounds the difficulty of introducing historical or cultural context into current cases, and further marginalizes the lived realities of subordinated peoples.

And yet, stories—select stories—continue to shape the law. As Milner Ball notes, “Stories of origin locate law, invest it with legitimacy, and so lend it stability.”<sup>146</sup> He explains a critical problem, as he sees it, with the underlying narrative of American law:

The American legal order debars the autonomy of tribes and the possibility of dialogue with them as independent centers of sovereignty. This exclusion cannot be overcome in the received rhetorical manner by telling the story of American origins because that story simply entrenches the exclusion. . . . The story can be told—and often is—as one in which the tribes are destroyed. . . . Told in another fashion, the story may seem to include Indian voices but is no less insidiously monophonic,

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<sup>141</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856). On the broader implications of this decision, see generally A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 *Cardozo L. Rev.* 1695 (1996).

<sup>142</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). See generally Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 *Okla. L. Rev.* 111 (1994).

<sup>143</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. 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>144</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Wong Wing v. United States*, 163 U.S. 228 (1896). See generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progress*, 100 *HARV. L. REV.* 853 (1987).

<sup>145</sup> I have addressed the ongoing significance of these and related cases in NATSU TAYLOR SAITO, *FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE* 13-49 (2007). On the continued use of racist precedent, see generally ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

<sup>146</sup> Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 *MICH. L. REV.* 2280 (1989).

for the Indians are given voice only as they are assimilated or made over into acceptable caricatures. . . .<sup>147</sup>

Ball goes on to explain why the American origin story incorporated into Supreme Court jurisprudence cannot be told in a way that gives American Indians voice.<sup>148</sup> The Constitution's Supremacy Clause, he concludes, is structurally and irredeemably "a great achievement of Americans but a threat to Native American tribes."<sup>149</sup> In other words, indigenous survival is incompatible with certain foundational principles of American law. This is a legal version of the dilemma posed by the committee member worried about Indian youth engaging in armed struggle.<sup>150</sup>

When historical realities are acknowledged, we cannot maintain the pretense that justice can be achieved without fundamental, structural change. This is a frightening prospect for many. Yet the alternative is to live in denial about genocidal realities and the fact that peoples threatened with the extermination of their histories, cultures, and identities will always resist in order to survive. It is, as Professor Montoya said, impossible to talk about race in this country without talking about genocide. Conversely, if we are not allowed to talk about genocide, we cannot have an honest discussion about race. And if we cannot talk about either race or genocide, justice through law is an illusion. This is why Margaret Montoya's work to make our realities a legitimate part of law and history is so important. *Máscaras* takes us back to the fundamental questions about how we conceive the legal enterprise and what it means to think—or teach—"like a lawyer."<sup>151</sup> In legal venues as elsewhere, as Cherokee law professor Rennard Strickland says, "It is time for us to speak the thing not spoken. It is time to stop pretending."<sup>152</sup>

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<sup>147</sup> *Id.* at 2296.

<sup>148</sup> *Id.* at 2300.

<sup>149</sup> *Id.* at 2306.

<sup>150</sup> See *supra* text accompanying note 132.

<sup>151</sup> On the historical and institutional factors that have shaped legal education in a manner that preserves extant relationships of power and privilege, see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475-94 (1997).

<sup>152</sup> Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11, 17 (2000).

