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THE USES OF HISTORY IN STRUGGLES FOR RACIAL JUSTICE: COLONIZING THE PAST AND MANAGING MEMORY

Katherine M. Franke *

In this Commentary, Professor Katherine Franke offers an analysis on Richard Delgado and Jean Stefancic’s California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education and Rebecca Tsosie’s Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights. These two Articles, she observes, deploy history for the purposes of justifying certain contemporary normative claims on behalf of peoples of color: affirmative action in higher education for Delgado and Stefancic, and sovereignty rights for native peoples in Tsosie’s case. Franke explores the manner in which stories of past conquest and discrimination contribute to contemporary conceptions of racial and ethnic identity and status, which in turn form the basis of rights claims. Drawing from sociological distinctions between remembrance, memory and history, Franke suggests that legal claims for amends prospectively demand more than reference back to an ignoble past, and she cautions against strategies that ground a right to redress in the status of people of color. Similarly, she examines the manner in which postcolonial arguments that seek to reinvigorate claims to sovereignty for native people run the risk of fetishizing the primitive.

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INTRODUCTION

The path of development that has brought the United States to this current period of enormous prosperity is undeniably littered with abominable racial violence, genocide, enslavement, discrimination, and structural subordination. Yet, our national identity remains grounded in notions of merit, opportunity, successful assimilation, and the promise of a rising tide lifting all boats. We feel much more comfortable acknowledging and condemning horrors pocking the

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national figures of other nations, such as the genocide undertaken by Nazis or the warring parties in the Balkans, than we feel owning the evil in our own past. The Holocaust Memorial in Washington, D.C. is one of the most often visited monuments in our nation's capital, but we have yet to officially acknowledge the evil perpetrated here at home against persons of African descent, not to mention the mass slaughter of the native people who were found here when Europeans "discovered" America.

Consequently, Richard Delgado and Jean Stefancic's *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*¹ and Rebecca Tsosie's *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*,² make significant contributions to the project of stopping up the Orwellian "memory hole" into which vast and hideous dimensions of our domestic past have seemed to disappear from our collective memories. They, like other scholars of U.S. racial history, provide an antidote to what at turns seems to be the amnesia, denial, repression, or flat out dishonesty of those who refuse to relate the current racial order to a violent racial past for which we bear an ongoing responsibility of redress.

Yet, neither of these two excellent papers are framed merely as "set-the-record-straight" projects. They both go further and demand that a normative injunction necessarily flows from these histories, memories, and facts. Thus, I applaud the story-telling aspects of both papers, and my comments herein largely address the normative projects they undertake by posing a set of questions that these papers provoke. All of these questions derive from foundational notions about the uses of history and memory in contemporary struggles for equality and sovereignty.

What use should we make of these ugly "truths" from our oft-whitewashed past? What is or can be the normative force of stories of historical victimization? What are their ethical imperatives? Do, or should, rights flow directly from the wrongs of the past, like diagnosis to prescription? Delgado and Stefancic are undoubtedly right when they tell us that "the past does indeed make a difference,"³ but how?

For Delgado and Stefancic as well as for Tsosie, the past must play a significant, if not determinative, role in contemporary efforts to define national identity, whether the identity of the United States or tribal identity, and to further social justice through the use of legal instruments, such as the Fourteenth Amendment or treaties. Yet, how does the past figure in these

1. Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000).

2. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000).

3. Delgado & Stefancic, *supra* note 1, at 1531.

works, given that the present inevitably forms the frame through which we view particular pasts? Perhaps the better question has to do with the manner in which the past is being *managed* by these authors for present purposes. Surely what they are up to is, in significant part, the correction of collective memory. How do the telling of history, the recounting of memory, and the relating of remembrance figure in the righting of old wrongs? What role do they play in a restructuring of identity that takes seriously the poison of structural subordination and the cultural genocide of colonialism? In the end, both papers suggest a connection between collective memory and collective identity in the following sense: "We are a people who have lived for generations with the horror of slaughter on the plains, with enslavement, and with betrayal of the promises contained in the Treaty of Guadalupe Hidalgo . . ." All three authors are well warned to steer shy of the fetishization of memory in such a manner that echoes the mistakes of the Serbs, for instance, for whom atrocities that took place in 1389 risk having greater significance than recent events, or worse, forming the normative justification for atrocities undertaken today.

In this Commentary, I develop two parallel concerns about the uses of history, memory, and remembrance, particularly as such uses relate to the modern constructions of justice and identity. In Part I, I explore the relationships between history, memory, and remembrance, with an eye to the challenges presented by contemporary claims for redress grounded in past experiences of injury. This discussion focuses primarily on Delgado and Stefancic's *California's Racial History*.

In Part II, I explore a related set of questions triggered by Tsosie's *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, wherein the postcolonial assertion of authentic Indian identity resists an assimilation narrative of the United States by reference to the performative power of treaty making. Here, Tsosie consciously refuses the turn to hybridity so popular with many postcolonial theorists, but in so doing, she risks the fetishization of the primitive. Her principle challenge appears to be to enunciate a sovereign Indian nation while avoiding what I call a kind of self-Orientalization.

In both Articles, the past is managed so as to justify a particularly emancipatory future. A form of pre-European conquest nationalism does much of the work for Tsosie, while Delgado and Stefancic cast their lot with Martin Luther King, Jr., who gave voice to the notion of a debtor and a creditor race.⁴

4. Dr. Martin Luther King, Jr.'s famous "I Have a Dream" speech introduced this concept in 1963:

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check; a check that has come back marked "insufficient funds."

I. "THOSE WHO DO NOT LEARN THE LESSONS OF HISTORY ARE DOOMED TO REPEAT THEM"⁵

The tone, the texture, and the passion of Delgado and Stefancic's thorough and convincing recounting of California's disgraceful racial past has the feel not of a detached historical record, but rather of repressed or denied memory being recovered. There is the therapeutic pain of the abusive parent from the past being revealed to the traumatized adult-child of the present that resonates throughout this piece. Yet, unlike the therapeutic trope that promises that remembrance is all one needs to make one whole again,⁶ in the domain of educational equality, illumination of a shameful past triggers a demand for affirmative measures into the foreseeable future.⁷ These affirmative remedies are construed as make whole in nature and are justified by the normative demands of the past injuries once revealed.

Yet, how can *raw* revelation nominate *cooked* remedies so self-evidently? James Baldwin began his *Notes of a Native Son* with the observation that "the past is all that makes the present coherent, and further, that the past will remain horrible for exactly as long as we refuse to assess it honestly."⁸ In these "Autobiographical Notes," Baldwin signals both the importance of memory to present identity, and the degree to which redress or healing demands an analysis of the remembered past. Surely, the lessons of the past, if there are any, emanate from interpretation, analysis, and criticism, not merely from revelation. It is this gap, if you will, between the story that Delgado and Stefancic tell and the redress that story necessarily justifies that I wish to examine. The *ought* cannot leap right out of Delgado and Stefancic's *is* without somewhat more work.

More than a half century ago, French sociologist Maurice Halbwachs began to tease apart remembrance, memory, and history as he investigated the ways in which collective memory figured into national or collective identity. Collective memory, he argued, functions as "essentially a reconstruction of

But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this Nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and security of justice.

109 CONG. REC. 16,242 (1963) (speech by Dr. Martin Luther King, Jr.).

5. Delgado & Stefancic, *supra* note 1, at 1613 (capitalization added). Richard Delgado and Jean Stefancic repeat a common misquotation of George Santayana's familiar invective. Santayana actually wrote: "Those who cannot *remember* the past are condemned to repeat it." GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (1920) (emphasis added).

6. Judith Herman has made important contributions to the psychoanalytic literature regarding memory of trauma. See generally JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1992).

7. See Delgado & Stefancic, *supra* note 1, at 1525.

8. JAMES BALDWIN, *NOTES OF A NATIVE SON* 6 (1955).

the past [that] adapts the image of ancient facts to the beliefs and spiritual needs of the present."⁹ By building a continuity with the past, memory does the work of laying the foundation for identity, on an individual and a cultural level.¹⁰ Halbwachs reasoned that

through its tradition a group colonizes the past by locating images of its values in a landscape of time, much as a nation-state colonizes a territory through the architecture with which it reshapes its topography. The most powerful group crowds out the traditions of competing groups, or reshapes them to conform to its own conceptions.¹¹

In this respect, memory, collectivized over a population, is the basis of cultural identity and social order.

Thus conceived, memory is to be distinguished from remembrance and from history. Rather than a reliable mental snapshot that we pull forth to accurately remind us of the past, memory is socially mediated as a present judgment about what to trust, emphasize, repress, or deny from our remembered past. Memory, as such, must be understood as a system of "organiz[ed] knowledge—of giving priority to some things, while consigning others to oblivion."¹²

Memory, understood as remembrance that is organized for present purposes, has a special character to it insofar as it operates as a live link to the past. It is dynamic and, as Pierre Nora has observed, "subject to the dialectic of remembering and forgetting, unconscious of the distortions to which it is subject, vulnerable in various ways to appropriation and manipulation, and capable of lying dormant for long periods of time only to be suddenly reawakened."¹³ In this respect, the past is always present as both conscious and unconscious memory that exerts enormous influence on our present actions and feelings and our future dreams and fears.

While there may be a present purpose to the shape of our memories, that purpose is by no means an entirely deliberate or conscious one. Yet, it is the vitality of memory, its vivacity, and the sense of it being "ours" that make

9. Barry Schwartz, *Iconography and Collective Memory: Lincoln's Image in the American Mind*, 32 *SOC. Q.* 301, 303 (1991) (citing MAURICE HALBWACHS, *LA TOPOGRAPHIE LÉGENDAIRE DES ÉVANGILES EN TERRE SAINTE* 7 (1941)).

10. "We preserve memories of each epoch in our lives, and these are continually reproduced; through them, as by a continual relationship, a sense of our identity is perpetuated." MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* 47 (Lewis A. Coser trans., 1992).

11. Patrick H. Hutton, *The Role of Memory in the Historiography of the French Revolution*, 30 *HIST. & THEORY* 56, 58 (1991).

12. Patrick H. Hutton, *Mnemonic Schemes in the New History of Memory*, 36 *HIST. & THEORY* 378, 381 (1997) (reviewing MATT K. MATSUDA, *THE MEMORY OF THE MODERN* (1996) and SIMON SCHAMA, *LANDSCAPE AND MEMORY* (1995)).

13. 1 PIERRE NORA, *REALMS OF MEMORY: RETHINKING THE FRENCH PAST* 3 (Arthur Goldhammer trans., 1996).

it so powerful and that render it so constitutive of identity—on the individual level, as well as on the cultural, social, and national levels.¹⁴ Describing how “[i]n our image of the Negro breathes the past we deny,”¹⁵ James Baldwin observed that “[t]he man does not remember the hand that struck him, the darkness that frightened him, as a child; nevertheless, the hand and the darkness remain with him, indivisible from himself forever, part of the passion that drives him wherever he thinks to take flight.”¹⁶ Similarly, with the familiar and determined demand to “Never Forget,” Jews insist that we retain both individual and collective *present* memory of the Nazi Holocaust. This demand is premised on the belief that the cultivation of a living memory of evil from the past will create a shield against its happening again.¹⁷ This move reduces events to mythic archetypes for present purposes, as part of what Peter Novick has recently described as “the management of Holocaust memory.”¹⁸

But the cultivation of collective memory can do more than provide a shield against the repetition of evil. The reiteration and sacralization of various founding myths or archetypal stories shape both memory and identity of both nations and peoples. “These ideas represent, if you will, the consciousness that society has of itself in its present situation. . . . The older they are, the stronger they will be; the greater the number of people and the more widespread the groups that have adopted them, the more potent these representations become.”¹⁹ The Declaration of Independence, the Bill of Rights, the Reconstruction Era amendments to the Constitution, and more recently, the U. S.

14. One of the most impressive instances of identity-based memory work pertains to the Pequot Indians' recent use of anthropologists to reconstruct authentic Pequot culture for descendants of this tribe who no longer remembered substantial aspects of their ancestors' tribal ways. These anthropologists were hired as memory workers to reconstruct and transform Pequot tribal history into present memory. Pequot identity, once revived, then formed the basis for the Pequot people's claim to gaming rights in Connecticut. See, e.g., Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 724–28 (1996). Pierre Nora discusses the way in which present identity is often “grafted onto and rooted in what went before.” 1 NORA, *supra* note 13, at 12.

15. BALDWIN, *supra* note 8, at 28.

16. *Id.* at 29.

17. This use of “Never Forget” in the service of “Never Again” has also animated some of the recent truth and reconciliation commissions that were designed to “preserve the memory of the victims, [so as to] promote a culture of mutual respect and observance of human rights.” Naomi Roht-Arriaza, *Overview*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 147, 158 (Naomi Roht-Arriaza ed., 1995) (quoting the Commission for the Historical Clarification of the Human Rights Violations and Violent Acts that Have Caused Suffering to the Guatemalan People), *cited in* Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 624 (1995).

18. Eva Hoffman, *The Uses of Hell*, N.Y. REV. BOOKS, Mar. 9, 2000, at 19, 22 (reviewing PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* (1999)).

19. HALBWACHS, *supra* note 10, at 183.

Supreme Court's decision in *Brown v. Board of Education*,²⁰ illustrate the degree to which

[s]ociety from time to time obligates people not just to reproduce in thought previous events of their lives, but also to touch them up, to shorten them, or to complete them so that, however convinced we are that our memories are exact, we give them a prestige that reality did not possess.²¹

For most racial and ethnic groups in the United States, the memory of “their” treatment in the past is relevant to the present insofar as it plays a fundamental role in the constitution of present group identity.²² For instance, a significant part of Jewish identity entails a sense of belonging to a religious/cultural group that suffered the horror of the Shoah. Similarly, the living memory of their people being subject to chattel slavery in the United States forms a central aspect, for many people, of what it means to be African American.²³ Indeed, the ritualized memory of ancestors’ escape from pogroms, famine, boat lifts, war, or political unrest performs an ongoing role in the present identity of many ethnic groups in the United States.²⁴ Self-knowledge is incomplete, or better yet, impossible without access to the memory of that historical injury. The challenge for Delgado and Stefancic, chroniclers of the past for present purposes, is to demonstrate how civil litigation can place both guilt and repentance at the center of a reconstituted collective memory in

20. 347 U.S. 483 (1954).

21. HALBWACHS, *supra* note 10, at 51.

22. Nora made a similar observation:

[The] “law of remembrance” has great coercive force: for the individual, the discovery of roots, of “belonging” to some group, becomes the source of identity, its true and hidden meaning. Belonging, in turn, becomes a total commitment. . . . The psychologization of memory makes each individual feel that his or her salvation ultimately depends on discharging a debt that can never be repaid.

1 NORA, *supra* note 13, at 11.

23. Indeed, some will go even further and make the argument that collective memory of past mistreatment is all that constitutes the group itself. More than a few members of the lesbian and gay community have wondered whether lesbian or gay identity is itself an artifact of the collective memory of historical homophobia. Anthony Appiah makes similar arguments with respect to the ontological integrity of African American identity—that it should be regarded as an epiphenomenon of racism itself. See K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUSNESS: THE POLITICAL MORALITY OF RACE* 32 (1996) (“[I]f we are to move beyond racism, we shall have, in the end, to move beyond current racial identities.”); see also PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 97–106 (2000).

24. In many respects, this mirrors Michael Novak’s idea of an ethnic group:

It is a group with historical memory, real or imaginary. . . . Ethnic memory is not a set of events remembered, but rather a set of instincts, feelings, intimacies, expectations, patterns of emotions and behavior; a sense of reality; a set of stories for individuals—and for the people as a whole—to live out.

MICHAEL NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS: POLITICS AND CULTURE IN THE SEVENTIES* 47–48 (1972).

such a way as to keep that memory alive as the justification for prospective relief.

If “[m]emory is always a phenomenon of the present, a bond tying us to the eternal present; [then] history is a representation of the past.”²⁵ History, unlike memory, is a representation of events now completed. “History . . . is the reconstruction, always problematic and incomplete, of what is no longer . . . History . . . calls for analysis and critical discourse.”²⁶ Historians provide a narrative coherence to the past; they string it together and organize it into topics, what some have referred to as “mnemonic reference points,”²⁷ such as wars or economic upheavals. This is not to say that history can boast any greater claim to objectivity than memory, but rather that history is self-consciously a story we tell about and coherence we give to a period or epic now over. History is behind us, memory lives on with us.

While these distinctions between history, memory, and remembrance gain far from a consensus among either historians or sociologists,²⁸ they provide some useful insights to assist in the evaluation of the normative force of Delgado and Stefancic’s project. It bears noting that while their research is quite vast and comprehensive, in the end it is marshaled in the service of a rather modest legal claim: Accepting that the diversity justification for affirmative action is a dead letter in U.S. constitutional law, they intend to provide the empirical documentation that will justify race-conscious educational policies as remediation for past discrimination. Framing their efforts here as a kind of “Brandeis Brief,”²⁹ they seek to make the case that endemic, persistent, and sweeping racial discrimination has characterized all stages in California’s evolution from the first westward expansion to the present day. In this respect, Delgado and Stefancic have undertaken an enormous project. But to bound this immense work in such a way that it is handed to a court as “California’s history of racial injustice,” is to risk its rejection on grounds of relevance. Rightly or wrongly, for the most part, history is not justiciable. Federal courts demand to be presented with live controversies, not stories from the past that might be illuminating but do not frame the particularized, present, and individualized

25. 1 NORA, *supra* note 13, at 3.

26. *Id.*

27. Hutton, *supra* note 12, at 382.

28. See Nathan Wachtel, *Memory and History: Introduction*, 2 HIST. & ANTHROPOLOGY 207, 211–17 (1986) (providing a critical perspective on the significance of Maurice Halbwachs’s theory of collective memory). The dedication of the Holocaust Memorial Museum in Washington, D.C. provided the occasion for much scholarship on the distinctions between individual memory, remembrance, and collective memory. For one interesting discussion of the evolution of the relationship between memory and history, see Leon Wieseltier, *After Memory: Reflections on the Holocaust Memorial Museum*, NEW REPUBLIC, May 3, 1993, at 16.

29. See Delgado & Stefancic, *supra* note 1, at 1527.

fault of a particular defendant that our legal system demands. Just as there is no such thing as group libel in the United States, so too, courts are loath to assert jurisdiction over diachronic, structural harm perpetrated against a "people." While advocates like Delgado and Stefancic may not agree with these rules of judicial engagement, the practical utility of their Brandeis Brief must be assessed according to these meager criteria.

The difficulty of this task is illustrated by the efforts that have been undertaken elsewhere to bring a society to terms with evil and injury from its own past. Ordinarily, national collective memory is comprised of a set of mythic stories told proudly about national heroes, momentous events, and founding and refounding moments, laid atop a complex system of repressed social dramas, horrors, and humiliating inconsistencies.³⁰ Notwithstanding a history of conquest, slavery, and structural discrimination, America is officially known to Americans as the land of the free and the home of the brave. We boldly send freedom fighters to defend democracy in Central America, and invade Kuwait to "keep freedom's light alive."³¹ Although virtually every modern nation was born of violence, conquest, or brutality, "[f]orgetting, I would even go so far as to say historical error, is a crucial factor in the creation of a nation, which is why progress in historical studies often constitutes a danger for [the principle] of nationality."³² Given the centrality of national pride to any notion of national identity and memory, Mark Osiel asks, "[I]s it possible, whether by legal judgment or other means, to construct group identity upon shared recollection of moral failure?"³³ Francis Fukuyama has questioned the degree to which "a national identity can be built on guilt and repentance, bereft of the ordinary pride of other nations."³⁴

Osiel demonstrates that those cultures that have seriously undertaken an accounting for their past evil have done so through what he describes as a clear break with the past.³⁵ War crimes prosecutions, truth and reconciliation

30. "[T]he essence of a nation is that all individuals have many things in common, and also that they have forgotten many things." Ernest Renan, *What is a Nation?*, in *NATION AND NARRATION* 8, 11 (Homi K. Bhabha ed., 1990). Recently authenticated stories about Thomas Jefferson's sexual liaisons with Sally Hemings represent one of these tragic moments of rupture when a long-repressed fact bursts forth to shatter collective memory. See, e.g., ANNETTE GORDON-REED, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* (1997); see also DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996) (provoking a similar disruption in Germans' collective sense of themselves).

31. Gaylord Shaw, *Bush Speaks Loudly, But Few Hear*, *NEWSDAY*, Aug. 30, 1990, at 15.

32. Renan, *supra* note 30, at 11 (alteration in original).

33. Osiel, *supra* note 17, at 588.

34. Francis Fukuyama, *The War of All Against All*, *N.Y. TIMES*, Apr. 10, 1994, § 7 (Book Review), at 7 (reviewing MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1994)).

35. See Osiel, *supra* note 17, at 588–623.

commissions, and similar public devices that provide the opportunity for a society to acknowledge guilt and to move on, do so by constructing a moment of rupture, a decisive break with a hideous past. At best, the concrete remedies these moments have enabled is the imprisonment of guilty individuals, reparations, or amnesty. These forms of cultural reckoning, if you will, are accomplished through a process by which the individual evildoers are lanced from the body politic. Once so purged, the culture moves forward, having been ritually cleansed of the guilt from the past national pride; pride that while wounded, nevertheless remains intact. Fukuyama is probably right that the people must persist in the belief of the nation's goodness. When confronted with moral failure, the badness can be isolated and excised through a kind of social disassociation that makes a "them" out of the "us" who threatened to disrupt our sanguine sense of collective identity.

In the end, the ugly stories from the past recounted by Delgado and Stefancic may not provide the jurisdictional predicate for ongoing affirmative remedies such as those that they seek through civil litigation. Civil litigation demands present, live injury and fault on the part of the parties and institutions named in the complaint—something the rupture cuts off because the misdeeds are treated as those that belong to a history now repudiated. As such, it seems that the sort of public reckoning they seek may not be amenable to civil litigation because the rupture with the past that enables a people to acknowledge moral failure necessarily relegates that failure to a period that has been broken off from the present. Inevitably, the moral reckoning that Delgado and Stefancic seek is accompanied by a kind of cultural disassociation that would render the dispute nonjusticiable.

Delgado and Stefancic's project can be understood as the present deployment of the past in the service of remedies in the future. As "memory workers,"³⁶ they seek to illuminate the degree to which the injuries of the past continue to be borne by the children of the present, such that the right to redress now and in the foreseeable future is justified by the ongoing victim status of African, Mexican, and Asian Americans living in California. By undertaking the work of modifying our collective memory of California's past, they link memory, identity formation, legitimacy, and moral order in such a way that they struggle to control the future by managing the past. However, the redress objectives of the Delgado and Stefancic Article may be best served by treating their project as management of memory rather than as documentation of history.

36. Iwona Irwin-Zarecka, *FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY* 67 (1994).

While history tells a story about who we were, of events now completed, memory provides the foundation upon which we build a present, temporal identity that reaches both forward and backward in time. Delgado and Stefancic's *California's Racial History* challenges us to know peoples of color in California as victims of an ongoing pattern of discrimination. This knowledge, grounded in an enhanced familiarity with California's racial past, then justifies a right to redress both in the present and in the future. The ignoble past of which they remind us is not one that should be relegated to a now foreclosed history, but rather dynamically persists in the lives of contemporary Californians of color.

If ethnic and racial memory plays such a significant role in shaping ethnic and racial identity, and in forming the normative justification for prospective affirmative amends to ethnic and racial minorities in California, then, of course, Delgado and Stefancic present us with a dilemma that resides in any such strategy of identity-based remediation. People of color are entitled to affirmative redress so long as their collective ethnic identities are comprised, at least in significant part, by their ongoing victim status. It is these "wounded attachments," or "states of injury," to borrow a frame from Wendy Brown,³⁷ that serve as the normative predicate for prospective relief in such a regime of rights. "[P]oliticized identity thus becomes attached to its own exclusion . . . because it is premised on this exclusion for its very existence as identity. . . . [I]t installs its pain over its unredeemed history in the very foundation of its political claim, in its demand for recognition as identity."³⁸ From this vantage point, Delgado and Stefancic risk constructing affirmative action as a *lieu de mémoire*, that is, as a symbolic site that ritualizes, commemorates, and overdetermines people of color as victims.³⁹ Memory shapes identity, identity shapes status, and from status are rights derived. Peter Novick's concerns about the role of the Holocaust in modern American Jewish identity presses a similar point: "[E]thnicity is seen as the main characteristic of social identity, historical catastrophe serves as the warrant of group legitimacy, and 'the status of victimhood' becomes proof of moral innocence and rectitude."⁴⁰

These sorts of strategies lay a trap: By naming and normalizing injury as status, it becomes difficult to imagine a future beyond that injury. "Politicized identity . . . can hold out no future—for itself or others—that triumphs over

37. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 52–76 (1995).

38. *Id.* at 73–74.

39. See 1 NORA, *supra* note 13, at 14–20. "[T]he fundamental purpose of a *lieux de mémoire* is to stop time, to inhibit forgetting, to fix a state of things, to immortalize death, and to materialize the immaterial (just as gold, they say, is the memory of money) . . ." *Id.* at 15.

40. Hoffman, *supra* note 18, at 22.

this pain.”⁴¹ Of course, Delgado and Stefancic encounter this trap largely because they choose to frame their project within the tiny window of equality left open by the Rehnquist Court. But there they are, nevertheless. The ongoing justification for prospective affirmative action resides in the persistent status of the injured parties as victims. Thus, ethnic and racial minorities are incentivized by such a regime of rights to structure past injury as presently constitutive. They trod into the future facing backwards with the eye of memory fixed on an inglorious and injurious past, dependent upon the prospective vitality of that past injury—always in sight and never to be forgotten—as the predicate for the ongoing payment of reparations. This backward-facing march into the future may be the only viable legal strategy the Supreme Court has left for us, but as marching orders for a progressive movement, its peril is rather obvious.

Maybe that is the best that we can do with the current state of affairs of rights. But it seems to me that if someone were to devote her intellectual and cultural resources to the project of amends, and she were invested in gaining an accounting for past injury, she might be inclined to invest as much capital in the construction of a revised collective memory of perpetrators as that of victims. The retelling of “our” stories of injustice necessarily entails the retelling of “their” tales of innocence. If the present identity and status of peoples of color is built on the injuries of the past, thus rendering them a class to whom a debt is owed, surely we should undertake the same project of (re)constructing the class who owes the debt. A demand for reparations that is grounded in a legacy of disadvantage may well be fortified by the illumination of the legacy of privilege that is its flip side.

II. RETURN OF THE NATIVE

Whereas Delgado and Stefancic seek amends for racial injustice as part of a larger project of building a “fair and just society”⁴² in which peoples of color are fully integrated into the dominant institutions of public and civil society *as citizens of the United States*, Tsosie has no such aspirations for her people—the Indian nations who continue to reside in what is now the United States. Rather, she makes the argument for reparations for Indians as part of a larger project of restoring Indian people to their rightful place within independent sovereign nations. Indeed, U.S. citizenship and inclusion within

41. BROWN, *supra* note 37, at 74.

42. Delgado & Stefancic, *supra* note 1, at 1614.

American culture is tantamount to genocide for native peoples, according to Tsosie.⁴³

Issues of identity and rights play as critical a role in Tsosie's project as they do for Delgado and Stefancic. For native peoples, treaties and the rights they engender are obligations sacred in nature on account of the political identity they presuppose. Tsosie seeks to distinguish a native, sovereign pre-conquest political identity for Indian nations, from the hybrid cultural identity asserted by Mexican American beneficiaries of the Treaty of Guadalupe Hidalgo. Whereas Indians possessed an intact independent political identity that enabled them to enter into various treaties with European colonists concerning claims to North American soil, the pedigree of Mexican Americans can be traced to the exchange of Mexican national identity for U.S. identity accomplished by these treaties. The Treaty of Guadalupe Hidalgo offered U.S. citizenship to former Mexican nationals residing in the territory that became part of the United States under that treaty, whereas Indians entered into treaties with the United States not in order to broker U.S. citizenship, but rather to manage the allocation of disputed claims to land between independent sovereign people—Indian nationals and U.S. nationals. Indians were the subjects of their treaties, whereas Mexican Americans were the objects of treaties entered into by other contracting parties on their behalf. After all is said and done, argues Tsosie, the treaties between the United States and Indian nations serve as evidence of the integral political identity of the Indian nations, while the treaties affecting Mexican Americans created or transformed their political identity by virtue of positive law.

Tsosie has offered a fascinating postcolonial account of the significance of treaty making to the different cultural and political identities of North American Indians and Mexican Americans. Tsosie contrasts the hybridity of Mexican Americans with the singular sovereign identity of Indians. An assimilation narrative lies at the heart of most American success stories, and by Tsosie's account, that holds true in many respects for Mexican Americans. But not so for Indians—at least this is what she wants to resist. U.S. citizenship, assimilation, and reservationizing of Indians have brought about the harshest of colonial annihilation of Indian peoples. The Indian of today is an abject simulacrum of the authentic precontact Indian whom Tsosie seeks to rehabilitate.

If Delgado and Stefancic risk the paradox of collapsing injury and identity, Tsosie has a different set of perils with which to contend. Surely we cannot return to the premodern period that serves as Tsosie's baseline of political integrity. What would intact *modern* indigenous cultures look like? How

43. See Tsosie, *supra* note 2, at 1657.

would we know we were looking at one? Does “modern” bear an oxymoronic relationship to “indigenous”? How is progress possible for indigenous peoples living as minorities among otherwise colonizing nations? How can the identity, practices, and internal norms of an indigenous group change over time in such a way that the group can claim stewardship over those changes—particularly when that group is culturally embedded within an imperialist nation?⁴⁴

The challenge for a project like Tsosie’s is to sidestep the pull of a self-Orientalizing impulse. That is, by insisting upon the authenticity of a pre-contact political identity, she runs the risk of fetishizing the primitive in such a way that conflates progress, cultural evolution, and change with assimilation, inauthenticity, and genocide. If the history of Indians in the postcontact era is one of cultural annihilation and forced denunciation of their “identity as the original inhabitants of lands,”⁴⁵ what would a modern Indian nation look like in the absence of this history? In many respects, the reparations move suggested by Tsosie risks stripping Indians of any history and freezing their political identity at some imagined moment prior to contact corruption. Only those vestiges of what is canonized as a classical set of political arrangements and values deserve to be owned as properly Indian.

Yet, this is exactly the move made by colonists who formed the subject of Edward Said’s Orientalism critique:

Renan had called the Semites an instance of arrested development, and functionally speaking this came to mean that for the Orientalist no modern Semite, however much he may have believed himself to be modern, could ever outdistance the organizing claims on him of his origins. This fundamental rule worked on the temporal and spatial levels together. No Semite advanced in time beyond the development

44. In this sense, the puzzle of identity with which Tsosie is struggling resembles that posed by Theseus’ ship:

The ship of Theseus is constructed of wooden planks. Over the years, some of the planks become worn and are replaced by new planks. Eventually, all the planks are replaced; nonetheless, we would not object to identifying the resulting ship as *the* ship of Theseus. Indeed, if someone were now to discover and reassemble the discarded planks into the original configuration, we would probably hesitate to declare the reassembled planks *the* ship. We might say that part of what it means to be the ship of Theseus today is to have come through the continuous experience of the past. Nevertheless, our linguistic practice leaves open the possibility that one might refer to either ship as the ship of Theseus. Whether we prefer one or the other depends upon the reason we have for caring about the ship of Theseus.

Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1859 n.13 (1997); see also ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 33 (1981) (explaining that each and every plank can be replaced and the ship remains the same, if the progression is gradual); 1 THOMAS HOBBS, *THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY* 136–37 (William Molesworth ed. & George Grote trans., Scientia Verlag Aalen 1966) (1655).

45. Tsosie, *supra* note 2, at 1639.

of a "classical" period; no Semite could ever shake loose the pastoral, desert environment of his tent and tribe. Every manifestation of actual "Semitic" life could be, and ought to be, referred back to the primitive explanatory category of "the Semitic."⁴⁶

Tsosie's challenge is to delineate a cultural political identity for Indians that is separate from, rather than subsumed under, U.S. identity, and to delineate that identity in such a way that distinguishes from a cultural imperialism by which "the dominant meanings of a society render the particular perspective of one's own group invisible at the same time as they stereotype one's group and mark it out as the Other."⁴⁷ David Theo Goldberg describes this Orientalizing gaze as one by which "[t]he Primitive assumed synonymy with the racial Other, a technical nomenclature for a popular category. . . . Formally, primitive societies were theorized in binary differentiation from a civilized order [T]he Civilized have a history, but the Primitive have none: their histories are frozen."⁴⁸

According to what standard or set of criteria can one differentiate the imperialist stereotype from the native truth? How can Tsosie stake out an Indian identity that is "other-than" European culture, yet not "Other" in the way Young and Goldberg use the term as epithet?

CONCLUSION

Whereas Delgado and Stefancic aspire to manage memory in such a way that the past is connected to the present by an unbroken filament that illuminates the present in constructive ways, Tsosie seeks to short circuit a sort of "middle passage" that was corrupted by imperialism and jump back to a premodern time when Indians were truly sovereign of their own destinies. But Tsosie's act of imagination can lay no greater claim to authenticity than any other. There is no winning a contest that is set up in such a way that precolonial truth is the only weapon by which one can vanquish the inauthenticity of imperialism.

Of course we must refuse the terms of such a duel, because the only way we know precontact political identity is as it has been passed on through the

46. EDWARD W. SAID, *ORIENTALISM* 234 (1979); see also Eugenio Abellera Cruz, Note, *Unprotected Identities: Recognizing Cultural Ethnic Divergence in Interpreting Title VII's 'National Origin' Classification*, 9 HASTINGS WOMEN'S L.J. 161, 185 n.141 (1998) ("[T]his process can be analogized to the European colonial experience which involved constructing a primitive 'other' which allowed the 'West' to define a contrasting identity as 'progressive,' which was then used to justify colonialism and imperialism.").

47. Tsosie, *supra* note 2, at 1656 (quoting IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 58 (1990)).

48. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 156-57 (1993) (footnote omitted).

years as managed remembrance or collective memory. That chain of custody of our pasts is all we have when it comes to constructing collective and individual identities—we either ignore it or hold it with a death grip at our peril. Yet, while memory creates an emotional and epistemic link to our pasts, the normative projects these authors have undertaken demand a critical analysis that memory alone does not offer.

No doubt the key to Indian sovereignty on the one hand, and ethnic and racial justice in California on the other, lies somewhere in between the surgical removal of imperialist injury that underlies Tsosie's project, and the permanent grafting of that injury onto ethnic identity that Delgado and Stefancic offer. These two papers make tremendous contributions to the project of understanding race at the end of the twentieth century. They do so not only for the contributions they make to what we know about our racial past, but also for the tough questions they suggest in the telling.