

1995

## Urban Despair and Nietzsche's "Eternal Return:" From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights

Barbara Stark

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Barbara Stark, Urban Despair and Nietzsche's "Eternal Return:" From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights, 28 *Vanderbilt Law Review* 185 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol28/iss2/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# VANDERBILT JOURNAL OF TRANSNATIONAL LAW

---

---

VOLUME 28

MARCH 1995

NUMBER 2

---

---

## Urban Despair and Nietzsche's "Eternal Return:" From the Municipal<sup>1</sup> Rhetoric of Economic Justice to the International Law of Economic Rights

*Barbara Stark\**

### ABSTRACT

*Urban poverty has had a devastating impact, especially on African Americans in the United States, who have been ill-served by the rhetoric of opportunity. In this Article, the author argues that economic rights must be recognized as rights if the urban poor are even to dream of economic justice. The author uses the writings of German philosopher Friedrich Nietzsche to explain how the past can be reclaimed. Urban poverty must be understood in an historical context. Limiting*

---

\*Copyright 1995, Barbara Stark. Associate Professor, University of Tennessee College of Law. B.A. Cornell; J.D. New York University; LL.M. Columbia. Thanks to Fran Ansley, Dwight Aarons, Judy Cornett, Tom Davies, Patrick Hardin, and Dean Rivkin for their thoughtful comments, to Milton Klein for historical reference materials, and to Werner Dannhauser for an unforgettable introduction to Nietzsche. I also gratefully acknowledge the helpful research of Susanne Bales, Ruth Buch, Philip Burnett, and Evelyn Stark, the diligent secretarial assistance of Katrina Bowman, and the generous support of the University of Tennessee, the College of Law, the Lewis, King, Kreig & Waldrop Fund, and the Carden Research Fund.

1. Throughout this Article, the term "municipal" refers both to city, as it is used in United States domestic law, and to nation, as it is used in international law. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 43 (6th ed. 1987).

*the inquiry to a domestic historical context not only blinds people to the relationship between domestic and international poverty, and domestic and international racism, but also keeps us from building on the hard work already done and the hard-won progress already made in international human rights law.*

TABLE OF CONTENTS

I.	INTRODUCTION.....	186
II.	OPPORTUNITY AND AMERICAN CITIES .....	198
III.	NIETZSCHE'S "ETERNAL RETURN".....	207
IV.	THE INTERNATIONAL BILL OF RIGHTS .....	214
	A. <i>Human Rights and Civil Rights in the 1950s.</i>	215
	B. <i>Human Rights and Economic Rights in the 1960s</i> .....	218
	C. <i>Human Rights After the Cold War</i> .....	226
V.	CONCLUSION.....	234

*A closed window looks down  
on a dirty courtyard, and black people  
call across or scream across or walk across  
defying physics in the stream of their will*

*Amiri Baraka<sup>2</sup>*

I. INTRODUCTION

There is not much consensus on what causes the "paradox of poverty in a wealthy nation,"<sup>3</sup> but there is no question about the persistence and devastating impact of urban poverty, especially on African-Americans in the United States.<sup>4</sup> Not since 1965 have

2. Amiri Baraka, *Ka 'Ba*, in 2 HEATH ANTHOLOGY OF AMERICAN LITERATURE 2451 (1990).

3. THE URBAN UNDERCLASS v (Christopher Jencks & Paul E. Peterson eds., 1991) [hereinafter THE URBAN UNDERCLASS].

4. Although most of the poor are not African-American, African-Americans are disproportionately represented among the poor. Moreover, because of the combined impact of class and race segregation, poor African-Americans are effectively denied access to the public amenities available to poor whites. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) [hereinafter AMERICAN APARTHEID]. In this Article, ghetto refers to inner-city neighborhoods with poverty rates of 40% or more. NATIONAL RESEARCH COUNCIL, INNER-CITY POVERTY IN THE UNITED STATES 1 (1990) [hereinafter INNER-CITY POVERTY] ("[N]early two-thirds of

so many Americans<sup>5</sup> lived in poverty and "more than 75% of this growing poverty population is concentrated in central cities and inner-ring suburbs."<sup>6</sup> Many of these poor Americans live in unsafe housing in decimated neighborhoods. Infant mortality rates, life spans, and health problems of poor urban Americans

ghetto poor are black, and most of the rest are Hispanic."). *Id.*; accord David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 408 (1994) (book review) ("Poor African Americans are disproportionately concentrated in high-poverty neighborhoods plagued by poor infrastructure, inferior schools, large numbers of single-parent families, and high exposures to crime and physical violence.").

The economic rights considered in this Article are not explicitly race-targeted in part to include poor whites who still constitute the majority of the poor in the United States. *Cf.* Michael H. Schill, *Race, the Underclass and Public Policy*, 19 LAW & SOC. INQUIRY 433, 443 (1994) (book review) (describing William Julius Wilson's focus on policies that are not race-targeted). It is nonetheless part of this Article's thesis that economic rights are politically and historically grounded in the experience of race. *See infra* notes 121-26 and accompanying text. *See generally*, Robert Greenstein, *Universal and Targeted Approaches to Relieving Poverty: An Alternative View*, in THE URBAN UNDERCLASS, *supra* note 3, at 437.

5. The term "Americans" as used here denotes "our common usurpation for the inhabitants of the United States." LOUIS HENKIN, THE AGE OF RIGHTS x (1990) [hereinafter THE AGE OF RIGHTS].

6. Henry G. Cisneros, *Focus on: Urban America - Introduction*, 12 YALE L. & POLY REV. 1 (1994). *Cf.* Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, in THE URBAN UNDERCLASS, *supra* note 3, at 3, 23-24 [hereinafter Peterson, *Poverty Paradox*]:

The extent to which ghettoization is occurring varies dramatically among regions. Most of the increases in the population living in extremely poor neighborhoods between 1970 and 1980 occurred in just five cities—New York, Chicago, Philadelphia, Newark, and Detroit. . . . Any theory that promises to explain the connection between the poverty paradox and the urban underclass must apply more widely than just to places where poverty is extremely concentrated. Such a theory . . . needs to focus on three facets of contemporary life that Wilson and others have identified as critical—the increasing numbers of female-headed households, the declining earning and labor force participation of young men from minority backgrounds, and the shift in poverty from rural areas to central cities.

*See also*, Robert Pear, *Poverty 1993: Bigger, Deeper, Younger, Getting Worse*, N.Y. TIMES, Oct. 10, 1993, at D5 (citing Census Bureau Report of increase in poverty in spite of the end of the latest recession). "A person working 30 hours a week and getting twice the minimum wage still does not earn enough to keep a family of four above the official poverty level, which last year was \$14,335." *Id.* In 1992, 14.5% of the population and 21.9% of the children under 18 were poor. *Id.* "The population of extreme poverty tracts [in which 40% or more of the population is at or below the poverty level] increased from 2.7 million in 1970 to 3.8 million in 1980 and 5.5 million in 1990." Schill, *supra* note 4, at 435 n.12.

are often closer to those of the Third World than to other industrialized Western states.<sup>7</sup>

---

7. See, e.g., PATRICIA A. EBENER ET AL., *SUBSTANCE ABUSE PROBLEMS AND PROGRAMS IN NEWARK: A NEEDS ASSESSMENT FOR NEWARK'S FIGHTING BACK INITIATIVE* xiv-xv (1993):

Newark has one of the highest crime rates per capita in the country, with 14,331 index offenses per 100,000 population reported in 1989, compared to a national average of 5,741 (index offenses include murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, and motor-vehicle theft). . . .

According to 1980 census data, 25 percent of all births in Newark were to mothers under 20 years old. This is the highest rate of young mothers among the major cities in the country.

Among all the cities in New Jersey, Newark has the highest number of infant, neonatal and postneonatal deaths; the highest number of low-birthweight babies and births to adolescents; the highest number of adult and pediatric AIDS cases; and the highest number of syphilis, gonorrhea, and clinically active tuberculosis cases.

In sum, it is clear, through any combination of economic, social, and health status indicators that Newark ranks as one of the most troubled communities in the country.

Cf. Fred R. Harris, *The American Negro Today*, 10 WM. & MARY L. REV. 550, 571 (1969) (noting that the gap between white and non-white income had grown larger between 1947 and 1966):

Less income means, among other things, poorer housing and poorer health. Negroes are three times as likely as whites to live in dilapidated and deteriorating housing. They are twice as likely to have tuberculosis, and their average life expectancy is 7.2 years shorter. Maternal mortality is four times as high for Negroes as for whites, and the likelihood of a child dying between the age of one month and one year is close to three times as great for Negroes.

*Id.* But see MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 1-2 (1962):

To be sure, the other America is not impoverished in the same sense as those poor nations where millions cling to hunger as a defense against starvation. . . . That does not change the fact that tens of millions of Americans are . . . maimed in body and spirit, existing at levels beneath those necessary for human decency. If these people are not starving, they are hungry, and sometimes fat with hunger, for that is what cheap foods do. They are without adequate housing and education and medical care.

*Id.*

Concrete examples from sociological studies, census reports, and newspapers are offered throughout these footnotes, less as authority for some general proposition than because "[t]he technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so." Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

There is a similar lack of consensus regarding remedies, but it seems increasingly clear that there is no single solution, no "silver bullet,"<sup>8</sup> and no reasonable hope for a quick fix to urban poverty. Rather, the problems of the urban poor demand long-term economic and social commitments, as well as some reliable method to generate, support, and enforce these commitments. These problems demand both the legal clout associated with rights<sup>9</sup> and the flexibility associated with more context-sensitive, problem-solving approaches.<sup>10</sup> In short, the problems of urban poverty require laws assuring broadly defined economic rights, including basic rights to shelter,<sup>11</sup> food,<sup>12</sup> and health care.<sup>13</sup>

8. Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993). Cf. Hubert H. Humphrey, *Foreword to Symposium, The Urban Crisis*, 10 WM. & MARY L. REV. 541 (1969) ("The last several years have revealed that no single approach is adequate for dealing with the highly complex and interrelated factors which, in their totality, comprise the urban crisis.").

9. Rights "trump," in Ronald Dworkin's oft-cited phrase. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

10. These include methods of alternative dispute resolution, which had their genesis in international law. See, e.g., ROGER FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969); ROGER FISHER & WILLIAM J. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); *INTERNATIONAL MEDIATION IN THEORY AND PRACTICE* (Saadia Touval & I. William Zartman eds., 1985).

11. See generally *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d. 713 (N.J. 1975) [hereinafter *Mt. Laurel I*]; *Southern Burlington County, NAACP v. Township of Mt. Laurel*, 456 A.2d. 390 (N.J. 1983) [hereinafter *Mt. Laurel II*] and *Hills Dev. Co. v. Township of Bernards*, 510 A.2d. 621 (N.J. 1986) [hereinafter *Mt. Laurel III*]. In *Mt. Laurel I*, the New Jersey Supreme Court held that growing municipalities have an obligation to provide a "realistic opportunity" for low and moderate income housing. 336 A.2d. at 724. Having worked on the *Mt. Laurel* litigation as a staff attorney in the Rutgers Constitutional Litigation Clinic from 1986-1989 convinced me of both the potential impact of economic rights and the difficulty of relying exclusively on domestic law to implement such rights. As Michael Schill has noted, *Mt. Laurel I* "was the first and thus far only exclusionary zoning case to explicitly adopt the spatial mismatch hypothesis and embrace the principle of deconcentration." Schill, *supra* note 4, at 449 n.80. See Martha Lamer et al., *Mt. Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197 (1989). For an insightful inquiry into the interaction between Title VIII of the 1968 Civil Rights Act and the *Mt. Laurel* cases, see John M. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?* 6 YALE L. & POLY REV. 361 (1988).

12. See generally *THE RIGHT TO FOOD* (Philip Alston & Katarina Tomasevski eds., 1984); Christine Chinkin & Shelley Wright, *The Hunger Trap: Women, Food, and Self-Determination*, 14 MICH. J. INT'L L. 262 (1993).

13. See generally 1 HEALTH & HUM. RTS. (1994). This new journal is published by the Harvard School of Public Health. The inaugural issue includes: Virginia Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24 (1994); and Lucie Bernier, *A Selected Bibliography of Human Rights and the Right to Health*, 1 HEALTH & HUM. RTS. 110 (1994).

Economic rights are necessary, though not sufficient,<sup>14</sup> if the urban poor are even to dream of economic justice.<sup>15</sup> Without such law, the hopeful rhetoric of "challenge"<sup>16</sup> and "empowerment" becomes a cruel parody of the "streets-paved-with-gold" rhetoric of opportunity<sup>17</sup> that lured the parents and grandparents of today's urban poor to the cities. Whatever else is

---

14. "The use of [human rights] terminology is inherently empowering and provides an important element of legitimacy and validation to the claims of those whose rights remain unrealized." Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 155 (Louis Henkin & John Lawrence Hargrove eds., 1994) [hereinafter Alston, in AGENDA FOR THE NEXT CENTURY].

15. Most commentators assume some level of support, regional or national, as a pre-condition for the survival of the cities. See, e.g., Peter A. Buchsbaum, *Urban Policy: The New Wave*, 26 URB. LAW. 249 (1994):

Clearly, cities themselves are not going to be raising new funds to support additional social programs. Just as clearly, the size of urban bureaucracies will shrink. Instead, local urban policy debates will consist of better methods for apprehending and punishing criminals and reforming (i.e., toughening) welfare programs through measures which a few years ago would have been deemed cruel and inhuman, such as cutting off welfare payments to AFDC mothers who have additional children out of wedlock . . . [C]ities have lost control of their destiny to an extent unimaginable a dozen years ago. Certainly, cities are no longer economically self-sufficient.

*Id.* at 250.

16. Cf. Humphrey, *supra* note 8, at 541 (using same language twenty-five years ago).

17. See Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: 'A Miracle for Breakfast'*, 33 VA. J. INT'L L. 433 (1993) [hereinafter Stark, *Postmodern Rhetoric*]. See also Brent Staples, *The Cruellest Game*, N.Y. TIMES BK. REV. Nov. 13, 1994, at 1 (quoting DAREY FREY, *THE LAST SHOT: CITY STREETS, BASKETBALL DREAMS* (1994)):

Which makes this process of playing for a scholarship not the black version of the American dream, as I had thought eight months earlier, but a cruel parody of it. In the classic parable you begin with nothing and slowly accrue your riches through hard work in a system designed to help those who help themselves. Here, at 17 years of age, you begin with nothing but one narrow, treacherous path and then run a gantlet of obstacles that merely reminds you of how little you have: recruiters pass themselves off as father figures, standardized tests humiliate you and reveal the wretchedness of your education, the promise of lucrative N.B.A. contracts reminds you of what it feels like to have nothing in this world.

*Id.* at 67.

needed—"vision"<sup>18</sup> or concrete proposals,<sup>19</sup> neighborhood<sup>20</sup> or federal programs<sup>21</sup>—it must be grounded in the bedrock of economic rights.<sup>22</sup>

18. See, e.g., Tom Redburn, *In Search of a Vision for the City of the '90's*, N.Y. TIMES, July 31, 1994, at E4 ("But something has also been lost from what passes these days for the art of urban planning. . . . [A] vision of the future of the big city."). But see Dennis W. Archer, *Challenges Facing Urban America*, 26 URB. LAW 187, 190 (1994). Mr. Archer, Mayor of the City of Detroit, stated: "But I submit to you that the number one issue . . . is our desire to create jobs and economic development, to put our people back to work, and to bring our people up and out of poverty." *Id.* Cf. Martha C. Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 TEX. L. REV. 1019, 1028 (1992) [hereinafter Nussbaum, *Aristotle, Feminism*]. "Aristotelian feminism . . . becomes a branch of the larger critique of poverty, oppression, inequality, and the frustration of capability in the lives of human beings the world over." *Id.*

19. See, e.g., DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992) (advocating entrepreneurial government which focuses on results, decentralizes authority, diminishes bureaucracy and encourages competition). Cf. Peterson, *Poverty Paradox*, *supra* note 6, at 25: "If the civil rights movement wants to shed its middle class bias and address the critical problems of the poor that became of increasing concern to Martin Luther King, it should make educational choice for urban residents and an integrated welfare system its most important concerns." *Id.*

20. See David E. Rosenbaum, *Concern, Cash, But Not Accord on Urban Woes*, N.Y. TIMES, May 10, 1992, at A1 (despite continuing absence of consensus among politicians and academics about "the best ways to lift people out of poverty," locally organized "[programs which] might not be applicable nationwide" are "bright spots."). See also Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 863 (1990). "Rather than dictating single, authoritative meaning to a passive audience, Kelly seems to invite readers to bring their own creativity into an open-ended, deeply pluralistic project of 'authorship' of our constitutional norms." *Id.*

21. See, e.g., Senator David L. Boren, *A Modern WPA: A Proposal to Empower Our People and Rebuild Our Country*, 11 YALE L. & POL'Y REV. 232 (1993). See generally THERESA FUNICIELLO, *THE TYRANNY OF KINDNESS: DISMANTLING THE WELFARE SYSTEM TO END POVERTY IN AMERICA* (1993); Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235; Symposium, *Welfare Law*, 26 U. MICH. J.L. REF. 731 (1993); *14th Annual Review of Poverty Law*, 27 CLEARINGHOUSE REV. 979 (1994); *After the Nation State: Reinventing Democracy*, 9 NEW PERSP. Q. 4, 6 (Fall 1992) (Interview with Michael Sandel). "Any agenda for revitalized self-government and the effective empowerment of smaller-scale communities must contain the devolution of power to smaller units and the universalization of rights on a *supra*-national level." *Id.*

22. NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* 151-52 (1989):

[S]ocial insurance schemes position recipients primarily as *rights-bearers*. . . . [who] are in the main not stigmatized. Neither administrative practice nor popular discourse constitutes them as "on the dole." They are constituted rather as receiving what they deserve; what they, in "partnership" with their employers, have already "paid in" for; what they,



The purpose of this Article is not to justify economic rights, philosophically or morally. To the extent such justification can be provided, it has been done and done ably.<sup>23</sup> Nor will this Article explain the advantages of rights discourse in this context, why the poor should, in Professor Sylvia Law's words, "prefer the harder edge of rights to the hope that others whose lives are very different will be able to empathize with them."<sup>24</sup> These arguments

therefore, have a *right to* . . . [With] relief programs, such as AFDC, food stamps, medicaid, and public-housing assistance . . . recipients are defined as "beneficiaries of government largess" or "clients of public charity." Indeed, the only sense in which the category of rights is relevant to these clients' situation is the somewhat dubious one according to which they are entitled to treatment governed by the standards of formal bureaucratic procedural rationality.

Cf. Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1423 (1993) (explaining how "[economic security devices] contribute directly to the poverty of women and children, and disproportionately disadvantage people of color").

See generally Alston in AGENDA FOR THE NEXT CENTURY, *supra* note 14, at 137-38 (criticizing the common use of the phrase "socioeconomic rights" in the United States and insisting on the phrase "economic and social rights").

23. See, e.g., HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* ix (1980) (describing and defending "the moral minimum—about the lower limits on tolerable human conduct, individual and institutional"); FRASER, *supra* note 22. Several imminent United States legal scholars have tried to ground economic rights in the United States Constitution. See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986) (discussing "the derivation of a constitutional right to a decent material basis for life"); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) ("[m]inimum protections for the necessities of life . . . are pre-conditions for civic republican citizenship"). For a concise account of the futile efforts in the 1960s and 1970s to ground economic rights in the United States Constitution, see Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 886 (1989) [hereinafter Neuborne, *State Constitutions*]. See also Mary E. Becker, *Politics, Difference and Economic Rights*, 1989 U. CHI. LEGAL F. 169 [hereinafter Becker, *Politics, Differences and Economic Rights*]. For a persuasive argument that the political process has not worked for the poor, see Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1309 (1993).

It is settled, in fact, that economic rights are not protected under any provision in the United States Constitution. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (no right to sleep in public places); *Harris v. McRae*, 448 U.S. 297 (1980) (no right to medicaid funding for abortion); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972) (no right to housing). See also Lynn A. Baker, *The Myth of the American Welfare State*, 9 YALE L. & POL'Y REV. 110 (1991) (book review).

24. Sylvia A. Law, *Some Reflections on Goldberg and Kelly of Twenty Years*, 25 BROOK. L. REV. 805, 816 (1990). Accord Nussbaum, *Aristotle, Feminism*, *supra* note 18, at 1027. Cf. Catharine W. Hantzis, *Kingsfield and Kennedy*:

are widely, if not universally, accepted.<sup>25</sup> Almost everyone would agree that certain basic rights should be assured, at least for certain populations.<sup>26</sup> No one condemns Head Start or Medicaid on philosophical or moral grounds.<sup>27</sup> While the limits of rights discourse continue to inspire a fresh, bold jurisprudence<sup>28</sup>—much

*Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 161 (1988). "To call rights talk empty rhetoric and to blame it for legitimating an oppressive ideology is to belittle the experience of people for whom rights have played an important role both in the transformation of their own consciousness and in their assertion of claims upon the system." *Id.*

25. As philosopher Charles Taylor notes, "We are all universalists now about respect for life and integrity. [W]e believe it would be utterly wrong and unfounded to draw the boundaries any narrower than around the whole human race." CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 6-7 (1989) [hereinafter *SOURCES OF THE SELF*].

26. *But see, e.g.*, Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201; Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17 (1992). Although most scholars agree that certain rights should be protected, this consensus does not mean that there is agreement as to how such rights should be assured, or which populations should be protected, or that such a consensus will be easy to achieve. As Professor Alston has noted, the recognition of economic rights as rights "is not to say that there is not enormous room for debate as to the best policies for achieving the desired objectives, but simply that the objectives themselves are not open to refutation on economic rationalist or other grounds." Alston, in *AGENDA FOR THE NEXT CENTURY*, *supra* note 14, at 154.

27. Some conservatives, however, have suggested that Head Start may be a waste of money. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 414-15 (1994). *See generally* PAT SHIPMAN, *THE EVOLUTION OF RACISM: HUMAN DIFFERENCES AND THE USE AND ABUSE OF SCIENCE* (1994).

Most criticism of these programs focuses on their cost or their efficacy, rather than the legitimacy of the needs they address. Even the 1994 class of newly-elected Republicans, who are eager to dismantle the welfare state; concede the validity of basic entitlements. They implicitly agree, for example, that the needs of inner-city children cannot be adequately met by their mothers' AFDC stipends. Their solution, paradoxically, is to expand entitlement programs by establishing group homes, which they quaintly call orphanages. *See generally* Todd S. Purdum, *First Lady Assails Orphanage Plan*, N.Y. TIMES, Dec. 1, 1994, at A1 (dismissing as "absurd" the "idea of putting children into orphanages because their mothers couldn't find jobs").

28. Work focusing on the limits of rights discourse with respect to vulnerable populations, including those considered here, includes that of critical race theorists, such as Charles Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Fran Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991) [hereinafter Ansley, *Race and the Core Curriculum*]; Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251 (1990); Barbara J. Flagg, "Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent", 91 MICH. L. REV. 953 (1993) [hereinafter Flagg, "Was Blind, But Now I See"]; feminists such as Mary Becker, *The Politics of Women's Wrongs and the Bill of Rights: A Bicentennial*

of it focused precisely on the need to reconceptualize the rights considered here—the fundamental usefulness of rights talk for the vulnerable is beyond dispute. As Professor Patricia Williams has observed: “For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one’s status from human body to social being.”<sup>29</sup>

Few scholars in the United States legal community really care about the philosophical, moral, or jurisprudential underpinnings of economic rights. Even those most concerned with economic justice generally avoid them.<sup>30</sup> Economic rights are considered too marginal—too alien to United States culture and too remote

*Perspective*, 59 U. CHI. L. REV. 453 (1992); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); and postmodernists such as Martha C. Nussbaum, Pierre Schlag, and Steven L. Winter, in Symposium, *Human Values in a Post-Modern World*, 6 YALE J.L. & HUM. (1994); Joan Williams, *Dissolving the Sameness/Difference Debate: A Postmodern Path Beyond Essentialism in Feminism and Critical Race Theory*, 1991 DUKE L.J. 296. For a classic example, see Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

Clinicians working with students to serve the legal needs of the poor have addressed the issue concretely, grappling with questions of client narrative, autonomy and subordination. See, e.g., Lucie E. White, *No Exit: Rethinking “Welfare Dependency” From a Different Ground*, 81 GEO. L.J. 1961 (1993); *Theoretics of Practice: The Integration of Progressive Thought and Action: Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 717 (1992); Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); see also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); *infra* notes 49-61 and accompanying text (urban rhetoric of the 1960s); *infra* notes 122-27 and accompanying text (international rhetoric of the 1960s). See generally MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1986).

29. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 153 (1991). See also Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1420, 1426 (1991) (“demonstrat[ing] the advantages of a discourse that combines elements of racial quality and privacy theories in advocating the reproductive rights of women of color”). But see Symposium, *A Critique of Rights*, 62 TEX. L. REV. 1361 (1984).

30. There are notable exceptions, including those scholars who have tried to ground economic rights in the United States Constitution. See *supra* note 23. See also Bert Lockwood, *The Economic Brown*, in WORLD JUSTICE: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 149 (Mark Gibney ed., 1991); Steven Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, in NEW DIRECTIONS IN HUMAN RIGHTS 109 (Ellen L. Lutz et al. eds., 1989); Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471 (1994).

from United States law<sup>31</sup>—to be taken seriously.<sup>32</sup> This Article will show that notwithstanding this perception, the United States has in fact already adopted economic rights law.<sup>33</sup> This Article will then explain how the urban poor can claim this law as their own.<sup>34</sup> Next, the Article will explain why the legal community

---

31. The taint accompanying these rights is also attributable in part to the lingering effects of McCarthyism, including the erasure of a generation whose work might otherwise have built the United States economy. See *infra* notes 133-35 and accompanying text.

32. As Mary Ann Glendon has noted, "We cannot, nor would most of us wish to, import some other country's language of rights. Nor can we invent a new rhetoric of rights out of whole cloth." GLENDON, *supra* note 28, at xii. Professor Glendon suggests, however, that "Americans do possess several indigenous languages of relationship and responsibility that could help to refine our language of rights." *Id.* Similarly, economic rights are in fact relatively well-entrenched in the United States, at least on the state level. See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79 (1992) [hereinafter Stark, *Economic Rights in the United States*]. Additionally, postmodern fragmentation of the rhetoric of opportunity has transformed ideas of economic rights in the United States. See Stark, *Postmodern Rhetoric, supra* note 17.

33. This statement refers to actual legal instruments signed by the United States, see *infra* notes 117-21 and accompanying text. However, these legal instruments have not yet been relied upon in United States courts. Thus the statement does not rely on the state constitutional protections and federal legislation that have already generated substantial litigation. The United States has long been a welfare state, albeit an ineffectual one. THE AGE OF RIGHTS, *supra* note 5, at 153. Cf. Stanley K. Sheinbaum, *Just Think . . .*, 11 NEW PERSP. Q. 64 (Spring 1994) (letter to Secretary of Labor, Robert Reich). "For the last three or four decades or so, any talk of income redistribution—or even softer phrases—has been simply ruled out." *Id.* Reich responded: "The problem with talking about any of this in terms of class is, simply, that Americans don't want to talk about class. Never have. . . . Our rhetoric is a classless one, and the nation has emphatically chosen thus." *Id.*

34. Many of the urban poor may have little interest in claiming economic rights law, preferring instead any available form of exit. See Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, § 6 (Magazine) at 27 [hereinafter *The Myth of Community Development*]; accord CORNEL WEST, RACE MATTERS 14 (1993). For many of the urban poor, however, this law is probably the most constructive option. See Andrew Hacker, *'Diversity' and Its Dangers*, N.Y. REV., Oct. 7, 1993, at 21, 23:

[A]lthough poor whites live apart from poor blacks, the neighborhoods in which both groups live have high out of wedlock rates, and schools with low achievement records. However, once whites rise to middle income levels they can and do move to neighborhoods where the rates and scores are discernibly different. It is also true that blacks who better themselves can leave the very worst sections. But because black families have far less freedom when it comes to choosing where they might move, the places they can find are still subject to the kinds of problems they had hoped to escape.

*Id.*

should take economic rights seriously in the 1990s. First, economic rights pick up where civil rights left off. Second, the major obstacle to the recognition of these rights disappeared along with the Soviet Union.<sup>35</sup> Finally, but crucially, even middle-class Americans increasing feel the need for a dependable safety net.<sup>36</sup>

Part II of this Article explains how the rhetoric of opportunity contributed to the growth of United States cities, even as it suppressed economic rights. It describes the racist assumptions of the rhetoric and the relentless cycles of hope and despair to which the urban poor have been subjected, especially African-Americans, for much of this century.

Part III describes Friedrich Nietzsche's doctrine of "eternal return," which urges the abandonment of hope in favor of the most profound despair. Nietzsche insists, paradoxically, that abandoning hope is the only way despair can be overcome.<sup>37</sup> Part

35. See *infra* text accompanying notes 154-67.

36. Louis Uchitelle, *Insecurity Forever: The Rise of the Losing Class*, N.Y. TIMES, Nov. 20, 1994, at E1 (opinion polls show that "Americans are increasingly angry about their economic insecurity"); Michael Wines, *Taxpayers Are Angry, They're Expensive, Too*, N.Y. TIMES, Nov. 20, 1994, at E5. "[P]ayments to the poor add up to less than the three largest tax breaks that benefit the middle class and wealthy: deductions for retirement plans, the deduction for home mortgage interest and the exemption of health-insurance premiums that companies pay for their employees." *Id.* See generally BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS (1989).

The tension between the need for a dependable safety net and Americans' continuing unwillingness to pay for it has already generated important litigation and will undoubtedly generate more. See, e.g., Joseph F. Sullivan, *New Jersey Plans to Cut Payments for Medicaid 20%*, N.Y. TIMES, Nov. 23, 1994, at A1 (anticipating legal battle over New Jersey's plan to cut payments to hospitals).

37. This Article does not rely on Nietzsche as authority for a dubious philosophical argument, as Brian Leiter claims legal scholars do. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUM. 79, 92 (1992). Rather, it relies on Nietzsche for the power of his parable, which describes the exhausting cycle of despair, the almost inconceivable effort required to overcome it ("defying physics in the stream of their will"), and finally, critically, the possibility of thereby reclaiming the past.

Using Nietzsche in this context may be seen as part of the deconstructionist project of "liberating a text from its author." See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 772-77 (1987) [hereinafter Balkin, *Deconstructive Practice*]. Although Nietzsche would surely condemn the use to which this Article puts his work, this use illustrates the possibility of reclaiming the past by reconceptualizing it. To put it another way, even Nietzsche's work can be expropriated. Nonetheless, the Author fully appreciates—and intends—"the irony of invoking Nietzsche here—the Nietzsche who presents himself as the merciless critic of . . . socialism." Leiter, *supra*, at 90.

Whether Nietzsche himself intended such expropriation remains an open question. See generally NIETZSCHE AS POSTMODERNIST: ESSAYS PRO AND CONTRA (Clayton Loelb ed., 1990) [hereinafter NIETZSCHE AS POSTMODERNIST]. Nietzsche

IV explains how the eternal return makes it possible to understand the urban riots of the 1960s as part of a global political upheaval. The Article concludes by explaining how the international law of economic rights, enacted thirty years ago, can be used by those seeking economic justice for American cities today.<sup>38</sup>

---

has been relied on by feminists and other "outsiders" who recognize him as the consummate outsider. See, e.g., DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW* (1991). But cf. SEYLA BENHABIB, *SITUATING THE SELF* 214-15 (1992). "[F]eminist appropriations of Nietzsche on [the question of the Death of the Subject] can only be incoherent." *Id.*

In any case, the Author is unrepentant. As Hilary Charlesworth responds to the criticism that feminists use elements from incompatible theories: "We remain unrepentant. The feminist project in law is less a series of discrete interpretations than, in Ngarie Naffine's words, 'a sort of archeological dig'. Different techniques are appropriate at different levels of the evacuation." Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 1, 3 (Dorinda G. Dallmeyer ed., 1993) [hereinafter *RECONCEIVING REALITY*]. Here, too, "different techniques are appropriate to different levels of the evacuation." See also Marsha P. Hanen, *Feminism, Objectivity and Legal Truth*, in *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHODS AND MORALS* 29 (Lorraine Code, Sheila Mullett & Christine Overall eds., 1988) (discussing impediments to interdisciplinary research). Marsha Hanen writes,

Virtually everything works against crossing the boundaries or understanding anyone on the other side. . . . It is easy to despair of ever bridging any gaps when knowledge is seen as a commodity to be owned exclusively by those with the proper pedigreed title. All this has much to do with control and power, and the whole system preys on our understandable insecurities about venturing outside our own narrow areas of expertise.

*Id.* at 43.

38. Economic justice has different meanings both within and between the legal and urban poor communities. One of the goals of this Article is to propose economic rights as a common focus.

As Jeffrey Swanson points out in his review of PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* (1989), some of the literature on economic rights is "address[ed] to an audience that excludes the poor." 5 *MED. HUM. REV.* 50, 55 (1991). Swanson criticizes Rossi for referring to "we," his audience, who can rescue "them," the poor. Cf. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 198 (1989):

We have to start from where *we* are— . . . What takes the curse off this ethnocentrism is not that the largest such group is "humanity" or "all rational beings" . . . but, rather, that it is the ethnocentrism of a "we" . . . which is dedicated to enlarging itself, to creating an ever larger and more variegated *ethnos*. It is the "we" of the people who have been brought up to distrust ethnocentrism.

*Id.* (emphasis original).

## II. OPPORTUNITY AND AMERICAN CITIES

The rhetoric of opportunity,<sup>39</sup> the get-rich-quick promise of the American Dream, has played an important part in building United States cities. It lured immigrant workers to the cities and continued to motivate them once they arrived.<sup>40</sup> The basic premise of the American Dream was that there was plenty of opportunity for everyone willing to work hard and take a chance.<sup>41</sup> This limitless opportunity made economic rights seem superfluous.<sup>42</sup>

---

39. Opportunity includes the idea of individualism. See ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 142-63 (1985). However, it also refers more broadly to dynamic functioning on a social level, such as when a particular ethnic, racial, or religious group has the opportunity to enjoy a middle-class American standard of living or even to strike it rich.

Probably the most devastating indictments of the rhetoric of opportunity are the poverty and mortality statistics of the African-Americans and Native Americans who were exploited by the rhetoric of opportunity. CLAUDETTE E. BENNETT, U.S. DEPT OF COMMERCE, *THE BLACK POPULATION IN THE UNITED STATES: MARCH 1992*, (1993). For a chart showing "selected characteristics of families below the poverty level," see *id.* at 17. See also U.S. DEPT OF HEALTH AND HUM. SERV., *2 VITAL STATISTICS OF THE UNITED STATES: 1988*, mortality, pt. A, at 3 (1991) (table showing death rates by race and sex).

Native Americans remain the "poorest of the poor" with 28% living below the poverty level. Native Americans also have the shortest life expectancy—about 54 years—and the highest suicide rate—300% greater than the national average. Nancy Butterfield, *Indians, Still a Long Way from Racial Equality*, SEATTLE TIMES, Jan. 21, 1991, § 1, at 13. For a chart comparing social and demographic characteristics of black, Mexican, Puerto Rican, other Hispanic, American Indian, and non-Hispanic white families, including the number of wage earners, see Gary D. Sandefur & Marta Tienda, *Introduction: Social Policy and the Minority Experience*, in *DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY* 1, 10 (Gary D. Sandefur & Marta Tienda eds., 1988) [hereinafter *DIVIDED OPPORTUNITIES*].

40. African-Americans were neither lured to the United States by opportunity nor driven from a hostile homeland, but abducted, enslaved, and brought here against their will. See Olaudah Equiano, *The Interesting Narrative of the Life of Olaudah Equiano or Gustavus Vassam, the African*, in *CROSSING THE DANGER WATER: THREE HUNDRED YEARS OF AFRICAN-AMERICAN WRITING* 8-19 (Deidre Mullane ed., 1993) [hereinafter *CROSSING THE DANGER WATER*].

41. Like an illegal pyramid scheme, the rhetoric was predicated on the notion of limitless expansion. See, e.g., FRANCIS JACKSON TURNER, *SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY* (1920).

42. Economic rights seem unnecessary for those persons with families (such as the extended families of recent Asian immigrants) or communities (such as the early Pilgrims) that would take care of them if necessary. See Barbara Stark, *Nurturing Rights: Women, Peace and International Human Rights*, 13 MICH. J. INT'L L. 144 (1991) (defining women's work as a set of duties corresponding to several economic rights). Cf. John Stuart Mill, *The Province of Government*, in *PRINCIPLES OF POLITICAL ECONOMY*, bk. V, ch. XI (1871), reprinted in VIRGINIA HELD,

For African-Americans who migrated from the rural South in the first half of the twentieth century,<sup>43</sup> however, the rhetoric was brutally debasing. It mocked their efforts; if they were unrewarded, it was because of their own lack of ambition or ability.<sup>44</sup> In fact, African-Americans who moved to the North were unable to get jobs in the construction industry or as clerks in downtown department stores. They were hired for factory work, but promotions were reserved for their white co-workers.<sup>45</sup> Many who had hoped for a better life in the North found themselves still poor after a lifetime of hard work.<sup>46</sup>

Although the Depression proved that the assurances of opportunity were as shaky as the banks, the New Deal nevertheless retained the rhetoric.<sup>47</sup> To do otherwise, to lose faith

PROPERTY, PROFITS AND ECONOMIC JUSTICE 178, 182 (1980) (describing the public welfare provisions of colonial era state constitutions). See generally, Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984) (grounding economic rights in the Declaration of Independence and the United States Constitution, as well as 42 U.S.C. § 1983 and § 7 of the National Labor Relations Act, 29 U.S.C. §§ 131-200 (1988)).

43. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991). For a vivid description of "[t]he wave of black people running from want and violence" in the late 19th century, becoming "a steady stream" by 1906, see TONI MORRISON, *JAZZ* 33 (1992). In the 1960s, one million African-Americans migrated north, fleeing poverty and racism. *America's War on Poverty* (PBS television broadcast, 1995) [hereinafter *War on Poverty*].

44. See, e.g., ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (1937); Thomas Powell, *Feel-Good Racism*, N.Y. TIMES, May 24, 1992, at E11 ("Most whites are more . . . successful than most blacks, so there must be some deficiencies of character and ability. . ."). The rhetoric demoralized many white Americans as well. See, e.g., ARTHUR MILLER, *DEATH OF A SALESMAN* 98 (1980) (Willy Loman, broken by what his son Biff calls "the wrong dreams," kills himself because he feels he can do no more for Biff than leave him his life insurance.).

45. *War on Poverty*, *supra* note 43.

46. See, e.g., WHEN I WAS COMIN' UP: AN ORAL HISTORY OF AGED BLACKS (Audrey O. Faulkner et al. eds., 1982) [hereinafter *WHEN I WAS COMIN' UP*].

47. The escalating standard of living enjoyed by most white Americans sustained the rhetoric until the Depression.

The most spectacular example of rapid national economic growth in the nineteenth century was the United States. . . . Income and wealth grew even more rapidly than population. . . . Although the statistics are imperfect, it is probable that the average per capita income at least doubled between the adoption of the Constitution and the outbreak of the Civil War. Almost surely, it more than doubled between the end of that war and the outbreak of World War I.

RONDO CAMERON, *A CONCISE ECONOMIC HISTORY OF THE WORLD: FROM PALEOLITHIC TIMES TO THE PRESENT* 228-229 (1989).

Franklin Roosevelt's welfare legislation was inhibited by a United States Supreme Court likely to "find that any act giving the federal government sweeping powers over public relief was an unconstitutional imposition on states' rights to administer welfare." MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE*



in opportunity, would have been to lose faith in the United States. Instead, Americans were "down on their luck" and just needed to "get back on their feet." Once they were helped up and brushed off, the opportunities of America would again assure their future.<sup>48</sup>

The post-World War II boom in the 1950s revived the rhetoric of opportunity with a vengeance. Even as President Franklin Roosevelt's promise of "freedom from want"<sup>49</sup> receded from public memory, economic rights were linked to the new arch-enemy of the United States, the Soviet Union. For yet another generation of African-Americans, however, there was no boom. Skyscrapers went up in downtowns across the United States, but the offices were filled with white Americans from the suburbs. There was money, there was opportunity, but for most African-Americans the reality of city life remained slum clearance, *de facto* segregation,<sup>50</sup> and menial jobs.<sup>51</sup>

RIGHTS MOVEMENT, 1960-1973, at 7-8 (1991). See also THEODORE MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 33-35 (1990). See generally BASIL RAUCH, HISTORY OF THE NEW DEAL 1933-39 (1944); CHARLES A. BEARD & MARY R. BEARD, AMERICA IN MIDPASSAGE (1939); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940 (1963).

48. For some Americans, opportunities did assure their future, although World War II also helped. MICHAEL A. BERNSTEIN, THE GREAT DEPRESSION: DELAYED RECOVERY AND ECONOMIC CHANGE IN AMERICA, 1929-39, 207 (1987) (describing how the problem of delayed recovery was overcome by World War II, which brought the "more mature industries of the inter-war period . . . out of their doldrums" and "new industries were at last provided with the generally high level of sales that the full emergence of new products . . . required"). For a thorough analysis of the New Deal recovery policy, see ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966). See also JORDAN SCHWARZ, THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT (1993) (discussing how the South and West were modernized by state capital).

49. 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, 2855, 2860 (Fred L. Israel ed., 1966) (quoting Franklin D. Roosevelt, Eighth Annual Message to Congress, January 6, 1941). In his 1944 State of the Union Message, President Roosevelt elaborated on the substance of "freedom from want," stating that it included "[t]he right to a useful and remunerative job . . . [t]he right of every family to a decent home. . . [t]he right to adequate medical care . . . [t]he right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; [t]he right to a good education." *Id.* at 2875, 2881 (quoting Franklin D. Roosevelt, Eleventh Annual Message to Congress, January 11, 1944).

50. For an illuminating explanation of how race and class segregation combine to concentrate poor African-Americans in certain areas, see AMERICAN APARTHEID, *supra* note 4, at 118-47. See also James, *supra* note 4, at 414-15.

51. John P. Cunningham wrote that:

The Negro had no place to go but the city as the 1960s wore on. He had to occupy the worst housing, endure the gouging of slum landlords, take the most menial jobs, face the prospect of being last hired, first fired, in an

In the 1950s and early 1960s, "equal opportunity" promised urban African-Americans the same civil and political rights as white Americans. However, there were many questionable assumptions built into this promise. First, proponents of equal opportunity assumed that racism could be effectively addressed through civil and political rights. That is, they assumed that civil rights law would assure full participation in civil society and that voting rights law would assure full participation in the political process.<sup>52</sup> Second, proponents of equal opportunity assumed that opportunity still made economic rights unnecessary.<sup>53</sup> Many blacks, as well as whites, believed that civil and political rights would produce equality, especially in combination with the booming downtowns.<sup>54</sup>

automated society that was eliminating the kind of jobs that had always been economic stepping stones for the downtrodden. Declarations that other minority groups had faced somewhat similar difficulties—and they had—were pointless, for other ethnic groups were white. This, after all, was the 20th century, and segregation was segregation. . . .

JOHN P. CUNNINGHAM, NEWARK 312 (1966) [hereinafter NEWARK].

52. Voting rights includes the correction of gerrymandering. The limits of this approach, even for the narrow purposes to which it aspired, have been cogently described by Lani Guinier. See, e.g., Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1592 (1993) (identifying "districting in general—not race-conscious districting in particular" as a problem better addressed by cumulative voting than race-conscious districting); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1079 (1991) (organizing "the divergent themes of black electoral success strategy within one conceptual framework"). Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) (describing and justifying an interest-based conceptual framework for statutory vote dilution). The vicious backlash to Professor Guinier's nomination to head the Civil Rights Division of the U.S. Department of Justice, and its subsequent withdrawal by the Clinton administration, itself suggests some of the limits of exclusive reliance on civil and political rights. Cf. Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 276 (1994) (exploring "the use of subjective experience as an element of legal doctrine, and of constitutional doctrine in particular").

53. See generally MARSHALL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* 324-25 (1982). In the 1960s, "millions of black and Hispanic people would converge on America's cities—at precisely the moment when the jobs they sought, and the opportunities that earlier poor immigrants had found, were departing or disappearing." *Id.*

54. See NEWARK, *supra* note 51, at 307-311 (describing commitment by big insurance companies, including Prudential, Mutual Benefit, and Blue Cross to build in Newark, the "\$100,000,000 program" to build or modernize schools and the \$10,000,000 investment in port Newark). "The tremendous building boom of the 1920s was being repeated, with one major difference. This time the surge was not merely a matter of downtown business towers; it included as well a concern for the living conditions of residents. The amelioration of the slums had held no

Finally, proponents of equal opportunity assumed that everyone could be assimilated—and wanted to be assimilated—into white America. The assumption of a white norm was challenged in the 1960s by widespread African-American rejection of tokenism, by calls for black power and black pride, and a growing interest in African heritage and culture.<sup>55</sup> These responses offered a challenge to which white America had no adequate response.<sup>56</sup>

interest for 1920 type tycoons." *Id.* at 308. Jobs for unskilled workers, in factories nationally and in regional industries such as Chicago's stockyards, were declining dramatically. *War on Poverty*, *supra* note 43.

Some critics remained dubious. See, for example, BLACK PANTHER PARTY PLATFORM (1966), *reprinted in* CROSSING THE DANGER WATER, *supra* note 40, at 683, stating:

We want land, bread, housing, education, clothing, justice and peace. And as our major political objective, a United Nations—supervised plebiscite to be held throughout the black colony in which only black colonial subjects will be allowed to participate, for the purpose of determining the will of black people as to their national destiny.

*Id.* at 684.

For others, civil and political rights were enough for them to escape to middle-class suburbs, where they were confronted by other forms of racism, including continuing segregation. See AMERICAN APARTHEID, *supra* note 4, at 9. Although there was some gentrification, revitalization was trivial in comparison to suburban growth.

55. See, e.g., MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 294-370 (Alex Haley ed., 1964). LeRoi Jones, who became Amiri Baraka, has described the transformative impact on Newark's African-American community. IMAMU AMIRI BARAKA, THE AUTOBIOGRAPHY OF LEROI JONES: AMIRI BARAKA (1984). See generally John A. Powell, *Righting the Law: Seeking a Humane Voice*, 96 W. VA. L. REV. 333, 338-40 (1993-94) (describing his experience working in the poor black community in Detroit in the 1960s). The themes of tokenism, black power, and African culture are all touched upon in the very observant, and very funny, film, PUTNEY SWOPE (Robert Downey, Sr. 1969). Swope, the token black man on a corporate board, is elected director because no one may vote for himself and no one thinks anyone else will vote for Swope. He stands, gray-suited like the rest, and quietly reassures them that he will not "rock the boat." The scene cuts to Swope in a dashiki, shouting with a raised fist, "I'm going to sink it!" *Id.* See also HUGH PEARSON, THE SHADOW OF THE PANTHER: HUEY NEWTON AND THE PRICE OF BLACK POWER IN AMERICA (1994). For a contemporary snapshot of relations between black Americans and black Africans, see Howard W. French, *Some Surprises Meet Nation of Islam Visitors in Ghana*, N.Y. TIMES, Oct. 9, 1994, at 16 (holding its first convention outside of the United States, the Nation of Islam is met in Ghana "with a mixture of puzzlement, humor and even offense"). See generally, Howard W. French, *An Ignorance of Africa as Vast as the Continent*, N.Y. TIMES, Nov. 20, 1994, at E3 [hereinafter *Ignorance of Africa*] (describing the persistence of simplistic and erroneous myths about African heritage and culture).

56. The problems of Newark, New Jersey, were similar to those of other Northern cities:

For some urban Americans, the riots that swept through the cities in the mid-1960s<sup>57</sup> were an inevitable result of years of frustrated expectations and repressed rage.<sup>58</sup> For others, the

---

During the 1950s and 1960s, Newark's steadily dwindling white majority resisted the political demands of the city's rapidly increasing black and hispanic population . . . for better access to jobs, housing, and political power. In the summer of 1967, festering resentment over these and other perceived injustices combined with the sweltering heat wave to produce several nights of rioting in the black community.

EBENER, *supra* note 7, at 4-5. Cf. NEWARK, *supra* note 51, at 314. In the year before the 1967 riots, one author wrote:

Newark through the summer of 1966 had not been rocked by the riots and disorder that had swept other cities. It certainly is not a matter of luck. For one thing, there long has been sincere dialogue between volunteer Negro and white leaders. . . . Even before extreme racial imbalance began to hit the schools, educators had sought to make tolerance a part of school teaching. . . . Other forces have helped ease tensions. Business and industry have in recent years searched for Negro employees—belatedly in many cases—and employment opportunities for Negroes have been greatly broadened. There has been awareness by city administrators that new office buildings downtown do not solve sociological problems—and urban renewal housing has swept into the blighted slums, bringing a spirit of hope.

*Id.*

57. For serious and thoughtful analyses and descriptions of the riots, see REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter KERNER COMMISSION REPORT]; Symposium, *The Urban Crisis*, 71 N.C. L. REV. 1283 (1993). See also Hans W. Mattick, *The Form and Content of Recent Riots*, 35 U. CHI. L. REV. 660, 662 (1968) ("In effect, what those who are now attacking white authority and property are saying (and have been saying for the past one hundred years) is, 'We want fuller participation in the goods, services, and amenities enjoyed by the vast majority of American citizens' . . . At this juncture in history the remaining minorities still want 'in,' not out; they want to play a role in the American dream.").

58. See KERNER COMMISSION REPORT, *supra* note 57, at 2 ("The expectation aroused by the great judicial and legislative victories of the civil rights movement have led to frustration, hostility and cynicism in the face of the persistent gap between promise and fulfillment."). In 1966, for example, the United States Commission on Civil Rights held hearings in major cities throughout the United States. These exposed the often wide gaps between white promises and African-American experience:

Commissioner Rankin: "Mr. Danzig, you use the terms 'integrated policy of housing,' could you very briefly define that statement?"

Mr. Danzig: "Well, since the law says that there is de facto segregation when a project is all-negro or all-white, it behooves the authority to see to it that that does not occur."

Commissioner Rankin: "Isn't it true that four out of the fourteen public housing projects in Newark are more than 90% white occupied and two are more than 90% colored occupied?"

Mr. Danzig: "That is correct."

riots were only the beginning of yet another era of hopelessness.<sup>59</sup> These riots were followed by several well-publicized federal programs, in addition to state and local initiatives, to rebuild the cities.<sup>60</sup> Each promised revitalization, each raised hopes, each had some limited, isolated successes. Overall, however, these

Commissioner Rankin: "Does that meet your standard of integrated policy?"

Mr. Danzig: "While we say we do not have perfection in all of our projects, we still strive for it."

U.S. COMM'N ON CIVIL RIGHTS, REPORT OF U.S. COMMISSION ON CIVIL RIGHTS: NEWARK, N.J. 109 (1961).

59. In a provocative recent article, Nicholas Lemann debunks the recurring popularity of "the myth of community development," which may be understood as a variation on the rhetoric of opportunity. Lemann describes the repeated efforts since the 1960s to revitalize cities. According to Lemann, there are three guiding principles: "Bottom Up, Not Top Down, Comprehensive and Coordinated" and "Revitalize the Neighborhood." His basic thesis is that those living in the poorest neighborhoods move out as soon as they can, like those living there before them. The focus, he insists, should be on assuring a decent standard of living and providing support services for those who remain until they, too, can move to bigger apartments in better neighborhoods—rather than using limited resources trying to buck all the market forces that situate businesses outside the cities in industrial parks, office complexes, and malls. *The Myth of Community Development*, *supra* note 34, at 29. *But cf.* Nat'l Econ. Dev. L. Ctr., *Enterprise Zones: Not Perfect But Full of Potential*, 27 CLEARINGHOUSE REV. 1016 (1994).

For more than a few people, the riots made it clear why the urban poor needed rights, and how the legal community could help provide them. For an eloquent personal account, see powell, *supra* note 55, at 336-7.

60. Housing Act of 1949, July 14, 1949, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 et seq. (1994)) (urban renewal); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 516 (repealed 1981) (community action programs); Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, Title 1, 80 Stat. 1255 (terminated 1975) (Model Cities); Housing and Community Development Act of 1974, Pub. L. No. 93-383, 97 Stat. 1206 (codified as amended 42 U.S.C. § 5301 et seq. (1994)) (community development block grants); Urban Development Action Grants 1977, Pub. L. No. 95-128, 91 Stat. 425 (codified as amended at 42 U.S.C. § 53(8) (1994)); Urban Jobs and Enterprise Zone Act of 1980, H.R. 7240, 96th Cong., 2d Sess. (1980); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13301-1322, 107 Stat. 312, 543-563. *See The Myth of Community Development*, *supra* note 34. *See, e.g.*, TOM HAYDEN, REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE 5-6 (1967). Hayden reported:

[I]n [its] application for planning funds under the Model Cities Act, . . . Newark claimed the nation's highest percentage of bad housing, the most crime . . . , the heaviest per capita tax burden, the highest rates of venereal disease, maternal mortality and new cases of tuberculosis. . . . Its unemployment rate, more than 15 percent in the Negro community, has been persistently high enough to qualify Newark as one of the five cities to get special assistance under the Economic Development Act.

programs made little difference.<sup>61</sup> The blight remains, and it becomes increasingly difficult for those born in the inner cities to find a way out.<sup>62</sup> Instead, they join a growing underclass.<sup>63</sup>

61. John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1293 (1993). “[T]he fundamental social and economic diagnosis of the Kerner Commission remain pertinent twenty-five years later, while its policy prescriptions remain largely ignored.” *Id.* (emphasis original); James, *supra* note 4, at 409. “[R]acial and continued segregation in U.S. cities has changed little since the civil rights revolution of the 1960s, and the concentration of poor blacks in high poverty neighborhoods has recently increased.” *Id.* Accord Joseph A. Califano, Jr., *Introduction on Welfare Reform*, 11 YALE L. & POLY REV. 109, 110-12 (1993); see Archer, *supra* note 18, at 187-88 (describing the Kennedy, Johnson, Nixon, Carter, Reagan, and Bush administrations and stating, “With each new administration, we seem to be going in a different direction.”). See generally ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S* (1984); *A DECADE OF FEDERAL ANTIPOVERTY PROGRAMS: ACHIEVEMENTS, FAILURES AND LESSONS* (Robert H. Haveman ed., 1977).

62. See Robert Pear, *U.S. Reports Poverty is Down but Inequality is Up*, N.Y. TIMES, Sept. 27, 1990, at A10; Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1071 (1989) [hereinafter Ansley, *Civil Rights Scholarship*]. Ansley describes the “ugly shape of victories that harden into bureaucratic nightmares and the frustrating shapelessness of victories that melt into unmonitored lassitude.” *Id.* at 1071. As Patricia Williams has pointed out, opportunity has no meaning in an economic vacuum. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) (criticizing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). See generally Powell, *supra* note 44, at E1: “Some of our forms of individualism make us the Western industrial nation harshest toward many of its own people: ethnic minorities, but also the sick and the poor, the young and the old.” *Id.*

63. For an illuminating discussion and comparison of the “impoverished underclass,” the “jobless underclass,” the “educational underclass” and the “reproductive/violent underclass,” see Jencks, *Is the American Underclass Growing?*, in *THE URBAN UNDERCLASS*, *supra* note 3, at 28-98. For a less sympathetic description, see LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 29 (1992). Mead states:

From the earliest analyses, the underclass was seen as a demoralized group unable to get ahead because of a lack not so much of opportunity as of personal organization. Inadequate jobs and residual racism were sometime causes, according to one journalistic account, but more important was the lack of ‘schooling, skills, and discipline to advance.’

*Id.* See generally Neuborne, *supra* note 23, at 883: “[D]emocracy and negative rights may no longer be effective vehicles for dealing with the structural needs of a chronically weak and permanently outvoted underclass.” *Id.*

The term “underclass” is controversial. See, e.g., Martha Fineman, *The Concept of the Natural Family and the Limits of American Family Law*, in *GENDER BIAS AND FAMILY LAW: COMPARATIVE PERSPECTIVES* (Barbara Stark ed., 1992). “What seems to unify the category of the underclass is . . . that their poverty results from their own failings.” See generally Martha Minow, *Repression: Of History, Poverty*

In his 1994 New Year's Day address, President Clinton promised to "rebuild the economy and with it the American dream."<sup>64</sup> Few people in United States cities, however, have anything to gain by subscribing to the American Dream; the rest are afraid of those who have nothing to lose.<sup>65</sup> Most Americans are apprehensive about the long-term social costs of increasing polarization.<sup>66</sup> For those people stuck in the inner city, the rhetoric of opportunity has acquired painful twists. The pregnant teenager's promise of a new life shackles her to the old one; the fierce group loyalty and willingness to take risks that meant success for generations of immigrant entrepreneurs means prison or early death for inner-city gang members.<sup>67</sup> The inner cities look like war zones and for many of their residents, especially the

and *Dissent*, 91 MICH. L. REV. 1204 (1993) (reviewing JACQUELINE JOINES, *THE DISPOSSESSED: AMERICA'S UNDERCLASS FROM THE CIVIL WAR TO THE PRESENT* (1992)).

64. Douglas Jehl, *Clinton Outlines Domestic Agenda*, N.Y. TIMES, Jan. 2, 1994, at 17.

65. See Richard L. Berke, *Crime is Becoming Nation's Top Fear*, N.Y. TIMES, Jan. 23, 1994, at 1.

66. The long-term social costs of polarization was the theme of the film *GRAND CANYON* (Fox, 1991). The film referred both to the chasm of race and class between the main characters and a mythic America, epitomized by natural grandeur, that can redeem them. Its images of a combat-zone nighttime Los Angeles, lit by police helicopters, reappeared on the news after the Rodney King verdict.

The Los Angeles riots reminded the rest of the United States that the problems of the inner city poor affect the entire society. *L.A. Lawless*, 254 NATION 651 (May 18, 1992); Timothy Noah & David Wessel, *Urban Solutions: Inner City Remedies Offer Novel Plans—and Hope, Experts Say*, WALL ST. J., May 4, 1992, at D16. See also *Talk of the Town*, NEW YORKER, May 11, 1992, at 27. "[W]hat, as a nation, did we really expect? The residents of our inner cities have for many years now been unable to lay claim to our national sense of common humanity and simple decency. On what basis can we expect to suddenly lay claim to theirs?" *Id.* Cf. Nathan Gardels, *Worlds Apart*, 11 NEW PERSP. Q. 2 (Fall 1994) (comparing Third World and developed states: "After converging during much of the post-colonial decades of development, a chasm between worlds has now appeared that is vaster by far at the end of the century than at the beginning. The science, technology, images and capital are on one side; youth, poverty and the great growing mass of humanity are on the other.").

67. Don Terry, *In an 11-Year-Old's Funeral, A Grim Lesson*, N.Y. TIMES, Sept. 8, 1994, at A1. "Neglected and abused by his family, bounced from group homes to squad cars and killed . . . by his own street gang, Robert was buried today, a symbol of the nation's most troubled children." *Id.* See, e.g., Adrian Nicole LeBlanc, *While Manny's Locked Up*, N.Y. TIMES, Aug. 14, 1994, § 6 (Magazine), at 26 (describing life in a Brooklyn gang from the perspective of a 16-year-old girl whose boyfriend is in jail). Cf. George Yúdice, *Marginality and the Ethics of Survival*, in UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM 214, 216 (Andrew Ross ed., 1988). "[H]ow can we distinguish between the various modes of 'bucking the system': the 'getting over' in school by a black teenager from the South Bronx. . . the use of inside information to make. . . millions in the stock market?" *Id.*

children,<sup>68</sup> they are. Not only the threat of sudden violence, but also the grinding violence of poverty is itself always present.<sup>69</sup> Even the United States government has conceded that the Third World is here: “[The Agency for International Development,] which spent the Cold War fighting communism with foreign aid and helping poor countries like Bangladesh immunize children, has found a new customer for its services: America’s inner cities.”<sup>70</sup> United States cities have succumbed to the rhetoric of hopelessness, the rhetoric of despair.<sup>71</sup>

### III. NIETZSCHE’S “ETERNAL RETURN”

What if Americans knew that the next thirty years would merely repeat the preceding cycle? What if we knew that the “empowerment zones” proposed in the 1990s would be no more effective than the “enterprise zones” of the 1980s or the “model cities” and the “war on poverty” of the 1960s?<sup>72</sup> What if we knew

68. For a vivid and depressing description of inner cities, see Nan Dale, *Croatia’s Casualties, Bosnia’s—and Ours*, N.Y. TIMES, Jan. 16, 1994, at 17. The author compares the children in a refugee camp in Croatia with those from a large residential treatment center in New York City:

[L]ike so many others from inner city, impoverished neighborhoods across America, [these children] have suffered traumas that started at birth; for them, there has rarely been a cease-fire. Pervasive and persistent poverty, fragmented families, chronic abuse and neglect, inadequate and unsafe housing and schools, lack of job opportunities and racism—these things are as lethal as mine fields.

[We] expected that an actual war, especially one of such grotesque intensity and duration, would cause more harm than anything, especially to the young. We were wrong.

*Id.* See also LeBlanc, *supra* note 67.

69. As Gandhi said, “Poverty is the worst form of violence.” GANDHI (Columbia, 1983). See Celia W. Dugger, *On the Edge of Survival: Single Mothers on Welfare*, N.Y. TIMES, July 6, 1992, at A1 (describing the “wearying struggle just to pay the bills with welfare benefits worth one-third less than 20 years ago”). Cf. Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess and Opposition*, 94 COLUM. L. REV. 1721 (1994) (book review) (describing the normative violence of poverty lawyers’ interpretative practices).

70. Thomas L. Friedman, *Cold War Agency Looks at Problems Back Home*, N.Y. TIMES, June 26, 1994, at 1.

71. See Felicia R. Lee, *On a Harlem Block, Hope is Swallowed by Decay*, N.Y. TIMES, Sept. 8, 1994, at A1.

72. Lemann says that we do know: “[T]he whole notion of economic revitalization functions as a kind of code: it’s a formulation that isn’t taken literally and one that worked wonderfully well to bring all the anti-poverty players together in a period when their cause wasn’t receiving much attention from the



that the stories of abuse and neglect, of broken promises and broken lives, would be repeated every generation?<sup>73</sup> What if we knew that our children's lives, like our own, would be spent in violence and hardship?<sup>74</sup> Who would not succumb to what Cornel West describes as the "nihilism that increasingly pervades black communities"?<sup>75</sup> As Professor West explains:

Nihilism is to be understood here not as a philosophic doctrine that there are no rational grounds for legitimate standards for authority; it is, far more, the lived experience of coping with a life of horrifying meaninglessness, hopelessness, and (most important) lovelessness. The frightening result is a numbing detachment from others and a self-destructive disposition toward the world.<sup>76</sup>

In the nineteenth century, Friedrich Nietzsche<sup>77</sup> challenged the notion of historical progress and the hopefulness embedded in

general public or the federal public." *The Myth of Community Development*, *supra* note 34, at 60.

73. Cf. David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability and Law*, 27 L. & SOC. REV. 785-92 (1993) [hereinafter *Origin Myths*]. Engel states:

The retelling of myths allows the narrators to rework the raw materials of experience according to shapes and patterns that now appear significant and to explore their implications for contemporary situations. Myths—like dreams—allow the narrators of past events, to 'keep doing it until they get it right,' to wrestle with an account of what occurred and what was said until fundamental truths shine through the story. These truths illuminate not only the past but the time of the retelling.

*Id.* at 792.

74. Philosopher Karl Jaspers has noted, "When one gives up the moral universe that makes its demands with logically inflexible unconditionality, no return is possible. One is threatened by the possibility of sinking into a limitless void. The loss of the resistance afforded by immutable moral laws may as easily be followed by abandonment to caprice and accident as by emergence from the source of authentic and historically unique possibility." Karl Jaspers, *Man As His Own Creator*, in *NIETZSCHE: A COLLECTION OF CRITICAL ESSAYS* 148 (Robert C. Solomon ed., 1973).

While Nietzsche's ultimate concerns are certainly different from those discussed in this Article, those presented in the doctrine of the eternal return—the absence of any external source of meaning, the lie of historical progress—are precisely those evoked by this Article. Cf. Leiter, *supra* note 37, at 85 (arguing that Gerald Frug's reliance on Nietzsche is misplaced because their concerns are "radically different").

75. WEST, *supra* note 34, at 14. See also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3 (1994) [hereinafter *FACES AT THE BOTTOM OF THE WELL*]. "Burdened with life-long poverty and soul-devastating despair, [our less fortunate brethren . . . in what some social scientists call the 'underclass'] live beyond the pale of the American Dream." *Id.*

76. WEST, *supra* note 34, at 14.

77. Nietzsche understood despair. He spent most of his life writing, "lonely, [and] pain-wracked." *THE PORTABLE NIETZSCHE* 12 (Walter Kaufmann ed.,

that notion, as well as the idea of any "rational grounds for legitimate standards for authority." His doctrine of the eternal return posited time not as linear progression, but as a cycle:<sup>78</sup>

[T]he knot of causes in which I am entangled recurs and will create me again. I myself belong to the causes of the eternal recurrence. I come again, with this sun, with this earth, with this eagle, with this serpent—not to a new life or a better life or a similar life: I come back eternally to this same, selfsame life, in what is greatest as in what is smallest, to teach again the eternal recurrence of all things . . .<sup>79</sup>

Nietzsche captured the psychological horror of eternal recurrence in a repulsive image: "A young shepherd I saw, writhing, gagging, in spasms, his face distorted, and a heavy black snake hung out of his mouth. Had I ever seen so much nausea and pale dread on one face?"<sup>80</sup> Instead of resisting such consciousness or trying to avoid it, Nietzsche urges those who can bear it<sup>81</sup> to go even further:

My hand tore at the snake and tore it in vain; it did not tear the snake out of his throat. Then it cried out of me: "Bite! Bite its head off! Bite!" Thus it cried out of me—my dread, my hatred, my nausea, my pity, all that is good and wicked in me cried out of me with a single cry.

....

1954). He "suffered from migraines" and was "almost always in execrable health." TRACY B. STRONG, *FRIEDRICH NIETZSCHE AND THE POLITICS OF TRANSFIGURATION 2* (1975). "His relations with women, including his mother and sister, were pathetic." NIETZSCHE: A COLLECTION OF CRITICAL ESSAYS, *supra* note 74, at 11. After a lifetime of virtual celibacy, he died of syphilis contracted during what his biographers speculate was a rare visit to a brothel as a student. *Id.*

78. Cf. ALAN LIGHTMAN, *EINSTEIN'S DREAMS 8-10* (1993):

Suppose time is a circle, bending back on itself. The world repeats itself, precisely, endlessly. For the most part, people do not know they will live their lives over. . . . How could they know that nothing is temporary, that all will happen again? No more than an ant crawling round the rim of a crystal chandelier knows that it will return to where it began.

*Id.*

79. FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: THIRD PART*, reprinted in *THE PORTABLE NIETZSCHE*, *supra* note 77, at 333. Support for a weaker version of the eternal return may be found throughout these footnotes, several of which offer both a 1960s and a 1990s version of the same concept. See, e.g., *supra* notes 7, 8, 55.

80. *THE PORTABLE NIETZSCHE*, *supra* note 77, at 271. As Kaufmann observes, "The theme of Zarathustra's nausea is developed *ad nauseam* in later chapters." *Id.* at 192.

81. Cf. STRONG, *supra* note 77. "What Leo Strauss [and his followers] seem to hold against Nietzsche is that he apparently said public that which only a few (those able to bear it) should hear." *Id.*

The shepherd . . . bit with a good bite. Far away he spewed the head of the snake—and he jumped up. No longer shepherd, no longer human—one changed, radiant, *laughing!*<sup>82</sup>

Nihilism is overcome by affirming that the only meaning is the meaning that we create:

I taught them to work on the future and to redeem with their creation all that *has been*. To redeem what is past in man and to re-create all "it was" until the will says, "Thus I willed it!—Thus I shall will it!—this I called redemption and this alone I taught them to call redemption."<sup>83</sup>

Although Nietzsche scholars and other philosophers offer wide-ranging interpretations of the eternal return,<sup>84</sup> Richard Rorty's explication of self-overcoming is the key here:

82. THE PORTABLE NIETZSCHE, *supra* note 77, at 272. According to Kaufmann, "Zarathustra's first account of the eternal recurrence . . . is followed by a proto-surrealistic vision of a triumph over nausea." *Id.* at 260.

83. THE PORTABLE NIETZSCHE, *supra* note 77, at 310. As Rorty explains, "[Nietzsche] thinks a human life triumphant just insofar as it escapes from inherited descriptions of the contingencies of its existence and finds new descriptions . . . It is the difference between thinking of redemption as making contact with something larger and more enduring than oneself and redemption as Nietzsche describes it: 'recreating all "it was" into a "thus I willed it."' RORTY, *supra* note 38, at 29.

According to Schacht, Nietzsche "embraces a highly restricted form of [nihilism] one which consists simply in the denial of any realm of 'true being' apart from this world and from any transcendently grounded system of values." Richard Schacht, *Nietzsche and Nihilism*, in NIETZSCHE: A COLLECTION OF CRITICAL ESSAYS, *supra* note 74, at 58, 59. See also Leiter, *supra* note 37, at 89 n.33.

Nietzsche is clearly a critic of one sort of nihilism—the inability to believe or value that comes in the wake of the collapse of meta-physical and transcendent foundations. Yet Nietzsche is a 'nihilist' only if one regards (and Nietzsche does not) the rejection of transcendent foundations as nihilistic.

*Id.*

84. According to Arthur Danto, Nietzsche felt "this to have been his most important teaching, and a terrifying idea." ARTHUR C. DANTO, NIETZSCHE AS PHILOSOPHER 203 (1965). It represented not only Nietzsche's rejection of the idea of progressive history, of humankind learning from the preceding generation, of humankind advancing, but of the critical importance of "what we eternally do, the joy in overcoming . . . the meaning we give to our lives." *Id.* at 212. See also Kathleen Higgins, *Nietzsche and Postmodern Subjectivity*, in NIETZSCHE AS POSTMODERNIST, *supra* note 37, at 189, 194. Higgins stated:

Nietzsche's skeptical analysis of the modern quest for historical knowledge is itself directed toward immediate experience. The danger he observes in his contemporaries' obsessive concern with history is a danger to their subjective condition. Excessive preoccupation with history, he argues, can damage a person's sense of self and of immediate connection with a larger world.

The drama of an individual human life, of the history of humanity as a whole, is not one in which a pre-existing goal is triumphantly reached or tragically not reached. . . . Instead, to see one's life, or the life of one's community, as a dramatic narrative is to see it as a process of Nietzschean self-overcoming. The paradigm of such a narrative is the life of the genius who can say of the relevant portion of the past, 'Thus I willed it,' because she has found a way to describe that past which the past never knew, and thereby found a self to be that which her precursors never knew was possible.<sup>85</sup>

---

*Id.* See also WILL DURANT, *THE STORY OF PHILOSOPHY* 454 (1926). "The possible combinations of reality are limited, and time is endless; some day, inevitably, life and matter will fall into just such a form as they once had, and out of that fatal repetition all history must unwind its devious course again." *Id.* Hannah Arendt suggests that Nietzsche's point was that the world view of "one day follow[ing] upon the next, season succeed[ing] season by repeating itself in eternal sameness . . ." is "much 'truer' to reality as we know it than the world view of the philosophers[.]" HANNAH ARENDT, *THE LIFE OF THE MIND: WILLING* 171 (1978).

Kaufmann explains that the eternal recurrence reflected Nietzsche's basic misconception that science had discovered that time repeated itself. At the same time, Kaufmann affirms "its personal meaning for [Nietzsche]." *THE PORTABLE NIETZSCHE* *supra* note 77, at 111; accord DANTO, *supra* at 203. Cf. ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* 142 (1985) (the "psychological use to which [Nietzsche] so crucially puts the eternal recurrence presupposes only a weaker view . . .").

Nietzsche prudently refrained from trying to prove the 'eternal recurrence' as a formal philosophical proposition. See generally *THE PORTABLE NIETZSCHE*, *supra* note 77.

85. RORTY, *supra* note 38, at 29. While Schacht concludes that Nietzsche literally believed in the truth of the doctrine of eternal recurrence, he concedes:

at times, to be sure, [Nietzsche] seems less concerned with the truth of the doctrine than with the cultivation of an affirmative attitude toward life so great that one could not only could *endure* the thought of an eternal recurrence of the same series of events which has produced and is the existing world, but moreover could *desire* such a recurrence. To *will* the eternal recurrence of the same events is for Nietzsche the ultimate expression of an affirmative attitude towards life.

Schacht, *supra* note 83, at 68; accord Jaspers, *supra* note 74, at 131. "Man's 'freedom' means that his alterability involves more than changes in accordance with those natural laws that apply to all existence: he is responsible for his own transformation." *Id.* Cf. Charles E. Scott, *The Mask of Nietzsche's Self-Overcoming*, in *NIETZSCHE AS POSTMODERNIST*, *supra* note 37, at 217, 218. *Id.* "The first step in understanding the mask of self-overcoming is to follow not the concept of self-overcoming but the self-overcoming process in Nietzsche's writing." *Id.*

Charles Taylor points out that the paradigm of "what this can mean is recounted by Proust . . . [i]n the scene in the Guermentes's library, the narrator recovers the full meaning of his past and thus restores the time which was 'lost' . . . [t]he formerly irretrievable past is recovered in its unity with the life yet to live, and all the 'wasted' time now has a meaning, as the time of preparation for the work of

The idea of self-overcoming or self-invention—"finding a way to describe the past which the past never knew"<sup>86</sup>—is familiar to most Americans.<sup>87</sup> It happens all the time in United States politics and law.<sup>88</sup> Americans only notice it when it is done clumsily and the strings show, as they did, for example, when President Bush claimed, "We won the Cold War."<sup>89</sup>

the writer who gave shape to this unity." SOURCES OF THE SELF, *supra* note 25, at 51.

For an illuminating comparison of textual functioning and psychic functioning, see PETER BROOKS, *READING FOR THE PLOT* 98, 108 (1984) (arguing that Freud's realization that the analytic experience requires the actual repetition of the "repressed material as a contemporary experience instead of . . . remembering it," has a textual analog: "Repetition toward recognition constitutes the truth of the narrative text" (emphasis original)).

86. RORTY, *supra* note 38, at 29.

87. Indeed, Americans expect United States politicians to reinvent themselves on a regular basis. Michael Wines, *The Nation: Cramming, So Many Minds to be Changed, So Little Time*, N.Y. TIMES, SEPT. 11, 1994, § 4, at 1. "Nobody disputes that Mr. Clinton, already adept at the quick change, needs to reinvent himself, not just his government." *Id.* Self-invention may well be the psychological objective of opportunity. See generally F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1953); JOHN E. CALLAHAN, *THE ILLUSIONS OF A NATION: MYTH AND HISTORY IN THE NOVELS OF F. SCOTT FITZGERALD* (1972).

88. See, e.g., Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 624-25 (1994) (describing Justice Frankfurter's "[r]evisionist history of Justice Roberts' actions in 1937" and explaining why "[t]he constitutional crisis of 1937 remains important less because of what really happened and more because the subsequent explanations and analyses of the crisis tells us much about our desire to shape the past for use in the present").

"Describ[ing] the past [in a way] which the past never knew," to use Rorty's phrase, often takes the form of revising, or debunking, the conventional wisdom:

Conventional wisdom tells us that the United States is witnessing a significant growth in the size of its urban underclass. Many believe that the percentage of the population persistently poor is large and rapidly increasing, that more and more unmarried teenage girls are bearing children, and that welfare roles are exploding . . . the poor are also said to be increasingly isolated in ghettos at the cores of our metropolitan areas. Yet none of these propositions is true.

Christopher Jencks & Paul E. Peterson, *Preface*, in *THE URBAN UNDERCLASS*, *supra* note 3, at v. See also Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447 (1992). The human rights provisions of the United Nations Charter, as well as the Universal Declaration of Human Rights, were based on a twenty-five year old draft by H.G. Wells. *Id.*

89. But see generally PETER SCHWEIZER, *VICTORY: THE REAGAN ADMINISTRATION'S SECRET STRATEGY THAT HASTENED THE COLLAPSE OF THE SOVIET UNION* (1994) (claiming that the "resource crisis" which faced the Soviet leadership in the 1980s was a leading cause of the downfall of the Soviet Union). Although not directly caused by American policy, the Soviet Union resource crisis was purposefully exacerbated by a comprehensive and systematic American policy. *Id.*

For the urban poor, however, self-overcoming is problematic. First, the African-American urban poor cannot opt out of what Professor West describes as “a system of race-conscious people and practices.”<sup>90</sup> Second, partly because of racism, self-overcoming is necessarily a collective activity for the urban poor. Professor bell hooks has observed: “[N]o level of individual self-actualization alone can sustain the marginalized and oppressed. We must be linked to collective struggle, to communities of resistance that move us outward, into the world.”<sup>91</sup>

In the 1960s, the civil rights movement explicitly drew on the independence movements of the formerly colonial Third World states,<sup>92</sup> a larger “community of resistance that [moved them] outward into the world.” In the 1990s, the urban poor can reaffirm that link by claiming the international human rights already won for them by the larger “communities of resistance” of which they are—and have always been—a part. By doing so, they can find “a way to describe that past which the past never knew and [find themselves] to be [that] which [their] precursors never knew was possible.”<sup>93</sup>

90. WEST, *supra* note 34, at 25. “After centuries of racist degradation, exploitation, and oppression in America, being black means being minimally subject to white supremist abuse and being part of a rich culture and community that has struggled against such abuse.” *Id.*

91. BELL HOOKS, *SISTERS OF THE YAM: BLACK WOMEN AND SELF-RECOVERY* 4-5 (1993). See also Flagg, “*Was Blind, But Now I See*,” *supra* note 28, at 1010-13 (stating that individual autonomy may require cultural self-definition).

92. Malcolm X, for example, described how South Africa and Angola were taken to the United Nations “for violating human rights” and said that “the entire [domestic] civil rights struggle” should be taken there as well. *U.N. Will Scrutinize USA’s Civil Rights Performance*, NPR, Sept. 9, 1994, available in LEXIS, News Library, Curnws File, Transcripts File No. 1430-11. See also, e.g., Etheridge Knight, *Ilu, the Talking Drum*, in HEATH ANTHOLOGY, *supra* note 2, at 2428. For a discussion of the United States Justice Department’s decision to file a brief in *Brown v. Board of Education*, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

The civil rights movement of the 1960s also drew on a larger movement to invert the historical hierarchy that privileged state values over human values. For a brilliant analysis of the radical change represented by the human rights movement and its “commitment to human values rather than to [s]tate values, even when the two conflicted,” see LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 215-226 (1994). See also Barbara Stark, *The “Other” Half of the International Bill of Rights as a Postmodern Feminist Text*, in RECONCEIVING REALITY, *supra* note 37, at 19 [hereinafter Stark, *The “Other” Half*] (noting that both parts of the International Bill of Rights invert the historical hierarchy privileging state values).

93. RORY, *supra* note 38, at 29.

## IV. THE INTERNATIONAL BILL OF RIGHTS

In the 1960s, Third World states began to point out the limitations of civil and political rights. Like the urban poor in the United States, they discovered that there were troubling assumptions built into these rights. While disenchantment with these rights in the United States led to promises, riots, and more promises,<sup>94</sup> Third World disenchantment with civil and political rights led to the international recognition of economic rights and their embodiment in an international treaty.

The global spread of the "human rights idea" in the 1950s provided the domestic civil rights movement with crucial leverage.<sup>95</sup> Because the United States needed Third World allies in the Cold War, African-Americans were able to draw effectively on international human rights in their struggle for civil and political rights in the 1950s. Because the United States linked economic rights with the Soviets during the Cold War, however, it was impossible for African-Americans to draw effectively on international human rights in their struggle for economic rights in the 1960s.<sup>96</sup>

The end of the Cold War finally allows the United States to recognize economic rights.<sup>97</sup> Just as domestic recognition of civil and political rights was crucial for foreign policy objectives in the 1950s, domestic recognition of economic rights is crucial for foreign policy objectives today. Recognition of economic rights is a critical step not only toward dealing with the urban crisis, but also toward a more coherent, more inclusive conception of rights—a step taken by the rest of the world long ago.

94. See *supra* text accompanying notes 48-60.

95. HENKIN, *THE AGE OF RIGHTS*, *supra* note 5, at 1.

96. "By 1963, the civil rights movement was attacking economic barriers keeping blacks in poverty . . . . There were 900 demonstrations in more than 100 cities . . . . On August 28, 1963 a quarter of a million people marched on Washington for social justice." *War on Poverty*, *supra* note 43. However, these rights remained marginalized, inchoate, in part because the Cold War effectively precluded even identifying, naming them, as economic rights. See *infra* text accompanying notes 122-24, 130-35.

97. Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351 (1993); accord Stark, *Economic Rights in the United States*, *supra* note 32, at 84-87.

### A. Human Rights and Civil Rights in the 1950s

Human rights law emerged from World War II.<sup>98</sup> Unlike the rest of international law at that time, which was concerned with the behavior of states toward other states, human rights law focuses on the conduct of states toward their own people. States endorsed the radical notion of human rights in horrified response to the atrocities of World War II.<sup>99</sup> For the first time in history, states conceded that their own people had rights beyond the rights established under their own domestic law, rights that even the states themselves could not legally abrogate.

Like the United States Declaration of Independence, the Universal Declaration of Human Rights was originally intended as an aspirational statement.<sup>100</sup> While the United States was eager to declare its support for international human rights after World War II<sup>101</sup> (and quickly recognized the need for other states to

---

98. The modern idea of human rights actually may have originated twenty-five years earlier. Burgers, *supra* note 88. Burgers tracks declarations drafted twenty-five years before World War II, authored by H.G. Wells and a pair of Russian and Greek lawyer-diplomats. *Id.* at 448. Moreover, Burgers shows that the United Nations Charter was signed in San Francisco just a few days after the end of the war, before the extent of the Holocaust was known. While the Universal Declaration of Human Rights was signed a few years later, it, too, tracks these earlier documents. *Id.* at 448-49.

99. Because human rights were in part a response to the Holocaust, the denial of the Holocaust suggests that human rights were in part a response to an illusory threat. See generally DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993); PIERRE VIDAL-NAQUET, *ASSASSINS OF MEMORY: ESSAYS ON THE DENIAL OF THE HOLOCAUST* (1993).

100. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1 at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. The United Nations Charter, drafted three years earlier, had similarly adopted a hortatory tone with regard to human rights. Some scholars in the United States urged participation in the international regime in the early years. See Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643 (1952) [hereinafter Schachter, *The Charter and the Constitution*]; Louis B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 369 (Theodor Meron ed., 1984) (hereinafter Sohn, *Implementation and Supervision*).

From the beginning, however, the United States was wary. "[I]n the 1940s and early 1950s, the United States was opposed to precise and binding obligations in the issue area of human rights. Fear of international scrutiny of its domestic practices, in the south and elsewhere, loomed large in U.S. calculations." DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 122 (1991).

101. FORSYTHE, *supra* note 100, at 21 "[From 1945-1952] the United States was determined to keep charter language limited to vague generalities, resisting most of the efforts of smaller states and private groups in favor of more specific and demanding obligations." *Id.*



guarantee them), it was concerned that the rest of the world would be scandalized by the segregation and other forms of racial discrimination in the United States. The Third World was appalled by media coverage of domestic civil rights struggles: "Those pictures of dogs and fire hoses were published in Europe, Africa, India, Japan. Photographs were especially powerful in countries where large parts of the population could not read."<sup>102</sup>

International opinion, reflecting the spreading idea that states could not abrogate the rights of their own people, was an important catalyst in the United States struggle for civil rights. As Mary Dudziak has explained:

At a time when the United States hoped to reshape the post war world in its own image, the international attention given to racial segregation was troublesome and embarrassing. . . . [T]he international focus on U.S. racial problems meant that the image of American democracy was tarnished. . . . U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home. Accordingly, efforts to promote civil rights in the United States were consistent with, and important to, the more central U.S. mission of fighting world communism.<sup>103</sup>

While the executive branch was concerned about the international reaction to domestic practices,<sup>104</sup> Congress was more concerned about the domestic reaction to international law-making. An excerpt from the debate in the U.S. Senate Foreign Relations Subcommittee on the Genocide Convention suggests both Congress' general distrust of international human rights law<sup>105</sup> and its more specific concern about the possible impact of that law on domestic civil rights:

102. Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES, July 17, 1994, at H31.

103. Dudziak, *supra* note 92, at 62-63; see FORSYTHE, *supra* note 100, at 122.

104. Goldberg, *supra* note 102, at H31. "The Kennedy administration was extremely worried about damage to this nation's image abroad. Well it might have been: the Soviet Union broadcast 1,420 anti-American commentaries linked to the troubles in Birmingham in 1963." *Id.*

105. Senator Joseph McCarthy and his cohorts were deeply suspicious of internationalism. The international human rights community was still reeling from McCarthy's attacks. Columbia Law School Professor Philip Jessup, for example, had been called before the House Un-American Activities Committee because of his analysis that considered China was a state under international law. Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 887 (1986). This statement alone was enough for some to brand him a communist. It is ironic that Richard Nixon later achieved renown for opening the door to China, a door he and his colleagues had so firmly hammered shut. *Cf.* Dudziak, *supra* note 92, at 65. "As was true in so many other contexts during the Cold War era, anticommunist ideology was so pervasive that it set the terms of the debate on all

The traditional concept of international law was that of the relation of states to each other—as Hamilton put it, the relation of sovereign to sovereign.

A determined effort is now being made, following the Nuremberg Trials, to change that concept to the relations of states and individuals in the states, thereby imposing individual liability for international law and creating unknown individual rights. The concept has been broadened also in the nature of the subjects to be covered. For instance, human rights have never been considered to be international in scope . . . . [T]his means that if domestic questions are made the subject of a treaty, they thereby become part of the structure of international law.

...

If there is to be a succession of treaties from the United Nations dealing with domestic questions, are we ready to surrender the power of the States over such matters to the Federal Government? Is that the road to peace, domestic or foreign? . . . [T]he report of the Civil Rights Committee appointed by the President, after considering the division of power over civil rights between the Federal Government and the States[,] in two places refers to the added power which may be given to Congress in the field of civil rights if the human-rights treaty is ratified and approved.<sup>106</sup>

Many in Congress were emphatically not “ready to surrender the power of the states over [civil rights] to the federal government”—and certainly not to the United Nations. They supported Senator Bricker’s proposed amendment to the United States Constitution, which would require an Act of Congress before any human rights treaty could become law in the United States.<sup>107</sup> As Louis Sohn and Thomas Buergenthal have pointed out: “[T]he defeat of the proposed constitutional amendment was due in large measure to the vigorous lobbying by the Eisenhower

sides of the civil rights issue.” *Id.* As Professor Forsythe has explained: “Initially [the United States] was too concerned to shield its own human rights record in race relations, and then it was caught up in the hysteria of Brickerism (and McCarthyism). Thus domestic politics prevented a leadership role in [the human rights] area of international affairs.” FORSYTHE, *supra* note 100, at 127. See also LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 932-34 (1973) (containing an excerpt from the Genocide Convention before the United States Senate in 1950 and discussing the applicability of U.N. human rights treaties in the domestic arena).

106. *The Genocide Convention, Hearings Before A Subcommittee of the Senate Committee on Foreign Relations*, 81 Cong., 2d Sess. 206, 208 (1950) (statement of Carl B. Rix, Vice Chairman of Special Committee on Peace and Law Through United Nations of the American Bar Association). For an excellent overview of the efforts to apply the human rights provisions of the UN Charter in state and federal United States courts from 1946 to 1955, see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984) [hereinafter Lockwood, *U.N. Charter and U.S. Civil Rights Litigation*].

107. LOUIS HENKIN ET AL., INTERNATIONAL LAW 208 (3d ed. 1993).

administration and its concomitant undertaking . . . not to adhere to human rights treaties."<sup>108</sup> While the United States civil rights movement was able to use international opinion as leverage in pushing for the Civil Rights Acts of 1964,<sup>109</sup> 1965,<sup>110</sup> and 1968,<sup>111</sup> and the Voting Rights Act of 1965,<sup>112</sup> conservatives in Congress were able to keep international human rights from becoming domestic law, at least for a while.<sup>113</sup>

### B. Human Rights and Economic Rights in the 1960s

In the 1960s, the Universal Declaration of Human Rights was divided into two more specific instruments, the International Covenant on Civil and Political Rights (the Civil Covenant)<sup>114</sup> and the International Covenant on Economic, Social and Cultural Rights (the Economic Covenant).<sup>115</sup> These instruments are legally

108. SOHN & BUERGENTHAL, *supra* note 105, at 964-65. See, e.g., A. E. Sutherland, Jr., *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952); Symposium, *Should the Constitution be Amended to Limit the Treaty-Making Power?*, 26 S. CAL. L. REV. 347 (1953). For early arguments, see Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959); Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60 (1949).

109. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1994) and scattered sections of 42 U.S.C.).

110. 42 U.S.C. § 1973 *et. seq.* (1994).

111. 42 U.S.C. § 3601-3619 (1994).

112. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified in scattered sections of 42 U.S.C.). The Voting Rights Act of 1965 and the Civil Rights Act of 1964 have been described as the "two most sweeping civil rights statutes ever written into American law." Boger, *supra* note 61, at 1297.

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, reporter's note 2. The view that the United States could not be bound by treaties addressing domestic issues, including human rights, has long since been abandoned. In fact, the United States ratified a few relatively minor (at least in terms of scope and visibility) human rights treaties during the Kennedy administration.

114. *Covenant on Civil and Political Rights*, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter the Civil Covenant]; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (UN Resolution adopting Civil Covenant).

115. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter the Economic Covenant]. See also G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (UN Resolution adopting Economic Covenant).

United States scholarship on the Economic Covenant is "meager at best" and there is only one book on this subject in English, according to Philip Alston. See A. GLENN MOWER, JR., *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS* (1985). Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 388 n.102 (1990) [hereinafter

binding, multilateral treaties under which ratifying states ensure the human rights of their own people. Together, the two covenants comprise the International Bill of Rights, globally recognized as the definitive law of international human rights.<sup>116</sup>

The Civil Covenant addresses negative rights, such as freedom of religion and expression and freedom from arbitrary arrest or detention. These rights are familiar to Americans because they are guaranteed by the Bill of Rights of the United States Constitution. The Economic Covenant addresses positive rights. By ratifying the Economic Covenant, a government "commits itself to its best efforts to secure for its citizens the basic standards of material existence."<sup>117</sup> Although some commentators claim that the Economic Covenant originated in the United States, tracing it to Roosevelt's "freedom from want,"<sup>118</sup> the United States is the only major industrialized democracy that has not yet ratified it.<sup>119</sup> It is also the only state in the world that

---

*Need for an Entirely New Strategy*]. Americans' lack of familiarity with the Economic Covenant is likely to make them that much more skeptical about it. For a discussion of the extent to which the rhetoric of the Economic Covenant is compatible with the United States rhetoric, see Stark, *Economic Rights in the United States*, *supra* note 32.

116. See *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/1, Annex (1987), reprinted in Symposium, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121, 122 (1987) (considering the obligations of state parties to the Economic Covenant) [hereinafter *Limburg Principles*]. In 1986, a group of distinguished experts in international law synthesized the "Limburg Principles," which they agreed "reflect the present state of international law." *Id.* at 121. And as such, "these instruments constitute the International Bill of Human Rights." *Id.* at 123. The two Covenants develop principles first set forth in the Universal Declaration of Human Rights. The Universal Declaration, however, "is not in terms a treaty instrument." 1971 SURVEY OF INTERNATIONAL LAW 85, U.N. Doc. A/CN.4/245 (1971) (statement of UN Secretary-General). While other treaties are recognized as law, and there are a cluster of *jus cogens* norms within the Covenants (such as, the prohibitions against genocide, torture, and racial discrimination) that are considered particularly compelling, the Covenants are the best-established and most widely accepted legally binding human rights instruments.

117. President Carter Signs Covenants on Human Rights, Oct. 31, 1977, DEP'T ST. BULL., Jul. 4-Dec. 26, 1977, at 587 [hereinafter *Carter Signs Covenants*].

118. See *supra* note 49 and accompanying text.

119. The Economic Covenant has been ratified or acceded to by 128 states as of May 15, 1994. Christina M. Cerna, *Human Rights Letter From Geneva*, ASIL HUM. RTS. INTEREST GROUP NEWS, Spring, 1994, at 6. But see Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 HARV. HUM. RTS. J. 69, 71 (1991) (deploring ratification of the Economic Covenant by states with "neither the intention nor the desire to abide by them"). See also Alston, in *AGENDA FOR THE NEXT CENTURY*, *supra* note 14, at 149 (describing international neglect of economic social and cultural rights).

has ratified the Civil Covenant,<sup>120</sup> but not the other half of the International Bill of Rights.<sup>121</sup>

The United States refusal to ratify the Economic Covenant can be attributed both to the historical antipathy toward economic rights in the United States and to global politics during the mid-1960s, when the covenants were drafted. Most scholars agree that the two covenants evolved from the Declaration of Human Rights "because of the East/West split and a disagreement over the value of socioeconomic rights."<sup>122</sup> During the Cold War,<sup>123</sup> the United States Department of State viewed economic rights as socialist propoganda hiding behind the language of rights.<sup>124</sup>

The Economic Covenant was championed by the formerly colonial Third World states. They insisted that civil and political rights were meaningless without economic rights, which would enable them to satisfy basic human needs—food, health care, shelter, and education.<sup>125</sup> In order to assure their people these rights, Third World states argued that they needed aid from

120. On April 2, 1992, the United States ratified the Civil Covenant. For the text of the Resolution of Ratification, see *International Covenant on Civil and Political Rights*, April 2, 1992, 31 I.L.M. 645, 658 (entered into force Sept. 8, 1992). For a discussion of the background of the Civil Covenant, see *id.* at 648, 649.

121. J. Kenneth Blackwell, Book Review, 14 HUM. RTS. Q. 485, 498 (1992). See also generally NATALIE KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990).

122. David P. Forsythe, Book Review, 8 HUM. RTS. Q. 540, 540 (1986); accord JOHN THOMAS PETERS HUMPHREY, *HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE* 144 (1984). The bifurcation of rights into two covenants was further justified by differences in "the nature of the legal obligation and the systems of supervision that could be imposed." D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 666 (4th ed. 1991). While it is a mistake to overstate the distinction between positive and negative rights, law that prescribes and law that prohibits usually require different approaches. The states accordingly agreed to recognize economic rights, which would be achieved through progressive realization, while at the same time agreeing to enforce the rights set out in the Civil Covenant. See *Limburg Principles*, *supra* note 116, at 125-126.

123. As used in this Article, the Cold War includes, broadly, the entire period from the end of World War II to the dissolution of the Soviet Union.

124. See generally Forsythe, *supra* note 122. See also *Need for an Entirely New Strategy*, *supra* note 115, at 366 (noting suspicion of many Americans who view the Economic Covenant as "Covenant on Uneconomic, Socialist and Collective Rights"). At the same time, oddly, human rights were regarded in the East as capitalist propoganda, an attempt by outsiders to undermine state policy-making. Notably, although the Universal Declaration of Human Rights was adopted by the General Assembly in 1948, by a vote of 48-0, the eight Soviet Bloc states abstained. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 986 (2d ed. 1987).

125. SHUE, *supra* note 23.

wealthier states.<sup>126</sup> Not only did the industrialized states have a moral obligation to provide aid, but they also owed the Third World compensation for their prior exploitation and the benefits they still reaped from it.

The question of compensation for expropriated property takes us, in many respects, to the heart of the relationship between the developed capitalist countries and the Third World. . . . [W]ho has compensated the African peoples for the millions seized and killed in the service of the European slave trade, or for the land, cattle, and minerals expropriated by European colonization and the millions who died in the process? . . . [T]he immiserizing poverty . . . of Third World peoples today in most cases can be traced back to the destructive effects of the European impact and to . . . the systems erected to service the European interest.

\* \* \*

What bolsters the Third World's case for compensation is the consideration that this destruction of life, expropriation of the resources and [other exploitation] also can, in large measure, be held responsible for the present affluence of the developed world.<sup>127</sup>

---

126. "[E]very state had duties to aid all those states where people were less materially advantaged." Craig N. Murphy, *What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology*, in *THE POLITICS OF INTERNATIONAL ORGANIZATIONS: PATTERNS AND INSIGHTS* 226, 228 (Paul F. Diehl ed., 1988). Because of their numbers, the developing states, or "Group of 77," were able to pass resolutions in the General Assembly over the objections of the western industrialized States. See, e.g., *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR 2d Comm., 29th Sess., 2315th mtg., U.N. Doc. A/9946 (1974); *U.N. Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Sess. (Special), Supp. No. 1, at 3, U.N. Doc. A/9559 (1974).

127. Norman Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, in 3 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 149, 150, 152 (R. Lillich ed., 1975). See also Roger C. Wesley, *A Compensation Framework for Expropriated Property in the Developing Countries*, in 3 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 3 (R. Lillich ed., 1975); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 *INT'L & COMP. L. Q.* 55 (1966). Cf. Harris, *supra* note 7, at 562:

This systematic downgrading of the Negro was also made more socially acceptable throughout the country by the growth of American imperialism, marked by the Spanish-American War, which began in 1898 and resulted in American jurisdiction over the colored peoples of Cuba, Hawaii, and the Philippines. Imperialistic national policy was openly justified by many of its proponents in the North, where it was strongest, on grounds of racial superiority.

*Id.*

Not all Third World states demanded such reparations. Some, like Ethiopia, had not been colonized. Moreover, some industrialized states had not been colonial powers, which seemed to absolve states such as Norway from any obligation.<sup>128</sup> In general, the developed states rejected arguments for compensation. The Economic Covenant, which affirmed rights of individuals against their own states without mentioning any rights of the Third World states against the industrialized states provided a formulation on which almost all the states—with the notable exception of the United States—could agree. The indivisibility of the two Covenants, their necessary interdependence,<sup>129</sup> and the fallacy of asserting the primacy of either, is now well-established in international law.

---

128. Murphy, *supra* note 126, at 234.

129. See *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/Res/44/130 (1989) (accepted Dec. 15, 1989). For a concise discussion of the shift in international priorities represented by this resolution, see Peter Meyer, *A Brief History*, in *THE INTERNATIONAL BILL OF RIGHTS* xxiii, xxxv (P. Williams ed., 1981). See also Louis Henkin, *Preface*, in *AN AGENDA FOR THE NEXT CENTURY*, *supra* note 14, at vii, xv ("It is necessary to reaffirm what should never have been questioned—that human rights are indivisible and interdependent . . .") [hereinafter Henkin, *Preface*]. Some lawyers' groups in the United States have recognized the link. While the American Civil Liberties Union (ACLU) has not endorsed the rights set forth in ICESCR, for example, it has "recognized that there may be links between economic status and civil liberties. Accordingly, the ACLU has insisted that government action may not cause or perpetuate poverty. . ." Nadine Strossen, *What Constitutes Full Protection of Fundamental Freedoms?* 15 HARV. J.L. & PUB. POL'Y 43, 48-49 (1992).

What the indivisibility of the Covenants actually means in practice, however, varies from state to state. This variation reflects a fundamental principle of international law, under which each state is recognized as an autonomous sovereign. No state is subject to the authority of another. Although states in theory relinquish some of their sovereignty by adhering to the Covenants, and adopting universal human rights norms, the interpretation and implementation of those norms is still essentially left to domestic law, especially with respect to economic rights. Because states remain reluctant to allow other states to judge them, the enforcement of civil and political rights between states remains very limited. Interstate support for progressive realization of economic rights, paradoxically, is both simpler and more complex. As Professor Henkin has pointed out, economic rights may be furthered merely by giving aid.

For a thoughtful discussion of the tension between universal and relative norms, see Douglas L. Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345 (1991). See also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 43 (1989) [hereinafter *FROM APOLOGY TO UTOPIA*]. Koskenniemi states that:

It is also commonly recognized that the openness of legal language causes contradiction and argument. One man's 'aggression' is another's self-defense. It is pointed out the although most countries use the available

The rights set forth in the Economic Covenant were compatible with rights long recognized in African cultures.<sup>130</sup> These rights were also familiar to Europeans and already incorporated in some of their national constitutive instruments.<sup>131</sup> In the United States, however, economic rights were anathema. Historically, economic rights were eclipsed by the rhetoric of opportunity—Americans were independent, they didn't want handouts.<sup>132</sup> During the Cold War, Senator Joseph McCarthy and his committee treated economic rights as a threat to national security, transforming Americans' historical distrust of

legal vocabulary, the meanings they attach to central expressions such as 'equality', 'humane treatment' or even 'state' vary to a great extent. It has even been argued that the sense of words such as 'law' and 'state' in European, African, Arabic, Chinese and Indian cultures differs to the extent that even the possibility of mutual understanding seems excluded.

*Id.*

130. See Adamantia Pollis, *Liberal, Socialist, and Third World Perspectives of Human Rights*, in *TOWARD A HUMAN RIGHTS FRAMEWORK 1* (Peter Schwab & Adamantia Pollis eds., 1982). See generally Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1605-09 (1981) [hereinafter, Henkin, *Rights: Here and There*] (describing human rights in the Third World generally, and Nigeria and Tanzania more specifically). African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 59 (expressly noting in the preamble that "civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights").

131. CONST. pmb. (Fr.) (Constitution of 1946). The French Constitution provides that: "Every human being who, because of his age, his physical or mental condition, or the economic situation, finds himself unable to work, has the right to obtain from the community the means to lead a decent existence." *Id.* See Henkin, *Rights: Here and There*, *supra* note 130, at 1590-96 (describing human rights in France); PETER BALDWIN, *THE POLITICS OF SOCIAL SOLIDARITY: CLASS BASES OF THE EUROPEAN WELFARE STATE 1875-1975* (1990); CARL LANDEUER ET AL., *EUROPEAN SOCIALISM: A HISTORY OF IDEAS AND MOVEMENTS* (1959).

132. "When [an American] has given his neighbor a chance he thinks he has done enough for him; . . . [i]t will take some hammering to drive a coddling socialism into America." GEORGE SANTAYANA, *CHARACTER AND OPINION IN THE UNITED STATES* 171 (1924). For a concise explanation of "the American taboo on socialism," see ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 112-38 (1975). Some commentators have considered dependence as injurious as need itself. See J. Anthony Lukas, *Declaring War on Welfare*, N.Y. TIMES, July 12, 1992, § 7, at 1 (book review) (quoting Franklin D. Roosevelt: "Continued dependence upon relief induces a spiritual and moral disintegration fundamentally destructive to the national fiber."). *But see supra* note 32 and accompanying text (various economic rights have historically been recognized, and relied upon, in states and communities of the United States); *supra* note 42 and accompanying text (family, particularly the women in the family, as provider of economic rights). Cf. Rosemary L. Bray, *So How Did I Get Here?*, N.Y. TIMES, Nov. 8, 1992, § 6 (Magazine), at 35 (first-hand account of a successful writer who grew up on welfare).



economic rights into a ruthless crusade.<sup>133</sup> The purges and blacklists used against purported communists in the 1950s<sup>134</sup> left few advocates for economic rights. Third World expropriations during the 1960s, moreover, outraged the United States Congress.<sup>135</sup>

While it may be tempting in hindsight to ridicule the rabid claims of un-Americanism, economic rights are difficult to reconcile with the traditional assumptions of opportunity.<sup>136</sup> The underlying premise of the Economic Covenant is that even if everyone has opportunity—and everyone does not—opportunity alone cannot dependably ensure survival, much less a decent standard of living. The Economic Covenant remedies this problem by explicitly establishing a right to a decent standard of living. In doing so, it articulates the “unprivileged conceptual

133. This fear of communism survived well into the 1960s. For example, before the riots in Newark the police director had warned of “leftist” influences in the civil rights and anti-poverty organizations.” HAYDEN, *supra* note 60, at 15. According to Ann Fagan Ginger, “[f]rom 1947 or 1948 until about 1965, people actively working for civil rights . . . and supporters of the United Nations . . . were frequently called to testify . . . before the House Committee on Un-American Activities . . . [and] the Senate Internal Security Subcommittee.” Ann F. Ginger, *Human Rights and Peace Law in the United States*, 6 TEMP. INT’L & COMP. L.J. 25, 26 (1992). As Professor Ansley reminds us, this concern is a living legacy for the civil rights movement: “Anti-communism particularly affects the civil rights movement. The fear that the movement’s program would be vulnerable to attack from the right as somehow . . . communist-inspired, and the frequent efforts to head off any such attacks by preemptive disavowals and self-censorship have seriously inhibited the movement.” Ansley, *Civil Rights Scholarship*, *supra* note 62, at 1075. See generally THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* (1982); RICHARD M. FREELAND, *THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM* (1972).

134. For vivid descriptions of the personal experiences of some who lived through this difficult time, see Ginger, *supra* note 133, at 26-30 (describing her experience as a lawyer representing witnesses); DALTON TRUMBO, *TIME OF THE TOAD: A STUDY OF INQUISITION IN AMERICA* (1972) (discussing “blacklisted” Hollywood writers); LILLIAN HELLMAN, *SCOUNDREL TIME* (1976) (addressing the issue of American intellectuals).

135. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court declined to rule on the validity of a Cuban expropriation of United States-owned sugar plantations, correctly observing that international law was unsettled on the issue: “There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.” *Id.* at 428.

Congress responded by enacting the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), in 1964, which explicitly overruled the *Sabbatino* case and required courts to hear cases involving expropriations absent an executive directive to the contrary.

136. Stark, *Postmodern Rhetoric*, *supra* note 17, at 435-37.

opposite" of the United States Constitution.<sup>137</sup> As Martii Koskenniemi has observed, "the unprivileged conceptual opposite—the dangerous supplement—will, under analysis, always show itself as the dominating one."<sup>138</sup> The United States Constitution assumes that citizens can afford bail or fines (as long as they are not "excessive"),<sup>139</sup> that they have "house[s]" in which soldiers may not be quartered in times of peace,<sup>140</sup> that there are "Post Offices and Post Roads,"<sup>141</sup> and courts and courthouses.<sup>142</sup> In short, the United States Constitution assumes a basic level of material comfort such that *citizens*, at least, are generally able to exercise their civil and political rights.<sup>143</sup> Historically, the United

137. It is also the unprivileged conceptual opposite of the Civil Covenant, which parallels the United States Constitution in its emphasis on civil and political rights, although it approaches some of those rights differently. See generally 31 I.L.M. 648, 649, 658 (1992) (excerpts from Senate debate on ratification of the Civil Covenant).

138. FROM APOLOGY TO UTOPIA, *supra* note 129, at xx (paraphrasing Derrida). In other words, economic rights have not only been suppressed in the United States, they have been repressed. See BROOKS, *supra* note 85; PETER BROOKS, PSYCHOANALYSIS AND STORYTELLING (1994). See generally Cass R. Sunstein, *The Beard Thesis and Franklin Roosevelt*, 56 GEO. WASH. L. REV. 114, 123 (1987):

Historians have recited a large number of reasons for skepticism toward Charles A. Beard's thesis about the relationship between the economic self-interest of the Framers and the Constitution. Beard and his followers were far too crude in this regard, and they undervalued the breadth and the power of central features of the Framers' vision. But the progressive historians were correct in pointing to the central importance of controversial understandings of private property to the original constitutional regime, and the ways in which those understandings have been repudiated in modern political and constitutional thought.

*Id.*

139. U.S. CONST. amend. VIII.

140. U.S. CONST. amend. III.

141. U.S. CONST. art. I, § 8, cl. 7.

142. U.S. CONST. art. III.

143. This statement does not to suggest, of course, that there were no poor people in the colonies. See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 24 (1941) (describing "four groups whose economic status had a definite legal expression: the slaves, the indented servants, the mass of men who could not qualify for voting under the property tests imposed . . . and women. . ."). Rather, poverty was not considered so permanent, the poor were not so rigidly confined to their class, as they had been in the "old country." Poverty was considered more of a choice than a fate, at least for white men. See, e.g., FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790, 199 (Liberty Press ed., 1979). "[M]ost New Hampshireites had already achieved the taxless, shiftless utopia which most Americans cherished as a secret dream, and for which 'republicanism' and 'unalienable rights' were merely euphemisms." *Id.* For detailed colonial statistics, many of which were unavailable to Beard, including wages, imports and even

States has rejected economic rights because a decent standard of living is, in fact, the "dangerous supplement," the dominating concept that white Americans have historically taken for granted.<sup>144</sup>

### C. *Human Rights After the Cold War*

Like the American urban poor of the 1960s, developing states understood the importance of rights and the need to reconceptualize rights to address real, concrete needs. Unlike the American urban poor, however, the developing states were able to draw on the international human rights law of the United Nations Charter and the Universal Declaration of Human Rights and to make that law their own. By considering the plight of the urban

caloric intake tables, see U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 743 (1960). See generally FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958) [hereinafter MCDONALD, WE THE PEOPLE].

There has always been poverty in the United States, but for the white majority there always has been at least the belief in opportunity and the promise of a better life, for one's children, if not for oneself. See generally HARRINGTON, *supra* note 7, at 8-19.

144. Cf. Stephen L. Carter, *The Constitution, the Uniqueness Puzzle, and the Economic Conditions of Democracy*, 56 GEO. WASH. L. REV. 136, 147 (1987). "[I]f . . . the law tends toward justice for the great mass of people, then the great mass of people must perceive themselves to be within the ruling elite—precisely what the Theory [of Democratic Prosperity] would predict, and what the first three words of the Constitution of the United States insist." *Id.* at 147. At least, those white American men who historically made law and policy took it for granted. White women, more problematically, took a decent standard of living for granted much as they took marriage for granted. As increasing numbers of women have become divorced, or single parents, women have increasingly sought economic rights. See Jason DeParle, *Welfare As We've Known It*, N.Y. TIMES, June 19, 1994, at E4. (including a chart 'Why Women End Up on Welfare' and stating that [t]he rise of welfare rolls stems directly from the decline of the two-parent family, since female-headed households are disproportionately likely to be poor"). According to the United States Bureau of the Census, "[t]he number of single-parent situations went from 3.8 million in 1970 to 10.5 million in 1992 . . . . In 1992, about 9.0 million, or 86 percent of all one-parent situations were single mothers. . . ." BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, P20-467, HOUSEHOLD AND FAMILY CHARACTERISTICS xii, xiii, xvi (1992).

As noted above, Americans have also taken for granted the safety nets of family, community, and state support, *supra* note 32, at 42. Since the economic boom after World War II, moreover, Americans have also relied on American economic hegemony to assure a decent standard of living. See *War on Poverty*, *supra* note 43. See generally MICHAEL J. SULLIVAN III, MEASURING GLOBAL VALUES: THE RANKING OF 162 COUNTRIES 95-109 (1991) (stating that the United States is still among the richest states of the international community, whether measured by gross national product, gross national product per capita, or gross domestic product).

poor in the United States in the larger historical context of international human rights, those seeking economic justice for American cities can find a way to "describe the past which the past never knew."<sup>145</sup>

They can ask, as the Third World states did, "[W]ho has compensated [African-Americans] for the millions seized and killed in the service of the . . . slave trade?"<sup>146</sup> They can trace urban "poverty . . . back to the destructive effects of the [Euro-American] impact and to . . . the systems effected to service the [Euro-American] interest." They can show how the prior exploitation of African-Americans contributed to the "present affluence" of white Americans.<sup>147</sup> This line of reasoning does not suggest that urban poverty, or the relative affluence of most white Americans, is solely attributable to the colonization of Africa or even to our own complex legacy of slavery. Rather, urban poverty must be understood in an historical context. Limiting the inquiry to a domestic historical context not only blinds us to the relationship between domestic and international poverty, and domestic and international racism, but also keeps us from building on the hard work already done and the hard-won progress already made.<sup>148</sup>

By recognizing instead that the United States is also part of the larger international community, those seeking economic justice for urban Americans can find that the rhetoric of economic justice is already law.<sup>149</sup> The Economic Covenant is part of the

145. RORTY, *supra* note 38, at 29. By reinterpreting our past, we change our stories and ourselves. See JEROME BRUNER, *ACTS OF MEANING* 111 (1990) (describing psychologists' insight in the 1970s and the 1980s that the "self" is defined through the stories that we tell); *Origin Myths*, *supra* note 73, at 789-90 ("The role of narrative in constructing concepts of self and society [has] become clear in a multitude of studies, including those addressing a broad range of law-related issues such as race . . . gender, community . . . and the practice of law. . . ."). According to Higgins, Nietzsche's "gay science" similarly "promotes creative activity by emphasizing our present creative power to give form to the range of contexts that the past has bequeathed us." Higgins, *supra* note 84, at 205.

146. Girvan, *supra* note 127, at 150; *cf.* Harris, *supra* note 7, at 562.

147. See Girvan, *supra* note 127, at 152; *cf.* HAYDEN, *supra* note 60, at 30.

148. This statement does not suggest that the domestic inquiry into economic rights has been completed, but that it has been begun. See, e.g., GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944); HARRINGTON, *supra* note 7, at 69-90; *FACES AT THE BOTTOM OF THE WELL*, *supra* note 75, at 3-5. For an illuminating account of legal scholars' failure to support and help structure that inquiry, and one law professor's efforts to begin doing so, see Ansley, *Race and the Core Curriculum*, *supra* note 28.

149. *Cf.* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 *YALE L.J.* 2277, 2314 (1991) (describing domestic adjudication of international law). "We need not consider a new model of international adjudication to explain our judge's role; we need only to recognize explicitly the

law the urban poor were seeking in the 1960s, and the urban poor are part of the domestic constituency that human rights law long ago identified in theory, but has yet to recognize in practice.<sup>150</sup> The poor, the hungry, the homeless, the children with babies, and the children with guns are all part of the constituency recognized by the Universal Declaration of Human Rights and by both the Civil and Economic Covenants. These groups were the intended beneficiaries,<sup>151</sup> as states affirmed that those left vulnerable by their own domestic law were now (since 1948) protected under international human rights law.

model that we already have." *Id.* Pierre Schlag has similarly noted that "many of the features . . . associate[d] with postmodernism . . . are all already suffusing law." Pierre Schlag, *Foreword: Postmodernism and Law*, 62 U. COLO. L. REV. 439, 444 (1991).

150. Some of the options for implementing the Economic Covenant are described in Stark, *Economic Rights in the United States*, *supra* note 32. For present purposes, it should be understood that the Economic Covenant is a broad statement of rights. Article 11, for example, requires states to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." Economic Covenant, *supra* note 115, art. 11. The Economic Covenant has no legally binding precedent, nor does it directly generate any. *Cf.* JAMES B. WHITE, *The Judicial Opinion and the Poem, in HERACLES' BOW: ESSAYS IN THE RHETORIC AND POETICS OF THE LAW* 107, 119-20 (1985) ("[A] simple but powerful statement [like 'all men are created equal'] is 'simple' only on the surface. It works as it does in large part because it forcefully evokes a rich and shared knowledge of language and culture."). As Dr. Koskenniemi has noted, "law-creation is a matter of subjective, political choice." FROM APOLOGY TO UTOPIA, *supra* note 129, at 2. Some have already recognized the usefulness of international economic rights for the poor in the United States. *See supra* note 30.

151. Article 22 of the Universal Declaration of Human Rights states:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality,

Universal Declaration, *supra* note 100, art. 22.

Article 25 of the Universal Declaration of Human Rights provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

*Id.* art. 25. *See also* Jaspers, *supra* note 74, at 147 ("Thus Nietzsche makes Pindar's demand his own: *Become what you are!*").

Even as the United States Supreme Court rejected arguments for finding economic rights in the Constitution,<sup>152</sup> holding that these rights must be left to the political process,<sup>153</sup> the executive branch had joined the other states of the international

152. *Dandridge v. Williams*, 397 U.S. 471, 485 (1969). These arguments have received thoughtful attention in the work of United States legal commentators, including Dean Brest and Professors Becker, Black, and Michelman, who have insisted that "positive rights" must be implied from the United States Constitution for that instrument to maintain its integrity and coherence and for the Constitution to assure fully the fundamental civil and political rights already guaranteed. See *supra* note 23.

Some have argued further that the poor are a political "out-group" requiring judicial protection. Loffredo, *supra* note 23, at 1309. ("The [*Dandridge*] Court did not pause to consider whether the poor are a politically subordinated out-group that might require special judicial protection. The *Dandridge* Court simply ignored this doctrinal inquiry, assuming instead that the poor were political 'insiders' who could properly be bound by majoritarian preference.")

153. *Dandridge v. Williams*, 397 U.S. at 484-85 ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."). If positive rights were not contemplated by the Framers of the United States Constitution, then political rights must be left to the political process, even if those who have the greatest need for economic rights, the homeless, the disabled, the very old and the very young, the uneducated, the non-English speaking, are those least able to participate in that process. But see Loffredo, *supra* note 23, at 1368-79. Loffredo argues that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), "shatters a core premise of the Court's poverty jurisprudence"; that is, "the Court's assumption of democratic legitimacy in the poverty cases cannot be squared with *Austin's* insight into the structural role that wealth plays in the American political order." *Id.* at 1368. See generally Olga Popov, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095, 1098 (1991) (developing theory inspired by Justice Blackmun's "suggestion . . . that a statute which has the effect of creating a 'discrete underclass' is inconsistent with the Equal Protection Clause").

Many scholars have questioned the legitimacy of the United States political process for precisely this reason. See generally BEARD, *supra* note 143. Although Beard's work has been discredited, it inspired an abundance of scholarship tracking the replication of privilege, and counter-scholarship, as well as tracking the democratization of constitutional law. See MCDONALD, WE THE PEOPLE, *supra* note 143 (discrediting Beard's thesis). See also Symposium, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 1 (1987). But see Akhil Reed Amar, *Some Comments on "The Bill of Rights as a Constitution,"* 15 HARV. J.L. & PUB. POL'Y 99, 100 (1992):

First, let me remind you that those who adopted our Constitution were Revolutionaries. They saw themselves as Revolutionaries. In their own era they were radical democrats. It is true that . . . there were profound exclusions from the perspective of 1991—women, slaves, et cetera.—but from the perspective of 1787, the process by which the Constitution became the supreme law of the land was more fundamentally participatory and democratic than anything that had ever preceded it. . . .

*Id.* at 100.

community in conceding that their own political processes could not guarantee the universal bottom line to which they had all agreed.<sup>154</sup> Economic rights are what the United States lacks as a nation, what Americans hardly have words for, just as those in other states hardly have words for the civil liberties<sup>155</sup> that many people take for granted here. Economic rights are the real contribution of international human rights law to our domestic jurisprudence. Americans generally think of human rights law as protection for oppressed people in distant places, people denied their civil and political rights.<sup>156</sup> However, the Economic Covenant protects the oppressed in the United States, including the urban poor denied basic economic rights taken for granted in every other western industrialized democracy.

Ironically, even as economic rights—and those who desperately needed them—were further subordinated in the United States, the United States government had already recognized economic rights in the international context. The United States was one of the original signatories to the Universal Declaration of Human Rights.<sup>157</sup> The United States also affirmed, in the Vienna Declaration of 1989<sup>158</sup> and the Charter of Paris for

154. In fact, Justices Marshall and Brennan cited Article 25 of the Universal Declaration in their dissent in *Dandridge*, 397 U.S. at 521. For an astute discussion of the “unique set of obstacles [faced by women] in using the political system,” see Becker, *Politics, Differences and Economic Rights*, *supra* note 23, at 180. Becker includes socialization, unconscious discrimination, and the design of jobs for workers with wives, as well as women’s personal relationships with men, as obstacles to political effectiveness for women. See *id.* See also DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES* (1993) (plurality system favors men).

155. Many newly emerging states have sought guidance from United States constitutional law and United States constitutional lawyers in drafting their own constitutions. See, e.g., *AMERICAN CONSTITUTIONALISM ABROAD* (George A. Billias ed., 1990); William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 *NOVA L. REV.* (1991); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 *U. CHI. L. REV.* 483 (1991). But see *Preface to Approaching Democracy: A New Legal Order for Eastern Europe*, 58 *U. CHI. L. REV.* 439, 440 (1991) (noting that “Eastern Europe must consult many models, not just the American, as it goes about the business of constitution-making”). See also Christopher Osakwe, *Introduction: The Problems of the Comparability of Notions in Constitutional Law*, 59 *TUL. L. REV.* 875 (1985). See generally Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 *NW. U. L. REV.* 198 (1977).

156. See, e.g., *Human Rights Watch Looks Within*, *NEW YORKER*, Dec. 13, 1993, at 53.

157. See *supra* note 100.

158. *Need for an Entirely New Strategy*, *supra* note 115, at 365.

a New Europe,<sup>159</sup> that everyone "has the right . . . to enjoy his economic, social and cultural rights."<sup>160</sup>

The Economic Covenant already is law and has already been recognized as such by the United States. President Carter signed it in 1978, but lacked the political clout to have it ratified by the Senate.<sup>161</sup> The Clinton administration originally pledged to press for ratification,<sup>162</sup> although it backed down even before the heavy liberal losses in the 1994 mid-term election.<sup>163</sup> Now more than ever, the Clinton administration should affirm its original commitment.<sup>164</sup>

---

159. 30 I.L.M. 190 (1991).

160. *Id.* at 194. The United States also participated in the Copenhagen Conference on the Human Dimension. Document of Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE), Jan. 29, 1989, 29 I.L.M. 1306 (follow-up meeting to the Helsinki Accords).

161. Presidents Reagan and Bush lacked the political inclination, although President Bush broke the logjam of unratified human rights treaties by supporting ratification of the Civil Covenant in 1991. See Roundtable, *The United States Constitution and the Adoption of International Human Rights Instruments: Freeing the Political Logjam*, 20 GA. J. INT'L & COMP. L. 253 (1990).

162. David B. Ottaway, *Universality of Rights is Defended by U.S.*, WASH. POST, June 15, 1993, at 15 (Secretary of State Warren Christopher said that the Clinton administration "will shortly ask the Senate to ratify four human rights treaties.").

163. According to Patricia Rengel, Chief Legislative Officer for Amnesty International, Warren Christopher's statement that the Clinton administration planned to push for ratification of the human rights treaties was intended to preempt anticipated international criticism. Rengel further noted that the proposed order of submission was: Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW) or International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Children's Convention. The Economic Covenant was not assigned a rank. ASIL Annual Meeting (Apr. 9, 1994). On June 24, 1994, the Senate ratified ICERD. S. EXEC. REP. NO. 29, 103d Cong., 2d Sess. (1994). See generally Paul Lewis, *Differing Views on Human Rights Threaten Forum*, N.Y. TIMES, June 6, 1993, § 1, at 14.

164. Michael R. Beschloss, *Midterm Melancholy: After Tuesday, Clinton had better let himself be Clinton*, NEW YORKER, Nov. 14, 1994, at 7, 8:

As a devotee of Harry Truman, Clinton should remember how H.S.T. came back after losing both houses of Congress in 1946, when even Democrats were calling for his resignation. It was not by homogenizing himself. Quite the opposite. During his first two years, Mr. Truman eased up on domestic reform and limited most of his public utterances to state papers written for him by others. It was only after his mid-term defeat that he became the fighting progressive we now honor. Mr. Truman had the satisfaction of knowing that even if he lost the Presidency in 1948 he would go down fighting for what he really believed in. As it happened, people flocked to him for his genuineness and his guts.



Those seeking economic justice for American cities should join in pushing for ratification. While the 1994 mid-term election showed that backlash remains a real risk, the climate in the United States now is still very different from the climate in the 1950s. No one is going to be blacklisted or fired, and no one is going to be accused of sympathizing with the Soviets.<sup>165</sup> Americans realize that their resources are limited and that for too many people, there is no opportunity. Gradually, but noticeably, the public is becoming more receptive to certain economic rights, such as health care, as Americans recover from the "mean season"<sup>166</sup> and recognize the need to invest in human resources.<sup>167</sup>

Professor Dudziak has shown how domestic desegregation served foreign policy objectives during the Cold War.<sup>168</sup> United

Ninety-two percent of African-Americans supported the Democrats. Michael Kelly, *You Say You Want a Revolution*, NEW YORKER, Nov. 21, 1994, at 56, 58.

Clinton has already paid a political price for waffling. See Michael Wines, *Talk Often and Be a Soft Touch*, N.Y. TIMES, JULY 17, 1994, § 4, at 1 (ascribing loss of political capital to President Clinton's lack of clarity as to his position and his failure to stay rooted to a position once clarified).

165. It would be hard to accuse even the Russians of such sympathies at this point. Marginalization is more likely. "[W]hoever has the most images and the widest distribution wins. Historians have been outvoted at the box office by film and television producers, who become the transmitters of history while owing their first allegiance to the bottom line." Cf. Goldberg, *supra* note 102, at H32. See generally MICHAEL J. O'NEILL, *THE ROAR OF THE CROWD: HOW TELEVISION AND PEOPLE POWER ARE CHANGING THE WORLD* (1993) (journalist's description of the transformation of international politics by television).

166. FRED L. BLOCK, *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* (1987). See also BARBARA EHRENREICH, *THE WORST YEARS OF OUR LIVES: IRREVERENT NOTES FROM A DECADE OF GREED* (1990).

167. See KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990) (arguing that the widening gap between rich and poor, along with greater concentration of wealth, is likely to lead, as it did in the 1930s, to a resurgence of populism); MARMOR ET AL., *supra* note 47, at 48 (noting widespread public support for the Medicare, Food Stamp, and Social Security programs). PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993) (white survey respondents say they support assistance for African-Americans who genuinely need it). See also WALLACE C. PETERSON, *SILENT DEPRESSION: THE FATE OF THE AMERICAN DREAM* (1994) (describing the paradox of a growing economy and increasing hardships for 60% of the population). But see *The Myth of Community Development*, *supra* note 34. "Voters are absolutely certain that social services cost a lot and don't work, so political support for them is hard to come by . . . . Everybody involved in antipoverty work . . . fear[s] that public hostility to Government social-service programs is too strong." *Id.* Jason DeParle, *In Welfare Debate, It's Now Not 'How?' but 'Why?'*, N.Y. TIMES, May 8, 1994, § 4, at E1, E3. "At least 30 [states] have experimental programs underway, designed to prod or pull people from welfare, a pattern that critics regard as a piecemeal dismantling of the system." *Id.*

168. Dudziak, *supra* note 92.

States foreign policy objectives are different, but equally pressing, in the 1990s. Because the United States needs Third World markets, it cannot afford to further alienate Third World states.<sup>169</sup> Because the United States wants to be a player in the world economy, it cannot afford the exponentially increasing costs of a neglected underclass.<sup>170</sup> Because the United States wants to be the "world leader in human rights,"<sup>171</sup> it cannot continue to ignore rights recognized throughout the world. Indeed, as the United States becomes increasingly reluctant to serve as a world policeman, the need to establish and to maintain a constructive global presence by other means becomes increasingly compelling. As Professor Henkin and other legal scholars have pointed out, the first step toward this new world order must be recognition and implementation of human rights already recognized everywhere else:

---

169. Alston, in *AGENDA FOR THE NEXT CENTURY*, *supra* note 14, at 143 ("[The United States] attitude should take account of the fact that any international strategy for promoting human rights that does not take full account of economic and social rights will be perceived by the Third World, as well as many other observers, as being inadequate at best and Eurocentric and biased at worst."). As Fran Ansley has pointed out, many Third World states are desperate for capital and may be quite willing to overlook our ongoing domestic problems (comment to Author after reading draft). But the opposing factions in those Third World states may not be, and many Third World states are torn by internal divisions at present. Robert D. Kaplan, *The Coming Anarchy*, *ATLANTIC MONTHLY*, Feb. 1994, at 44 (polarization at home fuels polarization abroad).

170. See Thomas Friedman, *Clinton's Playbook: The Designs Behind The Surprises*, *N.Y. TIMES*, Nov. 28, 1993, § 4, at 1, 3. Friedman describes President Clinton's:

new notion of 'national security'—not security against change, but security for change. The role of national government today, [the President] has argued, is to help the nation face the demands of [NAFTA] and neighborhood by providing personal security, job security and health security. Because without them, [the President] says, the rich will never make the necessary sacrifices for the poor, the poor will never embrace communal responsibility and the middle class will never make the huge changes required for the nation to remain competitive.

*Id.* See also Gwen Ifill, *Just Say 'Security': One Clinton Promise Fits All Issues*, *N.Y. TIMES*, Oct. 17, 1993, at E3. For an original argument that survival of the United States is a question of economic clout, see EDWARD N. LUTTWAK, *THE ENDANGERED AMERICAN DREAM: HOW TO STOP THE UNITED STATES FROM BECOMING A THIRD WORLD COUNTRY AND HOW TO WIN THE GEO-ECONOMIC STRUGGLE FOR INDUSTRIAL SUPREMACY* (1993).

171. Ottoway, *supra* note 162 (quoting Warren Christopher). See also Letter from President George Bush, Aug. 8, 1991, 31 *I.L.M.* 660 ("[R]atification [of the Civil Covenant] would . . . strengthen our ability to influence the development of appropriate human rights principles in the international community . . ."); Jimmy Carter, Keynote Address: *The United States and the Advancement of Human Rights Around the World*, 40 *EMORY L.J.* 723 (1991).

[F]ailure to adhere to the [Economic] Covenant is seen the world over as rejection of [economic and social] rights as rights, as a rejection of rights dear to the developing world and as an affront to their hopes and aspirations. It is seen as a blind confusion of ideological communism (which almost all are now prepared to reject), with commitment to the welfare of individual human beings to which virtually all States are now committed in principle and in fact.<sup>172</sup>

## V. CONCLUSION

Economic rights are not a panacea,<sup>173</sup> as the inhabitants of Third World states can attest.<sup>174</sup> However, as Third World states

172. Henkin, *Preface*, *supra* note 129, at xix-xx; *accord* Alston, in *AGENDA FOR THE NEXT CENTURY*, *supra* note 14, at 143.

173. As Professor Alston has pointed out, economic rights provide few solutions, instead leaving crucial policy questions wide open. See Alston, in *AGENDA FOR THE NEXT CENTURY*, *supra* note 14. Residential segregation, for example, seems particularly intractable. Nathan Glazer, Book Review, *NEW REPUBLIC*, Aug. 2, 1993, at 39, 41 (reviewing DOUGLAS S. MASSEY AND NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993)).

There are more integrated neighborhoods today than there were twenty-five years ago. . . . These modest improvements have done little to make inroads on black ghettos. Massey and Denton make proposals for government action to do more. But a successful program for massive dispersal would require government action on a scale that is simply not possible in a democracy.

*Id.*

174. Barbara Crossette, *The 'Third-World' is Dead, but Spirits Linger*, *N.Y. TIMES*, Nov. 13, 1994, § 4, at 1 (describing the death of a "fraternal third-world" envisioned by the world leaders at the 1955 Afro-Asian Conference, as "a gathering full of post-colonial promise, with dreams of self-sufficiency, solidarity among newly independent nations and commitment to an anti-superpower international policy that became known as nonalignment"). *Id.* Citing the UN Human Development Index for 1994, Crossette notes the "arresting picture of unprecedented human progress and unspeakable human misery, of humanity's advances on several fronts mixed with humanity's retreat on several others. . . ." *Id.* The Pacific Rim states, "a number of them boasting higher living standards than some European nations," have little in common with the poor states of Africa. *Id.* Yet the United Nations Index focuses on "big military spenders," noting a clear correlation between such spending and lack of development. *Id.* Those states that focused instead on economic rights—education, health, providing their people with opportunities to work—have in fact fared far better. *Id.* See also Ali A. Mazrui, *Development or Recolonization? The Message of Rwanda: Re-colonize Africa?* 11 *NEW PERSP. Q.* 18 (Fall 1994). "Much of contemporary Africa is in the throes of decay and decomposition. . . . While Africans have been quite successful in uniting to achieve national freedom, we

understood in the 1960s, and as those concerned with urban poverty have increasingly come to realize, economic rights are a necessary baseline. Without an irrevocable national commitment, emerging norms of economic rights are likely to be nipped in the bud every time there is an election. No state or city wants to be a "welfare magnet;"<sup>175</sup> no state or city wants to alienate its own tax base. Without the authority and legitimacy of legally recognized economic rights, the rhetoric of hope and of meeting "challenges" becomes disingenuous, if not cynical.

Just as Nietzsche's Zarathustra "tore at the snake and tore in vain,"<sup>176</sup> the rhetoric of opportunity "tore at [poverty] and tore in vain."<sup>177</sup> As a Legal Services lawyer in the 1970s, I represented indigent people in civil cases—usually involving consumer, public benefits, or landlord-tenant law. For the most part, my goal was simply to get my clients a little breathing space. On a good day, a court might grant a client a few months' extension on an eviction, or a subsection in a Social Security Disability regulation might persuade an administrative law judge to reinstate a claim. My clients were glad to have someone in a suit on their side, but to our shared dismay, they rarely had any rights—cognizable claims to justice rather than to mercy. Indeed, the only "category of rights . . . relevant . . . was the somewhat dubious one . . . of formal bureaucratic procedural rationality."<sup>178</sup> To maintain our morale, we spoke of symbolic victories against oblivious bureaucracies and incremental reform.<sup>179</sup> We grew accustomed to, even accepted, the intolerable.<sup>180</sup>

have utterly failed to unite for economic development and political stability. War, famine and ruin are the post-colonial legacy for too many Africans." *Id.* Kaplan, *supra* note 169, at 44 (describing "how scarcity, crime, overpopulation, tribalism, and disease [in the Third World] are rapidly destroying the social fabric of our planet"). *But see Ignorance of Africa*, *supra* note 55 (criticizing exaggerations of Kaplan article).

175. PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990) (discussing state welfare systems and the establishment of a national welfare standard); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 975-79 (1985) (urging a system of horizontal income transfers among states and localities, the recipients to be given broad discretion with respect to their use). For a review of recent state efforts to discourage immigration by welfare recipients, see Comment, *The Resurgence of Durational Residence Requirement for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305 (1993).

176. THE PORTABLE NIETZSCHE, *supra* note 77, at 271.

177. *Id.*

178. FRASER, *supra* note 22, at 152.

179. After another grueling round of appeals in *Urban League of Greater New Brunswick v. Carteret*, one of the many spin-offs of the *Mt. Laurel* litigation, see *supra* note 11, I telephoned C. Roy Epps, with the news of yet another quasi-defeat. "The beat goes on," he replied calmly. Stamina like his is obviously

For advocates to serve as lawyers, and not just as briefcase-carrying social workers, there must be law to argue. In order to serve as lawyers for the urban poor, there must be rights to assert on their behalf. To "work on the future," not merely endure it, lawyers must "redeem with [our] creation all that *has been*."<sup>181</sup> If Americans are concerned with economic justice, they must acknowledge and claim not only the degradation of America's urban poverty, but the larger degradation of peoples and continents, of which America's urban poverty is—and has always been—a part.<sup>182</sup> By doing so, Americans can claim as their own the other human rights already recognized and promised by the United States.<sup>183</sup>

Under international law, implementation of human rights treaties requires domestic legislation.<sup>184</sup> Lawyers in the United States must assert economic rights on behalf of their clients and educate courts and clients about these rights in the process. The United States has recognized that everyone has the right to "a standard of living adequate for the health and well-being of himself and of his family;"<sup>185</sup> that economic rights are not charity, but *rights* on a par with equal protection,<sup>186</sup> and freedom of

---

necessary when the kind of "long-term economic and social commitments" described *supra* text accompanying note 3, are involved. However, there is a difference between the stamina demanded by a long journey, which Mr. Epps displayed and which we all need, and the endurance of abuse, which should not be endured. Telephone Interview with C. Roy Epps, President of the Civic League of Greater New Brunswick.

180. This statement does not suggest that poverty law practice is always, or necessarily, limited in this way. Empathetic and creative lawyers can find, and even generate, transformative moments. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). For a sensitive and instructive account of the possibilities for reconstructing clients' narratives so as to empower them, see Alfieri, *supra* note 28. See also Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 69 (1994). Such lawyers could shape a rich jurisprudence of economic rights. For a thought-provoking range of "strategies of economic empowerment by persons actively engaged in legal and political struggle on behalf of the disadvantaged," see Symposium, *Poverty and the Law*, 22 HARV. C.R.-C.L. L. REV. 1 (1987).

181. THE PORTABLE NIETZSCHE, *supra* note 77, at 310.

182. See James, *supra* note 4, at 407 ("At the beginning of this century, racial privileges and disadvantages were routinely imposed and enforced as state policy in the United States and other countries and colonial regimes").

183. See *supra* text accompanying notes 154-64.

184. Richard Bilder, *An Overview of International Human Rights Law*, in GUIDE TO HUMAN RIGHTS PRACTICES 3, 15 (Hurst Hannum ed., 1983).

185. Universal Declaration, *supra* note 100, art. 25.

186. *Id.* art. 7.

thought, conscience, and religion.<sup>187</sup> These rights are an essential requisite of human dignity<sup>188</sup> and the entitlement of every child, woman, and man in the United States. Americans should settle for nothing less. Rather, Americans should press for ratification of the Economic Covenant. Lawyers practicing in the United States should give copies of the Economic Covenant to their clients and attach copies of it to their briefs.<sup>189</sup> By holding the United States to its promise, Americans can realize their own, and “[find themselves] to be [that] which [their] precursors never knew was possible.”<sup>190</sup>

---

187. *Id.* art. 18.

188. *Id.* art. 1.

189. *Cf.* Lockwood, *U.N. Charter and U.S. Civil Rights Litigation*, *supra* note 106, at 950-56 (appendix of briefs, petitions, and miscellaneous pleadings filed in the U.S. Supreme Court from 1946-55 relying on the UN Charter).

190. RORTY, *supra* note 38, at 29.

