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The Future of the United States Commission on Civil Rights

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DEBATE

THE FUTURE OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS

In *The Future of the U.S. Commission on Civil Rights*, Professors Lisa Crooms and Dawinder Sidhu discuss the potential for expanding the mandate of the Commission. Professor Crooms opens by noting that suggestions to expand the Commission's mandate to include human rights have been around for decades, and argues that such ideas are still worth adopting. She comments that the Commission would have to engage in extensive fact-finding in order to justify such an expansion. Professor Crooms raises further concerns over manipulation of the appointment process for commissioners, but that such manipulation has not necessarily jeopardized the Commission's role. Indeed, she concludes that an expansion of the mandate to include human rights would aid the United States in meeting its treaty obligations and discourage the Commission from ignoring its vital role in responding to important equality issues, including those already within its core mandate.

Professor Sidhu argues that the Commission's current civil rights mandate is too valuable to be expanded because persistent and complex traditional civil rights issues require its determined focus. Ultimately, he writes, the question is how to make the Commission more effective in meeting its existing obligations. Rather than expanding its mandate to include broad human rights oversight, which would dilute the Commission's existing duties, Sidhu contends that the Commission and civil rights compliance more generally would stand to benefit from a reinterpretation of its civil rights mandate, which may generate renewed public and government support for the Commission's work. Sidhu concludes that human rights monitoring may be best assumed by a separate federal independent agency.

OPENING STATEMENT

Seeing Through a Glass Darkly No More: Making the Case
for a U.S. Commission on Human Rights*Lisa Crooms[†]

The United States Commission on Civil Rights has been criticized with little regard for political fealty. It may indeed be the proverbial needle in the haystack of partisan politics. The universality of the belief that the Commission is broken, however, belies the widely divergent views about how it got that way and what to do about it. Some contend “the Commission has outlived its usefulness” because the discrimination and inequality at the center of its mandate are history. Ben Smith, *A Conservative Dismisses Right-Wing Black Panther “Fantasies,”* POLITICO, July 16, 2010, <http://dyn.politico.com/printstory.cfm?uuid=DD3055BF-18FE-70B2-A836F25EC61EF57A> (quoting Linda Chavez, president of the Center for Equal Opportunity). Others claim the Commission is hampered by a double standard that not only fails to take black racism seriously, but also supports the kinds of preferential programs and policies the Supreme Court rejects. Letter from Gerald A. Reynolds, Chairman, U.S. Comm’n on Civil Rights, to Eric Holder, U.S. Attorney Gen. (Oct. 16, 2010), *available at* http://www.usccr.gov/NBPH/10-13-10_Ltr2Holder-Perez.pdf. Still others believe partisan maneuvering has stacked the Commission with ideologues hostile to the agency’s equality and nondiscrimination mandate, seriously compromising the Commission’s ability to do its work. GARRINE P. LANEY, CONG. RESEARCH SERV., RL34699 THE U.S. COMMISSION ON CIVIL RIGHTS: HISTORY, FUNDING AND CURRENT ISSUES 17-20 (2008).

There is a certain amount of truth in all three views. The circa 1957 racism at which the Commission first took aim has changed. Created only three years after *Brown v. Board of Education*, the Commission fixed its crosshairs on Jim Crow and de jure racial segregation. In 2010, de facto racial discrimination persists, rendered

* 1 *Corinthians* 13:12.

[†] Professor of Law and Director of the Constitutional Law Center, Howard University School of Law and Steering Committee Chair, The Human Rights at Home Campaign. I would like to thank Pinal R. Shah (HUSL Class of 2012) for her research assistance, Professor Sidhu for initiating this debate, and the editors at PENNumbra for hosting our discussion.

all but unreachable by the outdated notions of intent associated with its de jure counterpart. Without demonstrable intent, discrimination is beyond the law, set there by Supreme Court decisions based on false notions of racial equality. These are the cases that offer views of equality and nondiscrimination untethered from the racially specific history of the amendments on which much of modern civil rights law is based. This world is color-blind. Here, racism and racial discrimination are equal opportunity offenses. In the context of the Commission, this is exacerbated by those who are willing to play fast and loose with the rules governing the appointment of commissioners and the Commission's composition. The Commission has come to be dominated by a conservative majority in which Republicans and Independents are virtually indistinguishable.

While some might conclude that the best way to fix the Commission is to kill it, I disagree. Rather, expanding the Commission's mandate could go a long way towards refocusing its efforts on the independent monitoring of the government's civil rights record that marked the highpoint of the Commission's history. Adding ratified human rights treaties to the body of law with which the Commission is concerned will better enable the United States to meet its treaty obligations. In this situation, more rather than less might be warranted.

Expanding the Commission's focus to reach human rights was first proposed in the early 1970s by Notre Dame University President and charter member of the Commission, Father Theodore M. Hesburgh. Theodore M. Hesburgh, *The Commission on Civil Rights—And Human Rights*, 34 REV. OF POL. 291, 303-04 (1972). Since then, Father Hesburgh's idea has been reprised by others both within and outside the Commission. MARY FRANCES BERRY, AND JUSTICE FOR ALL 175, 338 (2009). Recently, the call to expand the Commission's mandate in this way has been taken up by social justice, civil rights, and human rights organizations that believe this shift would restore luster to the Commission's reputation as "the conscience of the nation." *The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the Subcomm. on Human Rights & the Law and the S. Judiciary Comm.*, 111th Cong. (2009) (statement of Wade Henderson, President & CEO, The Leadership Conference on Civil and Human Rights); see also Lisa A. Crooms, *Bringing Human Rights Home to Help People Who Need Help the Most*, ROLL CALL, Dec. 11, 2009, <http://www.rollcall.com/news/41435-1.html>; Catherine Powell, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration* AMERICAN CONSTITUTION SOCIETY, 4-5 (Oct. 30 2008),

<http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>.

To be sure, the vision of human rights on which this proposed expansion is based would probably resolve the Commission's current ideological disputes in favor of those who believe that "[a]t the heart of the civil rights movements is the basic human dignity of all people and their right to live in freedom with justice and equal opportunity." LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, RESTORING THE CONSCIENCE OF A NATION: A REPORT ON THE U.S. COMMISSION ON CIVIL RIGHTS 44 (2009), http://www.civilrights.org/publications/reports/commission/lccref_commission_report_march2009.pdf. At a minimum, however, this expansion would require the Commission to engage in the kind of fact-finding on which its early reputation was built and which was essential to making the case for laws such as the Civil Rights Act of 1965, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. It would shift the Commission's focus from false issues such as the investigation of voterless claims of voter intimidation in the interest of taking black racism seriously. Adam Serwer, *Do We Need a Commission on Civil Rights?*, AMERICAN PROSPECT, July 21, 2010, http://www.prospect.org/cs/articles?article=do_we_need_a_commissi_on_on_civil_rights. It could decrease the ability of the Commission to absent itself from serious human rights events such as Hurricane Katrina and its aftermath, police murders in cities such as Oakland, California, and the racially motivated abuse of the criminal justice system in Jena, Louisiana. *Id.* These are among the things that could change by expanding the Commission's mandate to include human rights.

This is not meant to suggest there would be no room for debate among the Commissioners. Diversity of opinion is necessary for the kind of robust discourse that allowed the Commission to play an important role in the civil rights revolution of the 1960s and 1970s. Even in those halcyon days, the Commission's independence was threatened by those on whom the Commission cast an unflattering light. Despite these tensions, politics did not seriously deter the Commission from performing its essential functions and gathering the empirical data that demonstrated the need for major civil rights legislation. In 1983, this changed when the appointment rules were altered. New rules meant Commissioners were no longer chosen by the President with the bipartisanship that receiving advice and consent from the Senate requires. Interbranch responsibility would be shared in a different way, with four Commissioners appointed by the President, and two each by the President Pro Tempore of the Senate and the Speaker of the House. These congressional

appointments need only be informed by recommendations from the leaders of the majority and minority parties. Laney, *supra*, at 6-7, 17-18. They do not require any real bipartisanship.

The danger posed by these rules is the politically motivated manipulation of the appointments process they have been interpreted to permit. Over the past ten years, Republicans have been able to avoid the “no more than four” rule by appointing Independents rather than Democrats. These Commissioners appear to be Independent in name only and, more often than not, take positions that make them indistinguishable from their Republican counterparts. Perhaps the most egregious example of this type of political maneuvering involves Vice-Chairperson Abigail Thernstrom, who has, since 2001, changed her political affiliation twice. With each change, Thernstrom created an opening filled by a conservative with the needed party affiliation to avoid running afoul of the appointment rules. With the exception of Thernstrom herself, most of the Commissioners appointed in this way lack any appreciable civil rights expertise beyond opposing affirmative action. Serwer, *supra*. Satisfying the letter of the appointments rules at the expense of their spirit has prevented the Commission from constructively contributing to civil rights discourse and has compromised its efforts to monitor government implementation and enforcement of civil rights laws.

The likelihood that adding human rights to the Commission’s mandate could help to overcome these difficulties increases if the Commission is constituted in accord with the Paris Principles. United Nations General Assembly Resolution 48/134 sets forth “[p]rinciples relating to the status of national [human rights] institutions,” according to which Commission membership and composition would be determined by “a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation.” Paris Principles, G.A. Res. 48/134, at 4-5, U.N. Doc. A/RES/48/134 (Mar. 4, 1994). This standard is at odds with the manipulation of the appointments rules that has facilitated the current conservative majority—for which any distinction between Republicans and Independents is largely one of name rather than substance.

Transforming the Commission into a national human rights institution can also help the United States meet its obligations under the human rights treaties it has ratified. Beginning in the 1990s, no fewer than three United Nations’ human rights treaty bodies have expressed concern about the absence of a national, independent

human rights institution. Previous administrations chose either to ignore these concerns or deflect them with broad pronouncements about the limits of federalism and the primacy of the states. Most recently, however, the call for an independent human rights institution was met with assurances from the Obama Administration that creating such an institution was “currently under consideration in the United States.” Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review: United States of America*, ¶ 29, U.N. Doc. A/HRC/WG.6/9/L.9 (Nov. 10, 2010). There are a number of different forms that national, independent human rights institutions can take, including the form that would be created by transforming the Commission into such an institution. While the ultimate outcome of this consideration is unknown, what is fairly certain is that other assurances to ratify signed treaties—such as the International Convention on the Elimination of All Forms of Discrimination against Women—will make the need for a national human rights institution more urgent. The Administration’s commitment to leading by example in matters of human rights makes the need for such an institution more, rather than less, pressing.

Finally, expanding the Commission’s mandate to include human rights would permit it to fill a gap in the agency’s jurisdiction, thereby strengthening its work. The Paris Principles require that national human rights institutions “be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.” Paris Principles, *supra*, at 4. Addressing discrimination based on statuses such as sexual orientation, gender identity, and poverty “could make clear a concern with the nexus between race, sex, disability, age, national origin, sexual orientation, religious discrimination, poverty, and civil liberties concerns.” BERRY, *supra*, at 338. This is the type of broad mandate that the Paris Principles require. It involves the kind of expansion with which the Commission is familiar, having added discrimination on the basis of age, sex, and disability to its original four areas of concern: race, color, religion, and national origin. The Commission’s own history attests to its ability to address more without losing sight of its core issues and concerns. Recent events demonstrate that the unfinished business of racial justice and equality has not been lost in the larger universe of interdependent human rights. Concerns about the effect of race and racial discrimination on basic human rights remain central to any comprehensive evaluation of the United States’s human rights record. As long as civil rights are

understood as part of the broader human rights framework, there is nothing to indicate that broadening the Commission's mandate will yield a human rights agenda in which the continuing need to remedy racial discrimination will be either eclipsed or forgotten.

REBUTTAL

*On Reframing, Not Expanding, the Commission's Mandate*Dawinder S. Sidhu[†]

The U.S. Commission on Civil Rights is an independent federal agency responsible for (1) investigating deprivations of the right to vote resulting from discrimination or fraud; (2) examining and apprising laws related to discrimination or the denial of equal protection of the laws under the Constitution; and (3) submitting reports to the President and Congress on its fact-finding efforts. *See* 42 U.S.C. § 1975a (a), (c) (2006); *Hannah v. Larche*, 363 U.S. 420, 440 (1960). For the reasons that follow, I argue that the mandate of the Commission should not be expanded beyond these traditional civil rights obligations to include monitoring of the nation's compliance with international human rights laws. In the Conclusion, I offer several modest suggestions for how the Commission can enhance its institutional credibility, better meet its existing duties, and be more worthy of the public's sacred trust.

I. COMMON GROUND

To begin, it may be helpful to identify several fundamental points on which Professor Crooms and I agree. First, we agree that a federal entity independent of the tripartite branches of the federal government should study and assess whether the United States upholds its commitments to voluntarily assumed international human rights laws. The extent to which the United States adheres to human rights laws demonstrates that it is truly faithful to the rule of law and indicates to the broader global community, including moderate and fringe elements in the Muslim world, that America upholds certain essential values in practice—not just in abstract belief. *See* JOSEPH NYE, JR., *SOFT POWER* 55 (2004).

Second, Professor Crooms and I both recognize that the Commission has faced significant criticism for failing to adequately fulfill its mandate, with some commentators calling for its closure. *See, e.g.*, LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND,

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supra, at 4 (“Today, the [C]ommission is so debilitated as to be considered moribund.”). I share Professor Crooms’s belief, however, that the Commission’s doors should not be shut. The factual predicate for the Commission’s existence—systemic and entrenched civil rights issues, including race discrimination in voting—continues to persist and requires serious analysis. In the 2009 decision *Bartlett v. Strickland*, the Court recognized as much, noting that

some commentators suggest that racially polarized voting is waning—as evidenced by, for example, the election of minority candidates where a majority of voters are white. Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.

129 S. Ct. 1231, 1249 (2009). Thus totally abolishing the Commission—thereby leaving Americans without an independent arbiter of the government’s civil rights record—is neither sensible nor in the best interests of the nation.

Third, Professor Crooms and I agree that a diversity of backgrounds, viewpoints, and perspectives on the Commission is necessary for a robust and meaningful evaluation of civil rights in the country, both in identifying which problems to address and in recommending remedial action with respect to these problems. An absence of diversity limits the credibility of the Commission’s factual findings and substantive determinations, whereas its existence may enrich the intellectual quality of and provide greater legitimacy to the Commission’s work. Fourth, and relatedly, conscious efforts to subvert or bypass rules and policies designed to ensure diversity on the Commission only serve to undermine the agency as an institution and should be strongly discouraged.

II. REFRAMING “CIVIL RIGHTS” AS “HUMAN RIGHTS”

With this foundation of commonalities in mind, we may now turn to where Professor Crooms and I appear to consider things differently, despite our other shared beliefs. As Professor Crooms notes, the idea of adding a human rights agenda to the Commission’s responsibilities can be traced to an article by Father Theodore M. Hesburgh. *See generally* Hesburgh, *supra*. In the article, Father Hesburgh expressed his concern that the hard work of public servants in the civil rights arena had been “canceled out by silence.” *Id.* at 302. To ensure that these civil rights efforts gained appropriate attention from the government and the people, Father Hesburgh suggested that “civil rights . . . might [better] be faced in terms of human rights.” *Id.*

at 303 (quoting *Implementation of Recommendations of Presidential and National Commissions: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary*, 92nd Cong. 272 (1971) [hereinafter *Hearings*] (statement of Theodore M. Hesburgh, C.S.C., Chairman, U.S. Commission on Civil Rights)). This statement reveals that Father Hesburgh sensed that civil rights matters may attain greater traction in the halls of power and in the public square if they are reframed as human rights issues.

Further, Father Hesburgh wrote that the original focus of the Commission—racial segregation and similar, overt, race-based discrimination—had been “pretty well cleaned up,” however other “problems in housing, employment, and schools” and “administration of justice problems as they pertain to . . . [minority groups]” remained and needed to be addressed by the Commission. *Id.* (quoting *Hearings, supra*, at 272 (statement of Theodore M. Hesburgh, C.S.C., Chairman, U.S. Commission on Civil Rights)). Father Hesburgh therefore proposed that the Commission shift its efforts away from traditional race-based discrimination to other facets of discrimination “such as rights for children or rights for women or rights for old people.” *Id.* at 304 (quoting *Hearings, supra*, at 272 (statement of Theodore M. Hesburgh, C.S.C., Chairman, U.S. Commission on Civil Rights)).

It seems that the full spectrum of civil rights monitoring and its’ rebranding of them as human rights issues are what Father Hesburgh had in mind for the Commission in his seminal piece. The force and prescient nature of these views, as I interpret them, becomes apparent in consideration of the present, post-9/11 context. Speaking on the rights of Muslims after 9/11, Professor Baher Azmy observed that there has not been an “appetite in the courts or frankly in the public at large for a narrative or discussion about the rights of these individuals as individuals.” Professor Baher Azmy, Remarks at the University of Pennsylvania Panel Discussion: Nine Years Later: Civil Rights and Civil Liberties in Post-9/11 America, (Sept. 28, 2010) [hereinafter Panel Discussion]. Because of the sentiment that “‘if you’re one of the bad guys, we really don’t want to hear about your rights,’” some legal scholars and activists have begun to reframe Muslim rights as human rights because “human rights belong to everyone” and thus are more identifiable to public officials and the people. Professor Kermit Roosevelt, Panel Discussion, *supra*.

In my view, to reframe civil rights as human rights and to commensurately reframe the mandate of the Commission to include “human rights” as defined in this fashion may not only enhance

government and public interest in and support for the Commission's work, but may also adjust public perceptions such that infringements of anyone's rights necessarily may be seen to affect the rights of everyone else. I therefore find quite appealing Father Hesburgh's argument for the Commission's more comprehensive assumption of discrimination issues and for them to be presented in greater society as shared human rights' problems. In this limited sense, I agree that the Commission can be represented as an investigative body with human rights functions.

III. ADDING INTERNATIONAL HUMAN RIGHTS LAWS PROPER TO THE PLATE

Father Hesburgh's views on the Commission's mandate did not, however, stop at reframing civil rights as shared human rights. He proposed separately that the Commission's work include civil rights monitoring as well as efforts to ensure the general well-being of society—for example by addressing poverty, nutrition, welfare, and related social issues. See BERRY, *supra*, at 126-28. The Nixon White House rejected this idea. *Id.* at 128. Subsequently, during the Carter Administration, a Commission staffer asserted that the Commission's role should be expanded to liaise with human rights entities in other countries for the purpose of supplementing President Carter's demonstrated interest in international human rights—an idea that also failed to meet with approval. *Id.* at 175.

The latest iteration of this proposal has been expressed most notably by Professor Berry, Former Chair of the Commission. She writes that "the [C]ommission could be converted into a human rights commission devoted to the idea that all people have a right to be treated fairly because of their humanity, as suggested by . . . Father Theodore Hesburgh . . ." *Id.* at 337-38. To the extent this restates the "reframing" idea described in Section II, I agree with Professor Berry. She goes on, however, to argue that the Commission "could also monitor U.S. compliance with the international human rights covenants to which we are a party and encourage adoption of those we have not approved." *Id.* at 338. Expanding human rights proper to the Commission's mandate is imprudent for several reasons:

Advocates of this expansion enumerate several specific issues that a Commission with added human rights duties would be able to address. These include racial disparities in the displacement of individuals in the aftermath of Hurricane Katrina, the fatal shooting of an unarmed African American by Oakland police officers, and allegations of racial injustices in the criminal justice system as

exemplified by the “Jena 6.” These issues implicate questions of differential or unjust treatment premised on membership to a protected class, and thus seem to be well within the Commission’s existing mandate to examine discrimination and related issues in the administration of justice. For Professor Berry and others, the problem therefore appears not to be the scope of the Commission’s jurisdiction, but how it is exercised or framed for governmental or public consumption. *See The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the Subcomm. on Human Rights & the Law and the S. Judiciary Comm.*, 111th Cong. (2009) (statement of Wade Henderson, President & CEO, The Leadership Conference on Civil and Human Rights) (objecting to the fact that the Commission has opposed landmark hate crimes and employment discrimination legislation, which also seem to fall squarely within the Commission’s existing mission).

If it is the case that the Commission has not done an adequate job of addressing problems it is already charged to investigate, it is difficult to understand how expanding its mandate can enable, rather than complicate, its ability to perform its existing functions. The Staff Director of the Commission from 2004 to 2008, commenting on the proposal to saddle the Commission with monitoring international human rights obligations, wrote that advocates of this position need to explain how “significant additional substantive responsibilities can have any effect other than to weaken its current capabilities.” Kenneth L. Marcus, *Fixing the Civil Rights Commission*, ENGAGE, Mar. 2010, at 12. We would not give an additional child to a babysitter struggling already to safeguard one toddler on the theory that two will allow the babysitter to do its job better. Similarly, we would not add lots of hay to an already mighty haystack in order to help a person find her needles.

Sifting through that added hay of international human rights laws is not an insignificant responsibility. It would require the Commission to look at, for example, allegations of torture by the administration, whether detainees in Afghanistan are entitled to habeas rights, and how the detainees in Guantánamo and elsewhere have been treated by guards, among other things. These are weighty questions that should not be left with a “debilitated” agency with considerable functions at present. (They perhaps should go, instead, to a new, independent federal entity specifically and exclusively established to monitor America’s compliance with its international human rights obligations.) Moreover, while civil rights and international human

rights laws may be linked at the most general level by concerns for human dignity, both are of a distinct nature, are enforced by completely different statutes, regulations, and treaties, and implicate wholly different sets of parties.

Civil rights matters in the United States still require the comprehensive attention of the Commission because many such issues requiring serious study exist today and many will arise in the future. *See, e.g., Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009). As Professor Berry herself concedes, “[g]iven the continued contention and resurgence of conflicts over race and other domestic issues . . . it might . . . be better to maintain the [C]ommission’s focus on civil rights in this country.” BERRY, *supra*, at 338.

Finally, diluting the Commission’s mandate may send the harmful message that civil rights matters no longer warrant the existence or focus of a dedicated, independent civil rights agency. Professor Berry again puts it best: adding a human rights agenda to the Commission’s mandate “might signal a belief that the work that needs doing is done or an abandonment of the idea of further progress because the job is too difficult and the issues intractable.” *Id.* The very issues that advocates of a human rights Commission identify in their arguments—such as racial injustices stemming from Hurricane Katrina—indicate that civil rights continue to elude our complete grasp, meaning that our efforts in this regard must press on unabated and undeterred.

CONCLUSION

None of my arguments against adding human rights monitoring to the Commission’s responsibilities are meant to deny the value of and need for human rights compliance efforts. Rather my arguments are intended only to challenge whether the extent to which American activities around the world are in lockstep with international human rights laws is a question that should be presented to a body already charged with examining the state of equality in the fifty states.

As to improvements to the existing Commission, I believe it would be better served by an enlarged budget—which would enable it to adequately engage in its civil rights fact-finding—and reauthorization from Congress, which would reflect the importance of and continuing need for this monitoring agency. Moreover, actual or perceived manipulation of rules designed to ensure true diversity among the Commissioners should lead to an exploration of an alternative appointments process that will yield a genuinely diverse set of

Commissioners and thus enhanced credibility for its vitally significant work.

CLOSING STATEMENT

The Possibilities of More to Overcome the Limitations of Less

Lisa Crooms

As Professor Sidhu notes, there are a number of points on which we agree. To those points, I would add the following:

First, Father Hesburgh's initial call to expand the Commission's work according to a human rights mandate was accompanied by optimism about how quickly civil rights laws would change the terrain of race and rights in the United States that time has shown was unwarranted. Second, the racial justice at the center of the Commission's mandate has not been achieved. Third, more than one president rejected Father Hesburgh's idea to expand the Commission's mandate to include human rights. Fourth, human rights address the general wellbeing of society regarding matters such as poverty, nutrition, welfare, and education. Fifth, in post-9/11 America, human rights include those issues raised by the "War on Terror" that relate to U.S. human rights treaty obligations. Sixth, many of the issues that might benefit from being considered through a human rights lens are part of the Commission's existing mandate. Seventh, many of the Commission's problems stem from not the scope of its jurisdiction, but rather from how this jurisdiction is either exercised or understood. Eighth, there is both value in and a need for an independent national entity to monitor and assess U.S. compliance with human rights law. Finally, more money, congressional reauthorization, a different appointments process, and genuinely diverse membership would enhance the Commission's work and credibility.

Our common ground, however, forms a backdrop that brings our points of disagreement into sharp relief. Whereas Professor Sidhu sees the Commission as the poster child for the movement for simple living, I share Father Hesburgh's belief in the possibility of more rather than less. Enlarging "the vision of the American dream beyond the purely political rights in national documents of Government . . . [to] take in the broader view of the totality of human rights" remains the basis on which the government should expand the Commission's mandate. Hesburgh, *supra*, at 303-04 (quoting *Hearings, supra*, at 272). Much has changed since Father Hesburgh first linked the Commission and human rights—chiefly, the United States has ratified human rights treaties that require our government to respect rights

such as equality and nondiscrimination and to protect and promote these rights domestically. Just as human rights is the broader context in which American civil rights exist, adding human rights treaties to the Commission's jurisdiction merely formalizes the role the Commission is expected to play in monitoring domestic laws implementing human rights and efforts to enforce them.

As if anticipating Professor Sidhu's protestations, Father Hesburgh observed that "[s]ome people would object to this and say, look, you have enough problems, you should not take on any more, but I think, perhaps, sometimes, when you are having trouble getting a limited job done, you can even take on a larger job with a larger vision." *Id.* at 304 (quoting *Hearings, supra*, at 273). Father Hesburgh's vision finds additional support in the fact that an understanding of the domestic aspects of human rights law, as well as the primacy of enforcement and implementation at the national, rather than international level, has become *de rigueur*. The Obama Administration recognizes that upholding human rights requires countries to assess their own domestic laws, policies, and practices. The Administration characterizes the United States as "seek[ing] to advance human rights and fundamental freedoms around the world, [and doing] so cognizant of [its] own commitment to live up to [its] ideals at home and to meet [its] international human rights obligations." *U.S. Human Rights Commitments and Pledges*, U.S. BUREAU OF INTERNATIONAL ORGANIZATION AFFAIRS (Apr. 27, 2009) <http://www.state.gov/documents/organization/122476.pdf>.

That such a shift of domestic focus on addressing human rights seems unwieldy is largely a function of the noninterventionism and exceptionalism that have predominated U.S. engagement with the international community. For the United States, participating in the United Nations as well as acceding to the principles rooted in the Universal Declaration of Human Rights (UDHR), has always been a mixed bag. More often than not, the United States dickers over treaty language and denounces the human rights violations of others while neither abiding by the treaty language it helped draft nor permitting universal standards to be used to assess its human rights record. For example, the United States helped draft the UDHR which declares "[a]ll human beings are born free and equal in dignity and rights[.]" but at the same time, the government remained committed to the idea that *de jure* racial segregation was off limits for the emerging human rights regime. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. I, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

This is the same dissonance the United States exhibited in its desire to “form a more perfect union” so strong that it yielded a constitutional compromise that simultaneously advanced notions of liberty and due process of law while protecting property interests and the institution of chattel slavery. Only a civil war and three constitutional amendments would begin to address the gaps between the Constitution’s soaring rhetoric and the country’s “peculiar institution.” Within fifteen years of the ratification of the Fourteenth Amendment, Congress’s authority to enforce its provisions—including equal protection of the laws—was limited based on the belief that Federal civil rights laws had permitted former slaves to “shake[] off the inseparable concomitants of that state.” *Civil Rights Cases*, 109 U.S. 3, 25 (1883). This permitted the former slave to reach a “stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen . . . are to be protected in the ordinary modes by which other men’s rights are protected.” *Civil Rights Cases*, 109 U.S. at 61. Thirteen years later, “equal protection of the laws” and “separate but equal” became synonymous. *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896). Having placed the government’s imprimatur on legally mandated racism, states were free to enact legislation designed to keep the races separate in the name of protecting the health, safety, and welfare of their citizens. This would remain the case until 1954, when the Supreme Court declared that the doctrine of separate but equal was unconstitutional. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

This change would not have occurred without a multilevel assault on Jim Crow that was fueled in part by the notion of human rights as expressed in the United Nation’s Declaration of Human Rights. Contemporary appeals to embrace human rights are directly linked to the history of advocacy of those who saw the United Nations as a forum in which the United States might be held to account for the “lynching, brutality, terror, humiliation, and degradation through segregation and discrimination” that marked the reign of Jim Crow. Roy Wilkins, Editorial, *Now is not the Time to Be Silent*, THE CRISIS, Jan. 1942, reprinted in THE CRISIS, Nov. 1970, at 331. By directly petitioning the United Nations, these civil rights advocates “captured the imagination of African Americans by lifting the struggle of the Negro out of the local and national setting and placing it in the realm of the international.” CAROL ANDERSON, EYES OFF THE PRIZE 93 (2003) (internal quotation marks omitted). It should be no surprise that these petitions were defeated by the maneuverings of U.S. representatives determined to keep “the Negro question” out of the

United Nations. Nascent Cold War politics further distorted domestic views of human rights, inextricably linking them to a looming Communist threat. Many human rights advocates found themselves summoned by the House Committee on Un-American Affairs, stripped of their passports and branded as enemies. This context conspired to create a lexicon in which human rights were foreign and fundamentally un-American, obscuring the essential Americanness of contemporary human rights and the struggle for dignity and equality at the root of the United Nation's human rights mandate.

Thankfully, the American imprint on human rights law is not lost on the current Administration. By rhetorically breaking with the past, President Obama has eschewed exceptionalism, opting to lead by an example based on principled engagement. To this end, his administration is committed "to meeting its UN treaty obligations and participating in a meaningful dialogue with treaty body members." *U.S. Human Rights Commitments and Pledges, supra*. It is also committed to cooperate "with the UN's human rights mechanisms . . . by responding to inquiries, engaging in dialogues, and hosting visits." *Id.* These commitments evince an understanding of human rights as relevant to both domestic and foreign policy. It is this domestic human rights law and policy that would be central to the Commission's work.

The current Administration also understands that racial justice and equality are essential parts of U.S. human rights obligations. The United States has noted its strong commitment "to fighting racism and discrimination, and acts of violence committed because of racial or ethnic hatred." *Id.* It has acknowledged that "racism still exists in our country and we continue to fight it." *Id.* These commitments demonstrate that adopting a human rights framework need not sound the death knell for the continuing struggle against racial injustice. Rather, the seemingly intractable questions of race and rights as matters of domestic law and policy—by virtue of the United States's ratification of treaties such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racism—involve human rights. This challenges Professor Sidhu's claim that although "civil rights and international human rights laws may be linked at the most general level by concerns for human dignity, both are of a distinct nature, are enforced by completely different statutes, regulations, and treaties, and implicate wholly different sets of parties." Rebuttal, *supra*. The distinction between positive practices based on noninterventionism and

exceptionalism, on the one hand, and normative efforts of principled engagement informed by the fundamental idea that human rights are both universal and interdependent, on the other hand, is challenged to clarify the requirement that the standards and norms contained in ratified human rights treaties become imbedded in domestic law and policy. Implementation and enforcement of international human rights norms will require the United States to pass laws that incorporate these standards into domestic law. The stakeholders involved in implementing and enforcing human rights domestically are the same stakeholders involved in promulgating and enforcing civil rights laws, as well as monitoring those efforts. This would be the human rights work of Father Hesburgh's U.S. Commission on Civil Rights and Human Rights. The Commission's current responsibility to monitor fifty states and the District of Columbia further supports expanding its mandate. Indeed, the conditions under which the United States ratifies human rights treaties make both the executing laws and the nuts-and-bolts enforcement and implementation of these laws at the state and local level matters with which the Commission would continue to be concerned, particularly as they relate to racial justice and equality. As the Obama Administration's human rights commitments make clear, the voting rights which Professor Sidhu correctly identifies as an essential part of "[t]he factual predicate for the Commission's existence" are also an essential part of the U.S. record on human rights. *Id.*

To situate civil rights within human rights is among the first steps needed to make good on the Obama Administration's human rights pledges. To expand the Commission's mandate is essential to building the kind of domestic human rights infrastructure needed to meet U.S. treaty-based obligations. In this type of infrastructure, human rights and fundamental freedoms include not only the civil and political rights that have been the mainstay of U.S. civil rights laws, but also the economic, social, and cultural rights that are far too often either left to the vagaries of the market or seen as a matter of individual choice and responsibility. Like Father Hesburgh, I advocate for this expansion based on a belief in the possibilities of the more of human rights rather than the less of civil rights. To this end, I return to Father Hesburgh's observations about these possibilities. As he noted, "[t]o a large extent, our recommendations represent ideas whose times have not yet come. . . . A principal purpose of making what some believe are politically unrealistic recommendations is to bring these recommendations into the arena of public dialogue, with the conviction that this will hasten the time for adoption."

Hesburgh, *supra*, at 300. It is in this spirit that I embrace Father Hesburgh's idea about expanding the Commission's mandate to include human rights with the firm belief that it is an idea whose time has finally come.

CLOSING STATEMENT

All Along the Watchtower

Dawinder S. Sidhu

The proposal to expand the mandate of the U.S. Commission on Civil Rights to include monitoring of the nation's compliance with international human rights has been the subject of this Debate. In my Closing Statement, I intend to explain directly and through analogy why this proposal remains unpersuasive. Specifically and at the most basic level, it seems to me that advocates of this proposal have failed to prove at least four points that appear to be central to their position: first, that the state of civil rights is so favorable or tractable as to allow the Commission to assume a significantly widened jurisdiction over issues outside of the traditional civil rights arena; second, that an enlarged mandate will not diminish the Commission's existing capabilities to study civil rights in America; third, that monitoring compliance with international human rights obligations is a responsibility that must be bestowed on the Commission as opposed to another independent federal body; and fourth, that objections to the proposal are grounded only in certain rigid ideologies or political theories that do not, as an original or threshold matter, believe in the importance of American compliance with international human rights standards or norms.

I. PRELIMINARY COMMENT

Before addressing the residual contentions about the merits of the proposal, I am compelled to respond to Professor Crooms's view, expressed in her final salvo, that I "see[] the Commission as the poster child for the movement for simple living." This characterization lacks any relationship to the truth. The Commission, as I attempted to articulate in my Rebuttal, is charged with performing a vitally significant public function: to ensure that our nation is effectively eliminating the specter of discrimination such that an ordered, prosperous society comprised of different people may be a viable possibility instead of an unattainable, Platonic ideal. The extent to which our nation protects the civil rights of the people is the extent to which our nation has fulfilled its promise of liberty for all, and to which the people are truly free to pursue opportunities that may lead to a better life for themselves, their families, and society at large.

Conversely, the nation will not and “cannot endure if [it] falls short on the guarantees of liberty, justice, and equality embodied in our founding documents.” *Illinois v. Allen*, 397 U.S. 337, 348 (1970) (Brennan, J., concurring). Quite plainly, civil rights are fundamental and foundational in American society.

Post-9/11 realities help underscore the importance of civil rights. In the aftermath of the terrorist attacks of September 11, Muslims and those perceived to be Muslim have been harassed, assaulted, refused service in places of public accommodation, fired by their employers, and ejected from airplanes, among other things—not because of any tie to terrorism, but because of their appearance, which superficially links them to those who “look” like terrorists. See generally DAWINDER S. SIDHU & NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE (2009); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1259-63 (2004). Many Muslims and Sikhs were forced to stay indoors out of concern for their physical safety, mask their religious identity in order to seem less dangerous or suspicious to others, broadcast their allegiance to the United States by displaying American flags in their cars and outside of their homes, and question whether they truly belonged in this American experiment in religious freedom. See, e.g., SIKH COALITION, HATRED IN THE HALLWAYS: A PRELIMINARY REPORT ON BIAS AGAINST SIKH STUDENTS IN NEW YORK CITY’S PUBLIC SCHOOLS 5 (2007), available at <http://www.sikhcoalition.org/advisories/documents/HatredintheHallwaysFinal.pdf> (recounting a Sikh student’s decision to cut his hair to avoid further harassment); Image Archives: Cover Image from Nov. 5, 2001, THE NEW YORKER, http://images.archives.newyorker.com/djvu/Conde%20Nast/New%20Yorker/2001_11_05/webimages/page0000001_1.jpg (last visited Dec. 15, 2010); Sam McManis, *Protective Coloring of Patriotism: U.S. Flag Serves as Armor Against Bigotry*, SFGATE.COM (Oct. 06, 2001), http://articles.sfgate.com/2001-10-06/news/17623036_1_american-flag-central-valley-sikh; Kenji Yoshino, *Uncovering Muslim Identity*, TOWARD FREEDOM (Nov. 23, 2005), <http://www.towardfreedom.com/home/content/view/674/54>.

As a member of the Sikh community, I assure the reader (although I hope it may already be clear) that the civil rights matters with which the Commission deals are not about ensuring a “simple living” or cushy lifestyle. Rather, the Commission’s practical objective is to make it less likely that targeted groups will be threatened,

harassed, intimidated, assaulted, or subject to other illegal, hate-based conduct as they go about their daily lives.

The civil rights of post-9/11 Muslims and Sikhs (and others who have been the subject of discrimination) fall squarely within the Commission's existing mandate and are precisely what the Commission should be trying to safeguard through its monitoring and advisory duties. The Commission is not a "poster child" or mere window-dressing, but is in some respects one of the few bastions of hope and relief for those facing persistent discrimination—especially for those without the political wherewithal or know-how to effect change through other means.

II. LESS IS MORE

Professor Crooms believes in the "possibility of more rather than less" for the Commission. Crooms, *Closing Statement, supra*. One may be more inclined to agree with Professor Crooms if—and only if—the existing mandate of the Commission were not so rife with systemic and ongoing societal problems stemming from voting and discrimination in other contexts. The post-9/11 difficulties encountered by Muslims and Sikhs—which continue to linger over nine years after the attacks—are but one example of the broad, national civil rights problems that require the dedicated attention and interest of the Commission. Others include, but are not limited to, racial disparities in access to the criminal justice system, racial discrimination and disenfranchisement, the equality of educational and life opportunities for individuals with emerging disabilities such as post-traumatic stress disorder, and the rights of immigrants outside of the formal legal process. These examples are just the tip of the iceberg.

Even if the universe of national civil rights problems were limited to the problems just mentioned, the Commission would have its hands full: significant resources and time would be needed to properly examine the particular civil rights issues across the nation within these broad subjects, and to then propose comprehensive recommendations for their remediation.

The fact remains, however, that the Commission has been unable to sufficiently deal with these already weighty national civil rights matters. Were it otherwise, traditional civil rights issues would be disappearing from our public squares, boardrooms, and schools. The persistence of these problems suggests that the Commission's work is still necessary and that to dilute its substantive responsibilities would be to diminish its abilities relative to traditional civil rights and give

license to some of the very issues we wish to banish from our society.

The operative question, therefore, is not whether to expand the fact-finding and advisory functions of the Commission, but how to better ensure that the Commission does its existing job more effectively for the benefit of the people, including Muslims with headscarves, embattled soldiers returning home, or minorities without access to counsel or a fair trial, sitting for years on death row.

In this respect, Father Hesburgh advances a powerful and compelling argument. He posits, in essence, that civil rights *are* human rights and that as a result, any given individual should be concerned about the Muslim, the soldier, or the prisoner because *her rights are my rights*. See generally Thomas Paine, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT (1795), *reprinted in* 2 THE POLITICAL AND MISCELLANEOUS WORKS OF THOMAS PAINE 17 (R. Carlile ed.) (1819) (“[E]very man must finally see the necessity of protecting the rights of others as the most effectual security for his own.”). If, by contrast, we see civil rights as particular to a given group and of relevance only if the group to which we belong is implicated, civil rights in this nation will continue to languish and suffer from indifference, apathy, or “silence,” as Father Hesburgh poignantly observed. Hesburgh, *supra* at 302. Father Hesburgh’s alternative—that civil rights be reframed as human rights—warrants greater exposure and promotion. If anything, this Debate between Professor Crooms and me may be considered successful because we both see the value of and need for civil rights to be construed as universally held rights. For the Commission’s focus to remain on traditional civil rights and for those rights to be reframed as human rights may offer a clearer lens through which civil rights may be viewed and may thus trigger a new, more effective era of civil rights monitoring and resulting compliance.

III. THE FOLLY OF MORE

If we consider the Commission’s existing jurisdiction—discrimination and fraud in voting, discrimination generally, and the denial of equal protection—as a certain area of law, it is the Commission’s duty to monitor and examine societal problems and governmental responses in this area. The Commission is akin to a guard at a watchtower, overseeing the social activity and government actions in a particular part of the sea. As is evident by even a cursory assessment of the country, and as shown by the examples discussed herein, this area contains many entrenched, difficult, and complex issues requiring the watchful eye of our conscientious guard.

Professor Crooms and others would load additional supervisory duties onto this guard, asking her to review the state not only of this area (voting disparities and fraud, discrimination, and equal protection), but of another vast and complicated area as well—the nation’s compliance with international human rights obligations. While these areas may blend together at the margins, there can be no doubt that they are in fact separate and separable. In addition to monitoring traditional civil rights issues falling within its existing jurisdiction, such as discrimination against Muslims, individuals with disabilities, or minorities in the criminal justice system, our guard would be responsible for assessing, for example, whether waterboarding constitutes torture, whether detainees in Abu Ghraib or Bagram have been mistreated, whether detainees outside of Guantánamo are entitled to the writ of habeas corpus, and whether any current or former government officials (such as George W. Bush, John Ashcroft, Robert Mueller, and John Yoo) may be held liable for their involvement in approving or preparing wartime policies and tactics. Accordingly, placing international human rights compliance on the Commission’s shoulders does not, as Professor Crooms claims, “merely formalize” an expectation that the Commission look into human rights, but instead adds completely different substantive responsibilities to the Commission’s demanding and pressing docket.

In addition to international human rights compliance, Professor Crooms would seemingly have the Commission monitor the general well-being of everyone in America:

[H]uman rights and fundamental freedoms include not only the civil and political rights which have been the mainstay of U.S. civil rights laws, but also the economic, social and cultural rights that are far too often either left to the vagaries of the market or seen as a matter of individual choice and responsibility.

For the Commission to examine overall social welfare—such as poverty, nutrition, welfare, and related issues—would be for the Commission to explore virtually the entire universe of social problems and governmental action. One struggles to find an aspect of American life that could not be reasonably tied to economic, social, and cultural rights and thus would lie outside the Commission’s jurisdiction. One guard cannot be expected to oversee or survey all, as the advocates of the proposal appear to suggest.

IV. AN ALTERNATIVE

The expansive, if not unlimited, jurisdiction proposed by

Professor Crooms begs the following question: why must the Commission bear the sole responsibility for monitoring individual rights issues? Professor Crooms cites as “support” for the Commission’s expanded role Father Hesburgh’s statement that “sometimes, when you are having trouble getting a limited job done, you can even take on a larger job with a larger vision.” Hesburgh, *supra*, at 303-04 (quoting *Hearings, supra*, at 273). With due respect to Father Hesburgh, this statement amounts to a comment of purely aspirational qualities rather than an argument with an evidentiary basis. Professor Crooms further notes that “an understanding of the domestic aspects of human rights law, as well as the primacy of enforcement and implementation at the national, rather than international level, has become *de rigueur*.” At the outset of my Rebuttal, I endorsed fully the idea that “a federal entity independent of the tripartite branches of the federal government should study and assess whether the United States upholds its commitments to voluntarily assumed international human rights laws.” It does not follow from an appreciation for the relationship between civil rights and human rights, or from a recognition that nations themselves rather than super-national bodies should engage in enforcement of these rights, or from an agreement that human rights proper should be examined by an independent federal body, that monitoring the nation’s human rights record must fall to the Commission.

In my Rebuttal, I suggested an alternative paradigm in which compliance efforts would be shared. Specifically, I wrote that the international human rights questions might go to “a new, independent federal entity specifically and exclusively established to monitor America’s compliance with its international human rights obligations.” I proposed a second guard on the watchtower, if you will.

Professor Crooms’s Closing Statement completely ignores this idea and instead appears to insist that the only option with respect to international human rights monitoring is to augment the mandate of the Commission. This seemingly all-or-nothing approach lacks practical sense and may even be harmful; it compels our guard to take on the whole landscape of individual-rights-monitoring and makes it more likely that some matters may be overlooked or ignored out of sheer administrative strain.

To obviate the possibility that such monitoring may be stretched too thin, we may take a cue from federal agencies that divvy up compliance responsibilities among several agencies. The rights of individuals with disabilities, for example, are distributed among

several agencies, including the Departments of Justice, Education, and Housing and Urban Development. Even with respect to rights that are directly related and not just linked at abstract levels, splitting the load makes eminent sense. That these duties are diffused does not indicate that they are any less related or important, or less worthy of public or government attention. Rather, this allocation honors their nuanced nature and enhances the agencies' collective ability to address and redress certain individual rights. By the same token, the Commission need and should not be the sole independent entity that works to ensure that the nation is meeting its obligations with respect to civil rights *and* human rights proper. Advocates of the proposal to expand the Commission's mandate appear to be unwilling or unable to recognize the merits of the federal agency model.

Indeed, responsibility is shared not only among the agencies that directly promulgate laws and policies with respect to civil rights, but among multiple independent federal bodies charged with monitoring and recommending solutions to individual rights issues. For example, the U.S. Commission on International Religious Freedom examines whether individuals worldwide may practice their faith free of persecution. International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended in scattered sections of 22 U.S.C.). The now-defunct U.S. Commission on Immigration Reform studied, among other things, improving family reunification efforts, curbing illegal immigration, the impact of immigration on the labor market, the provision of educational opportunities to immigrants, and national security. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Clearly, it is possible for multiple independent guards to stand watch over the sea of individual rights, even if there may be an overlap of jurisdiction.

The presumption that the Commission is to assume all human rights monitoring duties—not just those that may be said to be part of its existing mandate—is difficult to square with the sensible and prudent sharing of monitoring functions that the federal government has practiced. Put differently, a fixation on a unified procedural framework invariably will point to a catchall Commission with broad civil rights and human rights monitoring duties, however a focus on how to optimally address the rights of the people dictates a more workable, shared system.

CONCLUSION

My argument is not meant to deny the importance of monitoring

our human rights obligations. In fact, such adherence to international human rights laws not only reaffirms our belief in the rule of law, but can also generate greater American credibility and legitimacy in the world, particularly the Muslim world. In other words, faithfulness to voluntarily assumed human rights standards can be an important and positive instrument of foreign policy. NYE, *supra* at 55. It cannot be said, therefore, that objections to the proposal to expand the Commission's mandate are grounded in American exceptionalism or isolationism. Proponents of the proposal must convince their kin—people in their own tent of political theory and those who also seek American fidelity to its human rights commitments—of the merits of an expanded Commission. They cannot simply assume that those with objections are on the opposite end of the ideological spectrum and reflexively discount these objections as a result.

Ultimately, the question boils down to how, not whether, the nation's compliance with its international human rights obligations should be monitored. I regret that advocates of the proposal now under consideration have failed to carry their burden of showing that the Commission—tasked already with weighty and complex civil rights monitoring responsibilities in a nation that remains racially charged, in which there exists great social distance between people of different groups, and in which the “us” versus “them” mentality stubbornly persists—is the best or only home for human rights monitoring, as well.

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