

# Fulfilling the U.S. Obligation to Prevent Exterminationism: A Comprehensive Approach to Regulating Hate Speech and Dismantling Systems of Genocide

*Sarah E. Ryan\**

“The practices of genocide anywhere affect the vital interests of all civilized people. Its consequences can neither be isolated nor localized.”

– Raphael Lemkin, 1945<sup>1</sup>

## I. INTRODUCTION

In 1933 Raphael Lemkin, an Eastern European legal scholar and prosecutor, proposed new international laws to prevent the “extermination of social collectivities”<sup>2</sup> at the International Conference for the Unification of Criminal Law. His proposal failed and the world soon witnessed “crimes of barbarity”<sup>3</sup>—Lemkin’s original conception of genocide—on a scale that even Lemkin never dreamed possible. Following the Holocaust, Lemkin again leveraged his philological<sup>4</sup> and

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\* Assistant Professor of Communication and Research Fellow in the Sam Donaldson Center for Communication Studies, University of Texas at El Paso (Ph.D., Scripps College of Communication at Ohio University, 2006). The author would like to thank Carol McMahon, Esq. and Justine Daniels, Esq. for insightful comments and contributions to this Article, Annie Balocating for three years of project management for the Rwanda Research Group, and Chuck Ambler and the Africa Working Group at University of Texas at El Paso for ongoing guidance and support.

1. Raphael Lemkin, *Genocide – A Modern Crime*, 9 FREE WORLD, Apr. 1945, at 39.

2. Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT’L L. 145, 146 (1947) [hereinafter Lemkin, *Genocide as a Crime*]; see also Raphael Lemkin, *Akte der Barbarei und des Vandalismus als Delicta Juris Gentium* [Acts of Barbarity and Destruction that Shock the Conscience of Nations], 19 ANWALTSBLATT INTERNATIONALES 6 (1933) [hereinafter Lemkin, *Akte der Barbarei*], available at <http://www.preventgenocide.org/lemkin/madrid1933-english.htm>.

3. See Lemkin, *Akte der Barbarei*, *supra* note 2.

4. Philology is the study of language, particularly its use and meaning within social contexts. The art and social science is rooted in ancient studies of rhetoric. See Mikhail Bakhtin, *The Problem of the Text in Linguistics, Philology, and the Human Sciences: An Experiment in Philosophical Analysis*, in SPEECH GENRES AND OTHER LATE ESSAYS 103, 122–28 (Caryl Emerson & Michael Holquist eds., Vern W. McGee trans., Univ. of Texas Press 1986) (discussing the need to view utterances within their context and judge their impact on third parties to determine their meaning).

legal expertise in a campaign to stop the destruction of peoples.<sup>5</sup> Lemkin coined the term “genocide”<sup>6</sup> and oversaw the creation of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide in 1948 (“Genocide Convention”).<sup>7</sup> Eleven years later, he died abandoned and penniless in his adopted country, the United States.<sup>8</sup> More than a quarter-century passed before the U.S. ratified a highly modified version of the Genocide Convention.<sup>9</sup>

The reluctance of U.S. lawmakers and jurists to fully enact the Genocide Convention—to this day<sup>10</sup>—illustrates the prevailing obstacles facing proponents of hate speech<sup>11</sup> regulations and

5. See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 47–52 (2002) (explaining Lemkin’s criticism of the Nuremberg Tribunal).

6. Genocide refers to the attempted or actual destruction of a gene pool, though Lemkin applied the term somewhat more broadly (e.g., to campaigns targeting religious groups). Efforts to expand the definition contained in the 1948 Genocide Convention have failed. According to William A. Schabas, other forms of targeted extermination have been successfully prosecuted as crimes against humanity rather than genocide:

Genocide is a crime of intentional destruction of a national, ethnic, racial and religious group, in whole or in part. . . . This definitional provision has stood the test of time, resisting calls for its expansion . . . . The obstinate refusal to modify the definition is not explained by some innate conservatism in the international lawmaking process. Rather, the gaps left by the somewhat narrow definition of genocide in the 1948 Convention have been filled more or less satisfactorily by the dramatic enlargement of the ambit of crimes against humanity during the 1990s.

William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. AUDIOVISUAL LIBRARY OF INT’L L., 3 (2008), [http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf).

7. The convention was adopted in 1948 and entered into force in 1951. See Lori Lyman Brunn, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT’L L. & TRADE 193, 204 (1993) (discussing the formation of the Prevention and Punishment of the Crime of Genocide).

8. See *The Totally Unofficial Man: Raphael Lemkin and the Struggle for a Genocide Convention*, ANTI-DEFAMATION LEAGUE, [http://www.adl.org/education/curriculum\\_connections/spring\\_2005/spring\\_2005\\_lesson2\\_lemkin.asp](http://www.adl.org/education/curriculum_connections/spring_2005/spring_2005_lesson2_lemkin.asp) (last visited Dec. 15, 2011) (outlining a lesson plan for high school students that includes this summary of Lemkin’s campaign to end genocide).

9. The implementing legislation, known as the Proxmire Act, contained significant reservations, understandings, and declarations that limited and modified U.S. obligations under the Genocide Convention. Proxmire Act of 1987, Pub. L. No. 100-606, § 2(a), 102 Stat. 3045, 3046 (1988).

10. See Gregory S. Gordon, *Never Say Never Again?*, GENOCIDE PREVENTION NOW, Winter 2010, at 1, available at <http://genocidepreventionnow.org/Portals/0/docs/Gordon-GPN-YEAR-REV2009.pdf> (noting that the sixtieth anniversary of the Genocide Convention was full of sober reminders that its primary goal of preventing genocide has remained out of reach); see also Clint Williamson, *U.S. Efforts to Combat Genocide and War Crimes*, 16 TUL. J. INT’L & COMP. L. 321, 323 (2008) (arguing that the United States can do more to combat genocide).

11. Disagreement looms over the definition of hate speech. Ronald Turner provided numerous definitions in his 1995 essay. See Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 IND. L. REV. 257, 257–58 n.1 (1995) (discussing how various scholars have defined the term “hate speech”). These included Professor Gerald Gunther’s topically-relevant definition of genocide as “speech expressing hatred or bias toward members of racial, religious, or other

preventative intervention. Accordingly, this Article looks briefly at the struggle to realize Lemkin's life's work in the U.S., while suggesting parallels between past challenges to the Genocide Convention and hate speech regulations today. Noting decades of legislative and judicial resistance to such proposals, this Article then suggests an alternative, complementary route to realizing Raphael Lemkin's ideals—system regulation.

## II. CHALLENGES TO THE GENOCIDE CONVENTION: AN ILLUSTRATION OF MODERN U.S. ANTAGONISMS TOWARD HATE SPEECH AND INCITEMENT REGULATIONS AND INTERNATIONAL JURIDICAL ARRANGEMENTS

Reservations about the Genocide Convention rest on four grounds: definitional vagueness, doctrinal limitations, jurisdictional objections, and geopolitical concerns.<sup>12</sup> First, in the years preceding the passage of the implementation legislation, the Proxmire Act,<sup>13</sup> members of both Congress and the American Bar Association (“ABA”) vociferously debated the convention's definition of genocide as the targeting of a group for extermination.<sup>14</sup> They questioned how many people constitute a group and posited hypothetical scenarios in which ethnic and racial groups were incrementally terrorized to test the bounds of the definition.<sup>15</sup> As political scientist Lawrence J. LeBlanc has observed, these discussions descended into absurdity when “[s]trained examples were used to illustrate the [definitional] problem, including murder of a single individual and ‘driving five Chinamen out of town.’”<sup>16</sup> Absent context, these debates suggested a gross insensitivity

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groups.” *Id.* at 258 n.1 (quoting GERALD GUNTHER, CONSTITUTIONAL LAW 134 (12th ed. 1991)). See *infra* notes 51–54 and accompanying text for a discussion of issues in defining “hate speech.”

12. See Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, 370 (1984) (explaining the reasons for the controversy over interpreting Article II of the Genocide Convention, which defines genocide as “intent to destroy, in whole or in part”); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 622–28 (1991) (summarizing U.S. reservations to ratifying the Genocide Convention); NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION—ITS ORIGINS AND INTERPRETATION (1949) (describing the preparation and interpretation of the Genocide Convention approved by the General Assembly on Dec. 9, 1948).

13. See Proxmire Act of 1987, Pub. L. No. 100-606, § 2(a), 102 Stat. 3045, 3046 (1988) (allowing the prosecution of any perpetrator of genocide found in the U.S.).

14. LeBlanc, *supra* note 12, at 374 (examining the view, held both by the ABA and members of Congress, that the ordinary meaning of the Genocide Convention's definition of genocide is intent to destroy a group in whole or in part).

15. *Id.* at 375.

16. *Id.* at 373; see also ROBINSON, *supra* note 12, at 14–19 (discussing issues other U.N. members had with the definition of genocide).

to calamities<sup>17</sup> such as the Holocaust and Armenian genocide. A full review of the historical record reveals their grounding in a pernicious desire to avoid blame for proto-genocidal campaigns conducted on U.S. soil, particularly lynchings and race riots.<sup>18</sup> The near paranoia over U.S. culpability for genocide expanded during the Vietnam War era, when opponents of the Genocide Convention<sup>19</sup> posited that doctrinal limitations would hinder determinations of intent to exterminate.

Throughout the 1960s and 1970s, prominent U.S. legislators and legal experts contended that courts could not determine genocidal intent.<sup>20</sup> They argued that even with robust evidence of sustained violence against a particular group, the intention to exterminate them on the basis of their affiliation would be hard to prove.<sup>21</sup> Groups routinely engage in bloody conflict over shared resources, cultural differences, and competing geopolitical aims—and they aim to hurt each other grievously—but often fall short of undertaking annihilation. Further, individuals and groups frequently utter discriminatory words without wishing for the complete destruction of the groups they disparage. U.S. opponents of the Genocide Convention contended that determining a purely exterminationist intent was simply beyond the capability of existing legal systems.<sup>22</sup>

Critics of the Genocide Convention claimed that neither domestic nor international courts could satisfactorily interpret or enforce it.<sup>23</sup> Domestic case law provided scant guidance on how to evaluate a

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17. The Hebrew word “Shoah,” or calamity, is often used to signify the calamity that befell humanity during the Holocaust. Gavriel D. Rosenfeld, *The Politics of Uniqueness: Reflections on the Recent Polemical Turn in Holocaust and Genocide Scholarship*, 13 HOLOCAUST & GENOCIDE STUD. 28, 48 (1999).

18. See LeBlanc, *supra* note 12, at 374 (arguing that the ABA’s objections to the Genocide Convention’s definition of genocide were as much political as legal, since the definition would make the Convention applicable to lynching and race riots in the U.S.).

19. Opponents of the Genocide Convention included prominent Republican senators such as Senators Bricker (R-OH), Helms (R-NC), and Thurmond (R-SC), and political advocacy organizations as diverse as the ABA and ultra-conservative Liberty Lobby. See Zachary Pall, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide*, 3 INTERDISC. J. HUM. RTS. 13, 22 (2008) (explaining that Senators Bricker, Helms, and Thurmond opposed the Genocide Convention because they saw it as a threat to U.S. sovereignty).

20. LeBlanc, *supra* note 12, at 378–79 (noting that both U.S. legislators and ABA representatives asserted that the International Court of Justice’s understanding of the definition of genocide was a contradiction that could not be applied in practice).

21. Genocidal rhetoric advocating the extermination of the Tutsis fueled the Burundian and Rwandan genocides, as will be discussed later. The mid-1990s Central African example demonstrates the possibility of determining genocidal intention from hate speech.

22. Riesenfeld & Abbott, *supra* note 12, at 623 (explaining the reasons for the United States’s delayed ratification of the Genocide Convention).

23. *Id.*

succession of criminal activities leading to the elimination of a people.<sup>24</sup> And international courts seemed willing to adjudge unpopular military actions genocidal, as they had with the U.S. campaign in Vietnam.<sup>25</sup> In the mid-1960s, the International War Crimes Tribunal (“IWCT”) found the U.S. guilty of committing genocide in Vietnam.<sup>26</sup> At the time—and until very recently—incitement of genocide within a military campaign was a foreign concept to U.S. jurists and lawmakers.<sup>27</sup> Thus, the findings of the IWCT only fueled skepticism about the possibility of a legally sound genocide prevention and punishment doctrine. The IWCT ruling also bolstered U.S. critics’ jurisdictional objections to the Genocide Convention.

As a general rule, the U.S. objects to oversight by foreign courts.<sup>28</sup> Not surprisingly, the Genocide Convention raised red flags about the power of international courts to try U.S. citizens for crimes committed domestically or abroad. Some feared that such trials might deprive these defendants of their constitutional rights.<sup>29</sup> Others saw the Genocide Convention as a threat to the balance of federalism.<sup>30</sup> Still more critics worried that the U.S. would be unfairly held to a higher standard than other countries under the Genocide Convention.<sup>31</sup> They reasoned that any case brought against the U.S. would have to be trumped up “because United States citizens are protected by the U.S. Constitution and . . . the crime of genocide would be unthinkable in the United States.”<sup>32</sup> Such objections delayed the ratification of the convention for decades and, in the end, yielded a spate of caveats to U.S. participation.<sup>33</sup>

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24. *Id.*

25. LeBlanc, *supra* note 12, at 381 (discussing the charges against the United States for waging a genocidal war in Vietnam).

26. The IWCT is also known as the Russell Tribunal. Jean-Paul Sartre served as the self-appointed public commentator for the trial, finding genocidal intent “on the battlefield in the racism of the American soldiers.” LeBlanc, *supra* note 12, at 381; *see also* Hugo Adam Bedau, *Genocide in Vietnam*, 53 B.U. L. REV. 574, 574 (1973) (stating that the IWCT unanimously found the U.S. government guilty of genocide against the people of Vietnam).

27. *See infra* note 62 for a discussion of a model “incitement to war crimes” statute that legal scholar Gregory Gordon is developing.

28. Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347, 352 (2000) (discussing U.S. reluctance to join international human rights protocols because they hinder U.S. business interests and because many in the U.S. feel that the nation has little to learn about human rights from foreign nations).

29. *See* Riesenfeld & Abbott, *supra* note 12, at 577 (explaining that the Senate adopted “treaty reservations” because of a concern that a treaty may be used to deprive citizens of their constitutional rights).

30. *Id.*

31. *Id.* at 622.

32. *Id.* at 623.

33. The 1988 ratification was accompanied by two reservations, five understandings, and a

While the U.S. routinely clarifies its intentions and jurisdiction under treaties, the 1988 caveats to the Genocide Convention prompted notable international criticism.<sup>34</sup> The world community was taken aback by the United States's unwillingness to fully submit to the convention and by the nation's apparent disregard for the proximity of the Holocaust, seriousness of exterminationism, or worldwide support for the convention.<sup>35</sup> Some signatories claimed that unless all parties assented to U.S. reservations and understandings, they would nullify ratification.<sup>36</sup> Others, however, took a more moderate stance.<sup>37</sup> In the end, the International Court of Justice ("ICJ") sided with moderates and the modified ratification stuck.<sup>38</sup> But the entire episode did little to dispel U.S. officials' geopolitical concerns.

In the decades leading up to U.S. ratification of the Genocide Convention and in the years since, many members of the U.S. legal community have been wary of the politics of international criminal justice. For instance, early Genocide Convention objectors at the ABA imagined that the ICJ might target the U.S. for prosecution while ignoring "groups behind the Iron Curtain."<sup>39</sup> LeBlanc contends that, "[w]hile many of the arguments were couched in legal terms, the preoccupation of the ABA critics with Soviet policies suggests that their objections were as much political as they were legal, and perhaps more

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declaration. *Id.*

34. *Id.* at 587; see also Roth, *supra* note 28, at 353 (remarking that at U.N. human rights gatherings, government representatives from other countries criticize the U.S. approach to human rights).

35. See Riesenfeld & Abbott, *supra* note 12, at 623 (discussing the effect of the United States's delay in ratifying the Genocide Convention and the reservations on the "international cause"). The authors further note that some observers felt that U.S. reservations struck at the heart of the treaty. *Id.* They explain:

Few reservations could more clearly strike to the object and purpose of a Convention intended to, inter alia, protect the residents of state parties from crimes committed by their own government than a reservation which sets up the internal constitutional law of a state party as a barrier to their protection. If the Genocide Convention had been in force at the time, the Nazi exterminations in Europe would presumably have escaped its application had the National Socialist government decided to enact constitutional changes declaring certain racial, religious, and ethnic classes unprotected as a matter of constitutional law.

*Id.* at 624.

36. See *id.* at 587 (noting that with respect to reservations to the Genocide Convention, some advocated that in order to be enforceable, all parties to the treaty had to assent to the reservations).

37. *Id.*

38. *Id.*

39. LeBlanc, *supra* note 12, at 374 (recognizing that ABA critics of the Genocide Convention were concerned that the terms of Article II made the treaty applicable to lynching and race riots in the U.S. but not to genocide against other "groups behind the Iron Curtain").

so.”<sup>40</sup> Since ratification, U.S. jurists have seemingly continued to play geopolitical games with the ICJ by, for instance, using the Alien Tort Act to claim jurisdiction over genocide disputes arising entirely in foreign nations.<sup>41</sup>

The Alien Tort Act was established via the Judiciary Act of 1789 for the vague purpose of providing state and circuit courts with jurisdiction over “causes where an alien sues for a tort . . . in violation of the law of nations or a treaty of the United States.”<sup>42</sup> For much of U.S. history, the Alien Tort Act “was essentially a dead letter.”<sup>43</sup> Its original intent was to settle disputes between U.S. citizens and foreign nationals during the nation’s early years.<sup>44</sup> Once the nation seemed settled, the Alien Tort Act was largely ignored.<sup>45</sup> Following World War II and the international passage of the Genocide Convention, U.S. courts began to revive the dormant doctrine.<sup>46</sup> As international genocide law was developing, U.S. jurists were concluding that the Alien Tort Act might extend to foreign plaintiffs, defendants, and crime scenes. This interpretation had little impact, however, until the 1980s,<sup>47</sup> when Congress was preparing to ratify the Genocide Convention.

Though few in number, Alien Tort Act cases have steadily expanded the reach of U.S. law since the 1980s. In the early 1990s, for instance, *Kadić v. Karadžić* broadened the Act to include non-governmental foreign actors carrying out genocide against foreign nationals on foreign soil (i.e., in Bosnia).<sup>48</sup> While none of the judges hearing Alien Tort Act

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40. *Id.*

41. See Peter Schuyler Black, *Kadić v. Karadžić: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281, 300–02 (1996) (analyzing how a U.S. court found that it had jurisdiction over a private, nonstate actor).

42. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73; see also Anne-Marie Burley, *The Alien Tort Statute and The Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 461 (1989) (noting the original statutory definition of the Alien Tort Act).

43. Charles F. Marshall, *Re-framing the Alien Tort Act after Kadić v. Karadžić*, 21 N.C. J. INT’L L. & COM. REG. 591, 594 n.40 (1996).

44. See *id.* (explaining that the Act was intended to cover only the three original violations: piracy, safe passage, and the slave trade).

45. With the exception of one 1795 case, federal courts “rarely heard and never upheld” Alien Tort Act Claims until 1960. *Id.* at 599.

46. See *id.* at 601 (asserting that U.S. courts “breathed new life” into the Alien Tort Act in 1980 with the *Filártiga v. Peña-Irala* decision).

47. Notably, in 1980, the Second Circuit broadened the reach of the Alien Tort Act by urging courts to “interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980), *remanded to* 577 F. Supp. 860 (E.D.N.Y. 1984). In 1996, a Second Circuit Chief Judge used this reasoning to find subject matter jurisdiction in *Kadić v. Karadžić*, 74 F.3d 377, 378 (2d Cir. 1996).

48. The *Karadžić* case involves a complicated history. In brief, the case history begins with twin lawsuits: *Doe v. Karadžić*, 866 F.Supp. 734 (S.D.N.Y. 1994) and *Kadić v. Karadžić*, No. 93 Civ. 1163, 1993 WL 385757 (S.D.N.Y. 1993). When the trial courts found no subject matter

cases have professed a desire to undermine the ICJ, the timing of the Act's resurgence is curious. In finding subject matter jurisdiction in the *Kadić* case, jurists implied—willingly or unwillingly—that U.S. courts were better equipped to handle Bosnian genocide trials than the Hague.<sup>49</sup> The *Kadić* case suggests that the U.S. plans to maintain its quasi-isolationist stance toward the regulation and adjudication of hate speech, incitement, and genocide.<sup>50</sup>

Though narrow in its scope, the preceding discussion of reservations and reactions to the Genocide Convention illustrates the sort of roadblocks facing proponents of hate speech and incitement regulations today. Just as lawmakers and jurists initially questioned the definition of genocide, many still doubt the law's ability to distinguish unsavory but constitutionally protected speech from hate speech or rhetorical incitement to violence.<sup>51</sup> Critics raise important questions, such as who gets to determine the definition of hate speech, and who will enforce incitement laws?<sup>52</sup> They also problematize evidentiary standards for proving exterminationist intent.<sup>53</sup> They remind us that prejudice is not

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jurisdiction, the cases were joined and appealed in *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995). The appellate court found subject matter jurisdiction partly because it could discern no more suitable forum. The *Kadić* case was subsequently denied certiorari on June 17, 1996, in *Karadžić v. Kadić*, 518 U.S. 1005 (1996). Separate courts ultimately awarded \$745 million in damages to the *Kadić* plaintiffs and \$4.5 billion to the *Doe* plaintiffs. See Rachel Irwin, *Civil Actions Offer Some Closure for Bosnian Victims*, INST. FOR WAR & PEACE REPORTING (Apr. 26, 2011), <http://www.iwpr.net/report-news/civil-actions-offer-some-closure-bosnia-victims> (noting the compensatory and punitive damages in both cases). This discussion is not meant to suggest that *Karadžić* should not have been convicted (i.e., ample evidence of his guilt exists). Rather, this brief analysis of the Alien Tort Act and the *Doe* and *Kadić* cases highlights the politics of jurisdiction selection and the willingness of U.S. courts to tread on the territory of the ICJ. See also Black, *supra* note 41, at 299–306 (discussing how the Second Circuit sought to use the *Karadžić* case to expand the reach of the Alien Tort Act).

49. See Black, *supra* note 41, at 316–18 (criticizing the Second Circuit in the *Karadžić* case for not instructing the lower court to consider resolution of the dispute in an alternative forum).

50. Alternatively, advocates for the *Kadić* case, such as Catharine A. MacKinnon, might argue that it reflects a renewed commitment to Lemkin's ideals within the U.S. legal community. While such motivations are honorable and in line with this Article, the *Kadić* rulings also provide fodder for isolationist lawmakers and jurists.

51. For communication studies professor Franklyn Haiman's discussion of First Amendment issues surrounding hate speech and religious expression, see FRANKLYN SAUL HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT (1993); FRANKLYN SAUL HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION (2003).

52. See Mary Anne Franks, *The Banality of Cyber Discrimination, or, The Eternal Recurrence of September*, 1 DENV. L. REV. ONLINE 5 (2010) [hereinafter Franks, *Banality*], available at <http://www.denverlawreview.org/storage/FranksPDF.pdf> (discussing the problems with defining hate speech and enforcing laws against hate speech in the cybercrime context); Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 124 (2010) [hereinafter Franks, *Unwilling Avatars*], available at <http://ssrn.com/abstract=1374533> (arguing that cyberspace allows users to create online representatives of others without their consent and that this practice has powerful discriminatory effects, particularly on women).

53. See LeBlanc, *supra* note 12, at 370 (discussing Bunyan Bryant's observation that intent of

against the law—killing is.<sup>54</sup> But the exact moment when homicidal intent emerges from the ashes of hatred is often unclear and tough to prove at trial. Selecting the appropriate venue for a hate speech trial is also difficult, critics suggest, because hate speech and incitement routinely spill over state boundaries.<sup>55</sup> Determining what constitutes incitement within diverse localities requires a complex understanding of the socio-cultural realities of those places, which might not be the strong suit of U.S. or international legal systems. Such objections arise from a genuine belief in the power of the U.S. “marketplace of ideas” to prevent atrocities,<sup>56</sup> as well as a reluctance to admit the changing nature

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genocide is near impossible to prove absent express intent).

54. Political scientist Peter Uvin suggests that the line between prejudice and genocidal ideation (or action) is blurred when prejudice becomes institutionalized at the nation-state level. Still, he and other scholars of genocidal conflict suggest that demarcations between individualized and state-sponsored prejudice exist in all modern genocides, and they afford opportunities for international intervention to prevent genocide. See Peter Uvin, *Prejudice, Crisis, and Genocide in Rwanda*, 40 AFR. STUD. REV. 91, 101–02 (1997) (providing radical Hutu leaders’ anti-Tutsi campaigns as an example of institutionalized discrimination).

55. See Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 321 (2009) (discussing the globalization of hatred and the resulting challenges to addressing hate speech internationally).

56. The marketplace analogy was first used by Justice Oliver Wendell Holmes in 1919 and has subsequently been invoked by nearly half of the sitting Justices. See W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 J. & MASS COMM. Q. 40, 41 (1996) (explaining Justice Holmes’s use of the marketplace metaphor, as he argued, “society’s ultimate good ‘is better reached by free trade in ideas’”). Subsequently, from 1919 to 1995, twenty-four Justices “used the metaphor at least once.” *Id.* The Court has struggled with the concept, especially in cases involving sexual expression. See generally Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005) (discussing the concept in the context of the “nude dancing” cases). Scholars have suggested that the marketplace is most viable in institutions such as schools and universities. See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 871 n.207 (2008) (asserting that scholars have recognized schools as “a public forum where the adult ‘marketplace of ideas’ concept holds full sway”). Scholars have also expressed concerns over taken-for-granted assumptions about the rationality and meritocracy of the marketplace, especially its ability to protect minority communities and viewpoints (i.e., in line with the Fourteenth Amendment). See Karen Eltis, *A Constitutional Right to Deny and Promote Genocide – Preempting the Usurpation of Human Rights Discourse Towards Incitement from a Canadian Perspective*, 9 CARDOZO J. CONFLICT RESOL., 463, 466 (2008) (“Constitutionalism—the anticipated safeguard against devastation of democracy from within—may itself, it seems, be co-opted for [the] very purpose” of “justif[ing] the ‘freedom’ to deny and promote genocide.”); Franks, *Unwilling Avatars*, *supra* note 52, at 23 (arguing that current conceptions of the marketplace of ideas mischaracterize the status quo, leading to the improper belief that cyberspace is a “paradise” where all people can express themselves freely); Mahoney, *supra* note 55, at 349 (explaining that in *Keegstra*, it was “recognized that not only can expression be used to the detriment of our search for the truth, it can also undermine the rationality in an unregulated marketplace of ideas and promote forms of intolerance and prejudice. Such uses destroy the marketplace of ideas. . . . The marketplace of ideas is a limited response to the search for truth.”); see also Raymie McKerrow, *Limitations of the Public Sphere: The Repressive Voice of Modernity*, in EXPERIENCES BETWEEN PHILOSOPHY AND COMMUNICATION: ENGAGING THE PHILOSOPHICAL CONTRIBUTIONS OF CALVIN O. SCHRAG 73–88 (2003) (Ramsey E. Ramsey & David J. Miller eds., 2003) (“[C]ontinuing to valorize the

of message transmission and collective organization.<sup>57</sup> These arguments lose their logical and juridical force as new media technologies transport hate speech to social locations well outside the U.S. marketplace of ideas.

New media technologies facilitate the rapid diffusion of hate speech to distant locales.<sup>58</sup> As a result, time worn strategies of localized hate mobilization—such as labeling intended victims as the perpetrators of community violence<sup>59</sup>—are now globalized and decontextualized. The lack of argumentative or empirical context for evaluating hateful claims

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public sphere as the site of rational decision making will perpetuate the repression of marginalized voices.”); ALEXANDER TSEIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 199 (2002) (acknowledging that the “Supreme Court has repeatedly recognized the need to protect persons with immutable characteristics, such as race, color, and ethnicity” and that it is “critical to (statutes) that (are) tailored narrowly enough to protect First Amendment rights” because hate speech “has played a significant role in fostering organized and systematic persecutions”); Alexander Tseis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 512 (2009) (discussing how speech in and of itself is a neutral medium that can validate facism and justify genocide as easily as it can promote democracy and civil rights).

57. See Eltis, *supra* note 56, at 471 (discussing that the Supreme Court of Canada, unlike the United States Supreme Court, “has elected to balance the value of free speech with the competing constitutional values of dignity, equality and multiculturalism”); Mahoney, *supra* note 55, at 330 (discussing how disseminators of hate speech have been able to silence their targets, “effectively knocking them out of the competition in the marketplace of ideas”).

58. See Eltis, *supra* note 56, at 471 (providing examples of the dissemination of hate speech through new technology, such as anti-Semitic statements made on live television); Mahoney, *supra* note 55, at 321–22 (explaining that hate speech can be proliferated on a global level because of the Internet). See generally Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951 (2005) [hereinafter Reidenberg, *Technology*] (discussing jurisdictional issues that arise due to the Internet’s lack of territorial boundaries); Joel R. Reidenberg, *The Simplification of International Data Privacy Rules*, 29 FORDHAM INT’L L.J. 1128 (2006) [hereinafter Reidenberg, *Simplification*] (proposing simplification of international data privacy rules as a solution to the obstacles data controllers face in attempting to comply with varying—and conflicting—standards and procedures).

59. Legal scholar Kenneth Marcus has written extensively about this process, describing it as “inversion.” See KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* 63 (2010) [hereinafter MARCUS, *JEWISH IDENTITY*]. According to Marcus, the instigators of hate speech lob accusations at intended targets of violence, priming bystanders to view the attacked as the wrongdoers. As a result, conceptions of blame and fault are inverted, and reprisals against the wrongly accused seem justified. This sort of human rights inversion is evident in metaphors of the Indian giver and Jewish Nazi, as well as in Jim Crow era narratives of black men as sexual predators. Such narratives indict victims of the crimes done to them and their communities (e.g., broken promises to Native Americans) and “shock, silence, threaten, insulate [the accusers], and legitimize” seemingly retributinal justice, according to Marcus. *Id.* For instance, “[t]he myth of the black rapist served, in the minds of Southern racists, to legitimize Jim Crow lynchings.” *Id.* at 64. And today, critiques of Israel’s policies are used to excuse broad-sweeping indictments of all Jews as uniquely “threatening, immoral, and categorically different from other people.” Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 376 (2009) [hereinafter Marcus, *Jurisprudence*]; see also Catharine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, 98 AM. J. INT’L L. 325, 330 (2004) (providing a description of “accusation in the mirror,” another way of framing anti-victim rhetoric).

is magnified when message receivers lack certain psychosocial capacities, such as the ability to analyze complex problems and break down group stereotypes.<sup>60</sup> Individuals can now target victims from afar, presenting a unique threat to democracy that did not exist in the pre-Internet age. According to legal scholar Kathleen Mahoney:

Democracies like Canada and the United States are being challenged by the culture of hate much differently and more seriously today than in the past. Today, racism, religious hatred, homophobia, sexism, and ethnic hatred are globalized, fed by all forms of hate propaganda. The globalization of hatred includes the additional feature of terrorist activity . . . . Easily accessed sources of communication now can broadcast virulent, and even lethal, hate speech promoting discrimination against, denial of, or assault upon members of certain groups regardless of where they live.<sup>61</sup>

U.S. courts are equipped to deal with such threats to democracy.<sup>62</sup> However, U.S. jurists are reluctant to intervene in the infringement of

60. See Steven K. Baum, *A Bell Curve of Hate?*, 6 J. GENOCIDE RES. 567, 569 (2004) [hereinafter Baum, *Bell Curve*] (explaining the three stages of personality development and how tiers I and II are most vulnerable to “prevailing cultural norms viz. normative hate/stereotypes”); STEVEN K. BAUM, *THE PSYCHOLOGY OF GENOCIDE: PERPETRATORS, BYSTANDERS, AND RESCUERS* 105–09 (2008) [hereinafter BAUM, *PSYCHOLOGY*] (describing perpetrators of genocide as the least emotionally developed individuals in society and bystanders as more developed but still underdeveloped compared to those individuals who resist genocide). Hate speech must be regulated, according to Baum, because it primes certain listeners to accept exterminationist directives in the future. *Id.* at 229. Priming activates the mental state necessary for dehumanization and intergroup violence long before brutality occurs. For those of diminished capacity and developmental delays, the repetition of hate messages reinforces prejudiced beliefs (i.e., rather than provoking skepticism of the speaker). See *id.* at 235–36 (arguing that emotionally underdeveloped individuals are prone to hate out of ignorance and prejudice); see also Irwin N. Sandler & Brian Lakey, *Locus of Control as a Stress Moderator: The Role of Control Perceptions and Social Support*, 10 AM. J. COMMUNITY PSYCHOL. 65, 65 (1982) (discussing a study that “investigated the effects of locus of control beliefs as an individual difference variable on (a) the relationship between negative life events and psychological disorder, (b) perceptions of control over negative life events, and (c) the receipt and impact of social support”); SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* (1987) (providing a foundational explanation of priming). See generally Mark Cleveland et al., *Shades of Green: Linking Environmental Locus of Control and Pro-Environmental Behaviors*, 22 J. CONSUMER MARKETING 198 (2005) (discussing research that examined “the impact of various attitudes and personality characteristics on environmentally-friendly behaviors, from a locus of control (LOC) perspective”).

61. Mahoney, *supra* note 55, at 321.

62. See Reidenberg, *Technology*, *supra* note 58, at 1954 (explaining that the U.S. Supreme Court has grappled with how to “apply traditional jurisdiction principles to Internet activities”). Legal scholar Gregory Gordon advises that the U.S. should also be prepared to charge its military commanders with “incitement to war crimes” if they directly instruct their subordinates to engage in targeted violence (e.g., against a particular ethnic group). Drawing upon his work as a prosecutor for the International Criminal Tribunal of Rwanda, Gordon suggests that this new incitement statute could evolve from existing military protocols and international law (e.g., Army Field Manual 27-10, art. 500, and art. 25 of the Rome Convention). See Gregory S. Gordon, “*A War of Media, Words, Newspapers, and Radio Stations*”: *The ICTR Media Trial Verdict and a*

human dignity,<sup>63</sup> even though they frequently enjoin speech that violates commercial interests.<sup>64</sup> Legal scholar Joel Reidenberg reasons that hesitant jurists might fulfill their public duty by at least requiring those who profit from technology to develop dissemination safeguards.<sup>65</sup> Despite the existence of such creative juridical solutions—and mounting social scientific evidence that genocide is a systematic phenomenon that begins with hate speech<sup>66</sup>—U.S. courts seem largely unwilling to regulate cyber targeting.<sup>67</sup> Going forward, hate speech regulation will necessitate a cultural revolution of sorts,<sup>68</sup> one that moves us beyond historical stalemates over the Genocide Convention. In the meantime, the U.S. has a moral and geopolitical obligation to actively prevent genocide.

Few cultural, social, or political calamities pose as much threat to communities, societies, or the human race as genocide. When genocide is fully implemented, it eliminates one of the world's peoples. No other

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*New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 189 (2004) [hereinafter Gordon, *War of Media*] (discussing the expansion of individual responsibility vertically); Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 607 (2010) [hereinafter Gordon, *Music*] (“[The] first principles of justice that ultimately define a system of law [are] the principles of uniform application of rules, of consistency, of evenhandedness, of fairness.”) (alteration in original).

63. Gordon, *Music*, *supra* note 62, at 147. For an example of international regulation of mediatized hate speech, see Yaman Akdeniz, *Case Analysis of League Against Racism and Antisemitism (LICRA)*, French Union of Jewish Students v. Yahoo! Inc. (U.S.A.), Yahoo France, *Tribunal de Grande Instance de Paris (The County Court of Paris)*, *Interim Court Order*, Nov. 20, 2000, 1 ELEC. BUS. REP. 110, 111–12 (2001). Reidenberg points to international cases such as *Twentieth Century Fox Film Corp. v. iCraveTV*, No. CIV. A. 00-121, 2000 WL 255989, at \*3–4 (W.D. Pa. 2000) (explaining that the U.S. Supreme Court asserts subject-matter jurisdiction over a case where a U.S. media company filed suit to enjoin a Canadian startup website from streaming its programs on the basis that a U.S. citizens had access to the site).

64. Reidenberg, *Simplification*, *supra* note 58, at 1954–55.

65. Reidenberg, *Technology*, *supra* note 58, at 1971; *see also* Irene Nemes, *Regulating Hate Speech in Cyberspace: Issues of Desirability and Efficacy*, 11 INFO. & COMM. TECH. L. 193, 199 (2002) (stating that regulation of the dissemination of hate speech is “possible via both hardware and software”).

66. *See* Baum, *Bell Curve*, *supra* note 60, at 567 (discussing the attempt of researchers to understand the psychological aspects of genocidal behavior and the idea of “accidental genocidalists” or “ordinary people [who] become perpetrators given the proper social conditions and context”); Gregory H. Stanton, *The 8 Stages of Genocide*, GENOCIDE WATCH (1998), <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html> (articulating the first of the eight stages as classification; the process via which individuals within a society categorize groups and distinguish between “us and them”); Gregory H. Stanton, President, Genocide Watch, *Could the Rwandan Genocide Have Been Prevented?*, Address at the Generations of Genocide Conference (Jan. 27, 2002), in 6 J. GENOCIDE RESEARCH 211–28 (2004) (providing Leon Mugesera’s speech as an example of hate speech occurring early in the genocide process, in which Mugesera spoke of the Hamitic hypothesis, which portrayed “Tutsis as foreign invaders”).

67. Franks, *Banalities*, *supra* note 52, at 7–8; Franks, *Unwilling Avatars*, *supra* note 52, at 209–10.

68. Franks, *Banalities*, *supra* note 52, at 7–8.

crime carries with it such a steep price. Few natural or human-made adversities occasion such irreplaceable loss. For this reason, the U.S. must act to prevent genocide. The nation cannot wait for doctrine to develop or culture to shift. Given the existing structures and political will, legislators and jurists must do as much as they can now.<sup>69</sup> Luckily, cultural support exists for a project that would prevent genocide and punish its perpetrators: the regulation of systems of oppression.

Dismantling oppression is a national pastime, or at the very least, a compelling cultural meme.<sup>70</sup> The U.S. often positions itself as an exporter of democracy, and much of the citizenry supports this contention.<sup>71</sup> Though the nation often falls short of its democratic ideals,<sup>72</sup> many activists and academics maintain hope that the U.S. can serve as an incubator for new social justice movements. As political scientist Iris Marion Young advocated, “We . . . can . . . illuminate oppression, expose ideology, and justify norms and institutions of justice.”<sup>73</sup> The corollary of this cultural conviction is the curtailing of centralized systems of citizen control. As this Article later outlines, such a project could be undertaken both domestically and internationally, increasing its reach and credibility. The Rwandan genocide and its aftermath afford ample guidance for what needs to be done in the U.S. and abroad.

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69. Given the recent “Arab spring” and nation-state upheavals occurring across the globe, it seems likely that there is an increased risk of retributive and genocidal violence now. As the U.S. considers how to contribute positively to people’s movements, leaders should consider how they might use this opportunity to promote increased personal privacy, smaller states, and enhanced protections of personal freedoms and dignities.

70. See MORTON HALPERIN, JOE SIEGLE & MICHAEL WEINSTEIN, *THE DEMOCRACY ADVANTAGE: HOW DEMOCRACIES PROMOTE PROSPERITY AND PEACE* xv (Routledge ed. 2005) (“[D]emocracies have compelling advantages over their authoritarian counterparts in fostering social and economic development.”).

71. *Id.*; see also Raymie E. McKerrow, *Principles of Rhetorical Democracy*, Address at the Southern States Communication Association National Conference (Apr. 2006) (“[T]he prime task of democratic politics is not to eliminate passions from the sphere of the public, in order to render a rational consensus possible, but to mobilize those passions towards democratic designs.”).

72. See Gordon Mitchell, *Team B Intelligence Coups.*, 92 Q. J. SPEECH 144, 163–64 (2006) (discussing how White House officers charged with presenting both sides of a debate for invasion of Iraq in 2003 purposefully omitted and misrepresented data to suggest few “cons” to U.S. military intervention, subverting internal intelligence community protocols and broader conceptions of democratic policy debate).

73. Iris Marion Young, *Fighting Words: Black Women and the Search for Justice*, 16 HYPATIA 91, 93 (2001) (reviewing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1990)); see also IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 155 (2000) (“Civil society promotes trust, choice, and the virtues of democracy.”); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 9 (1990) (“Oppression and domination . . . should be the primary terms for conceptualizing injustice.”); McKerrow, *supra* note 71, at 165 (arguing that the U.S. must regain credibility post-Iraq and can do so by changing the ways in which it approaches foreign-policy debates).

In Rwanda, age-old citizen control systems were harnessed for the destruction of most of the Tutsi people in the spring of 1994.<sup>74</sup> Today, many of these control systems are still in use by the Tutsi government and could be resuscitated as instruments of retaliation or extermination.<sup>75</sup> Four years of research revealed that local, provincial, and national government officials actively engage in classification, surveillance, and micromanagement of the Rwandan people. The findings are telling, and the lessons extend far beyond Central Africa. In part, this research suggests constructive avenues for U.S. action. Both with our Rwandan ally and domestically, the U.S. government could test and implement systems aimed at protecting human dignity by constraining the power of government officials and agencies. If successful, the initiative could usher in a new era of U.S. leadership in genocide prevention. The project could commence immediately, drawing upon the lessons learned from one of the world's greatest tragedies.

### III. FROM THE FIRST EXPLOSION TO CURRENT EXPLOITATIONS: WHAT THE U.S. CAN LEARN ABOUT REGULATING SYSTEMS OF OPPRESSION FROM MODERN RWANDA

#### A. *An Explosion of Violence in 1994*

On April 6, 1994, an explosion reverberated throughout Kigali, Rwanda. Uncertainty spread throughout the capital, and residents warily went about their evening work. Within hours, they learned that President Habyarimana's plane had been shot down.<sup>76</sup> Roadblocks emerged throughout the capital and, then, the countryside.<sup>77</sup> And then the killings began. Over days, then weeks, then months—roughly three months in total—nearly every tenth person in Rwanda was slaughtered.<sup>78</sup> As many as 1,000,000 people were killed in 100 days,<sup>79</sup>

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74. ALISON LIEBHAFSKY DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 9 (1999).

75. MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 7–8 (2001) (contemplating that we may not be able to understand genocidal rationale, but we “must understand it as thinkable” because failure to acknowledge its complex warning signs—presently and throughout history—inhibits our ability to recognize when groups are vulnerable to violence).

76. Madeline H. Morris, *The Trials of Current Jurisdiction: The Case of Rwanda*, 7 *DUKE J. COMP. & INT'L L.* 349, 350–51 (1997) (recognizing that the plane crash triggered the “mass killings (that) were preplanned and orchestrated by high officials”); see also MAMDANI, *supra* note 75, at 4 (noting that the genocide commenced swiftly following the president's assassination).

77. Jolyon Mitchell, *Remembering the Rwandan Genocide: Reconsidering the Role of Local and Global Media*, 6 *GLOBAL MEDIA J.* 1, 8 (2007) (indicating that those who helped with the roadblocks “were promised rewards” for their efforts).

78. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED*

or 10,000 per day. It was the swiftest mass murder ever executed and resulted in the near-extirpation of the Rwandan Tutsis.<sup>80</sup> Meanwhile, another 2,000,000 Rwandans were displaced into neighboring countries.<sup>81</sup> Central Africa is still feeling the effects of the Rwandan genocide and related migrations and regional hostilities.<sup>82</sup>

Whenever the killing waned throughout the spring of 1994, announcers at Radio-Télévision Libre des Mille Collines (“RTLM”)<sup>83</sup> were ready to fuel the fire. “The graves are only half empty; who will

WITH OUR FAMILIES: STORIES FROM RWANDA 3 (1998).

79. See Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355, 361 (2002) (noting that the massacre took place between April 7, 2004, and July 17, 2004). Estimates for the number killed during the genocide vary. Anthropologist Mahmood Mamdani contends that “between ten and fifty thousand Hutu, and between 500,000 and a million Tutsi” died during the 100-day genocide.” See MAMDANI, *supra* note 75, at 5 (providing an estimate and stating that “[n]o one can say with certainty how many Tutsi were killed . . .”). Mamdani notes that these statistics are drawn from problematic sources and mathematical extrapolations of 1991 census data. Christian Davenport and Allan C. Stam contend that that same census data, which recorded 600,000 Tutsi in 1991, paired with data from the Ibuka genocide survivors organization, noting that 300,000 Tutsis survived the genocide, suggests that of the “800,000 to 1 million believed to have been killed . . . more than half were Hutu.” Scholars are still attempting to validate Davenport and Stam’s claims, especially given that the 1991 census data underreported the number of Tutsis living in Rwanda then. See Christian Davenport & Allan C. Stam, *What Really Happened in Rwanda?*, MILLER-MCCUNE (Oct. 6, 2009), <http://www.miller-mccune.com/.../what-really-happened-in-rwanda-3432/> (concluding that their “best estimate of who died during the 1994 massacre” was between 300,000 and 500,000 Tutsi victims). According to Davenport & Stam, “If we believe the estimate of close to 1 million total civilian deaths the war and genocide, we are then left with between 500,000 and 700,000 Hutu deaths.” *Id.* The killings were not evenly spread out across Rwanda’s provinces. See Philip Verwimp, *Death and Survival During the 1994 Genocide in Rwanda*, 58 POPULATION STUD. 233, 236–37 (2004) (providing statistical evidence on the death and survival rates in different communes of the Kibuye prefecture in Rwanda; a sample demographic showing variation even within one geographical area).

80. See Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235, 239 (2001) (“In the span of a little more than one hundred days in the spring of 1994, Rwanda suffered the swiftest genocide the world has ever witnessed.”).

81. Christine L. Kellow & H. Leslie Steeves, *The Role of Radio in the Rwandan Genocide*, 48 J. COMM. 107, 107 (1998).

82. See Idean Salehyan, *The Externalities of Civil Strife: Refugees as a Source of International Conflict*, 52 AMER. J. POL. SCI. 787, 793 (2008) (articulating that beyond the immediate human toll, the Rwandan Genocide “contributed to long-term instability across the Great Lakes region of Africa”).

83. Radio-Télévision Libre des Mille Collines was one of Rwanda’s largest radio stations. The station name, The Land of 1000 Hills, references the popular name for Rwanda. See Mitchell, *supra* note 77, at 1 (investigating ways that “audiences both inside and outside Rwanda were told about what was happening” during the one hundred days of mass murder in the spring of 1994, focusing specifically on the Rwandan radio station RTLM); Schabas, *supra* note 6, at 3 (“Article III [of the Convention for the Prevention and Punishment of the Crime of Genocide] lists four additional categories of the crime of genocide . . . . The most controversial, ‘direct and public incitement’, is restricted by two adjectives so as to limit conflicts with the protection of freedom of expression.”).

help us fill them?” they provoked.<sup>84</sup> They reminded members of the interahamwe, the Hutu extremist youth militias, that the Tutsi inyenzi or “cockroaches” needed to be exterminated.<sup>85</sup> RTLM announcers even invented lies to frighten those Hutus reluctant to kill.<sup>86</sup> For example, RTLM broadcasters encouraged listeners to ponder, “Why weren’t there any Hutu bodies in the streets?”<sup>87</sup> In response, the broadcasters suggested that Tutsis were burying, hiding, and even eating their Hutu neighbors.<sup>88</sup> Shortly after the genocide, one French journalist stated, “If Rwandan crimes against humanity ever come to trial, the owners of Radio des Mille Collines will stand at the head of the accused.”<sup>89</sup> In the end, Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders and directors of RTLM, *did* stand trial.<sup>90</sup> The ICTR Trial Chamber found ample evidence that the radio defendants had perpetuated genocide.<sup>91</sup>

Hate speech fueled the genocidal fire in Rwanda.<sup>92</sup> The same was true in neighboring Burundi.<sup>93</sup> There, the message “Inivo nu gutwi,” or “[chop them] at the level of the ear,” circulated interpersonally and societally for years leading up to the mass murder of the country’s

84. Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, 6 J. GENOCIDE RES. 9, 9 (2004).

85. Kellow & Steeves, *supra* note 81, at 120 (describing the RTLM “broadcast orders to exterminate all Tutsis”).

86. *Id.* at 121. This tactic exemplifies the “inversion” strategies described by Kenneth Marcus, in which victims are portrayed as perpetrators of violence. See MARCUS, JEWISH IDENTITY, *supra* note 59, at 63 (discussing the “human rights inversion,” where victims are accused of “the very wrong that they have suffered”). For example, “the stereotype of Jewish conspiratorial power, combined with the use of Nazi motifs . . . [that ascribes guilt, which] carries with it the threat of punishment.” *Id.*

87. Kellow & Steeves, *supra* note 81, at 121 (explaining that the “broadcasters made up reasons why no Hutu bodies were visible”).

88. *Id.* Kellow and Steeves’s research revealed that “[s]ometimes, the broadcasts made up reasons why no Hutu bodies were visible . . . In another gruesome excerpt from June 14, 1994, the ‘inyenzi-inkotanyi’ were accused of killing Hutus by dissecting them alive . . .” *Id.*

89. See Francois Misser & Yves Jaumain, *Death by Radio*, 23 INDEX ON CENSORSHIP 72, 72 (1994) (discussing the RTLM’s role in the Hutu government’s propaganda).

90. Hassan Ngeze, Editor-in-Chief of *Kangura*, a pro-genocide newspaper, also stood trial. See Gordon, *Music*, *supra* note 62, at 613 (explaining that the defendants in *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, the “Media Case,” were Nahimana and Barayagwiza, “the founders and directors” of RTLM).

91. *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003); see also Gordon, *Music*, *supra* note 62, at 613 (“The Tribunal assessed, among other things, whether the RTLM broadcasts and the *Kangura* writings constituted direct and public incitement to commit genocide. . . . [T]he Trial Chamber erased any lingering doubts as to whether the crime of direct and public incitement to commit genocide requires a showing of violence occasioned by the incitement. It does not.”).

92. See Kellow & Steeves, *supra* note 81, at 109 (specifically noting that in the Rwandan situation, fear was perpetuated through contagion and the media’s ability, often by providing incomplete information, to inspire imitation of actions).

93. See TRACY KIDDER, STRENGTH IN WHAT REMAINS 270 (2010) (noting ways in which anti-Tutsi hate speech and propaganda lead to genocide in Burundi).

Tutsis.<sup>94</sup> Ethnically targeted rhetoric incited group violence in both countries. But rhetoric alone cannot account for the region's gruesomely efficient genocides or any of the world's modern genocides.

While hate speech can inflame genocidal proclivities and legitimize group violence, it only leads to mass extermination if a number of citizen control systems are fully operational.<sup>95</sup> In Rwanda, a series of interlocking, racialized, authoritarian structures—developed over centuries—enabled genocidaires to carry out their work.<sup>96</sup> Had those citizen control systems not been in place, 1994 might have witnessed another pogrom of the sort perpetuated against Tutsis and Hutus<sup>97</sup> throughout the late twentieth century. But what happened during that spring was genocide, set in motion during the creation of the modern Rwandan state.

*B. The Formation of the Rwandan State, Identity Categories, and Systems of Oppression*

Rwanda was at peace five hundred years ago. Renowned anthropologist Mahmood Mamdani has argued that that is partly

94. *Id.* at 116.

95. See MAMDANI, *supra* note 75, at 7 (“[T]his was neither just a conspiracy from above that only needed enough time and suitable circumstance to mature, nor was it a popular *jacquiere* gone berserk. If the violence from above could not have spread without cultivation and direction from above, it is equally true that the conspiracy of the tiny fragment of *genocidaires* could not have succeeded had it not found resonance from below.”); Philip Verwimp, *Peasant Ideology and Genocide in Rwanda under Habyarimana*, in GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES 1, 2 (Susan E. Cook ed., 2005) (arguing that Habyarimana’s speeches were not “mere rhetoric” but that “Habyarimana actually implemented the policies that he advocated in his speeches”).

96. See MAMDANI, *supra* note 75, at 7 (“[V]iolence of the genocide was the result of both planning and participation.”); David Newbury & Catharine Newbury, *Bringing the Peasants Back in: Agrarian Themes in the Construction and Corrosion of Statist Historiography in Rwanda*, 105 AM. HIST. REV. 832, 836 (2000) (recognizing that the political system in Rwanda arose as a result of “politically dominant groups adopting colonial hegemonies and [drawing] on colonial force to extend their power well beyond the effective administrative reach of the pre-colonial monarchy”).

97. Throughout the 1970s and 1980s, Amnesty International (“AI”) documented tens of thousands of killings of Hutu elites and their children by Burundi’s Tutsi government. The largest killing was in 1972, “when an estimated 100,000 Hutus were killed . . . with the participation of government troops . . .” AMNESTY INTERNATIONAL, WEEKLY UPDATE SERVICE 29/88 (Aug. 25, 1988). The report was accessed at the AI archives at Columbia University. See Amnesty International USA National Office 1966–2000 (1974–1993) HR #0001, Box 358. Approximately 300,000 Burundian Hutus fled to Rwanda, Tanzania, and Zaire that year. *Id.* I also documented the jailing and torture of Burundian teachers who spoke out against the government policy of denying Hutus education in the 1980s. *Id.* Though Hutus comprise a much larger proportion of the population in both Burundi and Rwanda, the Burundian government targeted Hutus on the basis of their group affiliation and sought to eliminate any members of the group that might one day rule. I would argue that this sort of killing is genocidal in nature (i.e., aimed at eliminating a gene pool), though others might disagree (i.e., because the entire Hutu population was not targeted). It is important to note that pogroms against Tutsis occurred throughout the region at the same time.

because Rwanda had no state.<sup>98</sup> Nor did it have fixed identity categories upon which to base state policies. From the freeform atmosphere of the fifteenth century<sup>99</sup> to the rise of the royal court in the eighteenth century, power remained relatively diffuse,<sup>100</sup> which enabled some Hutu, Tutsi, and Twa<sup>101</sup> to achieve high status. As Historian David Newbury has argued, social positions and group identities “were not randomly changing, to be sure, but neither were they static, enduring primordial features of Rwandan social structures.”<sup>102</sup> For instance, Hutu meant everything from cultivator,<sup>103</sup> to cattle client,<sup>104</sup> to

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98. See MAMDANI, *supra* note 75, at 61–63 (describing the peaceful nature of the region prior to formation of the Rwandan state).

99. During the Nyaginya dynasty of fourteenth and fifteenth centuries, the first central rulers were sacred leaders not administrators. These “Rwandan king[s] exercis[ed] very little power over the population and none over the means of production.” Villia Jefremovas, *Contested Identities: Power and the Fictions of Ethnicity, Ethnography, and History in Rwanda*, 39 ANTHROPOLOGICA 91, 93 (1997).

100. It took several hundred years for Rwanda to become an autocratic, centralized state. The evolution began when sixteenth century King Kigeri Mukobanya formed a military and instituted the practice of tribute payments. *Id.* at 94; David S. Newbury, “Bunyabungo”: *The Western Rwandan Frontier, 1750–1850*, in THE AFRICAN FRONTIER: THE REPRODUCTION OF TRADITIONAL AFRICAN SOCIETIES 170 (Igor Kopytoff ed., Indiana Univ. Press. 1987) (articulating that during this time, the “Court became the dominant political actor with a preponderant role in the distribution of political resources among the various factions in the country”). During Mukobanya’s rule, regional administrators “started to take over the functions of lineage heads.” Jefremovas, *supra* note 99, at 94. In the mid-nineteenth century, King “Rwabusigiri . . . thoroughly consolidated [this] system of clientage, smashed the power of the lineages . . . and . . . systematic[ally] appropriat[ed] . . . community and fallow lands . . .” *Id.*

101. The Twa are called “pygmies” by many Rwandans and outsiders. They are typically short and stocky and comprise roughly one percent of the population. Many Rwandans perceive the Twa to be among the oldest of Rwanda’s peoples, though they have long been relegated to the margins of society. See Peter Uvin, *Ethnicity and Power in Burundi and Rwanda: Different Paths to Mass Violence*, 31 COMP. POL. 253, 255 (1999) (discussing the historical hierarchy of Rwanda, in which the Twa inhabited the lowest level). While there are few or no phenotypic distinctions between Hutus and Tutsis, Twa look different to both local and foreign observers. Some scientific evidence suggests that they are genetically distinct from Tutsis and Hutus. See A. S. Santachiara-Benerecetti et al., *Subtyping of Human Red Cell Phosphoglucosyltransferase Locus 1 (PGM1) Polymorphism: A Third PGM1 Allele Common among Twa Pygmies from North Rwanda*, 33 AM. J. HUM. GENETICS 817, 818–19 (1981) (summarizing the results of a study that finds a genetic allele, *PGM1*, that might be unique to Twa Pygmies). Of course, even if Twa are genetically distinct from Hutus and Tutsis, the more salient factor is how that information is treated within Rwandan society.

102. David Newbury, *The Clans of Rwanda: A Historical Hypothesis*, 50 AFRICA 389, 391 (1980).

103. The most frequent and lasting distinction made between Hutus and Tutsi is one of occupation/social location. Tutsis are associated with the more prestigious occupation of animal production (i.e., pastoral activities), whereas Hutus are associated with growing crops (i.e., agricultural activities). In ancient times, some well-connected Hutus became Tutsi by acquiring cows. See DANIELLE DE LAME, A HILL AMONG A THOUSAND: TRANSFORMATIONS AND RUPTURES IN RURAL RWANDA 352–54 (2005) (discussing the importance of cows in Rwandan culture and socio-political power). It is important to note that within the categories of Hutu and Tutsi, there has always been great social variance (e.g., rich and poor among both groups).

104. As Catharine Newbury has documented, cattle clientship evolved from a somewhat

person of medium height,<sup>105</sup> to poorer person, to genetically inferior,<sup>106</sup> to marginalized majority,<sup>107</sup> to original inhabitant,<sup>108</sup> to victim of the Tutsi elite, to perpetrator—or even victim<sup>109</sup>—of the region’s numerous twentieth century pogroms. But long before the terms Hutu and Tutsi became racialized or associated with opposite sides of a genocide, ties to kin, clan, and region were central to Rwandans’ self conceptions and to the diminutive nation’s power structure.

According to historians David and Catharine Newbury, familial and local ties remained important even as the royal court began to develop the two-group state system.<sup>110</sup> Concomitantly, inefficient communication and transportation infrastructure hindered the efforts of the earliest royals to exert control over more than a small minority of the people.<sup>111</sup> Anthropologist Danielle de Lame has argued that the rural poor often placed more importance on the fulfillment of social obligations than ties to the royal court or to Hutu or Tutsi lineages.<sup>112</sup>

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symbiotic or reciprocal relationship to one of Hutu servility throughout the 1800s as the royal court exerted increasing authority in certain areas of Rwanda and certain social institutions withered. CATHARINE NEWBURY, *THE COHESION OF OPPRESSION: CLIENTSHIP AND ETHNICITY IN RWANDA, 1860–1960*, at 119 (1993).

105. MAMDANI, *supra* note 75, at 44 (stating that colonial archeologists observed the Hutus were “squat and of medium height”); *see also* Newbury & Newbury, *supra* note 96, at 839 (discussing how stereotypes about the physical differences between Hutus and Tutsis impacted the social distinction between the groups).

106. *Id.* During Belgian colonization, Western eugenics scientists claimed that their measurements of Hutus’ skulls, noses, etc., demonstrated genetic weaknesses and attendant intellectual inferiority relative to the Tutsis. *Id.*

107. *Id.* Hutus were the marginalized majority under Belgian occupation, though only a handful of Tutsis enjoyed great privilege under the colonial administration. Hutus comprise roughly 85% of the population.

108. *Id.*

109. Hundreds of thousands of Hutus died during the genocide. *See* Davenport & Stam, *supra* note 79 (stating that some Hutu moderates were killed by Hutu extremists, others were killed by the invading Tutsi army (i.e., Rwandan Patriotic Army (“RPA”)), and still others suffered various casualties of war and displacement); MAMDANI, *supra* note 75, at 4 (noting that estimates of the number of Hutus killed is between five hundred thousand and one million).

110. Newbury & Newbury, *supra* note 96, at 840. Uvin argues that the primary difference between the Rwandan and Burundian genocides was that (intranational) regionalism played a major role in the Rwandan mass killings, whereas social inequality was the main contributor to violence in Burundi. Uvin, *supra* note 101, at 253–54. As such, Uvin places more emphasis on regional divides than most other scholars of the genocide. *Id.* Regardless of whether regionalism contributed significantly to the mounting animosity of the early 1990s, ample evidence suggests that hate speech was targeted primarily at the Tutsis and that it spurred widespread killing. *Id.* at 260. In essence, it is difficult to prove whether regionalism or racism was a greater causal factor in Rwandan unrest from 1990–1994. Both antagonisms were exacted on Tutsi scapegoats. *Id.* at 265 (“The rulers in Rwanda have reinforced the ‘truth’ of their racist ideology by pointing to the massacres of Hutu (by the Tutsi-dominated army) in Burundi in 1965, 1972, 1988, 1989, and 1993 to ‘prove’ that all Tutsi seek the ruthless oppression of the Hutu.”).

111. *Id.* at 256.

112. DE LAME, *supra* note 103, at 459 (discussing how ritualized social practices can possibly be more effective in minimizing inequalities in Rwanda).

Even in recent times, many peasants still hold those ancestries suspect, recalling that some forefather or another transitioned from one group to the other.<sup>113</sup> But such social fluidity was anathema to the emerging royal court, which embraced the Hutu-Tutsi divide as a ruling philosophy.

By the early twentieth century, the royal court and German colonists<sup>114</sup> had come to terms over the ruling of Rwanda. They agreed that efficient administration required specialization among Rwanda's different peoples.<sup>115</sup> In a twisted take on the nation's history, royal leaders convinced colonial administrators that the Tutsi court had long held great power and should continue to rule.<sup>116</sup> Royals also argued that the Tutsi people were the superior tribe or ethnicity.<sup>117</sup> Catholic missionaries then began to suggest that the two groups might actually be descendants of different *races*.<sup>118</sup>

In the early 1900s, prominent missionaries known as the "white fathers"<sup>119</sup> opined that Tutsis were the long-lost progeny of Ham, Noah's outcast son.<sup>120</sup> In what became known as the Hamitic

113. *Id.*

114. Ieuan Griffiths, *The Scramble for Africa: Inherited Political Boundaries*, 152 GEOGRAPHICAL J. 204, 204 (1986) (noting that Germany was "awarded" Ruanda-Urundi at the 1884–1885 Berlin Conference).

115. Newbury & Newbury, *supra* note 96, at 847.

116. See NEWBURY, *supra* note 104, at 53 (finding that the Rwandan royals preferred the Tutsi court as opposed to regional and local leaders who actually held most of the power during the mid-eighteenth century); Newbury & Newbury, *supra* note 96, at 847 (stating that the Rwandan central court claimed to colonial authorities that its territorial domain stretched to the Kagera River over an area known as Gisaka, which, in reality, was recently politically autonomous).

117. See Newbury & Newbury, *supra* note 96, at 837–39 (discussing how European observers celebrated the Tutsis as tall and slender with aquiline noses and fine hair).

118. See MAMDANI, *supra* note 75, at 87–88 ("For Father Léon Classe, the future bishop of Rwanda and the key architect of missionary police, the Tutsi were already in 1902 'superb humans' . . . just as for Father François Menard, writing in 1917, a Tutsi was 'a European under a black skin.'"); CAROL RITTNER, JOHN K. ROTH & WENDY WHITWORTH, GENOCIDE IN RWANDA: COMPLICITY OF THE CHURCHES? 49 (2004) ("Catholic missionaries . . . considered Rwanda a country of two completely different human groups—which they later called 'ethnic groups' and 'races'—the Hutus, who made up the peasant masses, and the Tutsis, who were considered to be aristocrats."); Newbury & Newbury, *supra* note 96, at 837 (discussing popular lore stating that ethnicity was supposed to pervade all aspects of Rwandan culture, from personal capacities to political stratification, which led to the "assumption that, without empirical evidence, the three principal ethnic groups—Tutsi, Hutu, and Twa—were seen as entirely separate: separate in their cultures, histories, and racial origins"). Mamdani contends: "The Church was the original ethnographer of Rwanda. It with the original author of the Hamitic hypothesis . . . without the Church, there would have been no 'racial' census in Rwanda." MAMDANI, *supra* note 75, at 232.

119. See Newbury & Newbury, *supra* note 96, at 843–84 (discussing how the missionary priests of the Missionnaires d'Afrique were commonly referred to as the "White Fathers" "after the long white cassock that characterizes their dress code, modeled on the Muslim attire of North Africa where the order was founded").

120. MAMDANI, *supra* note 75, at 87 ("The Hamites had now become an entire branch of the

hypothesis, Tutsis were portrayed as white men with black skin, closer in ancestry and disposition to the European colonists than the middling Hutus.<sup>121</sup> By the time Belgium assumed control of the country,<sup>122</sup> the missionaries' Hamitic hypothesis had taken root. The church-run school system and court elites reinforced the new, conjured history of Rwanda's people.<sup>123</sup> In 1933, Belgium made the lie permanent by requiring Rwandans to carry racial identity cards.<sup>124</sup> Following the nation's independence,<sup>125</sup> Hutu governments maintained the identity card system.<sup>126</sup> In 1994, the cards made it possible to determine if a person was Hutu or Tutsi, deserving of safe haven or destined to perish.<sup>127</sup>

Rwanda's state-sanctioned identity card system made sorting possible during the genocide. But that process alone could not have consumed the lives of so many. Additional bureaucratic technologies—designed

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race of Caucasians; the Tutsis were said to be but one of many Hamite groups . . . [O]nly in Rwanda was the notion that the Tutsi were a *race* apart from the majority turned into a rationale for a set of institutions that reproduced the Tutsi as a *racialized* minority.”).

121. MAMDANI, *supra* note 75, at 87.

122. See *Timeline: Rwanda*, BBC, <http://news.bbc.co.uk/2/hi/africa/1070329.stm> (last updated Dec. 27, 2011).

123. See the discussion of Rwandan historian Alexis Kagame's revisionist history and other historiographical issues in Newbury & Newbury, *supra* note 96, at 843; see also DAVID NEWBURY, *THE LAND BEYOND THE MISTS: ESSAYS ON IDENTITY AND AUTHORITY IN PRECOLONIAL CONGO AND RWANDA* 269 tbl. 11.4 (2009) (analyzing the comparative chronologies of Rwandan kings, from Ruganzu to Rwabugiri).

124. See Timothy Longman, *Identity Cards, Ethnic Self-Perception, and Genocide in Rwanda*, in *DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD* 346 (Jane Caplan & John Torpey eds., 2001) (describing how Belgians instituted ethnic classifications that many commentators believe were the root causes of the 1994 genocide).

125. Rwanda's independence movement began in 1959, with an uprising of the Hutus against the royal court. Belgium supported the Hutu uprising and granted the nation its independence in 1962. See Catharine Newbury, *Ethnicity and the Politics of History in Rwanda*, 45 *AFR. TODAY* 7, 13 (1998) (outlining Rwanda's political history).

126. Longman, *supra* note 124, at 354. At the time Habyarimana took power, he promised racial harmony. *Id.* However, the president resurrected the Hutu/Tutsi distinction as a means to rebuild his support network, made claims that he was the Hutu defender, and that his opposition wanted to restore Tutsi dominance over Hutus. *Id.*

127. European eugenics scientists claimed to observe phenotypic distinctions between Hutus and Tutsis during their early-twentieth century research experiments. Those scientists held racist biases and conducted unreliable experiments. Additionally, the daily observations of millions of Rwandans demonstrated few or no observable differences between the two groups (i.e., even Rwandans could not tell if other Rwandans were Hutu or Tutsi). It is quite probable that a group of genetically distinct Tutsi herders migrated from the North, possibly Ethiopia, in approximately the fourteenth century. However, in the intervening centuries, intermarriage was commonplace and genetic demarcations eroded. See MAMDANI, *supra* note 75, at 47 (“Tutsi may be ancient East Africans—‘elongated East Africans’—whose physical distinctiveness attested to successful adaptation to and survival in a dry arid climate over millennia.”). For a broader discussion of the nature of eugenics discourses and argumentation, see generally Celeste Condit, *Race and Genetics from a Modal Materialist Perspective*, 94 *Q. J. SPEECH* 383 (2008).

to keep leaders in power and the citizenry in check—guaranteed that both victims and killers would submit to instructions, report to killing sites, and succumb to the master plan.<sup>128</sup> In Rwanda, seemingly benign, ancient, and modern public administration apparatuses provided a means for organizing widespread execution.<sup>129</sup> Among the most important of these was umuganda—compulsory communal labor for the state.<sup>130</sup> Throughout the spring of 1994, victims and perpetrators reported to their typical Saturday umuganda sites as instructed.<sup>131</sup> Most could not have fathomed that the ancient practice would be used to carry out the slaughter of the Tutsis.

*C. Umuganda: Compulsory Communal Labor for the State in Times of Peace, Genocide, and Today*

1. The Evolution of the Practice from Pre-Modern Rwanda to 1994

Umuganda derives from a Kinyarwanda word connoting neighborly collaboration, especially in the building of homes.<sup>132</sup> On the surface, it signifies the co-creation of something durable. In the earliest times, umuganda likely referred to the sort of communal homesteading farmers engaged in around the world. Yet, in modern times, umuganda has assumed another meaning. Since the sixteenth century, umuganda has meant the purchase of safety from local land-owners—and later the centralized state—through weekly or monthly sweat equity.<sup>133</sup>

Rwanda's peasants have served as a source of cheap labor for the nation's elites. As in many feudal societies, peasants initially plowed

128. See Verwimp, *supra* note 95, at 33 (arguing Habyarimana might have planned to “cleanse” his home region first, before moving on to the rest of the country).

129. See GOUREVITCH, *supra* note 78, at 252 (“The list of Rwanda’s ‘Most Wanted’ was a hodgepodge of akazu members, military officers, journalists, politicians, businessmen, mayors, civil service functionaries, clerics, schoolteachers, taxi drivers, shopkeepers, and untitled hatchet men . . .”); Verwimp, *supra* note 95, at 31 (“Just as burgomasters had organized barriers and patrols before the genocide so now they enforced regular and routine participation in such activities against the Tutsi. They sent councilors and their subordinates from house to house to sign up all adult males, informing them when they were to work. Or they drew up lists and posted the schedules at the places where public notices were usually affixed.”).

130. Verwimp, *supra* note 95, at 35 (stating that umuganda is the well-known word for weekly “communal labor for development” and was also used to describe and organize killings).

131. Verwimp, *supra* note 79, at 233 (noting that every adult was required to participate in weekly communal labor known as umuganda).

132. According to Rwandan linguist Eugène Shimamungu, umuganda is a “piece of wood that is driven into the ground in order to serve as pillars for a house . . . . When neighbours were building, each person would bring a piece of timber to assist in building and in that mutual self-help context the term ‘umuganda’ meant community self-help.” Eugène Shimanungu, Testimony before *Prosecutor v. Kanyabashi*, ICTR, Case No.: ICTR-98-42-T (Mar. 16, 2005).

133. See Jefremovas, *supra* note 99, at 94 (indicating that most Hutus who received land from “men of the land,” or chiefs, did so in exchange for labor, known as uburetwa, “in which they worked two out of every five days for the land chief”).

and harvested for local landowners to earn various considerations.<sup>134</sup> Then, as the royal court centralized power throughout the nineteenth century, peasant labor contributed to common defense and security.<sup>135</sup> Compulsory unpaid labor, in the form of umuganda, enabled royal rulers to orchestrate public works projects and keep track of the whereabouts of the people.<sup>136</sup> Rwanda's colonizers continued the royal court's practice.

German occupation of the nation, which lasted nearly two decades, was a hands-off affair. Royal court oversight of institutions such as umuganda enabled Germany to maintain a skeleton crew of administrators in Rwanda.<sup>137</sup> When Belgium transformed the public administration system in the mid-1920s, it layered a newly racialized Hutu-Tutsi distinction<sup>138</sup> onto existing citizen control systems. As a result, these systems disproportionately burdened the poorest Hutus and Twas.<sup>139</sup> Many of these early twentieth century public sector reforms—including umuganda—were maintained long after Rwanda achieved independence and continue to this day.<sup>140</sup>

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134. Verwimp, *supra* note 95, at 7 (stating that President Habyarimana regularly used the notion of work to promote his ideology). When talking about the Tutsi, he would describe them as feudalists who refused manual work. *Id.* He also portrayed them simplistically as the former masters of the Hutu-peasants. *Id.* “[T]hey are always plotting against the Hutu and working for the benefit of their own ethnic group.” *Id.*

135. King Rwabugiri ensured that “[b]y the beginning of the 20th century, the majority of the population in the central regions of Rwanda was part of a dependent peasantry.” Jefremovas, *supra* note 99, at 96. He leveraged patrimonial traditions to justify peasant labor. *See* David Norman Smith, *The Psychocultural Roots of Genocide: Legitimacy and Crisis in Rwanda*, 53 AM. PSYCH. 743, 744 (1998) (stating that peasants were relied on to enrich the royal court's granaries and herds); *see also* Alison Des Forges, *Defeat is the Only Bad News: Rwanda under Musinga, 1896–1931* (1972) (Ph.D. dissertation, Yale University) (on file with author) (detailing how a small minority of Rwandan elites extended their own power during colonization via the royal court).

136. Verwimp, *supra* note 95, at 19 (explaining the importance of umuganda to the Rwandan economy, as the government claimed that it resulted in a substantial amount of unpaid labor available to the state and it was used to build schools, roads, sanitation facilities, and health centers).

137. For example, the Germans stationed five administrators in the nation in 1913 and relied upon Tutsi elites and Catholic missionaries to maintain order. Newbury & Newbury, *supra* note 96, at 845.

138. MAMDANI, *supra* note 75, at 99. The Belgians relied heavily on data provided by the Church, “whose local servants knew very well their neighbors and their genealogy.” *Id.* The Belgians relied upon three major sources of information when determining how to divide the society: oral information filtered by the church, physical attributes, and cow herd ownership. *Id.*

139. The Twas and the Hutus were considered the beasts of burden in the new Belgian administration. *Id.*

140. For example, reforms of the imihigo system used to track local performance toward development targets. *See* Sarah Ryan et al., *Peace-building Through Good Governance and Capable Statehood*, 21 PEACE REV. 286, 291 (2009) (explaining how the age-old imihigo system has been revived as a means of assessing local communities' accomplishments, which has enabled central government officials to efficiently monitor the activities and expenditures of local

In the mid-1970s, Rwandan President Juvénal Habyarimana reimagined umuganda as a tactic for rooting out “inactivity.”<sup>141</sup> In describing his plans for the communal “democratization” of modern Rwanda, the president told a newspaper reporter, “First the population must get down to work—the Government and myself want to emphasize the value of work on the land. Thus we shall devote each Saturday to tilling the soil with hoes in our own hands.”<sup>142</sup> Of course, the work performed by the president and his cronies—as documented in pictures at the National University Rwanda (“NUR”)<sup>143</sup>—was often far less back-breaking than the labor performed by those subsisting on less than a dollar a day.

President Habyarimana actually noted the peasants’ distinguished umuganda performance. In fact, he increasingly contrasted Hutu farmers’ physical contributions to the state with Tutsi pastoralists’ supposedly laggard efforts.<sup>144</sup> In the years immediately preceding the Rwandan genocide, the economy began to falter, and the formerly integrationist president needed a scapegoat.<sup>145</sup> Umuganda provided a useful metaphor for the growing anti-Tutsi campaign led by his wife and her family.<sup>146</sup> The crux of the argument was that the Tutsis would not contribute to the building of the nation.<sup>147</sup> This was not surprising, given that they were neither farmers nor truly Rwandan.<sup>148</sup> The swirling rhetoric of an alien and parasitic race unwilling to participate in umuganda fomented genocidal tendencies. But umuganda did more than provide fodder for hateful narratives; it enabled genocidaires to carry out their work in the spring of 1994.

President Habyarimana was assassinated on April 6, 1994, but his citizen control systems survived.<sup>149</sup> His information-administration

officials).

141. MAMDANI, *supra* note 75, at 146 (describing the origin of umuganda, a “custom” of once-a-week forced labor that was formally launched by the president in February 1974).

142. *Id.*

143. The pictures were observed in the NUR historical Rwanda archives during field research in June–July 2009.

144. Verwimp, *supra* note 95, at 21. In a 1973 speech, Habyarimana stated, purportedly directed at the Tutsi, “The spirit of intrigue and feudal mentality . . . the valuation of labor . . . the harmfulness of the one who refuses to work.” *Id.*

145. MAMDANI, *supra* note 75, at 148 (detailing the decline of the Rwandan economy in the years preceding the genocide).

146. *Id.* “‘Inactivity’ was one of the three social evils the Second Republic pledged to eradicate at the very outset.” *Id.* at 146.

147. See Philip Verwimp, *The Political Economy of Coffee, Dictatorship, and Genocide*, 19 EUR. J. POL. ECON. 161, 179 (2003) (explaining that blaming the Tutsi was instrumental in masking the regime’s responsibility for the economic hardship and political crisis).

148. *Id.*; see also MAMDANI, *supra* note 75, at 135 (describing the attitude towards the Tutsi as “resident aliens”).

149. Verwimp, *supra* note 95, at 27–28 (charting the comparisons between the decisions of

system was quickly refashioned into “an efficient extermination machine,” according to political economist Philip Verwimp.<sup>150</sup> In the case of umuganda, Hutus and Tutsis were instructed to report to communal labor sites.<sup>151</sup> Tutsis reported to these sites believing that they were safe havens.<sup>152</sup> Hutus came prepared to kill or were coerced into killing by assembled mobs and local officials.<sup>153</sup> As Mamdani describes the situation:

Killings came to be referred to as umuganda (communal work), chopping up men as ‘bush clearing’ and slaughtering women and children as ‘pulling out the roots of the bad weeds’ . . . . After the slaughter of thousands of Tutsi at the church . . . in Nyakizu, the burgomaster told local people that burying the dead was required as umuganda.<sup>154</sup>

Some of the most brutal mass slaughters—such as the killing of thousands at the Murambi Technical School—required the sort of coordinated action and oversight made possible by the well-oiled umuganda system.<sup>155</sup>

The notion that umuganda would be misappropriated for the extermination of the Tutsis was not exactly predictable, but it was always possible. From its inception, umuganda enabled elites to exert control over citizen labor, particularly that of the impoverished Hutu masses. It facilitated tracking their movements and disciplining their behaviors—failure to report to umuganda frequently resulted in censure and penalty.<sup>156</sup> The socio-political practice also provided ammunition

November 12, 1982, in re-establishing an umuganda regime and the organization of the genocide and explaining that the similarities include a multi-step process).

150. *Id.* at 30.

151. *Id.*

152. See GOUREVITCH, *supra* note 78, at 157–58 (stating that although France had intervened and established so-called “safe zones,” thousands of Tutsis continued to be killed in these zones); MAMDANI, *supra* note 75, at 194 (stating that the killing of Tutsi was absorbed into the language of umuganda, or communal work); Verwimp, *supra* note 95, at 33 (noting that killings took place in communes).

153. See MAMDANI, *supra* note 75, at 225 (stating that without the massacres by machete-wielding civilian mobs, numbered in the hundreds and thousands, there would have been no genocide); see also COLIN M. WAUGH, PAUL KAGAME AND RWANDA: POWER, GENOCIDE AND THE RWANDAN PATRIOTIC FRONT 78 (2004) (analyzing the life of Paul Kagame, who ascended to power after the genocide was over and noting that in roughly one hundred days time, an estimated one million Rwandans died).

154. MAMDANI, *supra* note 75, at 194. A burgomaster was a powerful communal (i.e., sector) official. *Id.*

155. See Verwimp, *supra* note 95, at 29–30 (indicating the organization of the genocide had a similar structure to the umuganda system established by Habyarimana).

156. See MAMDANI, *supra* note 75, at 194 (noting that umuganda gave rise to power over entire communities in the name of custom); Verwimp, *supra* note 95, at 11 (discussing ruralization and restrictions on movement and stating Habyarimana “followed a consistent policy to make the peasants stay in the rural areas”). Noting statistical backing for the ruralization

for Hutu extremists' exterminationist campaign against the Tutsis.<sup>157</sup> In many ways, umuganda served as a mechanism for efficient slaughter. Surprisingly, the practice continues today.

## 2. Umuganda under the Kagame Administration

Despite its connection to the genocide, umuganda was revived shortly after Rwanda's current Tutsi President, Paul Kagame, took office. Like his predecessors, President Kagame views umuganda as a way for citizens to contribute to the nation.<sup>158</sup> The president empowers local officials to survey and report back on the participation of local peasants.<sup>159</sup> Currently, the last Saturday of every month is reserved for umuganda.<sup>160</sup>

Since 2007, the Rwanda Research Group ("RRG")<sup>161</sup> has studied and participated in this cultural phenomenon. Our ethnographic field

premise, the author notes that in 1973, 95% of the Rwandan population lived in the rural areas of the country and in 1993, the percentage was the same. *Id.* Today the penalties vary; they are meted out by local administrators. In discussing umuganda penalties with Rwandans over the past four years, the author has discovered that they range from "nothing," to denial of visas and other government papers, intimidation and harassment, beatings, and jail time.

157. MAMDANI, *supra* note 75, at 194 ("The use of the word 'custom' was highly significant. After all, was not customary obligation supposed to distinguish the indigenous from the nonindigenous?"); Verwimp, *supra* note 95, at 20 ("Umuganda also gave the local party and state officials knowledge and experience in the mobilization of the peasant population. A skill that was to prove deadly during the genocide.").

158. In the Kagame administration's first major planning document, Vision 2020, the president declared his intention to capitalize on Rwanda's "plentiful supply of cheap labour . . . [to re-]build infrastructure . . ." REPUBLIC OF RWANDA, MINISTRY OF FIN. & ECON. PLANNING, RWANDA VISION 2020, at 12 (2000), available at [http://www.gesci.org/assets/files/Rwanda\\_Vision\\_2020.pdf](http://www.gesci.org/assets/files/Rwanda_Vision_2020.pdf). In a subsequent five year plan, umuganda was touted as one of several "institutions of traditional social organization . . . harnessed for the struggle against poverty." GOV'T OF RWANDA, MINISTRY OF FIN. & ECON. PLANNING, POVERTY REDUCTION STRATEGY PAPER 8 (2002), available at <http://www.imf.org/external/np/prsp/2002/rwa/01/063102.pdf>. This document noted that localized public works were a time-honored means of community self-sufficiency. *Id.*

159. See Bert Ingelaere, *Do We Understand Life after Genocide?: Center and Periphery in the Construction of Knowledge in Postgenocide Rwanda*, 53 AFR. STUD. REV. 41, 44 (2010) (discussing how political favoritism continues under President Kagame's rule). Citizens talk about the idea of reconciliation as "a program of the state." *Id.*; SARAH RYAN ET AL., BUILDING THE CAPABLE STATE: DEFINING GOOD GOVERNANCE IN NEW RWANDA 14-16 (2008) (explaining the complexities of developing political institutions to curb cronyism and rebuild social trust).

160. John Gahindiro, *Making "Umuganda" More Useful*, NEW TIMES (June 2, 2008), <http://www.newtimes.co.rw/index.php?issue=14255&article=6830>.

161. The co-researchers and research assistants that have directly contributed to umuganda projects, ranging from house-building to weed-clearing, include: Anita Balocating, Austin Berescik-Johns, Katerra Billy, Owen Cortner, and Alejandra Diaz. Others have contributed to background research and planning, including: Arthur Aguirre, Elisa Espinosa, Tanya Flores, Darlene Nzorubara, Satoshi Ohno, Pamela Prieto, Lorena Ramos, Sam Rodriguez, Della Saju, Ashley Thompson, and Jennifer Walker. Research assistants and translators from the NUR have included: Mugabo Paul, Mahame Andrew, and Kasana Justus.

research<sup>162</sup> has revealed a complex and contradictory state program that simultaneously forges both community ties and discord. Umuganda brings locals—and foreigners—together to solve community problems, such as insufficient housing for genocide orphans.<sup>163</sup> The communal labor also unites heterogeneous members of society, such as the uneducated and college-educated.<sup>164</sup> While post-umuganda town hall meetings commence with highly-orchestrated “sensitizations” on central government policies,<sup>165</sup> they also afford a forum for both local grievances and appeals for mutual assistance.<sup>166</sup> The monthly gatherings bring neighbors together and strengthen both interpersonal and communal ties.

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162. This research commenced with a rigorous literature review. The review was followed by semi-structured interviews with Rwandans and development experts in the U.S. and Rwanda prior to engaging in participant observation of umuganda during the summers of 2009 and 2010. The initial study design was developed with assistance from Michael Fabricant, Executive Officer of the Social Welfare Ph.D. Program of The CUNY Graduate Center. Subsequently, study designs were approved by the Institutional Review Boards (“IRB”) of Baruch College, City University of New York and the University of Texas at El Paso (respectively, in 2007, 2008, 2009, and 2010). Research funding was provided by the Research Foundation of the City University of New York and the Department of Communication, College of Liberal Arts, and President’s Office of the University of Texas at El Paso. In addition, dozens of individual donors contributed to the Rwanda Research Group fund in 2007.

163. Mukagahizi Rose, *Kwitabira Umuganda ni Isoko y’Iterambere [Participating in Community Activities (Umuganda) is the Source of Development]*, IMVAHO NSHYA, June 2009. Translator Mahame Andrew stated that “Umuganda has become the culture of Rwanda . . . , adopted [by the] Red Cross, UNDP, UNICEF . . . [:] even foreigners participate in umuganda.” *Id.*

164. Ephrem Murindabigwi, *Abanyeshuri ba Kaminuza Barashimirwa Ibikorwa by’Umuganda [The University Student Community Activities: Umuganda]*, ARBORETUM, Sept. 3, 2008. The article contains several passages explaining how umuganda is helping to bridge distrust between the less-educated and college students, including how

[e]ven the people in the village see [NUR students] as proud people, even fearing associating with them as they think that they are of high class. Even greeting them, they take it as a mistake that cannot be forgiven . . . . Alice, who also attended the monthly umuganda indicated that ‘I have seen that [NUR students] can also do something unbelievable . . . so people are going to be familiar to you, you are good people and this is confirmed by the executive secretary of RUGARA cell where these houses are being built.’ For him, what university students are doing . . . is showing him with no doubt that University education is [going toward] the future benefit for society.

*Id.*

165. At the beginning of an umuganda town hall meeting observed by the RRG in summer 2010, a script produced by the national government was read. The script mainly concerned election protocols, and it was dispatched with quickly (e.g., no questions were taken) so that the meeting could proceed to local concerns.

166. For example, at an umuganda town hall meeting observed by the RRG in summer 2009, sector leaders reported recent thefts (e.g., a stolen motorcycle) and local landowners agreed to pay for additional night security. At an umuganda town hall meeting observed by the RRG in 2010, a local woman on crutches appealed to her neighbors for assistance in paying her medical bills. Older residents quizzed her on her marital status, living arrangements, etc. to ascertain her need, and then a collection was taken for her benefit.

Conversely, umuganda is exploited as a disciplinary opportunity by upwardly mobile local officials.<sup>167</sup> Though the RRG witnessed numerous opportunities for peasant participation in town hall meetings, local and national conveners<sup>168</sup>—many of whom were appointed by the president<sup>169</sup>—controlled both the agendas and flows of conversation at the people’s meetings we observed.<sup>170</sup> When these elites criticized marginalized Hutu peasants,<sup>171</sup> we imagined that longstanding animosities were reinvigorated.<sup>172</sup> There is insufficient space to report our full research findings here, but field notes from a house-building project in umudugudu<sup>173</sup> Karuhinda<sup>174</sup> illustrate the complexity of the umuganda system.

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167. For example, at an umuganda town hall meeting observed by the RRG in summer 2009, officials running the meeting chastised the locals for being late, ignoring the locals’ need to fetch water, cooking materials, etc., prior to the start of umuganda. At an umuganda town hall meeting observed in one of Rwanda’s poorest umudugudu in summer 2010, nearly all residents readily presented the notebooks they bought, exclusively, for umuganda attendance registration (i.e., at a cost of at least two to three days’ wages). See Ingelaere, Rwanda Research Group, *supra* note 159, at 13, 53 (providing further description of umuganda).

168. For example, at an umuganda town hall meeting observed by the RRG in the summer of 2009, a national Army commander was among the four leaders of the local town hall meeting.

169. See An Ansoms, *Re-engineering Rural Society: The Visions and Ambitions of the Rwandan Elite*, 108 AFR. AFF. 289, 295 (2009) (noting that the majority of the new Tutsi elite are ex-refugees (including President Kagame) and suggesting that “[t]he over-representation of Tutsi ex-refugees in official posts and their detachment from the rural setting” is of concern).

170. This was true at the umuganda town hall meetings the RRG observed. See also Ansoms, *supra* note 169, at 293–97 (discussing the differences between the new Rwandan political elite from the peasants in the countryside and noting that Tutsis hold more of the top political positions in the country today).

171. For example, such criticism was witnessed by the RRG at a rural umuganda near Huye in summer 2009.

172. See Bert Ingelaere, *Peasants, Power and Ethnicity: A Bottom-Up Perspective on Rwanda’s Political Transition*, 109 AFR. AFF. 273, 273 (2009) (analyzing the “life trajectories of [400] ordinary peasants” since the political transition of 1994 and positing that “the instrumental stance on ethnic identity adopted by the post-genocide regime is not only erroneous but counter-productive”); Ryan, *Peace-building*, *supra* note 140, at 286 (discussing Rwanda’s “Vision 2020” plan for the nation’s development and its guiding principal that peace can be achieved through “policy and institutional praxis”); RYAN, BUILDING, *supra* note 159, at 13 (noting that the term umuganda is likely irredeemable in the eyes of the poor and that critics have questioned the use of unpaid peasant labor as the primary means of rebuilding the nation’s infrastructure).

173. An umudugudu is the smallest administrative unit in the Rwandan system. This particular umudugudu is located in Southern Rwanda near Save, the site of the first Catholic mission, and the National University of Rwanda in Butare/Huye. For more information on administrative units and titles, see Shinichi Takeuchi & Jean Marara, *Conflict and Land Tenure in Rwanda* (Sept. 1, 2009) (JICA Research Institute, Working Paper No. 1), available at [http://jica-ri.jica.go.jp/publication/assets/JICA-RI\\_WP\\_No.1\\_2010.pdf](http://jica-ri.jica.go.jp/publication/assets/JICA-RI_WP_No.1_2010.pdf).

174. Umudugudu Karuhinda is located in cell Nyakagezi in sector Huye in southwestern Rwanda, which is relatively near to the Burundian border.

### 3. Field Notes from the June 2009 Umuganda in Umudugudu Karuhinda<sup>175</sup>

Umuganda fieldwork commenced in an Indian restaurant in midtown Manhattan in the spring of 2009. An esteemed Rwandan colleague and United Nations staffer met to talk about the RRG's upcoming field research. After the colleague learned that the RRG would be studying—and participating in—umuganda in June, he opined that June would be a good month to participate. During June, the Ministry of Local Government (“MINALOC”) would collaborate with the Ministry of Health (“MINISANTE”) to sensitize the citizenry about family health during the post-umuganda town hall meetings.

In the days leading up to the June 2009 umuganda, the RRG met with a district official in Huye. The official confirmed that the national discussion topic for June was health and that she was awaiting both instructions from MINALOC and talking points from MINISANTE. She would then disseminate these messages to local officials. She had already worked with those same officials to select projects that would contribute to local development targets<sup>176</sup> and the national agenda.<sup>177</sup> She explained, “MINALOC organizes the month-end . . . discussions. Then the districts translate the national discussions for the sectors and cells. The other Ministries also organize discussions . . . in June the umuganda discussion topics are about birth planning, malnutrition . . . they come from MINISANTE.” She suggested that the districts serve as more than communication intermediaries between the national government and local leaders; they provide limited financial support (e.g., for road-clearing tools such as machetes) and help to educate local leaders about district projects and priorities. “But the people feel like they own [umuganda],” she advised toward the end of the meeting.

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175. As per the study design and IRB recommendations, no interviewees or sources will be named in this Article. Though Rwanda has made progress toward democracy, open dissent of government policies is still risky. See Ingelaere, *supra* note 172, at 292 (“Although [shadow local governments are] currently mobilized for the development of the country, it was precisely a [similar] highly top-down, authoritarian, and non-democratic set of institutional structures and exercise of power that was of crucial importance in the administration of the genocide.”). See generally Ansoms, *supra* note 169, at 293–96 (describing Rwandan elite). For a theoretical treatment of this phenomenon, see Andrew R. Smith, *Dialogue in Agony: The Problem of Communication in Authoritarian Regimes*, 18 COMM. THEORY 160, 160–61 (2008).

176. These development targets are outlined in imihigos, or local performance contracts. See Ryan, *Peace-building*, *supra* note 140, at 293–94 (describing the mechanics of imihigos and stating that some of the biggest challenges of implementing the performance contracts are financing and the bureaucracy involved in getting centrally-controlled resources).

177. For example, in July 2010, nearly all projects related to the presidential elections. In the summer of 2009, with no major elections or celebrations on the horizon, local officials could engage their communities in locally-focused initiatives.

After meeting with the district official, the RRG conducted interviews with the leaders of local NGOs<sup>178</sup> and NUR student clubs<sup>179</sup> about umuganda and other citizen-led social change efforts. During these interviews, RRG members solicited invitations to local umuganda worksites. On the day of umuganda, one researcher joined leaders of a women's organization as they built a house in rural Cyarwa; two researchers helped clean local roadsides (e.g., manual weed clearance) in-town in Huye; and I made bricks in umudugudu Karuhinda with members of the District University Student Association Forum ("DUSAF"), a community service club at NUR.

Most of the DUSAF students had grown up outside the district; umudugudu Karuhinda was not their home. But they felt a duty to "help Rwandans with their problems," as one DUSAF leader explained. Each year they surveyed their members and local officials on "who are the poorest people in the area"<sup>180</sup> and then tried to assist as many as they could. In 2008, DUSAF helped construct houses in four districts. DUSAF members also taught English and trained elementary school teachers to use new communication technologies in their classrooms. They conducted workshops on the benefits of "kitchen gardens," small planters located outside kitchen windows where "[y]ou can use your extra dishwasher to water the plants!" one member explained enthusiastically. "In that way, we can help to resolve malnutrition," he added. For their umuganda initiative, on the last Saturday of each month, the students had convinced the university to lend them one of the busses President Kagame had donated—and to pay for the gas.

On the morning of umuganda, we boarded the university bus and traversed rough rural roads for approximately thirty minutes en route to our worksite. To pass the time, most of the two dozen students aboard sang Rwandan Patriotic Army ("RPA")<sup>181</sup> victory songs and love songs.

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178. For example, the non-profit organization Duhozanye. See Sarah Ryan & Annie Balocating, "We Snuck up on the Roof...": *The Widows of Duhozanye Rebuild their Community*, 1 SOC. JUST. WISDOM SERIES 1, 3 (2010) (noting how Duhozanye members challenged cultural taboos against women engaging in carpentry to rebuild their community).

179. For example, The University Women's Student Association ("UWSA") at NUR, which lobbied the university administration to build a women's dorm. In 2005, according to three UWSA leaders interviewed by the RRG, half of the first-year women at NUR got pregnant. Most had spent their first few days away from home walking the streets of Huye in search of a place to live. As a result, they accepted housing with strangers. In response, hundreds of UWSA members mobilized a protest and demanded that the University build a new dorm. The RRG visited that dorm in 2009.

180. According to a DUSAF leader interviewed by the RRG in summer 2009.

181. The RPA is the Uganda-based Tutsi army that invaded Rwanda in 1990. Though the RPA stopped the genocide in 1994, there is dispute about whether the army maintained an intention to liberate the Hutu majority. See MAMDANI, *supra* note 75, at 234 (describing a mass Hutu exodus from Rwanda following the RPF victory). Thus, as I was listening to the singing, I

We parked a short walk from umudugudu Karuhinda at around 8:15 a.m.

We were directed to the local community house, a mud-walled structure of approximately 200 square feet, to collect materials. Most of us hauled wooden brick-making forms to mud pits down a hill behind the community house. We surveyed the community's previous work and started piling up cement block-sized mud bricks. Military personnel and a few local men began breaking up large plots of dried mud with hoes.<sup>182</sup> Local women soon poured water into the plots from the ubiquitous yellow plastic jugs seen in most Rwandan households. Within an hour, the remaining local participants arrived.<sup>183</sup> The largely impoverished peasant population<sup>184</sup> dove into the grueling manual labor.

During the four-hour communal labor session, it was often unclear who was in charge.<sup>185</sup> A local official in a starched plaid shirt made notes, seemingly about attendance and work effort, while the DUSAF students directed me to tasks. Despite the lack of clear direction, we made hundreds of mud-and-straw bricks. At the post-umuganda town hall meeting, the local official claimed that we made 800 bricks at a value of approximately 24,000 Rwandan francs, or 48 U.S. dollars. Given what I had seen, the estimate of bricks seemed high; the value for

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wondered if there were Hutu students in the mix. I was curious how they felt about the RPA. Survey research conducted at NUR and the Kigali Institute of Education in the summer of 2010 revealed that a majority of the students were the children of poor farmers and, likely, Hutu. See Sarah Ryan, *Social Mobility through Higher Education* (unpublished manuscript) (on file with author) (noting a demographic profile that suggests that students in the bottom tier of Rwanda's public higher education system are Hutu and have opportunities to succeed).

182. The nation was celebrating "Army Week" and members of the army were pitching in at umuganda sites. Press Release, Ministry of Defence of Rwanda, Army Week (June 26–July 18, 2009), available at <http://www.mod.gov.rw/?ARMY-WEEK-26-June-18-July-2009>.

183. It is likely that many local participants were delayed by their morning chores. While traveling through the main part of umudugudu Karuhinda, I noticed residents at work. They were tending to small plots of crops, small children, etc.

184. The simple, worn clothing of most participants (e.g., skirts made from bolts of cloth for most of the local women, lack of shoes for many children), the conditions of their homes (e.g., tin roofed, stick-walled structures), and other visual indicators suggested that this was not an affluent umudugudu. I did not expect it to be, given its rural southern location (i.e., not in the more affluent capital city) and DUSAF's selection of the location as a site in need of assistance. Given visual observations and the lack of alternative employment opportunities in this area of the country, it is likely that most participants were crop farmers. See generally DE LAME, *supra* note 103, at 170 (describing rural Rwanda). It should be noted that the vast majority of Rwandans (more than 85%) engage in farming, largely of a subsistence nature. See THE REPUBLIC OF RWANDA, *ECONOMIC DEVELOPMENT AND POVERTY REDUCTION STRATEGY, 2008–2012*, at 5–8 (2007) (noting that agriculture provides most employment but that there has been a structural shift towards the service sector); see also Ansoms, *supra* note 169, at 289–99 (describing conditions in rural Rwanda).

185. RRG members noted this same lack of coordination at a summer 2010 umuganda in Kigali.

the collective labor of more than 100 people, low. According to the post-umuganda meeting leaders, that value would have been higher had locals taken umuganda more seriously.

The town hall gathering was held in a dirt clearing near the community house. At least two hundred residents were in attendance, mostly women. The meeting was presided over by the local administrator, a representative of DUSAF, a national army commander, and a police commander. The local administrator, who had not performed any manual labor that day, opened by thanking everyone for coming, especially the police, army personnel, students, and foreign visitor (i.e., me). He led the locals in a chant of “We work hard so we can develop.”<sup>186</sup> He then appraised the day’s effort: “Today we have made 800 bricks . . . . We would have made more than 1,000, but you have come late. But still, I thank you for coming.” The DUSAF representative spoke next.

The DUSAF student spoke confidently, despite being younger than most of the umudugudu residents and originally hailing from Uganda.<sup>187</sup> He began by situating the students’ contribution in a larger narrative of communal self-help: “These students have a lot of work to do. . . . But they help you because of love . . . so we can solve our own problems. We have many homeless, but we will join hands and construct houses for them.” He then seconded the local official’s appraisal of the peasants’ lackluster performance: “Even if you have done good, I can’t go without talking about your weakness. We have come early, but you have come late. So we’ve made fewer bricks. If you were on time, we might have constructed a house this week.”<sup>188</sup> He then responded to perceived prejudice against university students, stating, “We at NUR are not as proud as before. Before . . . we would not work physically. But we can do this work too.” He ended by attempting to rouse the crowd with a “Do you agree to be on time?” The locals responded weakly, “Yes.” Then the army and police commanders spoke in turn.

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186. Translation assistance was provided by two NUR students during the meeting. The quotes presented in this Article are rough translations gleaned from the author’s field notes.

187. Anthropologist Bert Ingelaere would likely contend that the speaker’s Ugandan background gave him confidence. According to Ingelaere’s extensive research of social and political capital in Rwanda, Ugandan-born Tutsis hold more power than their Rwandan-born compatriots, especially Hutus. *See* Ingelaere, *supra* note 172, at 275 (noting that socio-political distinctions between Hutus and Tutsis are as prevalent as ever). It should be noted that, given our visual observation of this student’s accommodations (members of the RRG saw the room he was renting), he was very poor.

188. It would have been impossible to construct a house that day. The previous month, participants had made less than half the bricks needed for a house. Those bricks had dried and were ready to assemble, but the bricks we made would take more than a few hours to dry.

Both security officials reiterated the previous speakers' messages, thanking the locals for attending and admonishing them for their subpar effort. The army commander equated their lateness with a lack of patriotism, explaining: "This country was destroyed by the people of Rwanda. We must rebuild it. If you come late, you do not love your country . . . . We beg you to report on time . . . ." He then turned to me as an example, as the other speakers had done, suggesting that the locals had ruined my opinion of their umudugudu or nation: "She worked hard. She had come to do research on umuganda, but you came late. What picture does she take away?" And, with that, he ended his speech.

And so, another umuganda Saturday unfolded in umudugudu Karuhinda. Bricks were made, attendance taken, recalcitrance noted, and residents disciplined. Of course, this is only a snapshot of what unfolded for the tens of thousands who participated in umuganda that day. Still, the activities and messages described in this short field report illustrate how modern umuganda both brings community members together and reinforces elites' power over them.

Umuganda is touted as labor for a common good, but the work has deeper meanings. For many peasants, umuganda is a monthly opportunity to earn forgiveness—even though most have nothing to be forgiven for<sup>189</sup>—and demonstrate allegiance to the state. It is their opportunity to literally be counted as eager citizens in the new Rwanda. But as administrators are tallying participants, many locals are adding to their list of grievances against the president and the Tutsis.<sup>190</sup> And, in a region with recurring pogroms and genocides, such simmering animosities are harbingers of violence. Thus, despite the economic<sup>191</sup> and social benefits of umuganda, it remains the withered appendage of an age-old system that has brought the nation far more pain than healing.<sup>192</sup> In the end, umuganda functions more effectively as a

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189. Though many Rwandans and Central Africans participated in the Burundian and Rwandan genocide, the majority did not steal, kill, or otherwise occasion harm to their neighbors directly. For an overview, see Davenport & Stam, *supra* note 79.

190. See Ingelaere, *supra* note 172, at 290 (noting that all citizens have access to authorities but that the "dominant political order serves to guarantee physical safety for Tutsi genocide survivors or Tutsi returnees"); see also Ansoms, *supra* note 169, at 293–97 (describing Rwandan elites); Danielle Beswick, *Managing Dissent in a Post-Genocide Environment: The Challenge of Political Space in Rwanda*, 41 DEV. & CHANGE 225, 244 (2010) (describing the complex politics of Rwanda).

191. At the after-umuganda town hall meetings, leaders often reveal the economic impact of the labor. At the featured umuganda, our work had yielded less than fifty dollars worth of labor. Our research team witnessed small-scale returns at a half-dozen umuganda sites, though leaders estimate far greater economic and social benefits. See also Ryan & Balocating, *supra* note 178, at 1 (describing community efforts and organizations such as the Duhozanye NGO).

192. See Verwimp, *supra* note 79, at 233 (noting a history of government-sponsored repression and political favoritism in Rwanda).

metaphor for reconciliation than as an institution of social good. And, like other citizen control systems, umuganda has the potential to oppress many as it empowers a few. But if umuganda evinces a shortcoming in modern Rwandan administration, it also reveals an opportunity for the nation to advance, and for its primary ally—the U.S.—to lend support and keep its promises.

#### IV. FULFILLING THE U.S. OBLIGATION TO PREVENT EXTERMINATION BY DISMANTLING SYSTEMS OF GENOCIDE IN RWANDA, THE U.S., AND BEYOND

Citizen control systems such as umuganda can be dismantled before they are put to violent ends (again). This belief forms the basis of U.S. culture and constitutional democracy.<sup>193</sup> And though policymakers have sometimes strayed from this principle, it is the standard that dictates how and why the U.S. must fulfill its obligation to prevent exterminationism. In both Rwanda and the U.S., government officials should begin testing and implementing initiatives to limit government surveillance and control of the movements, actions, and locations of their peoples, especially when such oversight is racially or ethnically targeted. If successful, such limits will deprive future genocidaires of the means to carry out efficient slaughters. System regulations are also likely to enhance citizen trust and social cohesion.<sup>194</sup>

In Rwanda, the project could unfold collaboratively, with the U.S. serving as an ally. For instance, the United States Agency for International Development (“USAID”)<sup>195</sup> could fund Labor Intensive Public Works (“LIPW”), compensating those who voluntarily contribute to infrastructure projects. Pilot LIPW projects have proven promising, and they represent a constructive avenue for U.S.

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193. For example, as proclaimed in the opening to the Declaration of Independence, “When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them . . . .” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). For more on Thomas Jefferson’s “complex . . . eighteenth-century civic understanding of republican institutions and the mutual interdependence of individual and community . . . .,” see David Thomas Konig, *Thomas Jefferson’s Armed Citizenry and the Republican Militia*, 1 ALB. GOV’T L. REV. 250, 270 (2008).

194. See Helen M. Hintjens, *Explaining the 1994 Genocide in Rwanda*, 37 J. OF MOD. AFR. STUD. 241, 241 (1999) (discussing the nature and importance of citizen trust and social cohesion in Rwanda); see also NAT J. COLLETTA & MICHELLE L. CULLEN, *VIOLENT CONFLICT AND THE TRANSFORMATION OF SOCIAL CAPITAL: LESSONS FROM CAMBODIA, RWANDA, GUATEMALA, AND SOMALIA* 33–50 (2000) (noting how the Rwanda case study “examined how social capital interacted with conflict in terms both of the unraveling of social fabric and the strengthening of social dynamics among Hutu that enabled the genocide”).

195. USAID is the government agency that provides U.S. economic and humanitarian aid worldwide.

engagement with the nation.<sup>196</sup> Simultaneously, the U.S. could negotiate with President Kagame to phase out systems such as umuganda, diminishing the grasp of both the central government and local administrators over the peasantry. Given President Kagame's deep ties to Washington<sup>197</sup> and his desire to please the donor community,<sup>198</sup> he is likely to consider such a request. The peasantry would immediately feel the impact of a resultant policy shift; such a shift might also vent some of the peasants' frustrations.<sup>199</sup> The U.S. could undertake simultaneous domestic initiatives to demonstrate good faith and solidarity.

While there is no parallel to umuganda in the U.S., the nation is not free of systems of oppression and control. Post-9/11, a spate of laws require citizens and visitors to carry increasing amounts of data on government-issued computer chips (e.g., chips embedded in passports), furnish identification upon request, and submit to more frequent

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196. See JAN-GERRIT VAN UFFELEN, LESSONS FROM SOCIAL PROTECTION PROGRAMMES IN SITUATIONS OF CHRONIC POVERTY AND FOOD INSECURITY 13–15 (2010) (discussing the National Labour Intensive Public Works in Rwanda (HIMO)); see also REPUBLIC OF RWANDA MINISTRY OF LOCAL GOVERNMENT, NATIONAL LABOUR INTENSIVE PUBLIC WORKS (HIMO/LIPW) STRATEGY 4 (2008) (noting that limited LIPW programs commenced at the end of 1978). Note that LIPW are not always compensated. This Article advocates for paid, voluntary labor as an alternative to umuganda. The work should also assist individuals and groups in developing trade skills (e.g., carpentry skills).

197. The Rwandan president has maintained ties to U.S. backers for nearly a quarter century. STEPHEN KINZER, A THOUSAND HILLS: RWANDA'S REBIRTH AND THE MAN WHO DREAMED IT 61–68 (2008). In 1990, the president trained at the U.S. Army Command and General Staff College in Leavenworth, Kansas. United States Defense Intelligence Agency, Biographical Sketch: Major Paul Kagame (Oct. 1994) (on file with author). Within months of the RPA's siege of Kigali in 1994, Vice President Kagame visited Washington, D.C. to discuss "the role the Rwandan Patriotic Army [would] play in reconstruction efforts in Rwanda." Invitation Letter from William James Perry, Dep't of Def., to Paul Kagame, Vice President, Minister of Def., Rwanda (Nov. 1994) (on file with author). During his visit, government officials outlined the beginnings of U.S. economic investment in Rwanda (e.g., paying off World Bank debts). United States Department of Defense, Comprehensive USG Talking Points for Kagame Visit (Dec. 8, 1994) (on file with author). These ties have remained relatively strong in recent years.

198. For a discussion of Kagame's relationship with donors (and vice versa), see Tristan McConnell, *One Man's Rwanda*, COLUM. JOURNALISM R., Jan.–Feb. 2011, at 39–41, available at [http://www.cjr.org/feature/one\\_mans\\_rwanda.php](http://www.cjr.org/feature/one_mans_rwanda.php), and the extensive responses of journalists who covered the genocide and aftermath, such as Philip Gourevitch.

199. Rwanda's poor are chiefly frustrated by both increases in the rich-poor gap and remaining land disputes. According to the United Nations Development Programme ("UNDP"), "Rwanda's recent growth has largely bypassed the rural poor, leading to a concentration of wealth at the top of the income distribution, and an increase in the country's Gini coefficient from 0.47 to 0.51 from 2001 to 2006." Press Release, UNDP, The Rwanda National Human Development Report Urges for a New Push in Investment and Aid to Achieve the MDGs (July 26, 2007) (on file with author). For a general overview, see Day, *supra* note 80, at 238–39. Of course, Rwanda's poor are a diverse group. For a discussion of the various impoverished segments of society, see AN ANSOMS, RURAL POVERTY AND LIVELIHOOD PROFILES IN POST-GENOCIDE RWANDA, INST. DEV. POL'Y & MGMT. U. OF ANTWERP 9 (Oct. 2008), available at <http://www.ua.ac.be/objs/00192837.pdf>.

background and security checks.<sup>200</sup> Civil libertarians contend that many of these new security protocols expand federal and state control over the population unnecessarily.<sup>201</sup> Because legal scholars have made a compelling case for curtailing these laws already,<sup>202</sup> this Article will

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200. The primary post-9/11 law requiring increased citizen surveillance is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act]. Of course, federal and state identification presentation and data carrying laws pre-date the implementation of the Patriot Act. See Inger Sandal, *Judge Upholds Deputy's Arrest of Bicyclist Who Didn't Have ID*, ARIZ. DAILY STAR, Feb. 5, 2001, available at <http://azbikelaw.org/articles/TucsonID.html>. However, increased enforcement has occurred since the passage of the Patriot Act. During the past decade, the federal government has funded the retraining of state and local law enforcement professionals to enhance surveillance effectiveness. Such retraining was the mandate of the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638 (2004). IRTPA funneled billions of dollars to state and local governments to support diverse securitization and citizen control initiatives. Closely following the passage of the IRTPA, the "REAL ID" Act moved the U.S. one step closer to a national identification card system by setting federal standards for state identification (e.g., driver's licenses). Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); see also ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), REAL ID IMPLEMENTATION REVIEW: FEW BENEFITS, STAGGERING COSTS 3-4 (2008) (outlining the creation of the REAL ID system). Recently, these initiatives have pitted state governments (e.g., Arizona) against the federal government in a clash over who has the authority to define and lead security efforts. See Press Release, U.S. Dep't of Justice, Office of Public Affairs, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010), available at <http://www.prnewswire.com/news-releases/citing-conflict-with-federal-law-department-of-justice-challenges-arizona-immigration-law-97873369.html> (describing the U.S. Department of Justice's brief, which argues that Arizona S.B. 1070 unconstitutionally interferes with the federal government's authority to set and enforce immigration policy).

201. For an astute analysis of how increasing access to criminal records is "mak[ing] the formation of a permanent criminal underclass more likely and intractable," see James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 213 (2008). For discussions of the problems posed by computer chips in passports and expanding government access to information and data storage capacities, see Margaret L. Lorenc, *The Mark of the Beast: U.S. Government Use of RFID in Government-Issued Documents*, 17 ALB. L.J. SCI. & TECH. 583, 586 (2007); Kyle Sommer, *Riding the Wave: The Uncertain Future of RFID Legislation*, 35 J. LEGIS. 48, 49-51 (2009). For a thorough treatment of how the Patriot Act enables unreasonable searches and seizures because nearly any search can be deemed anti-terrorism police work, see Christopher Metzler, *Providing Material Support to Violate the Constitution: The USA Patriot Act and Its Assault on the 4th Amendment*, 29 N.C. CENT. L. REV. 35, 53-54 (2006). And for how the Patriot Act has increased racial profiling and squandered anti-terrorism resources, see Yevgenia S. Kleiner, *Racial Profiling in the Name of National Security: Protecting Minority Travelers' Civil Liberties in the Age of Terrorism*, 30 B.C. THIRD WORLD L.J. 103, 103 (2010); Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 132 (2006).

202. See, e.g., Sinha, *supra* note 201, at 132 (noting heightened national security concerns after the terrorist attacks on September 11, 2001). On the opposite side, legal experts in information protection and national security have documented how lax regulations open the door for identity theft, terrorism, and even the financing of genocidal violence. Given that this Article interrogates systems of exterminationism, arguments in support of the Patriot Act's protective value (e.g., to prevent international money laundering for genocide) cannot be ignored. Most of

only briefly describe the pitfalls of a government system that is seemingly benign but frequently under the radar: the decennial national census.

While controversy swirls each time the U.S. Census Bureau unveils new categories or formats, critics typically argue over the substance of the changes rather than the expansion of power they might suggest, and few citizens express privacy concerns related to the census.<sup>203</sup> After all, the census is a taken-for-granted government institution, mandated by Article I of the Constitution.<sup>204</sup> But what began as a mechanism for apportioning taxes has evolved into a means of collecting household-level information, including racial and ethnic data.<sup>205</sup> And while the government currently dissociates individual addresses from demographic information and restricts access to census data,<sup>206</sup> it

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the “pro-Patriot Act” scholars suggest only that certain provisions within the Patriot Act (e.g., the Title III anti-money laundering provision) afford protections of the citizenry without undermining the balance of security and privacy. While recent Rwandan history suggests that governments are reluctant to relinquish the “bad parts” of police state policies while retaining the “good parts,” the piecemeal pro-Patriot Act arguments are nonetheless an important contribution to the discussion about how to move forward. See Paul Fagyal, *The Anti-Money Laundering Provisions of the Patriot Act; Should They Be Allowed to Sunset?*, 50 ST. LOUIS U. L.J. 1361, 1361 (2006) (noting information that can be obtained from investigating accused terrorists’ financial networks); Matthew T. Hovey, *Oh, I’m Sorry, Did That Identity Belong to You? How Ignorance, Ambiguity, and Identity Theft Create Opportunity for Immigration Reform in the United States*, 54 VILL. L. REV. 369, 369 (2009) (noting how addressing identity theft can also contribute to discussions of immigration reform in the U.S.). For a rebuttal to Title III defenses and a case for “Congress to play an energetic role” in dialing back the wide-reaching Patriot Act, see Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 696 (2008).

203. See Nancy A. Denton, *Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?*, 15 LAW & INEQ. 83, 83 (1997) (expressing concern over the inadequacy and inaccuracy of the U.S. Census Bureau’s racial and ethnic categories); Michael Omi, *Racial Inequity Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 7 (1997) (discussing issues that state-defined classifications of race create); Eleanor Singer, John Van Hoewyk, & Randall J. Neugebauer, *Attitudes and Behavior: The Impact of Privacy and Confidentiality Concerns on Participation in the 2000 Census*, 67 PUB. OPINION Q. 368, 370 (2003) (noting a study that was able to determine “whether attitudes toward privacy and confidentiality continued to predict census mail returns in the 2000 census as they had in the decennial census a decade earlier”). But see David E. Rosenbaum, *U.S. Census Returns Roll in Despite Privacy Criticisms*, PITTSBURGH POST-GAZETTE, Apr. 1, 2000, at A6 (reporting on the reluctance of some to give census information).

204. Article I, Section 9 states, in part: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, § 9.

205. See POPULATION REFERENCE BUREAU, THE 2010 CENSUS QUESTIONNAIRE: SEVEN QUESTIONS FOR EVERYONE (Apr. 2009), available at <http://www.prb.org/Articles/2009/questionnaire.aspx> (noting that the 2010 Census asks for an individual’s race and whether he or she identifies as Hispanic).

206. For example, the New York Census Research Data Center at Baruch College, City University of New York, is one of nine facilities in the United States in which data is made available under supervision.

nevertheless maintains a system capable of efficiently identifying the racial or ethnic composition of each household.<sup>207</sup> In the wrong hands and at the wrong time, this system could contribute to the targeting of African Americans, Mexican Americans, or some other group scapegoated by neo-nativists.<sup>208</sup>

As in Rwanda and other sites of recent genocide, such information collection seems innocuous, until it is not. Of course, pointing to the census as a system of oppression might seem the epitome of a straw argument, but such a reaching inquiry and thorough self-examination is both justified and necessary if the U.S. is to effectively prevent a future calamity on its soil. If lawmakers, legal scholars, and/or jurists concur that the modern census or other information-control systems are contributing to an overreaching central state, there are ways to curtail the systems without losing their benefits.

As legal scholar Joel Reidenberg advises, technology provides the means for concurrently addressing needs for both public information and privacy.<sup>209</sup> For example, policymakers and legal advocates need reliable data to determine community needs, trends, and even patterns of discrimination. For instance, to show a trend of discrimination (e.g., housing, hiring) against Italian Americans,<sup>210</sup> one needs to know their proportion within a given population and geographic area. But statistical modeling has advanced to a level that permits reliable

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207. For example, while the 2010 short form asked for only seven pieces of information (i.e., name, sex, age/birthdate, Hispanic ethnicity, race, relationship to person filling out form, other residence), it recorded more than a count of the citizenry for tax apportionment purposes. Some would argue that we need this data, for instance, so that we can hire public administrators attuned to a community's needs. Acceding to that argument does not justify the collection of household level data on ethnicity and race but, rather, the collection of community-level data.

208. See ROBIN DALE JACOBSON, *THE NEW NATIVISM: PROPOSITION 187 AND THE DEBATE OVER IMMIGRATION* 47 (2008) (discussing how stereotypes about Mexican criminality fueled the Proposition 187 campaign); PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA I* (2010) (noting that the U.S. is a "nation of immigration restrictions," and current immigration battles resonate with arguments made throughout U.S. history); see also Joan Walsh, *Everything You Know about the Civil War is Wrong*, SALON (June 9, 2011), [http://www.salon.com/news/opinion/joan\\_walsh/politics/2011/06/09/civil\\_war\\_america\\_aflame](http://www.salon.com/news/opinion/joan_walsh/politics/2011/06/09/civil_war_america_aflame) (describing the nativism prevalent during the U.S. Civil War).

209. For a defense of privacy rights in the context of genocidal violence, see HANNAH ARENDT, *THE HUMAN CONDITION* (1958). For an interesting counter-argument about the communal value of certain public data, see AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 103–39 (1999). It is difficult—but possible—to balance individual privacy and public information needs. The lesson of the Rwandan genocide is that both individual and public good were sacrificed to serve the ends of genocidaires.

210. For example, as statistical data demonstrated in City University of New York ("CUNY") staff and faculty hiring practices. See *Scelsa v. CUNY*, 806 F. Supp. 1126 (S.D.N.Y. 1992) (granting, in the context of an employment discrimination suit, the motion of plaintiff—an employee of CUNY—for a preliminary injunction against CUNY for engaging in employment discrimination against Italian Americans).

extrapolation from non-household data.<sup>211</sup> Extrapolating from the racial or ethnic composition of a school system might suffice to demonstrate a pattern of discrimination in the larger community, for example. Although it is beyond the scope of this Article to define the parameters of such a project, the normative backing for the initiative exists in both modern social science and in the lessons of history discussed in this Article and at the *Loyola University Chicago Law Journal* “Hate Speech, Incitement & Genocide” Symposium. As a laggardly but emerging leader in the international effort to prevent genocide, the U.S. should model appropriate behavior by critically engaging its own citizen control systems.

## V. CONCLUSION

Citizen control systems lay the groundwork for division and exterminationism. They do so by separating the people, rewarding government officials with expansive oversight powers, shaping the rhetoric of citizenship and civic participation,<sup>212</sup> and—most obviously—by training the citizenry to report and perform as instructed by its government. In the case of Rwanda, umuganda was not the sole cause of the genocide—no single system of oppression can be held responsible for the massive loss of life in 1994. But umuganda played its part. As a seemingly banal public administration instrument, umuganda was exploited to effectuate the fastest genocide in history. And while ample evidence suggests that hate speech inflamed genocidal tendencies and legitimized group violence in the nation and region, efficient extermination was possible only because citizen control systems were fully operational.

U.S. lawmakers and jurists should learn from the Rwandan genocide and commence a thoughtful examination of domestic citizen control systems. They should ponder: Are these systems uniting us or dividing us against each other? Are they depriving certain groups of agency, autonomy, or privacy? Could they provide fodder for exterminationist campaigns? And lastly, what can we do to ensure that our nation is a model for the preservation of individual and group dignity?

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211. See Ruth Meinzen-Dick, Monica Di Gregorio & Nancy McCarthy, *Methods for Studying Collective Action in Rural Development* ii (CAPRI, Working Paper No. 33, 2004) (suggesting that it is possible to make reliable inferences from community-level data); see also Yiheyis T. Maru, Ryan R. J. McAllister & Mark Stafford Smith, *Modeling Community Interactions and Social Capital Dynamics: The Case of Regional and Rural Communities of Australia*, 92 *AGRIC. SYS.* 179, 182 (2007) (analyzing non-household data).

212. See Young, *supra* note 73, at 92 (explaining how rational republicanism prevents marginalized individuals from being considered as full citizens by political elites).

Within U.S. legal and academic communities, there is a deep commitment to such inquiry and to the revitalization of an open society that safeguards all of its people.<sup>213</sup> While we must continue to deliberate about the timing, sequencing, and unfolding of such democratic strategies, we can agree that the U.S. has a responsibility to uphold its Genocide Convention obligations domestically, as well as internationally. Whether we adopt a comprehensive approach to regulating hate speech and dismantling systems of genocide or choose some other strategy, we must commit to forward progress. Only then can we realize Raphael Lemkin's dreams for our nation.

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213. The Bronx Defenders serves as an apt illustration. It works to promote transparency and accountability in the South Bronx while also protecting the dignity of clients and the community. THE BRONX DEFENDERS, [www.bronxdefenders.org](http://www.bronxdefenders.org) (last visited Dec. 15, 2011).