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The Human Costs of “Free Association”: Socio-Cultural Narratives and the Legal Battle for Micronesian Health in Hawai'i, 47 J. Marshall L. Rev. 1377 (2014)

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THE HUMAN COSTS OF “FREE ASSOCIATION”: SOCIO-CULTURAL NARRATIVES AND THE LEGAL BATTLE FOR MICRONESIAN HEALTH IN HAWAII

SUSAN K. SERRANO*

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I. INTRODUCTION

In 1947, under the newly formed United Nations, the Micronesian islands region became the Trust Territory of the Pacific Islands, part of an International Trusteeship System established to help former colonies move towards independence. The goal of the trusteeship was to promote the political, economic, social and educational “advancement of the inhabitants,” their “self-sufficiency” and “health,” and their “development . . . toward self-government or independence.”¹ The United States became the trustee of the region under this mandate. But in the late 1940s and 1950s, the United States – *as their trustee* – dropped sixty-seven atomic bombs on the Marshall Islands as part of its nuclear testing program, devastating not only the Marshallese homelands but also the health of the Marshallese and Micronesian people for ensuing decades. Radioactive ash entered the islanders’ lungs, stuck to their skin, and was played with and ingested by children. Horrific health effects, including thyroid and other cancers, and birth defects such as babies born without recognizable human shapes, were linked directly to the nuclear testing program.² At

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¹ Trusteeship Agreement for the Former Japanese Mandated Islands, art. 6, 61 Stat. 3301, 3302-3303 (July 18, 1947).

² See *Oversight On The Compact Of Free Association With The Republic Of*

the same time, the United States breached its acknowledged trust duties to promote Micronesian self-sufficiency, independence and self-government. It instead fostered economic and healthcare dependency on the United States to secure Micronesian acquiescence to a continued U.S. military and nuclear presence on the islands.³

In recognition of these injustices, as part of its Compacts of Free Association (COFA) with the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau (the “Freely Associated States”), the United States committed to repair the persisting damage, including allowing Micronesian people to “establish residence” in Hawai‘i and other states and territories as “nonimmigrants.”⁴ Largely because of insufficient health care systems, inadequate employment and educational opportunities, a limited economic base, and displacement because of U.S. nuclear testing, thousands of COFA residents⁵ now live in Hawai‘i and elsewhere in the United States, and the population is quickly growing.⁶

Under sweeping welfare reform in 1996, all COFA residents became ineligible for Medicaid and other federal benefits as “unqualified aliens,” even though their tax dollars were supporting

The Marshall Islands (RMI): Medical Treatment Of The Marshallese People, U.S. Nuclear Tests, Nuclear Claims Tribunal, Forced Resettlement, Use Of Kwajalein Atoll For Missile Programs And Land Use Development, Hearing Before the Subcomm. on Asia, the Pacific and the Global Environment of the H. Comm. on Foreign Affairs, 111th Cong. (2010) (statement of Jonathan M. Weisgall, Legal Counsel for the People of Bikini), at 2 (hereinafter “Weisgall testimony”); Zohl de Ishtar, A Survivor’s Warning on Nuclear Contamination, 13 PAC. ECOLOGIST 50, 50 (2006-07 (describing the devastating health effects of the nuclear testing). See also Davor Pevac, The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People, 35 DENV. J. INT’L L. & POL’Y 221 (2006) (outlining the islanders’ claims for the destruction and contamination of land and resources).

³ See *infra* note 84 and accompanying text (describing the United States’ interest in promoting Micronesian dependency).

⁴ See Act of January 14, 1986, Pub. L. No. 99-239, § 177(a). The Compacts between the U.S. and the FSM and RMI committed the United States to compensation for decades of damage from nuclear testing in the Marshall Islands. See *id.* The Compacts also give the U.S. complete military control over the region, which has allowed for continued weapons testing at the Ronald Reagan Ballistic Missile Defense Test Site on Kwajalein Atoll in the Marshall Islands, among other things. See Act of January 14, 1986, Pub. L. No. 99-239, §§ 141(a)(3); 311 (a), (b).

⁵ This essay uses “Micronesian” and “COFA residents” to include all COFA nation migrants, including peoples from the FSM, RMI and Palau. It also focuses primarily on the FSM and RMI; while Palauans are also affected by the State’s actions, there are fewer Palauans impacted by the issues addressed.

⁶ See U.S. Census Bureau, Final Report, 2008 Estimates of Compact of Free Association (COFA) Migrants, 3, April 2009 (finding that as of 2008, an estimated 12,215 Micronesians lived in Hawai‘i).

these programs.⁷ COFA residents continued to receive health benefits from the State of Hawai'i, but in the midst of the fiscal crisis, and in the context of nationwide anti-immigrant backlash,⁸ in 2010 Republican Governor Linda Lingle disenrolled approximately 7,500 COFA residents from the State Medicaid program and transferred them to a new and significantly inadequate healthcare plan, Basic Health Hawai'i. The State defended its actions by appealing to anti-immigrant sentiments.⁹ Patients with chronic or serious illnesses were suddenly faced with the loss of vital preventative care and life-saving treatment.

Non-profit and law firm attorneys filed two lawsuits on behalf of the COFA residents.¹⁰ In a federal class action, *Korab v. McManaman*, the plaintiffs argued, among other things, that the State of Hawai'i violated the Equal Protection Clause when it cut health benefits to individuals based on their alienage and national origin.¹¹ To support their claims, the plaintiffs recounted the dramatic impacts of Basic Health Hawai'i on COFA residents: patients with serious and chronic diseases were denied necessary medications, doctors' visits, and needed treatments like dialysis and chemotherapy; patients would be forced to repeatedly access emergency care, driving up costs for all. The State argued that rather than excluding individuals based on alienage, it was "affirmatively offering state-funded benefits to aliens who do not

⁷ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified as amended at 8 U.S.C. §§ 1601-46 (2006)). Congress also restricted states' ability to use state funds to provide benefits to certain aliens. For such state benefits, Congress created three categories of eligibility. Under the third category (relevant to this case), states can determine the eligibility for any state benefits of aliens who are qualified aliens, non-immigrants, or parolees. This category includes COFA residents. *Korab v. Fink*, No. 11-15132, 2014 WL 1302614 (9th Cir. Apr. 1, 2014), at *1 (citing 8 U.S.C. § 1622(a)).

⁸ See generally Heidi Beirich, *The Anti-Immigrant Movement*, Southern Poverty Law Center, available at <http://www.splcenter.org/get-informed/intelligence-files/ideology/anti-immigrant/the-anti-immigrant-movement> (last visited Dec. 13, 2013).

⁹ See Dina Shek & Seiji Yamada, *Health Care for Micronesians and Constitutional Rights*, 70 HAWAII MED. J. 4, 5 (2011) (quoting Director of Human Services Lillian Koller as saying that "Any alien who has been admitted under the Compact or the Compact, as amended, who cannot show that he or she has sufficient means of support in the United States, is deportable. . . . Individuals on any type of public assistance, including Hawai'i's state-only funded medical assistance for COFAs, do not have sufficient means of support.").

¹⁰ Plaintiffs were represented by attorneys from the non-profit Lawyers for Equal Justice and the law firm Alston Hunt Floyd & Ing.

¹¹ See *Korab et al. v. Koller*, No. 10-00483, 2010 WL 5158883 *1 (D. Hawai'i. Dec. 13, 2010) (granting Plaintiffs' Motion for Preliminary Injunction). See also Victor Geminiani & Deja Marie Ostrowski, *Litigation in Federal and State Courts in Hawaii Preserves Critical Health Care for Micronesians*, 45 CLEARINGHOUSE REV. 63, 64 (May-Jun. 2011) (describing the litigation strategy in *Korab*).

qualify for Medicaid coverage.”¹² After a hard-fought legal battle combined with multifaceted community mobilization, the federal district court halted the implementation of Basic Health Hawai‘i and reinstated the COFA residents’ prior state health plan.¹³ But the State appealed to the U.S. Court of Appeals for the Ninth Circuit.

I, along with others, filed an amicus curiae brief in the Ninth Circuit supporting the Micronesian community on behalf of the Japanese American Citizens’ League (JACL)-Honolulu, the National Association for the Advancement of Colored People (NAACP)-Honolulu and Kokua Kalihi Valley Comprehensive Family Services.¹⁴ Reframing¹⁵ the issue as one of redress for the harms of U.S. colonization, we directly linked the COFA residents’ poor health to the United States’ breach of its trust and Compact duties and to the Micronesians’ resulting economic dependency and acquiescence to a damaging U.S. military and nuclear presence. We thus contended that the United States bears a moral and legal responsibility to repair the damage of colonization, and the State of Hawai‘i, as a constituent member of the United States, has a joint obligation to continue a meaningful level of medical care coverage for Micronesians. Our brief was overwhelmingly embraced by the Micronesian community.

In a 2-1 panel decision that conspicuously ignored the Micronesian peoples’ histories and the United States’ infamous actions in their region, the Ninth Circuit Court of Appeals held that “Hawai‘i’s discretionary decision to deny coverage to COFA

¹² See Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 12, *Korab v. Koller*, (D. Haw. Oct. 4, 2010) No. 10-00483. In its memorandum in opposition to plaintiffs’ motion for preliminary injunction, the State contended that, “Far from discriminating on the basis of alienage, the State is affirmatively dedicating resources to providing health care to those whom the federal government has refused to cover. Nothing in the Equal Protection Clause requires the State to create such a program; nor does it require the State, if it chooses to provide benefits, to provide the same level that it provides under the Medicaid program with federal support.” *Id.* at 12.

¹³ See *Korab v. Fink*, No. 11-15132, 2014 WL 1302614 *2 (9th Cir. Apr. 1, 2014).

¹⁴ Amici counsel included law professor Eric K. Yamamoto, Director of Medical-Legal Partnership for Children of Hawai‘i Dina Shek and myself.

¹⁵ Socio-legal scholars describe “framing” as a “process through which movements mobilize ‘symbols, claims, and even identities in the pursuit of activism.” Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. OF SOCIOLOGY, 1718, 1721 (2006). Law and legal symbols are “master frames” through which “individuals and groups construct the relationships, practices, and knowledge that make up, or ‘constitute’ social life.” *Id.* at 1723. See also Robert Benford and David Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. OF SOCIOLOGY 611 (2000). While “framing” is relevant to the present analysis, a detailed treatment of this scholarship is beyond the scope of this essay.

Residents effectuates Congress's uniform national policy on the treatment of aliens in the welfare context."¹⁶ Therefore, "Hawai'i has no constitutional obligation to fill the gap left by Congress's withdrawal of federal funding for COFA Residents" with state funds.¹⁷

As the first appellate case to impact COFA residents' ability to receive continued health care from the State of Hawai'i, the dispute not only determines the rights of the parties, but could impact the larger constitutional rights of COFA residents as well as immigrants to the United States. It could also further erode the Equal Protection Clause's protections for subordinated groups.¹⁸ The impact of the case, however, reaches far beyond the boundaries of the law. The *Korab* case suggests that courts are "sites and generators of cultural performances."¹⁹ From this view, "courts provide a stage on which claimants not only enforce their legal rights, but also engage in a larger political process of framing issues, reinforcing or undermining social norms, and crafting [socio-]cultural narratives."²⁰ In this way, courts do much more than decide disputes – they also transform particular legal controversies and rights claims into larger "socio-legal or cultural narratives, or stories, about groups, institutions, situations and relationships."²¹ Law therefore functions as a "cultural system

¹⁶ *Fink*, 2014 WL 1302614, at *8.

¹⁷ *Id.* at *2. The State of Hawai'i announced that it will continue to provide benefits to COFA residents "until a full and final resolution of the issues in *Korab v. McManaman* is reached." See Dept. of the Attorney General Press Release, *State of Hawai'i Will Continue to Provide Benefits to COFA Residents*, Apr. 8, 2014. Plaintiffs filed a petition for a writ of certiorari in the U.S. Supreme Court on September 9, 2014. The Ninth Circuit granted plaintiffs' motion for an extension of the stay of the mandate until the U.S. Supreme Court's final disposition of the case. See Order, *Korab et al. v. Fink*, No. 11-15132 (9th Cir. Sept. 11, 2014).

¹⁸ See generally Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507 (2009) (describing the Supreme Court's recent limiting of the Equal Protection Clause).

¹⁹ Eric K. Yamamoto, Moses Haia and Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 (1994). See also Gerald Torres and Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990); Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988); David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326 (2012); Julian Aguon, *Other Arms: The Power of A Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113 (2008) (all describing courts as storytelling institutions and sites of cultural performances).

²⁰ Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 266 (1998).

²¹ Yamamoto et al., *supra* note 19, at 21.

that structures relationships throughout society, not just those that come before courts.”²²

The crafting and retelling of narratives through this court process can either reinforce or challenge a dominant socio-cultural narrative. A prevailing or dominant narrative serves as a “principal lens through which groupings of people in a community see and interpret events and actions.”²³ Counter-narratives, or “subversive stories,”²⁴ challenge dominant narratives by “bridg[ing] without denying, the particularities of experience” and “bear[ing] witness to what is unimagined and unexpressed.”²⁵ By contesting and destabilizing dominant frameworks and symbols through counter-narratives, outsider groups can put a dominant authority and its history of injustice on public display while “provid[ing] the impetus and direction for [the law’s] transformation.”²⁶ Importantly, as discussed below, each stage of the court process – claim assertion, discovery, case management, trial, and attorney interactions with parties, judges, advocates and the public – shapes these dominant and counter-narratives by limiting and expanding the scope and tenor of the debate.²⁷

Viewing courts as sites of cultural performances, this essay explores the socio-cultural narratives in *Korab v. McManaman*. Through procedural openings, the plaintiffs offered critical narratives to counter the prevailing story that COFA residents were a drain on the state’s resources, an unfair burden on the rest of Hawai‘i’s residents, and undeserving of equal health care treatment. Through partnership with community members and the medical community, the plaintiffs used declarations to tell their clients’ stories and “personalize the human as well as economic consequences of reduction in health coverage.”²⁸

Our amicus brief offered a larger narrative to show why the denial of adequate health care to COFA residents in Hawai‘i is a powerful justice issue rooted in U.S. colonialism. We highlighted how the United States made promises of self-determination to the Micronesian people, but characterized them as dependent “others” to make its political, economic, and military aggression in their homelands appear necessary and justified.²⁹ Indeed, part of the

²² Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 844 (1997).

²³ Yamamoto et al., *supra* note 19, at 21.

²⁴ Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward A Sociology of Narrative*, 29 LAW & SOC’Y REV. 197, 197 (1995).

²⁵ *Id.* at 220.

²⁶ Moriwake, *supra* note 20, at 289.

²⁷ Yamamoto et al., *supra* note 19, at 19.

²⁸ Geminiani & Ostrowski, *supra* note 11, at 65.

²⁹ See ALBERT MEMMI, DOMINATED MAN: NOTES TOWARD A PORTRAIT 185-95 (1968) (describing four steps, or discursive strategies, used by European-derived cultures to justify the colonization of non-white races); see also

LatCrit project is to analyze present day effects and responses to this kind of U.S. colonialism and imperial expansion.³⁰

Our amicus arguments are important because the plaintiffs' equal protection challenge failed at the Ninth Circuit. By offering a counter-narrative in a different legal frame (redress for U.S. colonization), we put forth a story that can survive the legal rejection of the equal protection narrative. This redress for U.S. colonization narrative can be and has been advanced in political arenas as the basis for compelling Congress and the state legislature to act.

Part II introduces the concept of courts as sites of cultural performance and describes the role of narrative in legal processes. Part III explores the "cultural performance" of the *Korab* case, focusing particularly on the counter-narratives told by the plaintiffs and the critical counter-narrative of U.S. colonization told by the JAACL et al. amicus brief. Part IV concludes.

II. COURTS AS "CULTURAL PERFORMANCE": SITES FOR CONTESTING SOCIO-CULTURAL NARRATIVES

Socio-legal scholars Patricia Ewick and Susan Silbey contend that "[n]arratives are not just stories told *within* social contexts; rather, *narratives are social practices*, part of the constitution of their own context."³¹ When we tell stories, we do it

EDWARD SAID, *CULTURE AND IMPERIALISM* 9 (1993) (explaining that colonialism and imperialism "are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with domination"); ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 69-76 (1965); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989) (applying Memmi's framework to Native Americans); *see also* Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases, in FOREIGN IN A DOMESTIC SENSE* 140 (Christina Duffy Burnett & Burke Marshall, eds. 2001) (applying Memmi's insights to the U.S. conquest of Puerto Rico).

³⁰ *See, e.g.*, Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921 (2001); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998) [hereinafter Román, *Alien-Citizen Paradox*]; Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002); EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2006) (all describing the effects of American colonialism on communities of color and Indigenous communities).

³¹ Ewick & Silbey, *supra* note 24, at 211.

strategically and within “the rules, expectations, and conventions of particular situations.”³² For Ewick and Silbey, “[t]he strategic use of narrative is nowhere more developed than in legal settings where lawyers, litigators, judges, and juries all participate in the telling of tales.”³³

This is echoed by critical race theory scholars, who describe courts as “sites and generators of cultural performances.” From this view, courts serve as locales to illuminate institutional power arrangements, focus issues, tell dominant stories and offer counter-stories to refute dominant narratives.³⁴ Courts thus transform legal disputes into public messages or socio-legal narratives about groups, institutions, and relationships.³⁵

As legal scholar Eric Yamamoto observes, each stage of the court process contributes to a “rephrasing” of the dispute:

Decisions concerning initial claim assertion followed by decisions concerning pretrial discovery, sanctions and overall case management (including motions and settlement maneuvering and legal issue formulation) redefine the claimant’s understanding and framing of the controversy. The interactions among parties, attorneys, judge, court personnel, community groups and general public, through the media, and the trial itself, further contribute to this rephrasing at the trial court level. Decisions by appellate courts, more detached and, yet in some respects, more far-reaching, further solidify the court system’s dispute rephrasing performance.³⁶

This process, he contends, raises critical questions about court access, claim development and presentation, and what perspectives and cultural values “collide and emerge in the interactions of judges, parties, attorneys, community and

³² *Id.* at 208. See also FRANCESCA POLLETTA, *IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS* 1-8 (2006) (noting that storytelling can empower, constrain, define identities and perspectives, mobilize action and transform issues into points of contention at every stage of political action).

³³ Ewick & Silbey, *supra* note 24, at 209.

³⁴ See Torres & Milun, *supra* note 19, at 628 (describing Native Americans’ efforts to tell their stories through the formalized language of legal discourse).

³⁵ See *id.* (“Within a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places.”).

³⁶ See Yamamoto et al., *supra* note 19, at 19. As Yamamoto observes, this raises concerns critical to the rephrasing process: “Who has court access; who controls claim development and presentation; according to what standards; from what perspectives; who reports on the contextual facts; and according to what selection criteria? What cultural values collide and emerge in the interactions of judges, parties, attorneys, communities and media?” *Id.* at 19-20.

media[.]”³⁷

The shaping and retelling of stories about groups, institutions and situations through court process can help either to reinforce or to counter a prevailing cultural narrative. Dominant narratives “remind [the ingroup] of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.”³⁸ In this way, narratives “can contribute to the reproduction of existing structures of meaning and power.”³⁹ For example, master narratives embodied in court opinions characterizing Native peoples as “savage” and “inferior” rationalized the continued oppression of Indigenous peoples and other people of color.⁴⁰

The stories told by outsiders, however, challenge and destabilize the assumptions and language of the dominant discourse.⁴¹ “Stories, parables, chronicles, and narratives are powerful means for destroying mindset[s] – the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”⁴² According to Ewick and Silbey, this is because counter-narratives or subversive stories “bridge, without denying, the particularities of experience and subjectivities and those which bear witness to what is unimagined and unexpressed.”⁴³ Subversive stories “do not oppose the general and collective as much as they seek to appropriate them; they do not merely articulate the immediate and particular as much as they aim to transcend them.”⁴⁴ They are instead “narratives that employ the

³⁷ *Id.* at 20.

³⁸ Delgado, *supra* note 19, at 2412.

³⁹ Ewick & Silbey, *supra* note 24, at 213. See also Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000); Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150 (1999); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gary Legal Theory*, 61 OHIO ST. L.J. 867 (2000) (all describing dominant and counter-narratives in the legal context).

⁴⁰ See Susan K. Serrano & Breann Swann Nu’uhiwa, *Federal Indian Law: Implicit Bias Against Native Peoples as Sovereigns*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 209-228 (Justin Levinson & Robert Smith eds., 2012); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 315 (1993-94). See generally Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawaii’s Plantations to Congress – Puerto Ricans’ Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353 (2011) (describing the narratives embedded in court decisions that legitimized discrimination against Puerto Ricans).

⁴¹ Moriwake, *supra* note 20, at 289.

⁴² Delgado, *supra* note 19, at 2413. See also Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 757 (2011).

⁴³ Ewick & Silbey, *supra* note 24, at 220.

⁴⁴ *Id.*

connection between the particular and the general.”⁴⁵ Thus, by altering accepted frameworks for organizing reality, counter-narratives elevate previously silenced voices.

Importantly, “stories are always told within particular historical, institutional, and interactional contexts that shape their telling, [] meanings and effects . . . [and] are constrained by both rules of performance and norms of content.”⁴⁶ Thus, in some instances, the legal system’s narrow procedural rules restrict pleadings, limit discoverable information, and constrain public disclosure.⁴⁷ Those rules, “backed by conservative judges and employed strategically by well-resourced litigants, realistically discourage attempts by claimants to deploy courts as sites of a cultural performance to develop and publicize counter-narratives.”⁴⁸ In other instances, however, when judges provide claimants with some litigation leeway and when the counter-narratives are linked to continuing social and political movements, litigants can introduce these counter-narratives in procedural openings (for instance, as in *Korab*, in plaintiffs’ argument in support of their motion for preliminary injunction), and “cultural performances” can take shape.⁴⁹ In those instances, courts become a “cultural stage upon which outsiders regain their voice, tell their stories on the record, compel those in power to respond under oath and thus begin to reshape the political foundations for justice action.”⁵⁰

For example, Indigenous Chamoru scholar-activist Julian Aguon urges the Chamoru people to use courts as sites of cultural performance in the face of heightening U.S. militarization of Guam. He proposes that the Chamoru assert both traditional common law claims for protection of ancestors’ graves (breach of

⁴⁵ *Id.* See also Charlton C. Copeland, *Creation Stories: Stanley Hauerwas, Same-Sex Marriage, and Narrative in Law and Theology*, LAW & CONTEMP. PROBS., 87, 89 (2012) (observing that “[n]arrative challenges the capacity of legal or doctrinal categories to dislodge dominant, prejudicial perspectives and presumptions”); Joshua C. Wilson, *Sustaining the State: Legal Consciousness and the Construction of Legality in Competing Abortion Activists’ Narratives*, 36 LAW & SOC. INQUIRY 455, 457 (2011) (contending that “individual litigants’ stories are another field in which legal meaning is contested and created”).

⁴⁶ Ewick & Silbey, *supra* note 24, at 206.

⁴⁷ See Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L.L. REV. 341, 427 (1990).

⁴⁸ ERIC K. YAMAMOTO, WHY LAW STILL MATTERS: THE DYNAMICS AND POLITICAL VALUE OF JUSTICE LITIGATION 57 (unpublished manuscript on file with author).

⁴⁹ Yamamoto et al., *supra* note 19, at 25-26.

⁵⁰ YAMAMOTO, *supra* note 48, at 57 (citing Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1409 (1990) (describing the Supreme Court as a “storytelling institution”); GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 39-41 (1992) (exploring the use of “stories to solve problems” and “stories as power strategies”).

trust and implied contract) and international human rights claims for control over Native lands under the Declaration on the Rights of Indigenous Peoples (rights to self-determination and cultural integrity). The narrower, domestic legal claims would allow Chamoru plaintiffs to stay in court. The human rights claims, even if likely to ultimately fail in court, provide the opening for a “critical counter-narrative” of the “varied forms of psychological trauma the Chamoru people suffer as a direct result of five hundred years of uninterrupted colonization.”⁵¹ By linking this court strategy to the larger Chamoru political movement challenging the U.S. militarization of Guam, he contends, the Chamoru can reframe a specific cultural issue as a broader political issue – the destruction and desecration of Chamoru culture and lands.⁵²

The interaction among lawyers, clients and advocates around procedural opportunities, along with the strategic use of the media, are essential to this process of advancing counter-narratives.⁵³ As Yamamoto observes, “[w]hen litigation procedures are strategically (and interactively) deployed, justice litigation becomes valuable [because] it helps remake the narratives of grievance and redress and reshape public consciousness about what is right and just.”⁵⁴

III. THE NARRATIVES IN *KORAB V. MCMANAMAN*

As described above, *Korab v. McManaman* was one of two lawsuits brought on behalf of COFA residents in Hawai‘i in response to the State’s attempts to implement and transfer them to the inferior Basic Health Hawai‘i plan (BHH). BHH is a medical benefits program for non-pregnant COFA residents age nineteen or older who are lawfully residing in Hawai‘i, and non-pregnant immigrants age nineteen or older who have been U.S. residents for less than five years. Under the second iteration of

⁵¹ Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration On the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113, 148 (2008).

⁵² *Id.* at 149 (by using court process, they would “openly contest the longstanding master narrative of Chamorus as ‘Happy Little Patriots.’”).

⁵³ Socio-legal scholars have also assessed how “causes” attract and transform lawyers and what “cause lawyers” “do for and to” social movements. Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For and To Social Movements, An Introduction*, CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (2006); STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING (2005). Through interviews and archival research, socio-legal scholars have examined the interactions among lawyers and social change advocates, and the extent to which cause lawyers have enhanced or inhibited political organizing and advocacy. While this extensive and important body of scholarship is relevant, a full examination is beyond the scope of this essay.

⁵⁴ YAMAMOTO, *supra* note 48, at 10.

the plan,⁵⁵ patients could receive no more than ten days of medically necessary inpatient hospital care per year, twelve outpatient visits per year, and a maximum of four medication prescriptions per calendar month. In addition, BHH covers dialysis treatments as an emergency medical service only, and the approximate ten to twelve prescription medications dialysis patients take per month are not fully covered. BHH also does not provide a comprehensive program for cancer treatments, causing cancer patients to exhaust their allotted doctors' visits within two to three months. Also, under the plan, COFA residents cannot enroll in long-term care services and those in need of an organ transplant cannot access the state's organ and tissue transplant program.⁵⁶

The dominant narrative in Hawai'i at the time of the plan's implementation and lawsuits was one of intense anti-immigrant scapegoating and racialization.⁵⁷ Echoing national anti-immigrant rhetoric,⁵⁸ the media and state decision-makers called COFA migrants "a drain on resources" or an "unfair burden."⁵⁹ Radio

⁵⁵ In its first iteration, BHH had no provisions for continued treatment for the 130–160 patients on chemotherapy or 110 patients on hemodialysis. "The announcement was in English only, some received notice merely days prior to implementation, and the medical community was not given guidance as to maintaining continuity of care." Shek & Yamada, *supra* note 9, at 5. U.S. District Judge Michael Seabright issued a temporary restraining order preventing the State from implementing the change. *Id.*

⁵⁶ Order Granting Plaintiffs' Motion for Preliminary Injunction at 2, *Korab et al. v. Koller*, No. 10–00483, 2010 WL 5158883, at *2 (D. Hawai'i Dec. 13, 2010).

⁵⁷ For more on racialization, see Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221 (1997).

⁵⁸ See, e.g., Philip Wolgin, *History Repeats Itself as Romney Takes a Hard-line on Immigration*, HUFFINGTON POST, (Jan. 24, 2012), available at http://www.huffingtonpost.com/philip-wolgin/mitt-romney-immigration_b_1229201.html (describing pervasive anti-immigration sentiment during Mitt Romney's 2008 presidential campaign); Salvatore Colleluori, *Michelle Fields Criticizes Ann Coulter's Anti-Immigrant Rhetoric She Herself Has Used*, MEDIA MATTERS, (Jul. 9, 2013), available at <http://mediamatters.org/blog/2013/07/09/michelle-fields-criticizes-ann-coulter-anti-im/194795>.

⁵⁹ See Chad Blair, *No Aloha for Micronesians in Hawai'i*, HON. CIVIL BEAT, (Jun. 20, 2011), available at <http://www.civilbeat.com/articles/2011/06/20/11650-no-aloha-for-micronesians-in-hawaii/> (relating first-hand accounts of Micronesians who have experienced discrimination in Hawai'i); Chad Blair, *Media Said to Fuel Micronesian Stereotypes*, HON. CIVIL BEAT, (Jun. 21, 2011), available at <http://www.civilbeat.com/articles/2011/06/21/11722-media-said-to-fuel-micronesian-stereotypes/> (reporting that media often describe Micronesians as "leeches" who use services at high costs to Hawai'i residents); HAWAII APPLESEED CENTER FOR LAW AND ECONOMIC JUSTICE, *Broken Promises, Shattered Lives: The Case for Justice for Micronesians in Hawai'i* 15 (Dec. 14, 2011), available at <http://www.hiappleseed.org/sites/default/files/COFA%20ReportFinal12-14->

DJs encouraged callers to call in with derogatory jokes about Micronesians. It was in this context that plaintiffs filed their equal protection challenge to BHH.⁶⁰

A. Plaintiffs' Equal Protection Counter-Narrative

In August 2010, COFA residents filed their federal class action lawsuit in *Korab*, contending, among other things, that the State discriminated against them on the basis of alienage and immigration status in violation of the Equal Protection Clause when it transferred them to BHH.⁶¹ The initial claim and the media surrounding its filing framed the issue as one of “discrimination” and “rights”: on the day of the case’s filing, a named partner of one the participating law firms announced that “The State of Hawaii may not discriminate on the basis of national origin Once the U.S. government allowed COFA residents free access to the U.S., no state could limit those rights.”⁶²

Federal case law from another circuit was unfavorable. Even so, the district court denied defendants’ motion to dismiss and later granted plaintiffs’ motion for preliminary injunction to enjoin the State from implementing BHH and removing COFA residents from their existing plans. The plaintiffs’ memorandum in support of their motion for preliminary injunction, in particular, provided openings for them to rephrase the dispute: they offered critical narratives to counter the prevailing story that COFA residents were a drain on the state’s resources and undeserving of equal treatment in health care.⁶³

11.pdf. (explaining prevailing stereotype that Micronesians are “lazy” and are “taking all of our resources”).

⁶⁰ Plaintiffs also argued that the state discriminated against disabled Plaintiffs when it required them to seek care in a hospital setting, which is not the most integrated setting appropriate to meet their needs in violation of the Americans with Disabilities Act. Plaintiffs subsequently withdrew this claim. See Order Granting Plaintiffs’ Motion for Preliminary Injunction at 1, *Korab et al. v. Koller*, No. 10–00483, 2010 WL 5158883, at *1 (D. Hawai‘i Dec. 13, 2010) (describing one of the bases for the equal protection claim).

⁶¹ See Order Granting Plaintiffs’ Motion for Preliminary Injunction at 1, *Korab v. Koller*, No. 10–00483, 2010 WL 5158883, at *1 (D. Hawai‘i Dec. 13, 2010) (enumerating the grounds for the equal protection challenge).

⁶² *State of Hawaii Sued to Restore Critical Medical Services*, Lawyers for Equal Justice Press Release, Aug. 23, 2010, available at <http://lejhawaii.blogspot.com/2010/08/state-of-hawaii-sued-to-restore.html>.

⁶³ Outside of the courtroom, Micronesian community members and their allies also counter the narrative that Micronesians are a drain on Hawai‘i’s resources. For example, Dr. Wilfred Alik, of the Micronesian Health Advisory Coalition contended,

If you live in Hawai‘i, if you read the online comments, if you listen to the radio, you know that Micronesians are being racially targeted. That is what we are afraid of, that people will literally just focus on one or two bad apples to justify their stereotypes, and forget that there

Through those openings, plaintiffs' attorneys used declarations both to support their argument that they were likely to prevail on the merits of their Equal Protection claim, and to "personalize the human as well as economic consequences of reduction in health coverage."⁶⁴ These counter-narratives carefully "describe[d] the patients' work history in Hawai[i], the consequences of being denied life-sustaining medications and medical treatment, and the impact that the denial had on the patients' own confidence in themselves and their fears for their families."⁶⁵ These stories were highlighted by the district court. For example, Judge J. Michael Seabright noted that "Tojio Clanton, a kidney transplant recipient, attended three doctor visits and took ten prescriptions per month prior to BHH, but now has stopped taking four of his medications (paying for two medications out of pocket)."⁶⁶ This "caused him to go into kidney failure and spend fourteen days in the hospital. Clanton has now used up all of his doctor visits and cannot afford to pay for doctor visits or other prescriptions." Also, "Tony Korab, a dialysis patient, takes approximately fifteen prescriptions per month, but as a result of his enrollment into BHH, he must now prioritize his prescriptions and he is no longer eligible for a kidney transplant

are thousands of COFA residents – some here for decades – that pay taxes, go to work, attend church, and defend our country. . . . If a public official can so brazenly promote such discrimination [as BHH], imagine what is going on below the radar, in our social systems, in our neighborhoods. And this is not some Frank Delima [local comedian] joke, this has now become life or death.

Health Advocates to Governor: Stop Health Care Discrimination—Hawai'i Residents Rally, Ask Governor Abercrombie to End Pursuit of Discriminatory Healthcare Policy Under Basic Health Hawai'i, HEALTHYPACIFIC.ORG News Release, (Sept. 16, 2012), available at <http://www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/7749/Micronesians-Stop-Abercrombies-Healthcare-Discrimination.aspx>. A Chuukese community organizer also explained that

A lot of our community are struggling. . . . But one thing I know for sure is that they really want the best for their children, they want to have a better life, and they will do anything to have that, even at the expense of working two, three jobs. And I think that it's the same as all the other immigrants who came before us – they really try to work hard to make ends meet for their family.

Anita Hofschneider and Nathan Eagle, *FOCUS: Meet Innocenta Sound, The Community Navigator*, HON. CIVIL BEAT, (Nov. 28, 2012), available at <http://www.civilbeat.com/articles/2012/11/28/17519-focus-meet-innocenta-sound-the-community-navigator/>.

⁶⁴ Geminiani & Ostrowski, *supra* note 11, at 65.

⁶⁵ *Id.*

⁶⁶ Order Granting Plaintiffs' Motion for Preliminary Injunction at 3, *Korab et al. v. Koller*, No. 10-00483, 2010 WL 5158883, at *3 (D. Hawai'i Dec. 13, 2010).

through the SHOTT [State of Hawai'i Organ and Tissue Transplant] program.”⁶⁷

Plaintiffs' attorneys also provided declarations of medical doctors who provide services to COFA residents. The doctors stressed that COFA residents with serious illnesses would be unable to receive preventative care, life-saving treatment, and an adequate supply of prescription medications, and many others would not have *any* health care apart from emergency room services. For example, physicians described their patients with chronic illnesses who needed more than the four-prescriptions-per-month limit imposed by BHH but could not afford to pay for non-covered prescriptions out of pocket. Doctors also warned that cancer patients would “exhaust BHH's yearly limit of only twelve outpatient visits within three to four months.”⁶⁸ Finally, they cautioned that the state's expenses would increase if patients who lacked covered services were forced to repeatedly use emergency care rather than traditional primary and preventive care providers.

The plaintiffs' legal filings thus redefined the narrative away from Micronesians as “undeserving welfare recipients” to Micronesians as full and equal participants deserving of meaningful health care. The interactions among the parties, attorneys, community groups and general public, through pretrial motions and media coverage, further contributed to this “rephrasing” of the dispute at the trial court level.

In granting the plaintiffs' motion for preliminary injunction and reinstating full medical benefits for COFA migrants, the district court held that Hawai'i was “constitutionally required to set up a state-only funded program that completely ‘fills the void’ created by the Federal Welfare Reform Act's discrimination against aliens.”⁶⁹ This significant legal victory had “immediate and potentially life-saving impact”⁷⁰ for COFA residents. As attorney Dina Shek and physician Seiji Yamada observe, “the victory was not solely a legal one; rather, it was forged from social justice lawyering practices that embraced a broader vision of what a ‘win’ means for lawyers, for health workers, and ultimately for the community.”⁷¹ For them, “it was a legal appeal to constitutional rights, alongside community mobilization and collaborative practice” that reinstated health care for COFA residents.⁷²

⁶⁷ *Id.*

⁶⁸ *Id.* at *2.

⁶⁹ *Korab v. Fink*, No. 11-15132, 2014 WL 1302614 (9th Cir. Apr. 1, 2014), at *2.

⁷⁰ Shek & Yamada, *supra* note 9, at 6.

⁷¹ *Id.*

⁷² *Id.*

B. Amici's Counter-Narrative: Redress for the Long-lasting Impacts of Colonialism

What was largely missing from the plaintiffs' main counter-narrative was the broader justice context: the United States' past and continuing failure to discharge its acknowledged responsibility to the peoples of the COFA nations. We filed an amicus curiae brief in the Ninth Circuit on behalf of the JACL-Honolulu, the NAACP-Honolulu and Kokua Kalihi Valley Comprehensive Family Services to offer this story.

As described above, our amicus arguments are important because the plaintiffs' equal protection challenge failed at the Ninth Circuit. By offering a counter-narrative in a different legal frame – redress for the long-lasting impacts of U.S. colonialism – we put forth a story that can survive the legal rejection of the equal protection narrative. This narrative of needed redress for U.S. colonization can be and has been advanced in political arenas as the basis for compelling elected officials to act.

In our brief, we contended that this case is about U.S. colonialism – that the COFA residents' poor health is directly linked to the United States' breach of its trust and Compact duties and to the Micronesians' resulting economic dependency and acquiescence to a damaging U.S. military and nuclear presence. We contended that the United States thus bears a moral and legal responsibility to repair the damage, and the State of Hawai'i, as a constituent member of the United States, has a joint obligation to continue a meaningful level of medical care coverage for Micronesians, particularly because it accepts partial reimbursement from the federal government for services for COFA residents.

We introduced this reframing in our starting paragraph:

“This case is unique. It is not about state benefits for immigrants. Nor is it about welfare for those in need. Rather, it is about repairing the persisting damage of injustice uniquely suffered by the people of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI) and the Republic of Palau (Palau)—people with whom the United States and State of Hawai'i have a long-standing special relationship.”⁷³

We then told the stories of the Marshallese people, who suffered the gravest injustices. For twelve years, from 1946 to 1958, the United States exploded 67 atomic and hydrogen bombs

⁷³ Amici Curiae Brief of the Japanese American Citizens League-Honolulu Chapter at 3, *Korab v. McManaman*, No. 11-15132, 2011 WL 3672693, at *3 (9th Cir. Aug. 24, 2011).

on Bikini and Enewetak atolls. Nine islands were completely or partially vaporized.⁷⁴ The most powerful test was “Bravo,” a fifteen megaton device – equivalent to 1,000 Hiroshima bombs – detonated in 1954 at Bikini atoll that threw radioactive fallout over nearly 50,000 square miles.⁷⁵ Radioactive ash fell on other Northern atolls, including Rongelap and Utrik, where it entered the islanders’ lungs, stuck to the coconut oil on their skin, and was played with and ingested by children.⁷⁶ At the time, the Marshall Islands were part of a United Nations Trust Territory administered by the United States, which, as sole trustee, “had pledged to the United Nations to ‘protect the inhabitants against the loss of their land and resources.’”⁷⁷

In addition to thyroid and other cancers, the most harrowing and psychologically damaging health effects were the birth defects caused by the nuclear testing, particularly in women on Rongelap atoll.⁷⁸ These included stillborn babies and babies born without recognizable human shapes – with shocking deformities like an extra head or a lack of bones in the body – which the people call “jelly-fish babies.”⁷⁹ And, as of 2004, “[a]bout 40% of the thyroid cancers and more than one-half of cancers to the other organs (at all atolls) are yet to develop or to be diagnosed. Hence, most of the radiation excess is projected to occur in the coming years.”⁸⁰ We pointed out that these widespread and long-lasting health effects are not limited to the Marshall Islands and are not confined to direct radiation injuries.⁸¹ In part because of these effects, as of

⁷⁴ Weisgall testimony, *supra* note 2, at 3-4 (describing extent and duration of the United States’ nuclear testing in the region).

⁷⁵ See *id.*; Pevec, *supra* note 2, at 221.

⁷⁶ HOLLY M. BARKER, BRAVO FOR THE MARSHALLESE: REGAINING CONTROL IN A POST-NUCLEAR, POST-COLONIAL WORLD 21 (2004).

⁷⁷ Weisgall testimony, *supra* note 2, at 3. In April 2014, the Marshall Islands filed suit in the International Court of Justice in The Hague against the world’s nine nuclear-armed nations, contending that the countries violated their obligation to disarm. See Cara Anna, *Marshall Islands Sues 9 of the World’s Nuclear Powers in International Court*, HUFFINGTON POST, Apr. 24, 2014, available at http://www.huffingtonpost.com/2014/04/24/marshall-islands-sues-nuclear-powers_n_5209379.html.

⁷⁸ BARKER, *supra* note 76, at 53.

⁷⁹ See Zohl dé Ishtar, *A Survivor’s Warning on Nuclear Contamination*, 13 PAC. ECOLOGIST 50, 50 (2006-07) (describing the horrific effects of radiation exposure on the affected populations).

⁸⁰ NATIONAL CANCER INSTITUTE, ET AL., ESTIMATION OF THE BASELINE NUMBER OF CANCERS AMONG MARSHALLESE AND THE NUMBER OF CANCERS ATTRIBUTABLE TO EXPOSURE TO FALLOUT FROM NUCLEAR WEAPONS TESTING CONDUCTED IN THE MARSHALL ISLANDS 17 (2004).

⁸¹ Seiji Yamada, M.D., *Cancer, Reproductive Abnormalities, and Diabetes in Micronesia: The Effect of Nuclear Testing*, 11 PAC. HEALTH DIALOG 216, 219-20 (2004). Physician Seiji Yamada, who treats and studies the health care challenges of COFA residents in Hawai’i, assessed that, “Given the megatonnage of nuclear testing that the U.S. conducted in the Pacific, it appears plausible that excess cancer would have occurred in areas of

2008, an estimated 12,215 Micronesians have legally traveled to Hawai'i to obtain, among other things, needed health care.⁸²

We also told the little-known story of the United States' failure to advance self-governance and economic development in the Micronesia region despite stated promises to do so. Notwithstanding its own mandate to promote "independence," and with little effort devoted to developing the inhabitants' self-governance, the U.S. military entrenchment in the islands continued alongside the islands' growing dependence on U.S. funding.⁸³ This economic dependency was not an accidental byproduct of good faith U.S. administrative decisions as trustee. That dependency flowed from the United States' recognition that "[a]s long as Micronesia remains economically dependent on the United States, the United States laws and policies [would] be influential."⁸⁴

To the rest of the world, the United States portrayed itself as civilized and law-abiding, while characterizing the Micronesian people as less-worthy and dependent to justify its continued control over the region's land and economy for military purposes.⁸⁵

Micronesia other than the Marshall Islands." *Id.* at 219.

⁸² See U.S. Census Bureau, Final Report, 2008 Estimates of Compact of Free Association (COFA) Migrants 3 (April 2009) (estimating the number of former COFA residents who have relocated).

⁸³ See Matthew Eilenberg, American Policy in Micronesia, 17 J. OF PAC. HIST. 62, 62 (1982) (revealing the United States' government's plan to keep Micronesia on a course consistent with the Kennedy Administration's interests).

⁸⁴ Román & Simmons, *supra* note 30, at 479, 505 (citing U.S. GOVERNMENT SURVEY MISSION TO THE TRUST TERRITORY OF THE PACIFIC ISLANDS: REPORT TO THE PRESIDENT (A. Solomon, Oct. 9, 1963)) (describing the Solomon Report commissioned by the Kennedy Administration that "outline[d] a strategy for furthering American interests in Micronesia, in part by intentionally fostering economic dependence on the United States"); Catherine Lutz, *The Compact of Free Association, Micronesian Non-Independence, and U.S. Policy*, 18 BULL. OF CONCERNED ASIAN SCH. 21 (1986) (the Report "clearly laid out a strategy[:] [t]he U.S. would pump large amounts of money into Micronesia, build a community-service infrastructure, establish a host of development programs and a dependency upon cash, hold a plebiscite at the point at which the Micronesians' hopes had been raised, and then pull back support as the various development programs failed to succeed."). See also Patsy T. Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L.F. 181, 183-84 (1970-71) (detailing over two decades of "neglect of trustee obligations" and chastising the United States for failing to make good on its Trust promises to "promote the economic advancement and self-sufficiency of the inhabitants" and "protect the inhabitants against the loss of their lands and resources.").

⁸⁵ See generally MEMMI, DOMINATED MAN, *supra* note 29; SAID, *supra* note 29. See also Román, *supra* note 30, at 214-15 (noting that U.S. decision-makers characterized Micronesians as "lotus eaters," "backward," and "underprivileged" to support colonialism in the region); Mink, *supra* note 84, at 196 (describing U.S. actions in the Marshall Islands as a "[c]lassic example of colonialism").

As LatCrit scholars have recognized in other contexts, this kind of colonial strategy created a façade of “membership” while depriving the people of rights to participation, self-determination, and human dignity.⁸⁶

We also described the Compacts of Free Association that the FSM, RMI and Palau entered into with the United States in the 1980s.⁸⁷ Among other things, the Compacts recognized the damages suffered by the Micronesian people, including health care needs, and committed the United States to repair that damage. They gave the United States complete military control over the region in exchange for the islands’ peoples’ nearly unrestricted travel to the United States and territories to “establish residence.”⁸⁸ Although the goals of the Compacts echoed the earlier Trust agreement,⁸⁹ little changed in U.S. practices in the region. The orchestrated dependency on federal monies continued through the 1980s, “but at greatly reduced federal funding levels as a result of the re-negotiated relationship with the U.S. under the Compact of Free Association[.]”⁹⁰ Over twenty-five years after the Compacts’ initiation, the United States still has failed to discharge its responsibility to the Micronesian people, and the dire situation in the Micronesians’ homelands has compelled ever-increasing migration to Guam, the Commonwealth of the Northern Marianas and Hawai‘i.⁹¹

We then underscored the United States’ responsibility to repair the harms of this colonization, as well as the State’s joint responsibility to maintain a humane level of health care coverage for COFA residents. We contended that providing financial support for COFA residents’ medical care is a justice issue – that justice requires repairing the damage of long-standing injustice to COFA residents for which the United States has direct responsibility and for which Hawai‘i is partly reimbursed. We argued that Hawai‘i has often acted with justice and compassion toward those in need. Indeed, the State’s commitment emerges

⁸⁶ See, e.g., Malavet, *supra* note 30; Román, *Alien-Citizen Paradox*, *supra* note 30; Román & Simmons, *supra* note 30.

⁸⁷ Compact of Free Association, U.S.-Micronesia & Marshall Islands, Pub. L. No. 99-239, 99 Stat. 1770 (1986); Compact of Free Association, U.S.-Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986).

⁸⁸ P.L. 99-239, 99 Stat. 177 §§ 141(a)(3); 311 (a), (b) (1986).

⁸⁹ U.S. Gov’t Accountability Office, GAO/T-NSIAD/RCED-00-21627, U.S. FUNDS TO TWO MICRONESIAN NATIONS HAD LITTLE IMPACT ON ECONOMIC DEVELOPMENT AND ACCOUNTABILITY OVER FUNDS WAS LIMITED 38 (2000). The Compacts’ stated goals were, and continue to be, to: “(1) secure self-government for each country; (2) assure certain national security rights for the FSM, the RMI, and the United States; and (3) assist the FSM and the RMI in their efforts to advance economic self-sufficiency.”

⁹⁰ Ann M. Pobutsky et al., *Micronesian Migrant Health Issues in Hawaii: Part 2: An Assessment of Health, Language and Key Social Determinants of Health*, 7 CAL. J. OF HEALTH PROMOTION 32, 33 (2009).

⁹¹ *Id.*

out of Hawai'i statutory language that instructs lawmakers to contemplate "Aloha . . . the essence of relationships in which each person is important to every other person for collective existence" – to repair the harms to community members for the benefit of all.⁹² It is also in the public interest: taking care of COFA residents' health care needs reduces the cost of truly expensive uninsured medical care for Micronesians in Hawai'i (who have a right to travel to Hawai'i under the Compact).

We also sought to counter the narrative that Micronesians were unworthy or undeserving of equal health care treatment in Hawai'i. Until recently, COFA migrants "have been treated as part of humanity in Hawai'i," we contended.⁹³ Indeed, the State expressly committed itself to embrace the value that our "collective existence" as an island community depends upon our fair treatment of "each person" among us. Now that the State is facing difficult financial stress, "Micronesians are being told that they are no longer part of the family, that they can take their broken bodies and go home to die."⁹⁴ If many or most COFA residents are deprived of health care, they will suffer in a way that no other group in Hawai'i suffers. This is not only unequal treatment; it is inhumane.

We contended that, even considering the State's fiscal limitations, the State has a moral as well as legal obligation to stop excluding COFA residents – and only COFA residents among us – from access to medical care for serious illnesses. It needs to provide a fair and adequate level of medical care for Micronesians who are legally present as taxpayers and members of the Hawai'i community in part as a result of the persisting effects of past injustices. This reflects Hawai'i's commitment that its peoples' collective existence depends in part on genuine efforts to repair the persisting damage of longstanding injustice suffered by those most in need.⁹⁵

C. *The COFA Residents' "Cultural Performance"*

Our brief thus presented a larger framing that challenged the dominant discourse and offered a powerful justice counter-narrative. That narrative – linked with continuing social and political movements – helped to remake the story of what is right and just and to reshape the "cultural performance" in *Korab*. For example, the Micronesian community in Hawai'i embraced and

⁹² See HAW. REV. STAT. § 5-7.5 (a), (b) (2014) (codifying the state government's intention to foster the "Aloha spirit").

⁹³ Aaron Saunders et al., *Health as a Human Right: Who is Eligible?*, 69 HAWAII MED. J. 4, 5 (June 2010).

⁹⁴ *Id.*

⁹⁵ See Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 52 (1997) (describing the values that should inform community restoration).

widely circulated the amicus brief because it was the first to explicitly link the larger story of redress for U.S. colonization in Micronesia to their current health care advocacy.⁹⁶

Indeed, our amicus brief is part of a much larger justice response that is still underway, that involves community organizing, public education, media storytelling and scholarly writing. This collective response is telling the history of the United States' relationship with the Micronesia region, highlighting the group harms to the Micronesian people and the need for redress, and countering the dominant narrative that COFA residents are undeserving of a meaningful level of healthcare. For example, at a rally at the Hawai'i State Capitol building in August 2009, "a Marshallese woman described being a child as nuclear fallout 'rained down' on her, then declared, 'The United States has an obligation after what they've done to us,' and 'We have earned the right to be here. I have earned the right to Med-QUEST [health care coverage].'"⁹⁷ Micronesian community organizer Joakim Peter also contended in 2012 that "the federal government has a responsibility to correct this oversight in funding for human services, particularly given the sacrifices our countries continue to make for the United States. . . . the solution is out there, but forcing our people onto a bare-bones healthcare plan is not a solution."⁹⁸

COFA residents have engaged a group of multiracial and cross-sector allies, including civil rights groups, community centers, health professionals, and social organizations, and collectively, they have spearheaded efforts at the federal, state and local levels. And the legal process, along with this political advocacy and community mobilization, is shaping the larger public understandings crucial to the movement. For example, not long after we filed our brief, a national JACL resolution affirming its support for state Medicaid coverage for Micronesians in Hawai'i and requesting that the State withdraw the *Korab* appeal echoed many of the narratives we introduced in our brief.⁹⁹ A community-

⁹⁶ In an unusual move, the defendants directly addressed our amicus brief's arguments in their Ninth Circuit reply brief, further highlighting our brief's arguments. See Reply Brief of Defendants-Appellants at 16-24, *Korab v. McManaman*, No. 11-15132 (9th Cir. Aug. 17, 2011). A major news article also highlighted our brief and provided a link to its full text. See Chad Blair, *Court: Hawaii Doesn't Have to Give Micronesians Health Care*, HON. CIVIL BEAT, Apr. 2, 2014, available at <http://www.civilbeat.com/2014/04/21680-circuit-court-hawaii-doesnt-have-to-give-micronesians-health-care/>.

⁹⁷ Shek & Yamada, *supra* note 9, at 6.

⁹⁸ *Health Advocates to Governor: Stop Health Care Discrimination—Hawai'i Residents Rally, Ask Governor Abercrombie to End Pursuit of Discriminatory Healthcare Policy Under Basic Health Hawai'i*, HEALTHYPACIFIC.ORG News Release, (Sept. 16, 2012), available at <http://www.hawaiiifreepress.com/ArticlesMain/tabid/56/ID/7749/Micronesians-Stop-Abercrombies-Healthcare-Discrimination.aspx>.

⁹⁹ A Resolution of the National Council of the Japanese American Citizens

based petition urging Congress to include COFA residents as “qualified aliens” to restore their eligibility for federal benefits under the Personal Responsibility and Work Opportunity Reconciliation Act similarly highlighted the complex historical and present-day relationship between the United States and the COFA nations.¹⁰⁰ The Hawai‘i Legislature also adopted a concurrent resolution that urged the U.S. Congress to restore COFA migrants’ federal benefits because of the residents’ “unique historic and ongoing sacrifices and contributions to the United States[.]”¹⁰¹ These efforts were direct results of the counter-narrative gaining traction.

Following the Ninth Circuit decision, the Micronesian community continued to rally its members and supporters to “take a unified stand to hold the federal government accountable in addressing the healthcare needs of COFA taxpayers and residents of the United States.”¹⁰² It also called on the state and federal governments to “act consistently with the spirit of our long relationship between the COFA nations and the United States.”¹⁰³

As Shek and Yamada contend, COFA residents are strategically using law and politics in much the same way as Japanese American redress advocates and lawyers did:

[i]n some respects, the Micronesian community in Hawai‘i [is] engaging in key community organizing to bring context and a face to the narrow legal issues — in a manner reminiscent of the Japanese American redress movement, where community organizing and public education were not an afterthought but a key element of the legal redress strategy. Legal scholars Eric Yamamoto and Susan Serrano state, “the real bulwark against governmental excess and lax judicial scrutiny,

League Relating To Micronesians Living in Hawai‘i, Jul. 26, 2013, *available at* <http://www.jaclhonolulu.org/wp-content/uploads/2013/04/ER2-Micronesians-Hawaii1.doc>. News articles also reflect the same themes. See Jon Letman, *Micronesians in Hawaii face uncertain future: COFA Agreements provide US regional control in exchange for limited access to America*, AL-JAZEERA, (Oct. 3, 2013), *available at* <http://www.aljazeera.com/humanrights/2013/10/micronesians-hawaii-face-uncertain-future-201310191535637288.html> (chronicling current developments and the challenges facing COFA residents).

¹⁰⁰ A PETITION TO CONGRESS URGING THE RESTORATION OF FEDERAL HEALTHCARE AND OTHER BENEFITS FOR U.S. RESIDENTS PRESENT UNDER THE COMPACTS OF FREE ASSOCIATION, HEALTHYPACIFIC.ORG, *available at* <http://www.healthypacific.org/sign-our-petition.html>.

¹⁰¹ See S.C.R. 108, 27th Leg., Reg. Sess. (Haw. 2013), *available at* http://www.capitol.hawaii.gov/session2013/bills/SCR108_.htm.

¹⁰² Joakim Peter, *Citizens of Oceania: COFACAN Statement and Call to Action*, Apr. 16, 2014, *available at* <http://www.healthypacific.org/blog/category/cofacan>.

¹⁰³ *Id.*

then, is political education and mobilization, both at the front end when laws are passed and enforced and at the back end when they are challenged in courts.”¹⁰⁴

Thus, even in the absence of a favorable court decision, COFA residents, along with their allies, have launched consciousness-raising and mobilization efforts that have built community, shaped media discourse about the meanings of health care access and rights, and “transmit[ed] a powerful political message ‘concerning the kind of society we want to live in[.]’”¹⁰⁵ And this shifting environment has opened new possibilities for compelling concrete action by State and federal actors with decision-making power.

IV. CONCLUSION

As the *Korab* case suggests, courts can be viewed as sites and generators of cultural performances. In this way, courts are places where litigants and their allies can illuminate institutional power arrangements, focus issues, tell dominant stories and offer counter-stories to refute dominant narratives. The plaintiffs in *Korab* bolstered their equal protection claim by using procedural openings to highlight the COFA residents’ stark health care narratives. Alongside the plaintiffs’ narratives, our amicus brief introduced a redress for U.S. colonization narrative that shifted the focus from a more traditional common law claim to a broader socio-historical and -political focus. Because the plaintiffs’ equal protection claim failed at the Ninth Circuit, this redress for U.S. colonization narrative can be and has been advanced in political arenas as the basis for legislative action.

The theoretical insights discussed above have broad relevance for the LatCrit project and for subordinated groups who often turn to the legal system as part of political organizing. The specific focus on redress for U.S. colonization also has relevance for groups struggling against colonization within the territorial confines of the United States, including Native Hawaiians,¹⁰⁶ Puerto Ricans,¹⁰⁷ Chamorus of Guam and other territorial peoples,¹⁰⁸ Native Americans,¹⁰⁹ African Americans,¹¹⁰ Asian

¹⁰⁴ Shek & Yamada, *supra* note 9, at 7.

¹⁰⁵ Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking A Critical Look at Baehr v. Lewin*, 9 GEO. MASON U. CIV. RTS. L.J. 1, 111 (1998) (quoting Elizabeth M. Schneider, *The Dialectic Of Rights And Politics: Perspectives From The Women’s Movement*, 61 N.Y.U. L. REV. 589, 624-25 (1986)).

¹⁰⁶ See Yamamoto, *supra* note 19.

¹⁰⁷ See Serrano, *supra* note 40.

¹⁰⁸ See Aguon, *supra* note 51.

¹⁰⁹ See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POLY REV. 191 (2001) (outlining the struggles of Native American populations to maintain cultural autonomy, self-determination, and identity).

Americans,¹¹¹ and other Latinos/as.¹¹²

Although the Ninth Circuit *Korab* decision was unfavorable, the litigation efforts and the narratives offered by briefs like ours – as part of a larger movement – were integral to the process of rephrasing the dispute and advancing critical counter-narratives. As Yamamoto recognizes, by reshaping the larger justice narrative of a controversy, the legal process can “help people regain their voice – indeed, their soul.” When individuals and groups face persistent subordination in daily life, they often are unable to speak of their oppression. But in some circumstances, the legal process can strategically be deployed to provide a forum with a wider audience – “where wrongdoers or their predecessors can be compelled to account on the record under oath; where people take seriously what those who have been harmed are finally able to say; and where those harmed articulate what they hope for the future.”¹¹³

¹¹⁰ See Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial-Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1295 (2003) (maintaining that the African American reparations “lawsuits – in conjunction with political organizing and community education – are . . . bringing to the public fore issues of history, collective memory, psychological healing, and institutional reordering”).

¹¹¹ See Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A “Constant Caution” in A Time of Crisis*, 10 ASIAN L.J. 37 (2003) (describing the U.S. government’s World War II treatment of Japanese Americans and urging political activism to prevent similar actions against other racial groups).

¹¹² See Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 167 (2005) (tracing developments following the landmark decision that ended the exclusion of Mexican Americans from juries).

¹¹³ YAMAMOTO, *supra* note 48, at 120.