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CRITICAL RACE THEORY MEETS THIRD WORLD APPROACHES TO INTERNATIONAL LAW

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## Critical Race Theory Meets Third World Approaches to International Law

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### ABSTRACT

By and large, Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) exist in separate epistemic universes. This Article argues that the borders between these two fields are unwarranted. Specifically, the Article articulates six parallel ways in which CRT and TWAIL have exposed and challenged the racial dimensions of United States law and international law, respectively. It foregrounds the related ways in which both CRT scholars and TWAIL scholars have: contested the legalization of white supremacy; marked and problematized the degree to which regimes of inclusion can operate as mechanisms of exclusion; staged important if non-identical critiques of colorblindness; engaged and repudiated neoliberal, racialized claims about the social responsibility and agency of Black people and African nations; confronted perceptions that both literatures exist outside the boundaries of the presumptively neutral scholarly conventions of constitutional law and international law, engendering either criticism or willful dis-attention or non-engagement by mainstream scholars in both fields; and remained invested in reconstruction and transformation of and within law, seeking to maximize law's emancipatory potential for racial justice and substantive equality, while remaining clear-eyed about the limits and costs of such engagements and the need to effectuate change in other arenas, such as social movements.

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## INTRODUCTION

This Article articulates six important parallel thematic developments in Critical Race Theory (CRT)<sup>1</sup> and Third World Approaches to International Law (TWAIL).<sup>2</sup> The parallels we describe mark not only the continuities of ideas across CRT and TWAIL, but also the continuities in the historical, political, racial, and disciplinary forces against which those ideas have been articulated. Which is to say, we are interested in both the critical moves through which CRT and TWAIL are articulated and the resistance, obfuscation, or delegitimization of those moves, especially in scholarly arenas. For simplicity, we frame international law as the site of concern for TWAIL scholars and constitutional law as the site of concern for Critical Race Theorists.

We should note at the outset that this Article is a critique of neither CRT nor TWAIL. One might, for example, reasonably ask the colonization question vis-à-vis CRT (why are the problems of empire, imperialism, and colonization largely absent from CRT?).<sup>3</sup> In a similar vein, one might reasonably ask the racialization question vis-à-vis TWAIL (why are problems of racialization—particularly of nations, global power, and international law and relations—not a more central part of TWAIL?).<sup>4</sup> These questions invite a CRT intervention into TWAIL and a TWAIL intervention into CRT. James Gathii's contribution to this Symposium Issue, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other*, successfully takes on the challenge of identifying key

1. For introductions to CRT, see generally Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas, *Introduction*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. L. REV. 329 (2006); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011).
2. For introductions to TWAIL, see Makau Mutua, *What is TWAIL?*, 94 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 31 (2000).
3. For excellent work in this area, see NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* (2020). See also EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2006); Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 Fla. State U. L. Rev. 1 (1998).
4. Justin Desautels-Stein's contribution to this Symposium takes up a version of this question. See Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. Rev. 1536 (2021); University of California Television, *Migration—Transnational Legal Discourse on Race and Empire*, YOUTUBE (Mar. 18, 2020), <https://www.youtube.com/watch?v=KKkPksbo7W0> [<https://perma.cc/6ZSA-9LMF>].

lessons CRT might learn from TWAIL and vice versa,<sup>5</sup> and the contributions in this Symposium Issue offers examples of what a race-centered critique of international law might look like.<sup>6</sup> Interventions such as these are important, but are not our focus here. Instead, our aim is to draw out synergies between CRT and TWAIL on the view that a mapping of the normative, theoretical, and critical spaces where CRT meets TWAIL will also help to reveal precisely where an intervention into both fields might be warranted.

Needless to say, there are other axes along which one might fairly lodge critiques of TWAIL and CRT, including through interrogations of both fields' limited engagement with indigeneity and—sometimes—dichotomous representations of “the west and rest” (in the TWAIL literature)<sup>7</sup> and “the white and the non-white” (in the CRT literature).<sup>8</sup> For now, we put these concerns to one side as well and focus instead on some of the ways in which CRT and TWAIL are performing similar analytical and normative work.

Our final prefatory comment before turning to the substance of our argument is this: Articulating the boundaries of any theoretical movement is fraught with contingencies and reductionisms. Such a project is all the more contestable when those boundary delineations implicate two intellectual movements, both of which have their own internal disputes. In this respect, we should be clear to note that this Article is a full articulation of neither CRT nor TWAIL. It is a preliminary effort to describe some of the parallel epistemological projects on which both CRT and TWAIL rest.

We have organized the Article in six moments: Moment I: Foundational Racial Capitalism; Moment II: Formal Equality and Racial Inclusion; Moment III:

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5. See James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other*, 67 UCLA L. REV. 1610 (2021). Gathii's project draws on earlier efforts. In particular in 2000, Ruth Gordon convened “the first symposium to address comprehensively how Critical Race Theory (“CRT”) might inform, and be informed by, an international perspective” namely TWAIL, and the issue that resulted from that symposium includes exploration of what CRT and TWAIL might each contribute to the other. Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 827 (introducing the Symposium Issue and its goals).
  6. For other race-based critiques of international law, see Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law*, 33 U.C. DAVIS L. REV. 1519 (2000).
  7. See, e.g., Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law With Lessons From the Fourth World*, 14 OR. REV. INT'L L. 131 (2012) (critiquing TWAIL's relative neglect of the “Fourth World,” including Indigenous Peoples in the settler colonies of the First World).
  8. See generally CRENSHAW ET AL., *supra* note 1. We should be clear, at the same time, we are not calling for projects that describe their invention as moving “beyond” the “Black/White” paradigm, an articulation that sometimes carries with it the implicit assumptions that the work of anti-Black racism is finished business or that Black people's civil rights time has expired.

Colorblindness; Moment IV: Social Responsibility and Agency; Moment V: Quasi and Second-Class Scholarship; and Moment VI: Reconstruction and Transformation. We discuss each moment in turn.

## I. PARALLEL MOMENTS OF INEQUALITY AND INTERVENTIONS

### A. Moment I: Foundational Racial Capitalism

The first moment we describe implicates what Cedric Robinson calls “racial capitalism.”<sup>9</sup> Which is to say, here, both international law, on the TWAIL side, and constitutional law, on the CRT side, operate as regimes of power and violence that implicate racism, capitalism, and colonialism. In Moment I, there are profound questions under international law to which TWAIL scholars have attended concerning which nations belong to the “family of nations” (and therefore deserve sovereignty);<sup>10</sup> and profound questions under constitutional law to which CRT scholars have attended concerning which peoples belong to the “family of man” (and therefore deserve citizenship).<sup>11</sup> In other words, in Moment I, there are social meaning attributions to nations and peoples (and nations of peoples) that facilitate, legitimize, and entrench global and domestic orderings of white supremacy, whose entailments have included conquest, expansionism, militarism, economic extraction, slavery, and genocide. CRT scholars have highlighted the operation of this global ordering of white supremacy in constitutional law cases<sup>12</sup> and TWAIL scholars have highlighted its manifestation in positivist jurisprudence and its sanctioning of imperial practices.<sup>13</sup>

With respect to the constitutional law side of this engagement, consider the case of *Dred Scott v. Sandford*,<sup>14</sup> formally an anticanonical case in U.S. constitutional law. Explicit in that case is the idea that African Americans are “so

9. Cedric J. Robinson, *Black Marxism* at 2 (UNC Press 2000). See also Cheryl I. Harris, *Reflections on Whiteness as Property*, 134 HARV. L. REV. F. 1 (2020) (offering an even more direct engagement of capitalism).

10. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 32–100 (James Crawford & John S. Bell eds., 2004).

11. Cheryl Harris’s *Whiteness as Property* remains a classic articulation of this view. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

12. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (foregrounding how constitutional law facilitates white supremacy); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (same).

13. For a thoughtful discussion of the intersection between positive jurisprudence and race, see Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739 (2006). See also Justin Desautels-Stein’s contribution to this Symposium Issue. Desautels-Stein, *supra* note 4.

14. 60 U.S. 393 (1857).

far inferior, that they ha[ve] no rights which the white man was bound to respect. . . .”<sup>15</sup> Note that in this formulation, Black inferiority is articulated as a preexisting fact (Black people are “so far inferior”) rather than the effect of the very regime of slavery on which the idea of Black inferiority rests. In other words, obscured in the articulation that Black people are “so far inferior” are the acts of racial violence (including but not limited to Middle Passage) through which Black people became inferiorized under conditions of economic extraction, racial domination, and involuntary servitude.<sup>16</sup>

Importantly, the framing of Black subalternity as an effect of rather than an anterior to white supremacy is a central claim in CRT.<sup>17</sup> It is part of a broader contention in that literature that race is socially constructed through, among other sources of power, law.<sup>18</sup> With respect to *Dred Scott* specifically, the argument would be that in the context of constitutionalizing slavery (its racial dimensions, economic dimensions, and violent dimensions), the Court’s construction of Black people as “so far inferior” positioned African Americans beyond the reach of liberal subjectivity and outside of “the family of man.” Thus positioned, African Americans became socially unintelligible as citizens and constitutionally ineligible for citizenship. Understood in that way, the white supremacist ordering of slavery produced the subjugated status of Blackness that the regime purported merely to find. To put that another way still, and borrow from a point Simone de Beauvoir made about women, Black people were not born the appropriate subjects of slavery.<sup>19</sup> They were made the appropriate subjects of slavery through the racially naturalizing dimensions of that regime.<sup>20</sup>

If it is fair to say that CRT reflects an interrogation of which people belong to “the family of man” and therefore deserve citizenship, it is also fair to say that TWAIL reflects an interrogation of which nations belong to the “family of nations”

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15. *Id.* at 407 (describing the state of public opinion regarding African Americans at the time the Declaration of Independence and U.S. Constitution were framed and adopted, and justifying the failure to recognize formal citizenship for African Americans).
  16. For a provocative reimagining of that case from a CRT perspective, see Cheryl I. Harris, *Dred Scott v. Sandford Rewritten*, in CRITICAL RACE JUDGEMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND LAW (Bennett Capers, Devon Carbado, Robin Lenhardt & Angela Onwuachi-Willig eds.) (forthcoming 2021).
  17. See Carbado, *supra* note 1 (describing the genesis, boundaries, and principles of Critical Race Theory).
  18. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).
  19. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 301 (H.M. Parshley trans., Vintage Books 1974) (“One is not born, but rather becomes, a woman.”).
  20. See generally Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005).

and therefore deserve sovereignty. Since its inception, TWAIL has foregrounded the constitutive role of European colonialism in shaping international doctrine. In particular, TWAIL scholars have demonstrated how the imperial logics of nonwhite exclusion were embedded by a concept that sits at the very foundation of international law—sovereignty. In a seminal contribution to the TWAIL canon, Antony Anghie details not only how membership in international society formed a prerequisite for sovereignty, but also how that membership was simultaneously racially and culturally restricted to European nations.<sup>21</sup> These racializing dimensions of international law generally do not figure into the conventional international law scholarship. According to Anghie, that body of work, which focuses on “order among sovereign states,” elide the role of race and culture in shaping the very formation and formulations of concepts such as sovereignty.<sup>22</sup>

Conventional international legal scholarship is problematic in another way. It does not address how international legal doctrine and policies construct race. We have already hinted at the nexus between the social construction of race in the international arena and the instantiation of racialized global hierarchies. We will say more on this point further along in the Article. For now, we simply want to note that inquiries about which nations belonged to the “family of nations” and therefore deserved sovereignty were never made or answered without recourse (at least implicitly) to racialized views about peoples and nations.

Christopher Gevers’s contribution to this Symposium Issue broadens TWAIL’s racial critique of international law beyond the terrain of sovereignty. In Gevers’s formulation, the very idea of the international is always already racialized in the sense of being articulated against background assumptions about the necessity and naturalness of a white global order. According to Gevers, even some critical analyses of international law routinely fail to address the “international” of international law as “a racial imaginary—a ‘White World’ . . . that emerges from and reinforces Global White Supremacy[.]”<sup>23</sup>

TWAIL’s racial critique of sovereignty specifically and the international legal order more generally pays particularly close attention to positivism, the methodological means through which the racialization of sovereignty was achieved.<sup>24</sup> In a move analogous to the claims CRT scholars have rehearsed about

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21. See ANGHIE, *supra* note 10, at 32–100.

22. *Id.* at 101–02.

23. Christopher Gevers, “Unwhitening the World”: Rethinking Race and International Law, 67 UCLA L. REV. 1652 (2021).

24. See, e.g., ANGHIE, *supra* note 10; James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1015, 1043–54 (2007) (detailing how “highly formalist and positivist” international and common law doctrine underwrote the



the social construction of race, TWAIL scholars have long argued that non-European nations did not, a priori, lack sovereignty. Positivist jurisprudence produced that “lack” through ostensibly objective facts about racially inferior people, uncivilized cultures, and dysfunctional and backward governments.<sup>25</sup> TWAIL’s interrogation of these representational contingencies reveals that non-European nations were not, in some pre-political sense, outside of the “family of nations.” Colonization placed them there, in part by relying on the otherizing images of the Third World positivist jurisprudence expressed. Understood in that way, the racial work positivist jurisprudence performed was never just discursive. It was also material in the sense of presaging and ultimately effectuating legalized racial domination.<sup>26</sup> To put these points another way still, if slavery was underwritten by the idea that African Americans had no rights that white people were bound to respect, colonization was underwritten by the idea that nonwhite nations had no claims to sovereignty that white nations were bound to respect. In short, the racial logics of colonialism rendered non-European nations not only available for domination but the appropriate subjects for domination.<sup>27</sup> By effectively defining sovereignty as Europeanness, international law underwrote a

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expropriation of Maasai land by the British). B.S. Chimni and Anghie provide an overview of a number of TWAIL concerns with positivism: It fails to place international law and international institutions in their proper political context, shielding from view the geopolitical power dynamics that vitiate Third World consent in international and bilateral arena, and it has been used repeatedly to defeat Third World attempts to remake international law on more equitable terms. Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 98 (2003). For other racial engagements of positivism, see Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIA. L. REV. 943 (1999).

25. For an analysis of this dynamic in the field of international human rights law, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 *passim* (2001).

26. See ANGHIE, *supra* note 10, at 38–39.

27. See, e.g., Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 887–88 (2000) (“Race, transmuted into the more comprehensive notion of ‘civilization,’ is central to the very definition of international law. . . . Race served a very important function, for it determined the issue of membership within the family of nations. Furthermore, it usually signified not merely difference, but inferiority—the characteristics of which were comprehensively elaborated by the writers of that time when they detailed the nature of African or Asian societies . . . . Race, at the most basic level, signified a difference that had to be overcome by the assimilative powers of international law, if international law was to become truly universal. In this way, the whole concept of race is inextricably connected with one of the defining characteristics of international law—its universality.”).

white-dominated global order in which European nations exploited, dominated, and, in some instances, facilitated the genocide of Third World people.<sup>28</sup>

James Gathii's work in this area speaks to the political and economic dimension of this white global hegemony. His study of the fusion of British imperial expansion in East Africa and British colonialism in the region offers a prototypical example of a TWAIL intervention delineating the link between positivist sovereignty jurisprudence and the political and economic exploitation it enabled. In Gathii's formulation, imperialism is defined to emphasize capitalist expansion and economic exploitation, and colonialism is defined to emphasize territorial conquest and acquisition.<sup>29</sup> Gathii demonstrates how British courts' positivist jurisprudence relied on racist conceptions of the Maasai and other East African peoples to ratify British expropriation of Maasai land.<sup>30</sup> In the relevant cases, British courts' characterization of the Maasai as variously uncivilized or semicivilized proved vital to the vitiation of the Maasai people's legal challenges to British expropriation of their land.<sup>31</sup> These courts employed formal positivist analysis to rule that the Maasai were sufficiently sovereign to enter into treaties ceding their territories to the British,<sup>32</sup> but insufficiently civilized to be protected as such. This sufficiently sovereign/insufficiently civilized construction of the Maasai provided the normative foundation on which British courts treated the expulsion of the Maasai people from their land as legitimate under both international and British law, notwithstanding that the expulsion unequivocally contravened various treaty agreements.<sup>33</sup>

As we have already said, and want to reemphasize here, the racialized determinations about the unfitness of Black people under U.S. constitutional law for citizenship and the unfitness of non-European nations under positivist jurisprudence for sovereignty were never made outside of economies of violence and economic exploitation. Domestically and globally, those determinations were

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28. See ROSA AMELIA PLUMELLE-URIBE, *WHITE FEROCITY: THE GENOCIDES OF NON-WHITES AND NON-ARYANS FROM 1492 TO DATE* (Virginia Popper trans., 2020); Dominik J. Schaller, *Genocide and Mass Violence in the 'Heart of Darkness': Africa in the Colonial Period*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* (Donald Bloxham & A. Dirk Moses eds., 2012); Gregory D. Smithers, *Rethinking Genocide in North America*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* (Donald Bloxham & A. Dirk Moses eds., 2012).

29. Gathii, *supra* note 24, at 1019–20.

30. *Id.* at 1033–57. Gathii also shows the role of British common law in this process, and links these doctrinal moves to those made by U.S. federal courts in the 2000s in the Guantanamo Bay Detainee cases, which he argues similarly ratify U.S. imperial exploitation. *Id.* at 1054–63.

31. *Id.* at 1041–42.

32. *Id.* at 1045–46.

33. According to Gathii, the British courts' ruling by declaration of Maasai land and part of a broader "system of authority over a barbaric and uncivilized people was compelled by the needs of peace, order, and good government. . . ." *Id.* at 1042.

part of a broader set of racial logics through which labor was extracted, genocide effectuated, territories confiscated, wars initiated, bodies subjugated, and capital accumulated.<sup>34</sup>

## B. Moment II: Formal Equality and Racial Inclusion

In Moment II, CRT and TWAIL foreground the problem of racial inclusion, albeit at different scales. Here, TWAIL scholars focus on the formal inclusion of nonwhite peoples into the international society of sovereign nation states (under First World and white dominated international terms and norms) and CRT scholars focus on the formal inclusion of nonwhite peoples into citizenship (under white dominated domestic terms and norms).<sup>35</sup> For both CRT and TWAIL scholars, then, the preceding acts of inclusion, or incorporation, if you prefer, are not a fundamental reconfiguration of power but rather a particular technology through which to maintain, manage, and legitimize the prior hierarchical domestic and global racial orderings. Under this formulation, the old regimes of racial exclusion (sovereignty and citizenship) are repurposed to carry forward their subordinating work as new regimes of racial inclusion. Giorgio Agamben might describe this phenomenon as an example of an “inclusive exclusion.”<sup>36</sup> Our point is that both TWAIL and CRT scholars have identified inclusion and recognition as means of perpetuating subordination. Within TWAIL, the analysis is of formal sovereign recognition in international law and the ways in which that recognition was structured to perpetuate quasi sovereign status in the global arena. Within CRT, the analysis is of formal citizenship

34. See, e.g., Elena Blanco & Anna Grear, *Personhood, Jurisdiction and Injustice: Law, Colonialities and the Global Order*, 10 J. HUM. RTS. & ENV'T 86 (2019); Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 LEIDEN J. INT'L L. 597 (2018). See also Lama Abu-Odeh, *Reactions: Natsu Taylor Saito's "Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism,"* 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 111 (2009); Jeena Shah, *UDHR: Our North Star for Global Social Justice or an Imperial and Settler-Colonial Tool to Limit Our Conception of Freedom?*, 31 PACE INT'L L. REV. 569 (2019); Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT'L L. 525 (2007).

35. Chantal Thomas has made this point elsewhere. See Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1197 (2000) (noting the shared exploration by CRT and TWAIL scholars of subordination in legal systems that have shifted from treating racial others as “formally separate and subordinate to formally equal”).

36. See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Stanford Univ. Press 1998). See also Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 638 (2005) (drawing on Agamben to describe racism as a naturalization project whose entailments include “inclusive exclusions”).

recognition in constitutional law and the ways in which that recognition was structured to perpetuate second-class citizenship in the domestic arena.

A classic example from constitutional law of how processes of racial inclusion can be mechanisms through which to reproduce rather than undermine a prior hierarchical ordering is *Plessy v. Ferguson*,<sup>37</sup> the U.S. Supreme Court case that litigated the equality boundaries of the Fourteenth Amendment. Reflecting an express repudiation of *Dred Scott*, the Fourteenth Amendment is one of the Reconstruction Amendments that was designed to facilitate the inclusion of Black people into citizenship. The amendment includes a Citizenship Clause—“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”—and an Equal Protection Clause—“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>38</sup> A central question *Plessy* presented was whether separate-but-equal violated this latter clause, that is to say, ran afoul of the Fourteenth Amendment’s guarantee of equal protection. Writing for the Majority, Justice Brown answered that question in the negative.<sup>39</sup> In so doing, he constitutionalized Jim Crow and ensured that Black people would be included into citizenship on racially subordinating terms. This feature of Jim Crow—that it performed its racially subordinating work *inside* of citizenship—is at least one sense in which *Plessy v. Ferguson* structuralized Black people’s membership in and belonging to the United States society as an “inclusive exclusion.” It is precisely because this inclusive exclusion carried forward substantive dimensions of the ideological and material apparatus of slavery that, borrowing from Saidiya Hartman, one might describe Jim Crow as an “afterlife of slavery.”<sup>40</sup>

With respect to international law, one of TWAIL’s pivotal examples of the subordinating inclusion of nonwhite nations into a terrain from which they had historically been excluded is the formal decolonization of the Third World. TWAIL characteristically marks this moment of incorporation into the “family of nations” as inclusion on terms that have ultimately ensured *neocolonial*

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37. 163 U.S. 537 (1896).

38. The text of the Fourteenth Amendment reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

39. *Plessy*, 163 U.S. at 551.

40. See, e.g., SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* 6 (Farrar, Straus & Giroux 2008).

domination, not substantive sovereignty for the former colonial nations. Indeed, as the former colonies gained seats at the international lawmaking table, they had to contend with the hard reality that the former colonial powers had neocolonial aspirations. Those aspirations manifested themselves in strategic mobilizations of international law and policy doctrines that were designed to maintain not only the subordinate status of Third World nations, but also the control First World nations had over the international legal system.<sup>41</sup> The former colonies organized in various attempts to disrupt this reassertion of colonial power. But their efforts largely failed. The built-in historical headwinds of colonialism ushered in a colonial afterlife in which formal sovereignty, or equality of states, comfortably existed alongside the quasi sovereignty of the Third World.

While Third World nations did not experience their quasi sovereignty in precisely the same way, they all confronted the fact that the postcolonial world was not a departure from the racial hierarchy on which colonialism was based but rather a rearticulation of that hierarchy on neocolonial terms. Antony Anghie and Siba N'zatioula Grovogui's scholarship have advanced a version of this claim, extending the analysis of neocolonial scholars, such as Kwame Nkrumah and Walter Rodney,<sup>42</sup> to demonstrate how, following formal decolonization, First World nations deployed multiple dimensions of the international system, including sovereignty doctrine and international institutional arrangements, to reproduce the economic and political domination of the First World over the Third.<sup>43</sup> As just one example of this dynamic, Anghie details how the precursor regime to formal decolonization—the mandate system that the League of Nations oversaw—included design features that effectively ensured the postcolonial

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41. Even as early as 1955, the Bandung conference is an early and significant example of such mobilization, which was composed predominantly of leaders from territories still under formal colonial occupation. Bandung aimed, among other things, to chart a vision for Third World sovereignty free of neocolonial domination. See Antony Anghie, *Bandung and the Origins of Third World Sovereignty*, in *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* 537–41 (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017). In their TWAIL tour de force volume analyzing Bandung, Luis Eslava, Michael Fakhri, and Vasuki Nesiah remind that one of Bandung's unique contributions to international law is "recognition that racism and political, legal, and economic structures of racial difference were an inextricable part of international law and the genealogy of the nation-state." Luis Eslava, Michael Fakhri, & Vasuki Nesiah, *The Spirit of Bandung*, *in supra*, at 17.
  42. See KWAME NKUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* (1<sup>st</sup> Ed., Int'l Publishers Co., Inc. 1966) (1965); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1973) (Vincent Harding, William Strickland & Robert Hill, rev'd. 1981) (1972).
  43. SIBA N'ZATIOULA GROVOGUI, *SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW* (Univ. of Minn. 1996); ANGHIE, *supra* note 10, at 11.

subordination of former colonial nations.<sup>44</sup> Consequently, even as First World nations shifted in their articulation of Third World countries from describing them as too insufficiently developed to merit sovereignty to describing them as sufficiently developed enough to warrant that designation, that rearticulation still presupposed that the newly independent and sovereign Third World would serve and be subordinate to First World interests and demands.<sup>45</sup>

The story we are telling about the inclusion of Third World nations into sovereignty on racially hierarchical terms transcends the boundaries of formal sovereignty doctrines. Neocolonial assertions of the international legal system implicate development doctrines, international economic law, international humanitarian law, and domestic legal regimes. To begin with development, TWAIL scholar Sundhya Pahuja has powerfully demonstrated how the racial logics through which formerly colonized nations were naturalized as sovereign under conditions of marginality and subordination were carried over into the contemporary development paradigm. Under the guise of benefiting the Third World, that paradigm reproduced some of the very colonial-era hierarchies that characterized the mandate system.<sup>46</sup>

With respect to international economic law, James Gathii's work illustrates how the First World's influence on international economic law stripped that juridical body of its progressive possibilities.<sup>47</sup> According to Gathii, the First World's overdetermination of the content of international economic law undermined that law's redistributive and reparative potential and preserved the economic agendas of hegemonic First World states and international financial institutions.<sup>48</sup>

In the field of international humanitarian law, TWAIL scholars have shown how formal sovereignty has failed to shield Third World states from First World and international coercive intervention. The absence of an international shield for the Third World in that regard is tied directly to the ways in which the First World can wield the international system as a sword with which to treat Third World sovereignty as provisional and contingent on First World interests and assessments. Consider, for example, Ashl Bâli and Aziz Rana's study of U.S. and European-led coercive intervention into various parts of the Arab world in the

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44. Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 746–49 (2006).

45. *Id.*

46. SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011) (deploying this analysis through three examples).

47. See James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2033–34 (2000).

48. *Id.*

wake of the 2011 uprisings in that region. Although that intervention included some instances of regime change and implicated numerous humanitarian concerns, those coercive intrusions did not create a problem for the international legal order because they occurred in nations whose sovereignty had been vitiated for failing “to support key international and regional arrangements.”<sup>49</sup> A crucial takeaway from Bâli and Rana’s analysis is that Third World sovereignty is both *provisional* and *contingent*. It is only capable of constraining coercive foreign intervention—which is supposed to be unlawful under international law—when practiced to converge with First World global and national interests.<sup>50</sup>

Finally, TWAIL scholars have also interrogated the manner in which international law operates *within* nation states as an inclusive exclusion, including through its interactions with domestic legal doctrine. For example, John Reynolds describes the Israeli government’s deployment of emergency doctrine to manage Israel’s colonial governance of Palestinians as a form of “repressive inclusion,” a mechanism of subordination through which legal doctrine facilitates racially contingent inclusion within the juridical order.<sup>51</sup> In a related vein, Mohammad Shahabuddin’s work foregrounds how international law operates in postcolonial states to enable forms of inclusion of ethnic minorities that ultimately result in the “assimilation and the extinction of group identity.”<sup>52</sup> On this account, the terms and means of inclusion presuppose and effectuate the erasure of cognizable groups.

The preceding examples are a way of saying that a definitive contribution of TWAIL, shared in common with CRT, is attention to how formal inclusion into the international order and the sovereignty recognition it effectuated was not an achievement of substantive equality for Third World nation states. Instead, the very terms of inclusion ensured a persisting global hierarchy with First World nations on top and Third World nations on the bottom that belies the common equation of formal decolonization with the end of colonial relations between the First and the Third World.

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49. Aslı Bâli & Aziz Rana, *Pax Arabica?: Provisional Sovereignty and Intervention in the Arab Uprisings*, 42 CAL. W. INT’L L.J. 321, 324 (2012).

50. *Id.* at 324–29. Note how this claim aligns with CRT’s claims about interest convergence. See Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

51. JOHN REYNOLDS, *EMPIRE, EMERGENCY AND INTERNATIONAL LAW* 210–11 (2017).

52. Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law*, TWAILR: REFLECTIONS, May 13, 2020 (book review), <https://twailr.com/minorities-and-the-making-of-postcolonial-states-in-international-law> [<https://perma.cc/BS3M-9LS7>].

### C. Moment III: Colorblindness

In Moment III, CRT and TWAIL expose and contest various iterations of colorblindness, including the idea that race no longer matters in structuring society and lived experience. In this moment, the analytical and normative fight is about both the speakability of race and racism and whether the real and pressing issues of inequality are somewhere (anywhere) beyond the boundaries of race and racism—think class, think religion, think nationalism, think culture. On the CRT front, there are at least two salient ways in which colorblindness functions in constitutional law—the complete elision of race from the doctrinal analysis at hand and the explicit treatment of race as a suspect basis for governmental decisionmaking, whether or not that decisionmaking is designed to mitigate racial inequality. Consider first the elision of race with reference to Fourth Amendment jurisprudence.

The Fourth Amendment, which is supposed to protect us from “unreasonable searches and seizures,”<sup>53</sup> is arguably the most important constitutional provision for regulating police conduct. Part of the Bill of Rights (the original ten amendments added to the U.S. Constitution in 1791), the Fourth Amendment is part of a larger body of constitutional criminal procedure that was promulgated to impose constraints on police power. Debates about excessive force, stop-and-frisk, and Driving While Black all implicate Fourth Amendment law. Yet, in virtually none of the cases in which the Supreme Court adjudicates Fourth Amendment issues does one see a robust—or, indeed, much of any—engagement with race.<sup>54</sup> A perfect example of what we mean is manifested in the Court’s “seizure” jurisprudence.

Because, as previously mentioned, the Fourth Amendment protects us from unreasonable searches and seizures, a preliminary or threshold question in Fourth

53. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”)

54. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245 (2010); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) [hereinafter Carbado, *From Stopping Black People*]; Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993); Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049 (2011); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990); Cynthia Lee, *Reasonableness With Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133 (2012); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012).



Amendment law is whether governmental conduct amounts to a search or seizure. If, for example, a police officer interacts with a person and that interaction is not a search or a seizure, the Fourth Amendment has nothing to say about it. In other words, nonsearches and nonseizures reside beyond the regulatory reach of the Fourth Amendment. We should add, parenthetically, that if the police conduct in question does amount to a search or a seizure, that conduct is not necessarily unconstitutional. The question would then become whether that search or seizure was reasonable.<sup>55</sup> It turns out that lots of searches and seizures are reasonable, even ones that are racially motivated.<sup>56</sup>

With respect to what counts as a seizure, the Supreme Court has said that the inquiry is whether a “reasonable person feels free to leave or otherwise terminate the encounter.” To flip that inquiry around, if a reasonable person would not feel free to leave or terminate the encounter, then that person is seized. To appreciate how the Court has elided race in its seizure jurisprudence, imagine that an officer observes Marcia on the street corner. He has no reason to believe she has done anything wrong. Nevertheless, he proceeds to:

Follow her;

Question her along the following lines:

What’s your name?

Where are you going?

Where have you been?

Where do you live?

He then asks Marcia for her identification.

Because Franita has a Jamaican accent, he asks her questions about her immigration status.

Those questions are followed by a request to search Marcia’s bag.

After searching the bag, the officer asks Marcia whether she would mind accompanying him to the station for additional questioning.

At the station, the officer continues to question Marcia about a range of matters.<sup>57</sup>

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55. See Carbado, *From Stopping Black People*, *supra* note 54 (explaining this analytical structure of the Fourth Amendment).

56. See *id.* at 152 (discussing *Whren v. United States*, 517 U.S. 806 (1996), where the Court effectively turned probable cause that a person had committed a traffic infraction into a license for police officers to employ race as a basis for determining which people to stop to enforce those infractions).

57. See Carbado, *From Stopping Black People*, *supra* note 54 at 133, 137–38 for a more extended discussion of these examples.

None of the foregoing would trigger the Fourth Amendment in the sense of constituting a seizure.<sup>58</sup> The Court would rule that, throughout the entire encounter, Marcia was free to leave. Was the officer required to inform Marcia of her right in that respect? No. Does it matter whether Marcia knows she has that right? No. What about the fact that Marcia was questioned at the police station? Was she still free to leave? Yes—or, at least, she should have felt free to leave. What if Marcia subjectively did not feel free to leave? Does that matter? No. The test is (supposedly) an objective one, not a subjective one.

You are probably now wondering about Marcia's race and gender. She is, after all, a Black woman. Surely that matters. It does not. Nor, in the context of applying the Fourth Amendment's seizure doctrine, would the Court take note of the historical and contemporary manifestations of overpolicing and police violence in the Black community.

The Court's colorblind approach to the seizure analysis communicates two troubling ideas. First, that the so-called reasonable person has no race (or would not be invested in paying attention to race); and second, that taking race into account in the context of determining whether a person is seized would be jurisprudentially unreasonable. Both ideas obscure what ought to travel in Fourth Amendment law as uncontestable social realities—namely, that race could inform a police officer's decision to target an African American for questioning and that being an African American could shape how one experiences and negotiates an interaction with the police.<sup>59</sup> Our broader point is that, consistent with one of the imperatives of colorblindness, the Supreme Court's seizure analysis almost entirely elides the ways in which race intersects with policing.

Another way in which colorblindness works in constitutional law is to treat any reference to race as constitutionally suspect. Perhaps the clearest example of this dimension of colorblindness is the Supreme Court's equal protection jurisprudence. In a series of equal protection cases, the Court has explicitly stated that *any* use of race on the part of the government is constitutionally suspect.<sup>60</sup> To

58. We will not, in this Article, cite to the relevant Fourth Amendment cases. They are discussed at length in one of our prior projects. See generally Carbado, *From Stopping Black People*, *supra* note 54.

59. For an explicit engagement of the role colorblindness plays in structuring Fourth Amendment jurisprudence, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 *passim* (2002). See also I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855 (2015) (analyzing how sex and gender norms inform Fourth Amendment standards).

60. *Adarand Constructors, Inc. v. Peña Sec'y Transp.*, 515 U.S. 200, 224 (1995) (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We apply strict

illustrate the implications of this jurisprudential approach, stipulate that the federal government has decided to racially target members of the Black Lives Matter (BLM) movement and incarcerate them on the view that they are a radical group whose political agenda threatens the very nature of the country's democracy.<sup>61</sup> Assume, meanwhile, that the state of California is concerned about the displacement of African Americans via gentrification<sup>62</sup> and creates a housing voucher for which only African Americans living in the parts of Los Angeles undergoing gentrification may apply. The Supreme Court would employ the same constitutional standard to determine the constitutionality of both decisions. Which is to say, in both instances, the Court would apply "strict scrutiny," the most rigorous form of judicial review.<sup>63</sup> The Court would treat California's effort to mitigate the racialized housing displacement gentrification effectuates, and not just the federal government's effort to incarcerate BLM members, as presumptively constitutionally suspect because both violate the constitutional norms of colorblindness.<sup>64</sup>

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scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.") (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

61. This is not entirely hypothetical. There is evidence that the FBI has systematically targeted so-called "Black Identity Extremists," which includes people who are perceived to be too closely associated with various Black Lives Matter formations. See Mike German, Opinion, *The FBI Has a History of Targeting Black Activists. That's Still True Today*, GUARDIAN (June 26, 2020, 5:41 AM), <https://www.theguardian.com/commentisfree/2020/jun/26/fbi-black-activism-protests-history> [<https://perma.cc/PSR5-MAAW>]; Kimberlé Williams Crenshaw, *Fear of a Black Uprising: Confronting the White Pathologies That Shape Racist Policing*, NEW REPUBLIC (Aug. 13, 2020), <https://newrepublic.com/article/158725/fear-black-uprising-confronting-racist-policing> [<https://perma.cc/VF7U-HHMu>].
62. On the problem of gentrification in Los Angeles, see Tracy Jan, *A New Gentrification Crisis*, WASH. POST (July 31, 2020), <https://www.washingtonpost.com/business/2020/07/31/ethnic-enclaves-gentrification-coronavirus/?arc404=true> [<https://perma.cc/B9BU-PCNZ>]; CNK Staff, *A New Gentrification Crisis*, UCLA CTR. FOR NEIGHBORHOOD KNOWLEDGE (Aug. 2, 2020), <https://knowledge.luskin.ucla.edu/2020/08/02/a-new-gentrification-crisis> [<https://perma.cc/V6RE-GV65>]. See generally Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 J. CONST. L. 1 (2006); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010) (describing local governments' use of police powers to restructure urban spaces along race and class lines, displacing low-income residents of color).
63. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").
64. See, e.g., *Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.... [S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Absent searching judicial inquiry into the justification for such

“Colorblindness” as an umbrella term of art for critiquing legal and jurisprudential elisions of race is arguably a term more commonly used in CRT than in TWAIL. Yet from TWAIL’s founding, TWAIL scholars have variously interrogated international law’s role in racialized subordination, including through carefully crafted legal and judicial techniques shorn of any explicit reference to race.<sup>65</sup> In other words, even without explicit reference to colorblindness, TWAIL scholars have critiqued means of racial subordination that variously obscure or disavow the racial nature of the respective interventions. TWAIL scholars have analyzed, for example, the reliance of international legal doctrine on purported cultural differences that Europeans used to establish themselves as morally and legally superior to non-European peoples they colonized, exploited, and exterminated, cloaking imperial projects of racial subordination in the language of distinctions between the “civilized” and the “uncivilized.”<sup>66</sup>

In this Symposium Issue, Christopher Gevers traces a colorblindness of sorts within mainstream international legal scholarship,<sup>67</sup> even among critical international legal scholars who otherwise spotlight the colonial trappings of the discipline. For example, some scholars in the field have been unwilling to name and confront the ways in which race has operated on the international landscape. Other scholars insufficiently distinguish between (and sometimes conflate) racial and cultural difference in ways that obfuscates how race has structured the global order and the treatment of nations and peoples within it.<sup>68</sup> Still other scholars “in effect, minimize the role that race plays in international law,”<sup>69</sup> elide the “sociopolitical system of Global White Supremacy,”<sup>70</sup> and reduce their

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race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”).

65. Anghie, *supra* note 27, at 890–91 (and accompanying bibliographic notes).

66. See, e.g., Anghie, *supra* note 44; Gathii, *supra* note 24. In these examples, TWAIL scholars unmask parallel racial elisions in the service of racial subordination, to those that CRT scholars have engaged in, in the development of colorblindness critique.

67. Gevers *supra* note 23, at 2–3.

68. *Id.* at 4–5. In our analysis, both Gevers and the TWAIL II scholarship of Anthony Anghie, which he charges with “reading down” racism, are both engaged in critiques of racial subordination including through the elision of race, with Gevers representing momentum in TWAIL III that insists on greater analytical precision in race theory within TWAIL.

69. *Id.*

70. *Id.*; *id.* at 4 n.10 (defining Global White Supremacy as a “sociopolitical system that ‘encompasses de facto as well as de jure white privilege and refers more broadly to the European domination of the planet that has left us with the racialized distributions of economic, political, and cultural power that we have today.’”) (citing Charles W. Mills, *Revisionist Ontologies: Theorizing White Supremacy*, in *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 97, 98 (1998)).

conceptualization of racism to the individual prejudices of a small number of aberrant international law scholars and practitioners.<sup>71</sup> Each of the preceding scholarly approaches reflects a particular technique of colorblindness in the sense of avoiding or marginalizing concerns about race and racism or disappearing them altogether.

Scholars such as Hope Lewis have criticized the ubiquity and currency of colorblind approaches to international law. Lewis's scholarship is particularly important because it blurs the boundary between CRT and TWAIL by explicitly pursuing both approaches to expose various racially subordinating features and mobilizations of international law.<sup>72</sup> These mobilizations have included the instantiation of neocolonial land arrangements that entrench and normalize the racialized economic order on which colonialism rested. A striking example of what we mean is a 2008 ruling from the highest adjudicatory body for the South African Development Community (SADC)<sup>73</sup>—the SADC Tribunal. That ruling traded on colorblindness to effectively both “lock out” Black Zimbabwean’s access to land and “lock in” the access colonialism granted to whites.<sup>74</sup>

The case centered on Mike Campbell, the lead plaintiff and a white Zimbabwean commercial farmer. Campbell alleged that the Zimbabwean government’s controversial Fast Track Land Reform Program (FTLRP), which authorized the uncompensated, compulsory seizure of agricultural lands for redistribution, constituted unlawful racial discrimination under the applicable international human rights law.<sup>75</sup> The SADC Tribunal ruled in favor of the

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71. *Id.* at 2–3.

72. Hope Lewis uses the term “BlackCrit Theory” to describe her work at the intersection of TWAIL, CRT, Critical Race Feminism, and a number of other critical traditions. See Hope Lewis, *Reflections on “Blackcrit Theory”: Human Rights*, 45 VILL. L. REV. 1075, 1077 (2000). Among other things, she provides a literature review of BlackCrit scholars who “have critiqued beliefs about the race-neutral nature of international human rights law.” *Id.* at 1079.

73. See *Mike Campbell (Pvt) Ltd v. Republic of Zim.*, Case No. 2/2007[2008] SADCT 2, 53 (Nov. 28, 2008), <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>. SADC is an economic community of sixteen countries in southern Africa. See *About SADC*, SOUTH AFRICAN DEVELOPMENT COMMUNITY, <https://www.sadc.int/about-sadc> [<https://perma.cc/2NP6-7P3P>] (last visited Dec. 11, 2020).

74. For a discussion of a “locked in” theory of inequality, see DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).

75. For a comprehensive analysis of this case, see E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts*, in *INTERNATIONAL COURT AUTHORITY* 124 (Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen eds., 2018) [hereinafter *The SADC Tribunal*]; see also E. Tendayi Achiume, *Transformative Vision in Liberal Rights Jurisprudence on Racial Equality: A Lesson from Justice Moseneke*, in *A WARRIOR FOR JUSTICE: ESSAYS IN HONOR OF DIKGANG MOSENEKE* (Penelope Andrews, Dennis Davis, & Tabeth Masengu eds., 2018) [hereinafter *Transformative Vision in Liberal Rights Jurisprudence on Racial Equality*].

plaintiffs. To do so it applied the prohibition on racial discrimination provided by the International Convention on the Elimination of Racial Discrimination, which prohibits *de facto* and *de jure* forms of such discrimination. In its conclusion, the Tribunal found that although the FTLRP made no mention of race, it nonetheless constituted unlawful *de facto* discrimination because of its disproportionate impact on white Zimbabwean farmers.<sup>76</sup>

Understanding Zimbabwe's broader sociopolitical context—a product of its colonial past and neocolonial present—reveals how this decision manifests a particular iteration of colorblindness in international human rights jurisprudence. Ostensibly mobilized in the defense of equality, colorblindness functions to reinforce racial subordination by bluntly invalidating race conscious remedies without which it is impossible to redress persisting neocolonial racial subordination. At the time of Zimbabwe's independence from British colonial rule in 1980, an estimated 6000 white commercial farmers owned 42 percent of the country, specifically, the most arable land. Whites had acquired that land through violent and nonviolent dispossession of the majority Black population under colonial rule.<sup>77</sup>

In the context of independence, the British government ensured that the *colonial* racial allocation of land would remain in place *postcolonially*. To do so, that government promulgated a time-restricted guarantee that prevented the newly independent Zimbabwean nation from undoing white people's illegitimate (but legalized under international law) access to and mass accumulation of land. This neocolonial arrangement brings to mind Cheryl Harris's claims about whiteness as property.<sup>78</sup> By that, we mean the time-restricted guarantee is an example of the ease with which political and legal actors are able to deploy law to settle and entrench, rather than unsettle and disrupt, white people's expectation of a *right* to benefit from the legacies of racism, including the legacies of colonial domination.

The Zimbabwean example is revelatory in another sense. It lays bare the co-constitutive relationship between international law and neocolonialism. Consistent with international law, Black people's freedom from colonial rule in Zimbabwe was predicated on white people's freedom to maintain the land grab that was a core feature of that rule. The end result was that the formal end of colonialization created a neocolonial racial order that left in place—as a matter of international law—the racialized dispossession of land colonialism had effectuated.<sup>79</sup>

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76. *Mike Campbell (Pvt) Ltd*, Case No. 2/2007[2008], at 2, 53.

77. Achiume, *The SADC Tribunal*, *supra* note 75, at 131.

78. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

79. Achiume, *The SADC Tribunal*, *supra* note 75, at 131.

Significantly, the end of the time-restricted land policy ended neither white control of Zimbabwe's land nor the ways in which that unjust enrichment structured Zimbabwean society. On the contrary, subsequent to the expiration of that policy, an ineffectual preoccupied postcolonial government failed to make any significant inroads into redistributing land on more racially equitable terms.

But in 2005, things changed. That same postcolonial regime, in a desperate bid to shore up popular support, instituted the FTLRP, which it proceeded to implement violently, targeting predominantly white commercial farms.<sup>80</sup> As one of us has stressed elsewhere, there was much that was flawed about the FTLRP, especially in its implementation.<sup>81</sup> Its flaw, however, was not its disparate racial impact on whites. It bears emphasizing that, by the year 2000, white commercial farmers still dominated Zimbabwe's primarily agrarian economy.<sup>82</sup> This racially unequal structuring of the economy was achieved through laws that explicitly excluded Black people from certain forms of land ownership—laws that were in full effect when Mike Campbell himself acquired the farm whose seizure he ultimately challenged as racially discriminatory.<sup>83</sup>

Against the background of Zimbabwe's colonial history in which land was systematically taken away from Black people and given to white people, any intervention to redress that land theft was bound to disproportionately affect white farmers, as ownership had been accrued to them on a *de jure* racial basis. The *Campbell* opinion ignored these basic insights. The tribunal's ruling traded on two central logics of colorblindness: (1) that formal sameness in treatment is necessarily racially egalitarian,<sup>84</sup> and (2) that historical forms of legalized racial subordination are irrelevant to contemporary assessments of racial inequality. At no point does *Campbell* meaningfully engage the critical question the case presents: How does treating Black and white people the same in the present address the fact that Black people and white people were treated differently in the past? This question is not simply about whether and to what extent the tribunal should have structured a remedy to make up for what happened "then" (in the context of colonialism). The question is also a way of asking: What should the tribunal do about the fact that the colonial dispossession of land continues to

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80. For an analysis of the legitimate popular demands for land redistribution and the illegitimate means and political strategies pursued by the government, see *id.* at 130–35.

81. See Achiume, *Transformative Vision in Liberal Rights Jurisprudence on Racial Equality*, *supra* note 75, at 180–81.

82. Achiume, *The SADC Tribunal*, *supra* note 75, at 132.

83. Achiume, *Transformative Vision in Liberal Rights Jurisprudence on Racial Equality*, *supra* note 75, at 190–91.

84. See Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753 (2001).

racially structure access to land “now” (in the context of neocolonialism). Informing our analysis is the view that colonialism “then” was not a momentary accomplishment fixed within a particular time frame. It created trajectories of inequality for Black people, and trajectories of opportunity for white people, into the future that shape extant racial hierarchies “now.” Thus understood, contemporary juridical approaches rooted in treating all racial groups formally the same make little sense (unless one’s racial project is to entrench in the present the race-based hierarchies colonialism produced in the past). The sum of what we are saying is that the racial discrimination ruling of the SADC Tribunal was flawed not only for treating FTLRP effectively as a form of so-called reverse discrimination against whites, but also for failing to view land redistribution as a necessary form of racial remediation to undo the deeply entrenched vestiges of colonization in the present.<sup>85</sup>

Conventional scholarly engagements of *Campbell* have not subjected the case to anything like the preceding TWAIL/CRT-inflected analysis.<sup>86</sup> Nor has there been much in the way of scholarly contestations of the application of international human rights law to the case. Part of our aim here has been to demonstrate what a TWAIL-/CRT-informed critique of *Campbell* might look like. In the context of doing so, we have tried not only to expose how *Campbell* traded on colorblindness, but also to reveal how the Tribunal’s finding of racial discrimination perversely consolidated a jurisprudence that solidified rather than disrupted the colonially rooted and racially unjust structures of land ownership in the region.

#### D. Moment IV: Social Responsibility and Agency

In Moment IV, CRT and TWAIL scholars engage and repudiate neoliberal claims about social responsibility and agency. Often expressed in the form of rhetorical questions, those claims look something like this: What’s wrong with Africa? What’s wrong with Black people?<sup>87</sup> Why are Black people always rioting

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85. Achiume, *Transformative Vision in Liberal Rights Jurisprudence on Racial Equality*, *supra* note 75, at 191–97.

86. *Id.* at 181.

87. Here, the matter is sometimes framed comparatively with respect to Asian Americans. The question then becomes: Why can’t Africans be more like Asian Americans—that is to say, be a model minority? Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226 (1995).



in their own communities?<sup>88</sup> Why are they always killing themselves?<sup>89</sup> Why are African nations always at war? Why are they so corrupt? Why are they so violent? Fundamentally, these questions are postcolonial, post slavery, and post Jim Crow—which is to say, racially modern—ways of rearticulating concerns about Black people’s fitness for citizenship and nonwhite nations’ fitness for sovereignty, to wit: Why can’t Black people properly manage the citizenship they have been given (by white people)<sup>90</sup> and why can’t nonwhite nations properly manage the sovereignty they have been given (by white nations)?

Against the background normality, legitimacy, and ubiquity of questions of the foregoing sort, it is no wonder that the interventionary table for both civil rights and international law is set largely with ideas about foreign aid, antidiscrimination, and “racial preferences,” rather than ideas about reparations, redistribution, unjust enrichment, and disgorgement.<sup>91</sup> As Ngūgĩ wa Thiong’o once put it,

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88. This issue often surfaces against the backdrop of social unrest that includes looting and property destruction in the context of mass mobilization against police violence. See, e.g., Jonathan Peterson & Hector Tobar, *South L.A. Burns and Grieves: Life Has Been Hard in the Neglected Area for Years. But Now, as Self-Inflicted Wounds Mount, Residents Fear for the Future*, L.A. TIMES (May 1, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-05-01-mn-1395-story.html> [<https://perma.cc/Y7T5-3YUG>]. This narrative continues today. See, e.g., Katherine Kersten, Opinion, *Racial Justice: The New Religion?*, STARTRIBUNE (July 24, 2020, 5:57 PM), <https://www.startribune.com/racial-justice-the-new-religion/571899352> [<https://perma.cc/UPB7-N8LU>] (accusing people of “torch[ing] whole neighborhoods” in response to the murder of George Floyd).
89. One sees versions of the foregoing claims manifested in debates about Black-on-Black crime. See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (critiquing the way Black-on-Black crime discourses are mobilized to discipline discussions about policing); Sascha-Dominick Dov Bachmann & Naa A. Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?*, 29 WASH. INT’L L.J. 247 (2020) (describing criticism that the ICC singles out African leaders).
90. It must be remembered that denials of citizenship to Black people rested on, among other arguments, that they could not manage the responsibilities and burdens of citizenship. See, e.g., *Bryan v. Walton*, 14 Ga. 185, 198–204 (1853) (describing that Black people had no capacity even when freed from enslavement and thus could not be citizens).
91. For a critique of the racial preference frame in antidiscrimination law, see Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in the Regents of the University of California v. Bakke Decision*, 6 RES. POL. & SOC’Y 133 (1999). See also Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008). Perhaps for the first time in United States history, the issue of reparations is being robustly discussed. A. Mechele Dickerson, *Designing Slavery Reparations: Lessons From Complex Litigation*, 98 TEX. L. REV. 1255 (2020); Brandon Hasbrouck, *White Saviors*, 77 WASH. & LEE L. REV. ONLINE 47, 57 (2020); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/6WBQ-2626>]; Peter Dixon, *U.S. Cities and States Are Discussing Reparations for Black Americans. Here’s What’s Key.*, WASH. POST (Aug. 24, 2020, 3:00 AM), <https://www.washingtonpost.com/politics/2020/08/24/us-cities-states-are-discussing-reparations-black-americans-heres-whats-key> [<https://perma.cc/S86P-HXFV>]; Rachel L.

writing in 1981, “African’s natural and human resources continue to develop Europe and America but Africa is made to feel grateful for aid.”<sup>92</sup> At the same time, this “aid,” and the overall sense that Black people and nonwhite nations are not pulling their citizenship and sovereignty weight, fuels domestic and global expressions of white anxiety, white exasperation, and white anger. None of these expressions are principally about what “these nations” and “these peoples” are doing to themselves. They are more fundamentally about the externalities of their conduct on white nations and white people.

Part of the way in which TWAIL and CRT scholars contest Moment IV is through structural accounts of domestic and global inequalities. That is to say, both groups of scholars have foregrounded—in materialist ways—not only the contemporary manifestation of the colonial and slavery/Jim Crow pasts, but also the particular ways in which current legal structures in constitutional law and international law continue to produce “proper” subjects for racial inequality and domination. Consider this point with respect to constitutional law first. In the context of determining the constitutional parameters of state punishment, the Supreme Court, in *McCleskey v. Kemp*,<sup>93</sup> made Black people the “proper” subjects of the death penalty by refusing to permit a robust showing of disparate impact to establish an equal protection challenge to the administration of that violent and morally bankrupt regime.<sup>94</sup> The Court’s unwillingness to act on the mountain of empirical evidence demonstrating that Black people are more “death eligible” than white people<sup>95</sup> legitimizes the idea that there is something natural and normal—

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Swarns, *Is Georgetown’s \$400,000-a-Year Plan to Aid Slave Descendants Enough?*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/us/georgetown-slavery-reparations.html> [https://perma.cc/6A6E-SGTD].

92. Ngũgĩ wa Thiong’o, *The Language of African Literature*, in *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 4, 28 (1986).

93. 481 U.S. 279 (1987).

94. For philosophical works articulating the immorality of the death penalty, see Albert Camus, *Reflections on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 175 (Justin O’Brien trans., Knopf 1966) (1964); LLOYD STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* (1998); STEPHEN NATHANSON, *AN EYE FOR AN EYE?: THE IMMORALITY OF PUNISHING BY DEATH* (2d ed., 2001); HUGO ADAM BEDAU, *KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA* (2004).

95. See Symposium, *Learning From Struggles*, 67 MERCER L. REV. 524, 529–44 (2016); Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95 (2018); Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006); Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178 (2007).

and again, one might add, “proper”—about the disproportionate rate at which the state kills African Americans.<sup>96</sup>

We would be remiss not to note that the Court’s approach in *McCleskey* built on a broader normative view in equal protection doctrine that discrimination is a function of conscious racial intentionality.<sup>97</sup> The Court’s legitimization of intent as the baseline against which equal protection claims are adjudicated creates a constitutional landscape on which the racially disparate positions in which Black people find themselves across multiple dimensions of social life (from access to housing,<sup>98</sup> education,<sup>99</sup> and employment<sup>100</sup> to exposure to police violence,<sup>101</sup> mass

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96. We are not saying, to be clear, that the state should be in the business of punishing people via death. We think the death penalty is an abhorrent state practice that should be abolished. Our focus here is about its racially disparate impact.
  97. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that even though a police department’s written test of “verbal skill” had a disparate impact on Black applicants, the test was neutral on its face and plaintiffs could not prove discriminatory intent or purpose; therefore, its use to screen applicants was constitutional). For two of the most trenchant critiques of the discriminatory intent standard, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); and Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).
  98. See Audrey G. McFarlane, *Race, Space and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Poverty Law*, 2011 WIS. L. REV. 855; Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140 (2019); Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319 (2013); Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313 (2015).
  99. See LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397 (2019); Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131 (2020); ACCOUNTABILITY AND OPPORTUNITY IN HIGHER EDUCATION: THE CIVIL RIGHTS DIMENSION (Gary Orfield & Nicholas Hillman eds., 2018); THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION (Erica Frankenberg & Gary Orfield eds., 2012); LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS (Erica Frankenberg & Gary Orfield eds., 2007).
  100. Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017); Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155 (2015). See also David S. Pedulla & Devah Pager, *Race and Networks in the Job Search Process*, 84 AM. SOC. REV. 983 (2019); Fabiana Silva, *The Strength of Whites’ Ties: How Employers Reward the Referrals of Black and White Jobseekers*, 97 SOC. FORCES 741 (2018); Amon Emeka, *Where Race Matters Most: Measuring the Strength of Association Between Race and Unemployment Across the 50 United States*, 136 SOC. INDICATORS RES. 557 (2018).
  101. See Carbado, *supra* note 89; Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951 (2020); Amanda Geller, Phillip Atiba Goff, Tracey Lloyd, Amelia Haviland, Dean Obermark & Jack Glaser, *Measuring Racial Disparities in Police Use of Force: Methods Matter*, J. QUANTITATIVE CRIMINOLOGY (2020); PHILLIP ATIBA GOFF, TRACEY LLOYD, AMANDA GELLER, STEVEN RAPHAEL & JACK GLASER, CENTER FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE (2016),

incarceration,<sup>102</sup> and more recently COVID-19<sup>103</sup>) are—under constitutional law—existential givens, forms of inequality that are “properly” constitutive of Black life.

A final example of the “properizing” of Black subordination that bears mention is manifested in affirmative action jurisprudence. There, the Supreme Court has rendered Black people the “proper subjects” of societal discrimination in the sense of ruling that societal discrimination is too “amorphous” a concept to function as a compelling justification for affirmative action.<sup>104</sup> There are other examples to which we could refer, including the heightened pleading standards in civil procedure (which make it difficult for plaintiffs to bring racial discrimination claims<sup>105</sup>) and the legalization of pretextual policing under Fourth Amendment

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[https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) [<https://perma.cc/FE55-5N76>]; L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2014).

102. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

103. See The COVID Racial Data Tracker, <https://covidtracking.com/race> [<https://perma.cc/JR9F-YRLK>], a collaboration between The Atlantic’s COVID Tracking Project and the Boston University Center for Antiracist Research, and also The Centers for Disease Control and Prevention, *COVID-19 Hospitalization and Death by Race/Ethnicity*, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> [<https://perma.cc/6FPV-PAJG>] (last updated Nov. 30, 2020). See also Harmeet Kaur & Naomi Thomas, *Black, Hispanic and Native American Workers and Their Families Face Greater Coronavirus Exposure Risks, Report Finds*, CNN (Dec. 3, 2020, 2:38PM), <https://www.cnn.com/2020/12/03/health/black-hispanic-native-american-workers-covid-risks-trnd/index.html> [<https://perma.cc/VN6W-7HB4>]; Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist—and in Some Cases Worsen*, NPR, (Sept. 23, 2020, 1:01 PM), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> [<https://perma.cc/QXQ4-JE7D>]; Roni Caryn Rabin, *Why the Coronavirus More Often Strikes Children of Color*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/01/health/coronavirus-children-minorities.html> [<https://perma.cc/7UJS-BHKJ>]; Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> [<https://perma.cc/ZFR3-6S2N>].

104. Justice Powell first articulated this view in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978), disapproving of the idea that the state has a legitimate interest in combating “societal discrimination,” and characterizing it as “an amorphous concept of injury that may be ageless in its reach into the past.” That idea remains a feature of contemporary affirmative action jurisprudence. See *Gutter v. Bollinger*, 539 U.S. 306, 306–8, 325 (2003) (summarizing *Bakke* and concluding that diversity may function as a “compelling state interest” for affirmative action).

105. See Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187 (2013).

law (which makes it easy for police officers to racially target African Americans<sup>106</sup>). The point is that the cramped space Black people have (and historically have had) within which to mobilize law and contest the racially subordinating features of their lives helps to “properize” those features as natural (and naturally occurring) incidents in the lives of Black people. It is precisely against the backdrop of this “properizing” of Black subalterneity that the expression “Black Lives Matter” becomes a necessary articulation.

TWAIL scholars, too, have surfaced how international law and its implementations have racialized the Third World and its peoples as “proper” subjects of First World receivership.<sup>107</sup> For example, Makau Mutua contends that, as a historical matter, international law routinely depicted the Third World as culturally aberrant savages—corrupt, despotic, and violent<sup>108</sup>—and the populations of those states as “powerless, helpless innocent[s] whose naturalist attributes have been negated by the primitive and offensive actions of the [Third World] state. . . .”<sup>109</sup> According to Mutua, these supposedly neutral and objective representations of Third World nations and their peoples helped to legitimize supposedly universal and objective international human rights norms and principles that were fundamentally Eurocentric in their substance and origins, and imperial in their ambitions. Which is to say, these norms and principles functioned not only to reform Third World nations into European likeness,<sup>110</sup> but also to create a broader discursive economy that licensed colonial domination in part by naturalizing a “white man’s burden” imperative. Driving this imperative was a narrative in which First World states, their international institutions, and their nongovernmental actors and entities became global saviors with “super powers” to vindicate, civilize, modernize, and discipline (through violence if necessary) the savagery and victimhood ostensibly characterizing the Third World.<sup>111</sup> The ongoing global market for and traction of these discursive renderings—propagated and backed up by international law—continues to make

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106. Carbado, *From Stopping Black People*, *supra* note 54.

107. In this Issue, for example, Aslı Bâli and Tendayi Achiume describe how the First World intervention that contributed to Libya’s decimation relied in part and in different ways on racialization of Libyan territory and its inhabitants, rendering this intervention as a humanitarian pursuit, and belying a host of imperial interests. E. Tendayi Achiume & Aslı Bâli, *Race and Empire: Legal Theory Within, Through and Across National Borders*, 67 UCLA L. REV. 1386 (2021).

108. Makau Mutua, *Savages, Victims, Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 202–03, 219–27 (2001).

109. *Id.* at 203; *see also id.* at 227–33.

110. *Id.* at 209–19.

111. *Id.* at 204, 233–42.

Third World nations and their peoples vulnerable to First World interventions and global control.<sup>112</sup>

As an example of the relationship between First World representations of and interventions into the Third World, Katherine Fallah and Ntina Tzouvala's contributions to this Symposium Issue focuses on a particular racialized deployment of the United Nations Security Council Resolutions.<sup>113</sup> Those resolutions are the primary legal means through which international law authorizes foreign military interventions. Fallah and Tzouvala deftly show how the UN Security Council resolution justifying the First World-led NATO military intervention in Libya in 2011 adopted and relied upon a racialized narrative of the conflict that casted African mercenaries who supported the Qaddafi regime as especially brutal and sexually violent. This racialized narrative created a hierarchy in the context of the international law of mercenarism that positioned African/Black mercenaries as greater threats to international security than West-based/white mercenaries.

The circulation of those anti-Black tropes helped to produce a First World-into-the-Third World externality. More specifically, the particular problems of dangerousness and violence African/Black mercenaries were constructed to pose laid the foundation for the idea that because Black Libyans and African migrants in Libya were particularly vulnerable to violence and displacement,<sup>114</sup> they were particularly in need of humanitarian intervention, including in the form of First World receivership. Viewed in that way, Fallah and Tzouvala's case study of Libya is an example of how international law internalizes colonial-era racialized ideas about victims, perpetrators, and saviors to shore up a global stage on which "savages and victims are generally nonwhite and non-Western, while the saviors are white."<sup>115</sup> This (savage) perpetrator/(uncivilized) victim positionality in which Third World nations find themselves continues to structuralize their availability for various forms of First World entanglements, including military intervention.

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112. *Id.* at 235 (observing that "[h]uman rights law continues this tradition of universalizing Eurocentric norms by intervening in Third World cultures and societies to save them from the traditions and beliefs that it frames as permitting or promoting despotism and disrespect for human rights itself.").

113. Katherine Fallah & Ntina Tzouvala, *Deploying Race, Employing Force: 'African Mercenaries' and the 2011 NATO Intervention in Libya*, 67 UCLA L. REV. 1580 (2021).

114. *Id.*

115. Mutua, *supra* note 108, at 207.

### E. Moment V: Quasi and Second-Class Scholarship

In Moment V, attempts to articulate versions of Moments I through IV within the disciplinary context of international law and constitutional law raise an epistemological legitimacy problem. Here, both TWAIL and CRT engender push back, contestations, and refusals that shore up a hegemonic basis of knowledge within which CRT and TWAIL become “quasi scholarship” or “second class” scholarship. As a consequence of this positioning, CRT and TWAIL are always already under pressure to signal and supply intellectual credibility and to assimilate into, dare we say, the “civilized” conventions of constitutional law and international law, respectively. The perception that both literatures exist outside the boundaries of the presumptively neutral scholarly conventions of constitutional law and international law has engendered either criticism or willful disattention and nonengagement.<sup>116</sup> The classic articulation of these points within CRT is Richard Delgado’s still relevant and compelling *The Imperial Scholar*, a title that speaks volumes to the ways in which white male scholars have dominated the epistemological terrain of constitutional law.<sup>117</sup> With respect to TWAIL, James Gathii’s contribution to this Symposium Issue marks a different but related kind of intellectual imperialism, the marginalization of critical international law perspectives, such as TWAIL, within the *American Journal of International Law*, the flagship journal of the field in the United States.<sup>118</sup>

Crucially, then, the disciplinary problem CRT and TWAIL scholars confront is not just that race and racial inequality are marginalized in or read out of the juridical fields of constitutional and international law, it is also that CRT and TWAIL scholarship that contests this intellectual arrangement are falsifiable as

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116. We limit ourselves to a few examples. First, Jeff Rosen attacks CRT scholars for failing to attain objectivity, before going on to describe CRT as akin to “play[ing] the race card” or engaging in “open race war.” Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC (Dec. 8, 1996), <https://newrepublic.com/article/74070/the-bloods-and-the-crits> [<https://perma.cc/2CEU-NZEM>]. Second, Daniel Farber and Suzanna Sherry wrote a book directed largely (though not entirely) at CRT in which they framed particular strands of CRT as “beyond all reason.” DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997). In a review of the book, Richard Posner suggests CRT has a “lunatic core” that is rejecting objective reality and rational inquiry. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 40 (book review). Finally, Randall Kennedy argues that CRT scholars are “blinded by the limitations of their own racially-defined experience or prejudiced by the imperatives of their own racial interests.” Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1747 (1989).

117. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

118. Gathii, *supra* note 5 at 1621 n.39.

modalities of intellectual production and therefore read out of the scholarly domains of international law and constitutional law.

#### F. Moment VI: Reconstruction and Transformation

Moment VI speaks to CRT's and TWAIL's reconstructive interventions. In neither CRT nor TWAIL is this interventionary sensibility predicated on the view that law, standing alone, can produce a racially emancipatory world. The point is rather that law as a site of power should not be ceded but rather mobilized progressively to move the social justice needle.<sup>119</sup> That both CRT and TWAIL conceive of law in this way is not to say that either movement acquiesces in regnant notions of exceptionalism. On the contrary, CRT and TWAIL's reconstructive moves are effectuated in opposition to, rather than alignment with, claims about U.S. exceptionalism, or liberal democratic exceptionalism more broadly.

The reconstructive dimensions of CRT were written into the earliest articulations of the intellectual movement. Indeed, in one of the first CRT anthologies, Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas identify reconstruction as one of two of CRT's minimalist commitments:

The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as “the rule of law” and “equal protection.” The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it.<sup>120</sup>

CRT's investment in reconstruction (and not just deconstruction) engendered a vigorous debate between CRT and one of its intellectual allies: Critical Legal Studies (CLS), a largely white and male group of progressive

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119. A recent paper has argued that CRT scholars have insufficiently attended to social movements in their work. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. (forthcoming 2021) [hereinafter *Movement Law*]. While reasonable minds can differ on the treatment and boundary delineation of CRT in *Movement Law*, it is indeed fair to say that more of the CRT literature should take up various dimensions of social movements—and not just as a basis of study, but also, as Akbar et al. suggest, as a site for engagement, collaboration, and knowledge production. See *id.* Our footnote to this footnote is the observation that scholars in allied fields, particularly law and society, have for some time rendered social movements an important subject of scholarly engagement. Our colleague, Scott Cummings, has been an important voice in this endeavor. See generally Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1556 (2017); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645; Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 360–63 (2018); Scott L. Cummings, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES (2021).

120. Crenshaw et al., *supra* note 1, at xiii, xiii.



intellectuals who had an insurgent presence in American law schools in the 1980s.<sup>121</sup> “CRT was aligned with the radicalizing dimensions of CLS, particularly the movement’s trenchant critique of the legal ideology of law’s neutrality, and its conceptualization of law as constitutive, and not simply reflective, of political and social relations.”<sup>122</sup> As for the misalignment, CRT scholars differed with CLS scholars on the question of rights. According to CLS scholars, rights were not only “alienating” and “indeterminate,” they were also a vehicle through which to effectuate social control.<sup>123</sup>

Critical Race Theorists did not disagree with the account of rights CLS scholars advanced. Instead, they foregrounded other crucial entailments of rights, especially for racially subordinated groups. In particular, Critical Race Theorists maintained that, with respect to groups that historically have been denied access to rights, the availability of rights can produce a sense of both political identity and political possibility (“I can mobilize rights to effectuate *positive social change*”). Patricia Williams’s engagement with rights evidences this CRT sensibility. According to Williams:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations.<sup>124</sup>

More recently, Dorothy Roberts has articulated a version of this point in the context of theorizing the possibility for constitutional law to reflect an abolitionist orientation. According to Roberts, “The tension between recognizing the relentless anti[B]lack violence of constitutional doctrine, on one hand, and demanding the legal recognition of [B]lack people’s freedom and equal

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121. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1288–89 (2011); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1519, 1541 (1991).

122. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2212 (2019); see also Crenshaw, *supra* note 121, at 1288–89, 1294.

123. José A. Bracamonte, Foreword: *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 298 (1987).

124. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 163 (1991).

citizenship, on the other, animates” her interventions into juridical arenas.<sup>125</sup> Roberts goes on to note that “Despite my disgust with the perpetual defense of oppression in the name of constitutional principles, I am inspired by the possibility of an abolition constitutionalism emerging from the struggle to demolish prisons and create a society where they are obsolete.”<sup>126</sup>

Part of what informs CRT’s view that people of color should not cede rights as a domain of power is the claim that law is a site for the production, instantiation, and legitimation of racial hierarchy.<sup>127</sup> Precisely because law plays a role in structuring racial subordination, Critical Race Theorists see in law the possibility of structuring at least some measure of social change.<sup>128</sup> Consistent with that view, CRT scholars have staged numerous doctrinal interventions, including, but not limited to, the following ten examples:

1. Contestations of the intentional model of discrimination that governs equal protection law in favor of disparate impact<sup>129</sup> or other approaches.<sup>130</sup>
2. Arguments against the application of strict scrutiny to racial remediation and insisting instead that intermediate scrutiny or rational basis should apply.<sup>131</sup>

125. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 10 (2019).

126. *Id.*

127. See Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1190 (2004); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333 (2006); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1217 (2002); Daria Roithmayr, *Introduction to Critical Race Theory in Educational Research and Praxis*, in RACE IS, RACE ISN’T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION 1 (Laurence Parker, Donna Deyhle & Sofia Villenas eds., 1998) (providing background on CRT and its engagement with the law). See generally Richard Delgado & Jean Stefancic, *CRITICAL RACE THEORY: AN INTRODUCTION* (2017) (providing a primer on CRT).

128. For two of the most powerful articulations of how CRT straddles the line between deconstruction and reconstruction, see Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994) and Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

129. See Angela Onwuachi-Willig, *From Loving v. Virginia to Washington v. Davis: The Erosion of the Supreme Court’s Equal Protection Intent Analysis*, 25 VA. J. SOC. POL’Y & L. 303, 308 (2018); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1143–46 (1997); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1155 (2010); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1828 (2012).

130. See Lawrence, *supra* note 12, at 355–81 (arguing for the “cultural meaning test”); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (proposing a “behavioral realist” approach); Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627 (2015).

131. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 51 (1991); Elise C. Boddie, *The Constitutionality of Racially Integrative Purpose*, 38 CARDOZO L. REV. 531,

3. Expansive conceptualization of diversity and robust defenses of the rationale beyond the “robust exchange of ideas.”<sup>132</sup>
4. Claims that defend affirmative action on terms other than diversity.<sup>133</sup>
5. Resistance to the conflation of desegregation efforts that began with *Brown v. Board of Education* with affirmative action case law.<sup>134</sup>
6. Arguments promoting the express consideration of race in constitutional criminal procedure cases, including Fourth Amendment jurisprudence, to account for the ways in which race interacts with every dimension of our criminal justice system.<sup>135</sup>
7. Interventions incorporating race into various articulations of the reasonable person standard across different bodies of law, including criminal law and criminal procedure.<sup>136</sup>

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540–41 (2016); Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 45 (2004); see Eric K. Yamamoto, Carly Minner, & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241 (2006); Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 611 (2004).

132. Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1149–57 (2013); Alfredo J. Artiles, Robert Rueda, Jesús José Salazar & Ignacio Higuera, *Within-Group Diversity in Minority Disproportionate Representation: English Language Learners in Urban School Districts*, 71 EXCEPTIONAL CHILDREN 283 (2005); Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 TUL. L. REV. 1941, 1951 (2004); Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463 (2012); John Hayakawa Török, *The Story of “Towards Asian American Jurisprudence” and Its Implications for Latinas/os in American Law Schools*, 13 BERKELEY LA RAZA L.J. 271, 299 (2002); Mario L. Barnes, *We Will Turn Back?: On Why Regents of the University of California v. Bakke Makes the Case for Adopting More Radically Race-Conscious Admissions Policies*, 52 U.C. DAVIS L. REV. 2265, 2283–84 (2019).
133. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1070 (2006); Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1613 (2000); Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1627 (2003); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 4 (1994); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 1001 (1996).
134. See, e.g., Lawrence, *supra* note 12, at 379 n.294; see also Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 816 (2004); Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1291 (2016) (providing distinct analyses of affirmative action and desegregation cases).
135. See *supra* note 54 (listing examples of these arguments).
136. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 454 (1996) (arguing race can be relevant to the objective standard of reasonableness in self-defense cases); Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 886 (2018); L. Song Richardson & Phillip Atiba Goff, *Self-Defense*

8. Proposals that courts adopt an intersectional approach to antidiscrimination claims that recognizes that people's vulnerability to discrimination might turn on more than one aspect of their identity.<sup>137</sup>
9. Repudiation of the same actor doctrine inference in Title VII law that creates a presumption that, for example, a person who hires an African American as an employee would not subsequently racially discriminate against that person in other contexts—for example, with respect to promotion.<sup>138</sup>
10. Expansions of the conceptualization of discrimination on the basis of race to include performative conceptions of race or the fact that people might experience discrimination “on the basis of racial orientation.”<sup>139</sup>

To repeat, none of the preceding interventions reflect the naivete that law, standing alone, is the antiracist solution to extant forms of racial inequality. Moreover, some of them are quite clearly more radical than others. We could, of course, assess whether any of the interventions we have described should count as “non-reformist reforms.”<sup>140</sup> But that question is beyond the scope of our project and should not elide the central claim we mean to advance here: namely, that the doctrinal reconstructions CRT scholars have proposed are (an admittedly limited)

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and the Suspicion Heuristic, 98 IOWA L. REV. 293, 319 (2012); Carbado, *From Stopping Black People*, *supra* note 54, at 140.

137. For the classic articulation of intersectionality, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. For a mobilization of the idea to equal protection doctrine, see Devon W. Carbado, and Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond “Either/Or” Approaches to Equal Protection*, YALE L.J. F. 108 (2019).
138. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1314.
139. Devon W. Carbado, *Discrimination on the Basis of Racial Orientation* (Mar. 10, 2013) (unpublished manuscript) (on file with author); *see also* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Onwuachi-Willig & Barnes, *supra* note 138, at 1317; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815 (2000); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); D. Wendy Greene, *Title VII: What’s Hair (And Other Race-Based Characteristics) Got to Do With It?*, 79 U. COLO. L. REV. 1355 (2008); D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333 (2013).
140. For an example of one legal scholar’s engagement with the idea of nonreformist reforms in the context of articulating a broader discussion of instantiating democratic power, see Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90 (2020).

window into an investment on the part of Critical Race Theorists to abolish, disrupt, or mitigate the various ways in which law effectuates and maintains racial inequality. From that vantage point, at least some of the reconstructive moves CRT scholars have made align with precisely what Dorothy Roberts suggests is a worthwhile antiracist project—to infuse law with an abolitionist sensibility<sup>141</sup> that includes (but is not limited to) the dismantling of *anti*-abolitionist doctrines, such as colorblindness and the intentional discrimination paradigm.<sup>142</sup>

As a further indication of the doctrinal reconstruction efforts to which CRT is being put, we reference as well two forthcoming texts on which one of us serves as a coeditor. The first, *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and Law*, figures rewritten (mostly Supreme Court) cases from a CRT perspective.<sup>143</sup> The second, *The Oxford Companion to Race and the Law*, comprises a series of essays that perform racial analyses of central law school courses, including every first-year course and a range of second-year courses, such as Tax, Corporations, Evidence, and Professional Responsibility.<sup>144</sup> Both of these texts are ways of navigating the tension between CRT's deconstructive sensibilities and its reconstructive investments.<sup>145</sup>

To be clear, CRT's interventions in the domain of rights do not exhaust the transformative work CRT scholars mobilize their scholarship to perform. The field of CRT is enormously diverse, with some scholarly expressions more squarely within the modalities of conventional legal argumentation than others.<sup>146</sup> Thus, in addition to doctrinal interventions reflected in the examples we outlined above, one also finds CRT scholarship whose interventions are staged in relation to social

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141. See Roberts, *Foreword: Abolition Constitutionalism*, *supra* note 125.

142. *Id.* at 77–90.

143. CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND LAW (Capers et al., eds., forthcoming 2021).

144. THE OXFORD COMPANION TO RACE AND THE LAW (Carbado et al., eds., forthcoming 2021). See also DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS (3d ed. 2014). For other engagements with CRT, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 1; DELGADO & STEFANCIC, *supra* note 1; and KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2018).

145. For one of the most powerful articulations of this tension, see Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994).

146. Some scholars have referred to the diversity of ideas within CRT as an indication that the field has adopted a “big tent” approach. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1363 (2002).

movements<sup>147</sup> and in the register of abolitionism.<sup>148</sup> Our broader point is that the CRT critique of law is not a call for CRT scholars to abandon law as a reconstructive project.

TWAIL has been similarly reconstructive in its general orientation. While the critique of international law is a fundamental part of TWAIL's intellectual identity, the theory also reflects a commitment to rearticulate international law to achieve less subordinating and more liberatory ends. Here, too, one could assess whether TWAIL's efforts in that regard should count as nonreformist reforms and, again, that project is beyond the scope of our engagement. The point we are emphasizing, to borrow from Luis Eslava and Sundhya Pahuja, is that "[r]esistance and reform . . . come together in TWAIL to form a single process of destabilisation and renewal of international law's history and operation. Rather than replacement, TWAIL scholarship is more interested in overcoming international law's problems while still remaining committed to the idea of an international normative regime. . . ."<sup>149</sup> For many within TWAIL, international law retains transformative potential, and law remains a means of constraining power, notwithstanding the indeterminacy that inheres in international law and in law generally.<sup>150</sup> Thus, even while TWAIL scholars remain determined to confront and critique the imperial and colonial nature of international law, they

147. See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (considering the project of radical social movements, specifically Black Lives Matter, seeking to transform the state). See also Akbar et al., *Movement Law*, *supra* note 119 (articulating a framework through which scholars can engage with social movements in their antiracist practices, including knowledge production).

148. Roberts, *Foreword: Abolition Constitutionalism*, *supra* note 125 (arguing prison industrial complex abolition is the only path to liberation); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1447 (2016).

149. Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 VERFASSUNG UND RECHT IN ÜBERSEE [VRU] 195, 204 (2012); see also Anghie, *supra* note 27, at 891 (describing that the study of history requires a critical engagement with the "existing histories of international law" and "telling . . . alternative histories. . ."). But see John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27 CANADIAN J.L. AND JURIS. 383 (2014) (arguing that "TWAIL unwittingly operates under the sway of a European capitalist orientation that produces some of the very problems TWAIL seeks to contest," in ways that constrain its emancipatory potential).

150. See Anghie & Chimni, *supra* note 24, at 101. See also James Thuo Gathii, *The Promise of International Law: A Third World View*, Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law (June 25, 2020) at 20 (citing the critical but reconstructive TWAIL scholarship of Alejandro Alvarez, R.P. Anand, Tiejia Wang, Onuma Yasuki, George Abi-Saab, Mohammed Bedjaoui, Taslim O. Elias, Buphinder Chimni, Upendra Baxi, Christopher Weeramantry and Kamal Hosain).

view the abandonment of international law as a site of struggle, and potential emancipatory gains as a luxury that many Third World peoples cannot afford.<sup>151</sup>

In their respective reconstructive projects, both CRT and TWAIL have had to attend to various forms of exceptionalism that serve to reify racial subordination within and through law. With respect to U.S. law, Aziz Rana describes the narrative of U.S. exceptionalism this way:

[F]rom the founding the United States has always been committed to principles of freedom and equality . . . [that] the US is an exceptional nation because unlike Europe it's a place where feudalism never took hold. To the extent that the United States has had problems of native expropriation or African enslavement, these are really marginal to the basic identity of the country. We can think of the country as, fundamentally, if incompletely, liberal and on a steady path to fulfilling its essential project.<sup>152</sup>

Under U.S. exceptionalism, the very conditions of possibility for the establishment of the United States as a particular kind of racialized democracy—one that normalized and constitutionalized both slavery and the appropriation of Native lands—are at best footnotes. Those footnotes are subordinated to an easily falsifiable but nonetheless deeply entrenched text that posits the United States was always already a democracy that presupposed the availability of freedom and justice for all. The marginalization of the racial violence on which U.S. history rests, and the denial of contemporary forms of racial inequality, help to explain why the New York Times 1619 Project has engendered so much controversy and contestation.<sup>153</sup>

151. See, e.g., Anghie & Chimni, *supra* note 24, at 101.

152. Aziz Rana, *Keynote Speech, UCLA Law Review Symposium 2020: Law and Empire in the American Century*, 67 UCLA L. REV. 1432 (2021).

153. The 1619 Project, which “reframe[s] the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative,” is one of the most ambitious contemporary pieces of journalism. *The 1619 Project*, N.Y. TIMES MAG. (Sept. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/EYN2-7CM5>]. It garnered criticism from a variety of sources. Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093> [<https://perma.cc/95C7-6HZN>]; Bianca Quilantan, *Obama Education Chief: Trump Sounding ‘Dog Whistle’ in Bashing 1619 Project*, POLITICO (Sept. 24, 2020, 2:54 PM), <https://www.politico.com/news/2020/09/24/trump-dog-whistle-1619-421238> [<https://perma.cc/PS2R-F4VU>]. Despite the pushback, the *New York Times* stood by the reporting and Nikole Hannah-Jones won a Pulitzer for the work. Jake Silverstein, Letter to the Editor, *We Respond to the Historians Who Critiqued the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html> [<https://perma.cc/PJ5Y-D2NS>]; Jeff Barrus, *Nikole Hannah-Jones Wins Pulitzer Prize for 1619 Project*, PULITZER CTR. (May 4, 2020),

Crucially, CRT's advocacy for legal change does not downplay the historical racialized features of U.S. democracy, or what one might call the democratization of racism. It is precisely because of the normal and constitutional ways in which racism in the United States historically functioned as an everyday democratic practice in which judges and legislatures, school educators and administrators, bank officials and neighborhood associations, and public and private employers routinely engaged that leads CRT to recognize that, across different historical periods in the United States—and certainly in the context of slavery and Jim Crow—racism functioned as an unexceptional feature of American society whose contemporary impacts transcend intentional forms of discrimination.

Exceptionalism is an international phenomenon as well, and a TWAIL analysis reveals that exceptionalism at the international stage can mirror exceptionalism on the U.S. domestic stage to similar effect, in that U.S. exceptionalism—as one front of liberal democratic exceptionalism—can serve to reify racial subordination through international human rights mechanisms.<sup>154</sup> A recent example is illustrative.

Following the murder of George Floyd and the transnational racial justice uprising that followed, a coalition of over 600 movement and NGO human rights activists mounted a campaign for a special session of the UN's primary human rights body (the UN Human Rights Council) to address the situation in the United States.<sup>155</sup> Among other demands, they requested that such a session authorize an independent international commission of inquiry to investigate the ongoing human rights abuses wrought by systemic, anti-Black racism.<sup>156</sup> Following this

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<https://pulitzercenter.org/blog/nikole-hannah-jones-wins-pulitzer-prize-1619-project> [https://perma.cc/2NM8-P3W7].

154. See, e.g., E. Tendayi Achiume, *Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate*, EJIL: TALK (Dec. 15, 2020), <https://www.ejiltalk.org/black-lives-matter-and-the-un-human-rights-system-reflections-on-the-human-rights-council-urgent-debate> [https://perma.cc/7ZL8-GUFM].

155. Coalition Letter—Request for U.N. Independent Inquiry into Escalating Situation of Police Violence and Repression of Protests in the United States, ACLU (June 8, 2020), <https://www.aclu.org/letter/coalition-letter-request-un-independent-inquiry-escalating-situation-police-violence-and?redirect=letter/coalition-letter-request-un-investigation-escalating-situation-police-violence-and-repression> [https://perma.cc/D4H3-SYSB].

156. Independent Experts within the UN human rights system also called for the establishment of such a commission. See *Statement From the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Working Group of Experts on People of African Descent*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25969&LangID=E> [https://perma.cc/3CH5-VGPX]. For the rationale underpinning the request for the commission of inquiry, see E. Tendayi Achiume, *The UN Should Establish a Commission of Inquiry on Systemic Racism and Law Enforcement in the United States*, JUST SECURITY (June 16, 2020) <https://www.justsecurity.org/70811/the-un-human-rights-council-should->



and other developments, the Africa Group—the Third World regional formation comprising African nations on the UN Human Rights Council—drove a process that ultimately resulted in precisely such an unprecedented session of the Council: an urgent debate on systemic anti-Black racism in U.S. law enforcement.<sup>157</sup>

During the session, however, the initial proposal for an independent international commission of inquiry for the United States was ultimately defeated, in part as a result of naked, behind-the-scenes geopolitical bullying of Third World nation states by their First World counterparts.<sup>158</sup> But this was only one tool in the arsenal that killed the possibility of an international legal mechanism to help tackle racism in the United States. The official justifications articulated by First World nation states and their allies during the debates on the resolution to oppose the commission plainly relied on U.S. exceptionalism specifically,<sup>159</sup> and liberal democratic exceptionalism generally. This exceptionalism in effect shielded systemic, anti-Black racism from the scrutiny of the international human rights system. U.S. opposition to international human rights accountability was articulated in precisely the terms of Aziz Rana's description above. In his official statement, the U.S. Secretary of State asserted:

Americans work through difficult societal problems openly, knowing their freedoms are protected by the Constitution and a strong rule of law. We are serious about holding individuals and institutions accountable, and our democracy allows us to do so. . . . If the Council were honest, it would recognize the strengths of American democracy and urge authoritarian regimes around the world to model American democracy and to hold their nations to the same high standards of

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establish-a-commission-of-inquiry-on-systemic-racism-and-law-enforcement-in-the-united-states [https://perma.cc/W9B3-7U6C].

157. The debate was also intended to address the excessive use of force against and repression of peaceful protestors during the racial justice uprisings. It was unprecedented in that it was the first in the history of the Human Rights Council to focus on human rights violations within the territory of a liberal democratic hegemon, and also the first to center anti-Black racism.
158. Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council*, EJIL: TALK (June 26, 2020), <https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council> [https://perma.cc/N9ZK-SN9J]. Independent experts within the UN system, including one of us, issued a statement denouncing this geopolitical bullying. Ahmed Reid, Dominique Day, Sabelo Gumede, Michal Balcerzak, Ricardo A. Sunga III & E. Tendayi Achiume, *Statement on the Human Rights Council Urgent Debate Resolution*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R (June 19, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25977&LangID=E> [https://perma.cc/2S2G-NFSP].
159. Sejal Parmar remarks on different approaches within the session that shielded the United States from accountability through U.S. exceptionalism. Parmar, *supra* note 158.

accountability and transparency that we Americans apply to ourselves.<sup>160</sup>

Australia, among others, supported the U.S. position noting that “[t]he United States is an open, liberal democracy, governed by the rule of law. . . . Open and transparent democracies are well-placed to tackle such issues.”<sup>161</sup> Such liberal democracies then, are not the appropriate subjects of international human rights interventions, which, as Makau Mutua would likely remind us, are reserved for savage, Third World nation states. As one of us has pointed out elsewhere, this exceptionalism flies in the face of the very reality that triggered the special session in the first place: the anti-Black racism of U.S. law enforcement as a *systemic* feature of U.S. liberal democracy, and which its liberal democratic institutions have proved incapable of redressing.<sup>162</sup> Here we see how narratives of U.S. and liberal democratic exceptionalism dissipate the possibility of international human rights intervention regularly deployed in the Third World, with the effect of shielding the systemic operation of anti-Black racism within liberal democratic society.

### CONCLUSION

Our aim in this Article is decidedly limited: to articulate parallel developments in CRT and TWAIL. As we stated in the introduction and want to repeat here, we do not purport to have mapped all the ways in which the interventions performed by CRT scholars track similar interventions in TWAIL (or vice versa). There are other “moments” in the story we have told that we invite other scholars to describe.

We should also say that we view our Article, and the articles in this Symposium Issue more generally, as a predicate for a disciplinary turn in both CRT and TWAIL. Which is to say, notwithstanding the parallel developments we have described, it remains true that, by and large, as modalities of scholarly production, CRT and TWAIL exist in separate epistemic universes with far too few moments of cross fertilization. Our hope is that by demonstrating that both projects are performing similar kinds of intellectual and normative work against a backdrop of similar kinds of hurdles and challenges, scholars in both fields will more intentionally and robustly engage each other’s work.

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160. Michael R. Pompeo, *On the Hypocrisy of the UN Human Rights Council* (June 20, 2020) <https://www.state.gov/on-the-hypocrisy-of-un-human-rights-council> [<https://perma.cc/GLT9-2DT2>].

161. Lawrence Hill-Cawthorne, ‘*Racism Will Not Pass*’, EJIL: TALK! (July 20, 2020), <https://www.ejiltalk.org/racism-will-not-pass> [<https://perma.cc/K6LJ-LYLP>] (citing Australian delegate).

162. See, e.g., Achiume, *supra* note 154.