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## Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory

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# TALES OF COLOR AND COLONIALISM: RACIAL REALISM AND SETTLER COLONIAL THEORY

*Natsu Taylor Saito*<sup>A</sup>

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<sup>A</sup> Natsu Taylor Saito, Professor of Law, Georgia State University. Some of the themes of this article were presented at a 2013 lecture sponsored by UCLA’s Asian American Studies Center; at the 2014 “Re-Envisioning Race in a ‘Post-Racial’ Era: New Approaches in Critical Race Theory,” conference at Yale Law School; and at UCLA Law School’s 2014 Critical Race Studies Symposium, “Whiteness as Property: A Twenty-Year Appraisal.” They are developed in more detail in my book *SETTLER COLONIALISM AND RACE IN AMERICA* (forthcoming, NYU Press). I am indebted to the work of many scholars, including: Antony Anghie, the late Derrick A. Bell, Jr., Devon Carbado, Richard Delgado, Neil Gotanda, Cheryl I. Harris, Y.N. Kly, Tayyab Mahmud, Henry A. Richardson III, Nikhil Pal Singh, Linda Tuhivai Smith, Sharon H. Venne, Robert A. Williams, Jr. and Michael Yellow Bird. Mukungu Akinyela, Keith Camacho, Harlon Dalton, Anthony Farley, Moana Jackson, Akilah Kinnison, Jed Kinnison, Akinyele Umoja, and, especially, Zahyr Lauren Brown and Andrea Curcio provided much-needed feedback. Special thanks go to Kathleen Cleaver and Ward Churchill for discussions of colonialism spanning many decades. Thanks also to Pam Brannon, librarian extraordinaire, and my research assistant Omenka Uchendu; to the Georgia State University College of Law for research support; and to the editors of this law review. This piece is dedicated to Derrick Bell, whose principled life and work inspired a generation of critical race scholars and activists.

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#### ABSTRACT

More than a half-century after the civil rights era, people of color in the United States remain disproportionately impoverished and incarcerated, excluded and vulnerable. Legal remedies rooted in the Constitution’s guarantee of equal protection remain elusive. This article argues that the “racial realism” advocated by the late Professor Derrick Bell compels us to look critically at the purposes served by racial hierarchy. By stepping outside the master narrative’s depiction of the United States as a “nation of immigrants” with opportunity for all, we can recognize it as a settler state, much like Canada, Australia, and New Zealand. It could not exist without the occupation of Indigenous lands, and those lands could not be rendered profitable without imported labor. Employing settler colonial theory, this article identifies some of the strategies of elimination and/or subordination that have been—and continue to be—used to subjugate Indigenous peoples, Afrodescendants, and migrants of color in order to further settler state goals and maintain a racialized status quo. It suggests that further analysis of these strategies will help us find common ground in the diverse experiences of those deemed Other within the United States, and that exercising our internationally recognized right to self-determination—a primary tool of decolonization—may prove more effective than formal equality in dismantling structural racism.

## INTRODUCTION

*How do we rectify a system that so brilliantly serves its intended purpose?*

—Dorothy E. Roberts<sup>1</sup>

Reflecting on the legacy of the civil rights movement, the late law professor Derrick A. Bell Jr., said in 1992 that “[a]ll too many of the black people we sought to lift through law from a subordinate status to equal opportunity, are more deeply mired in poverty and despair than they were during the ‘Separate but Equal’ era.”<sup>2</sup> He observed that the successful elimination of formal, visible, racial barriers encourages White society to dismiss racism as a historical anomaly while leaving Black Americans in “anguish over whether race or individual failing” accounts for their continued exclusion.<sup>3</sup> “Either conclusion,” he noted, “breeds frustration and eventually despair.”<sup>4</sup> Professor Bell’s starkly worded conclusion—one he claimed “many will wish to deny, but none can refute”<sup>5</sup>—was that “[b]lack people will never gain full equality in this country.”<sup>6</sup>

More than twenty years later, and a half-century after some of the most celebrated victories of the civil rights movement,<sup>7</sup> American

1. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 265 (2007).

2. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 372 (1992); see also Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER RACE & JUST. 47, 54-55 (2012) (noting that Black youth raised in the post-civil rights era face conditions worse than those contested during that era).

3. Bell, *supra* note 2, at 374. Other than in direct quotations, I capitalize the term “Black” because, as Kimberlé Crenshaw observes, “Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Although “indigenous” is a descriptor that applies to a relationship peoples have to their lands, rather than a “racial” or “ethnic” group as such, see *infra* note 24, I have capitalized it when it is used to reference a collective identity. I capitalize “White” where it refers to those of (purportedly) exclusively European descent, because the privileges attending “Whiteness” have led those who so identify to regard themselves as having a particular “group” status in American society. See *infra* note 22. While an analysis of Whiteness is beyond the scope of this article, it must be noted that certain subgroups of the White population have been subordinated in significant ways. See, e.g., COLONIALISM IN MODERN AMERICA: THE APPALACHIAN CASE (Helen Matthews Lewis et al., eds., 1978).

4. Bell, *supra* note 2, at 374.

5. *Id.* at 373.

6. *Id.*

7. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding segregated public schools to be inherently unequal); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, codified at 42 U.S.C. §§ 2000d-2000d-7 (2006); Voting Rights Act of 1965, Pub. L. No. 89-

society continues to be divided by what W.E.B. Du Bois famously described as “the problem of the color-line.”<sup>8</sup> The wishful thinking of those who proclaim this to be a “postracial” era<sup>9</sup> is belied by the persistence of starkly racialized disparities in health, education, income, and incarceration rates, and the harsh realities, material and psychological, of life in impoverished communities of color.<sup>10</sup> There is no social consensus that it is a crime for vigilantes or police officers to kill unarmed Black youth walking down the street just a few blocks from their homes.<sup>11</sup> Simultaneously, young people of color, especially young men, fill the prisons while remaining conspicuously absent in institutions of higher education.<sup>12</sup>

Much of the energy generated by the social movements of the mid-1950s to early 1970s has dissipated—or, perhaps more accurately, been crushed—along with hopes of realizing both formal equality and community empowerment.<sup>13</sup> Legal efforts to remedy racial injustices have, for the most part, been framed in terms of the constitutional guarantee of equal protection, but the successes we have had in achieving formal equality have had little discernible impact on the disparities

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110, 79 Stat. 437, codified at 42 U.S.C. § 1971 (2006); Fair Housing Act of 1968 [Title VIII of the Civil Rights Act of 1968], Pub. L. No. 90-284, 82 Stat. 73, codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1988).

8. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 1 (Cosimo Inc., 2007) (1903). The term “American” is used throughout this essay with reference to the United States. It is an inaccurate term, as the United States is but one of many states in the Americas, but I have been unable to find a suitable alternative.

9. “Post-racialism” references the perspective that “racial discrimination is rare and aberrant behavior as evidenced by America’s and Americans’ pronounced racial progress.” Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010); see also john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 788-91 (2009). See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (providing a theoretical and historical critique of post-racial ideology).

10. See *infra* notes 54-66 and accompanying text. The term “racialization” is used to encompass the dynamic “set of practices, cultural norms, and institutional arrangements that are both reflective of and simultaneously help to create and maintain racialized outcomes in society.” powell, *supra* note 9, at 785.

11. See, e.g., Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 963-64 (discussing debate over the initial failure to charge George Zimmerman for the shooting death of 17-year-old Trayvon Martin); Julie Bosman & Monica Davey, *Ferguson Waits Uneasily for Grand Jury’s Decision*, N.Y. TIMES, Nov. 7, 2014, at A10, available at [http://www.nytimes.com/2014/11/08/us/ferguson-missouri.html?\\_r=0](http://www.nytimes.com/2014/11/08/us/ferguson-missouri.html?_r=0) (noting fears of civil unrest related to expectations that the officer who shot and killed 18-year-old Michael Brown would not face criminal or civil charges); see also Karlyn Bowman & Jennifer Marsico, *Black and White Opinions About the Justice System in America*, FORBES (Aug. 22, 2014), <http://www.forbes.com/sites/bowmanmarsico/2014/08/22/black-and-white-opinions-about-the-justice-system-in-america/> (noting the racial divide in attitudes about fairness in policing and criminal justice).

12. See *infra* notes 61, 66 and accompanying text.

13. See *infra* notes 36-39, 45-53, 71-78 and accompanying text.

that continue to define the material and psychological conditions of life for most people of color in the United States.<sup>14</sup> As Derrick Bell predicted, “[e]ven those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance,” a description that, based on our histories, applies equally to all communities of color in the United States.<sup>15</sup> According to Bell, only the acknowledgement of this reality, an approach he termed Racial Realism, “frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.”<sup>16</sup>

This article explores the liberatory potential of racial realism, a perspective that I believe “implicitly suggests a settler colonial framework for understanding legal reform,” as Indigenous scholar Andrea Smith has observed.<sup>17</sup> I begin from the premise that the forms of racialization we confront today cannot be separated from the roles and restrictions that have permeated social, cultural, political, economic, and legal institutions throughout U.S. history. In other words, while race-based distinctions may manifest in different ways over time, they are deeply institutionalized.<sup>18</sup> Effective change will require institutional restructuring which, in turn, requires an accurate analysis of the structural dynamics and relationships at issue. If, as Dorothy Roberts observes, the system “brilliantly serves its intended purposes,”<sup>19</sup> the challenge we face is to understand those intended purposes, and the role racialization plays in furthering them, so that we can effectively rectify the injustices it perpetuates.

Most remedial options, legal and political, are framed within a dominant narrative that describes the United States as a democracy in

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14. See *infra* notes 54-66 and accompanying text.

15. Bell, *supra* note 2, at 373.

16. *Id.* at 374.

17. Andrea Smith, *The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement*, 2(2) SETTLER COLONIAL STUDIES 69, 71 (2012), available at <http://www.tandfonline.com/doi/abs/10.1080/2201473X.2012.10648842#.VQDVNfnF98E> [hereinafter Smith, *The Moral Limits of the Law*].

18. As noted by the Minnesota Council on Crime and Justice, “the racial bias in the justice system lies primarily in institutional policies and practices, rather than individual racism. The result, however, is still the same.” COUNCIL ON CRIME AND JUSTICE, REDUCING RACIAL DISPARITY WHILE ENHANCING PUBLIC SAFETY: KEY FINDINGS AND RECOMMENDATIONS 14 (2006), available at <http://www.crimeandjustice.org/researchReports/RDI%20Final%20Report.pdf>; see also Jesse J. Norris, *State Efforts to Reduce Racial Disparities in Criminal Justice: Empirical Analysis and Recommendations for Action*, 47 GONZ. L. REV. 493, 494 (2011-2012). On the abundance of social science literature recognizing institutionalized racism, see William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1102 n.23 (2014).

19. See Roberts, *supra* note 1.

which all persons—or, at least, all citizens—are afforded equal rights.<sup>20</sup> That narrative suggests that, because racialized barriers to citizenship and political participation have been formally abolished, on-going inequities are attributable to some combination of individual or cultural characteristics or, in the most generous reading, to disadvantages resulting from past discrimination.<sup>21</sup> One can, however, look at our history—our histories—through a very different lens.

This article proposes that if we are to be “real” about contemporary manifestations of racism, another narrative can provide a more accurate understanding of the persistence of racial domination and subordination. It begins by acknowledging that the “founding fathers” were Anglo-American settler colonists.<sup>22</sup> Unlike their brethren who colonized much of Africa and Asia, they did not come to extract profit from the land, labor and natural resources of their colonies and then return home. Instead, like those who established settler states in Australia, New Zealand, and Canada, they came to stay.<sup>23</sup>

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20. See Allan H. Macurdy, *Rights Respiration: Disability, Isolation, and a Constitutional Right of Interaction*, 13 TEX. WESLEYAN L. REV. 737, 738 (2007) (noting how the equal protection doctrine effectively “disconnects equality from rights, proceeding as if they are conceptually independent legal theories”). For a nuanced discussion of the paradigms undergirding the scholarship of race, see generally Richard Delgado, *Centennial Reflections on the California Law Review’s Scholarship on Race: The Structure*, 100 CAL. L. REV. 431 (2012) [hereinafter Delgado, *Centennial Reflections*]. On the dangers of focusing solely on redress for past historic wrongs without assurance of structural change, see generally Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99 (2007).

21. See generally R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (discussing the attribution of such negative characteristics as racial stigma). For a specific example, see generally Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995) (addressing the construction of African American school children as intellectually or behaviorally disabled).

22. See WALTER L. HIXSON, *AMERICAN SETTLER COLONIALISM: A HISTORY* 1-2 (2013). Anglo-American settler colonists constructed Whiteness as a means of protecting their privilege. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev’d ed. 2006); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) [hereinafter Harris, *Whiteness*]; GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998). Because my intent is to emphasize the structural implications of identification with the settler class, I generally use the term “settler” rather than “White.” I am grateful to Maori legal scholar Moana Jackson for pointing out that “settler” can be a deceptively benign substitute for “colonizer” or “invader.” Keeping this caution in mind, I employ “settler” because I believe a cognitive shift from “White” to “settler” in the context of discussions about race can help pierce the general unwillingness to analyze the United States as a settler colonial state.

23. Paradigmatic examples of settler states include Australia, New Zealand, Canada, the United States, Israel, and South Africa. See HIXSON, *supra* note 22, at 4. Some scholars include Latin American states such as Argentina and Brazil. See *id.*; see also Richard Gott, *Latin America as a White Settler Society*, 26(2) BULLETIN OF LAT. AM. RES. 269-289 (2007).

They came to stay. This article explores the implications of this very simple truth. Coming to stay meant occupying the land; in turn, this meant disappearing the peoples indigenous to that land.<sup>24</sup> It meant making the land profitable, which required the importation of labor—voluntary and involuntary—and establishing structures for controlling that labor.<sup>25</sup> It meant settlers who came with a presumption of their own sovereign prerogative. They did not come to join someone else's society; they came to establish a state over which they could exercise complete control.<sup>26</sup> This included determining who would be allowed to remain within the boundaries claimed by the settlers, who could enter from without those boundaries, which peoples would be accorded particular civil or political rights, and the extent to which settler privilege would be promoted and protected by the state.<sup>27</sup> These relations were enshrined in the American legal system, which continues to be utilized to ensure that each person remains in his or her “place,” literally and figuratively.<sup>28</sup>

Indigenous peoples' lands are still occupied and the racialized hierarchy established by the early Anglo-American settlers persists. Amending the Constitution to abolish slavery and provide formal equality changed the discourse within settler society, but did little to disrupt the fundamental premises of the settler state. Racialized injustice continues to shape the lives and limit the potential of each

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Others exclude Latin America because of the effect “hybridity” has had on its social and political dynamics. See LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 30 (2010) (citing María Josefina Saldaña-Portillo, “How many Mexicans [is] a horse worth?” *The League of United Latin American Citizens, Desegregation Cases, and Chicano Historiography*, 107(4) *SOUTH ATLANTIC QUARTERLY* 809, 812 (2008)) [hereinafter VERACINI, SETTLER COLONIALISM].

24. See *infra* notes 127-31 and accompanying text. There is not a universally accepted definition of Indigenous identity and “[g]enerally, indigenous peoples have insisted on the right to define themselves.” Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 *DUKE L.J.* 660, 663 n.4 (1990) [hereinafter Williams, *Encounters*]. According to James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, “[t]hey are *indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. And they are *peoples* in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.” S. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* 1 (2009).

25. See PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY* 1-2 (1999) [hereinafter WOLFE, *SETTLER COLONIALISM*].

26. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 53-74.

27. See *id.* at 32, 67.

28. See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841 (1994).



generation of children in this country. There is little, if any, evidence that the United States is postracial or postcolonial.<sup>29</sup> A new narrative will not change these realities. However, understanding the United States as a colonial settler state explains a great deal about the apparently intractable relations of racialized privilege and subordination that characterize life in this country. As a third generation Japanese American, with immediate family members who are Black, White, and American Indian, I am particularly interested in the implications of settler colonial theory for non-Indigenous communities and write in the hope of contributing to an on-going conversation about race that will “free[] us to imagine” remedial options framed in the context of decolonization and self-determination.<sup>30</sup>

Part I sets the stage by recalling the activism that swept communities of color in the United States in the 1960s—movements for social change that often framed their analyses in terms of colonialism and the right to self-determination—and considering how we moved from the energy and optimism of that era to the despair associated with the seemingly intractable poverty, racial disparities, and injustices these communities face a half-century later. Part II provides a brief overview of settler colonial theory, laying the groundwork for my argument that it helps us to understand why racial hierarchy in the United States is so persistent and begin to envision strategies for social change that go beyond the limits of constitutional equal protection.

Because our “stories” frame our understanding of remedial options, the dominant narrative of American history as gradually progressing toward a “multicultural” society is contrasted in Part III with an alternate perspective on migration, settlement, and the construction of racial hierarchy in the United States. Part IV looks more specifically at some of the strategies used to consolidate and maintain the American settler state, from attempts to eliminate Indigenous peo-

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29. On postracialism, see *supra* notes 8-10 and accompanying text; on postcolonialism, see Patrick Wolfe, *Race and the Trace of History: For Henry Reynolds*, in *STUDIES IN SETTLER COLONIALISM: POLITICS, IDENTITY AND CULTURE* 272-96 (Fiona Bateman & Lionel Pilkington eds., 2011) (discussing problems with the term “postcolonial”) [hereinafter Wolfe, *Race and the Trace*].

30. See Bell, *supra* note 2. I use the term “American Indian” to refer to peoples indigenous to the contiguous territory in North America claimed by the United States but more often employ the term “Indigenous” as it also encompasses Native Hawaiians and Alaska Natives. I have avoided “Native American” because for some it connotes “those individuals of Indigenous ancestry who seek to assimilate into and become a part of American society.” Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 108 (1999) [hereinafter Porter, *Demise*].

ples to the subjugation of African Americans and the subordination and manipulation of other peoples of color.

The inadequacies of remedies for racialized injustice available within the American legal system are discussed in Part V. I suggest that the “dynamic of difference” common to settler societies, whereby the full assimilation of those not part of the settler class is both professed as the end goal and perpetually precluded, requires us to look beyond our legal system. Part VI considers some ways in which international law can help us challenge racial and colonial subjugation, noting both the potential and limitations of international legal rights and remedies. Part VII concludes this article with some thoughts on how we might contribute to the decolonization of American society.

### I. DREAMS DEFERRED<sup>31</sup>

*We woke up each day to serve the people and went to sleep analyzing what we had accomplished, and at night we dreamed about the new society that we would create, convinced that the richest country on the globe had sufficient resources to make a better world.*

—Iris Morales and Denise Oliver-Velez<sup>32</sup>

#### A. Liberatory Visions

The construction of racialized identities and hierarchy has long been understood by many American Indians as a manifestation of ongoing colonization.<sup>33</sup> Other peoples of color in the United States have also described their communities as internally colonized and framed their efforts to redress racialized injustice in terms of the right to self-determination.<sup>34</sup> In recent decades, however, this paradigm—particularly as applied to African American communities—has increasingly been regarded as, at best, an analogy employed to emphasize the ongoing deprivations and disparities that shape the lives of so many.<sup>35</sup> In revisiting the notion of colonial relations as providing insight into current racial realities, it is worth considering why contemporary analyses of racialized privilege and subordination are so rarely framed

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31. This phrase comes from Langston Hughes’ poem *Harlem*, which asks, “What happens to a dream deferred? Does it dry up like a raisin in the sun? . . . Or does it explode?” THE COLLECTED POEMS OF LANGSTON HUGHES 426 (Arnold Rampersad ed., 1994).

32. Iris Morales & Denise Oliver-Velez, *Why Read the Young Lords Today?*, in THE YOUNG LORDS: A READER xii (Darrel Enck-Wanzer ed., 2010).

33. See *infra* note 98 and accompanying text.

34. See *infra* notes 46-52 and accompanying text.

35. See *infra* note 100 and accompanying text.

in terms of internal colonialism. Was it because the organizations that advocated self-determination were effectively repressed? Was the theory itself flawed?

The 1960s to the early 1970s was an era of tremendous tumult and energy, as movements for independence and fundamental social change swept the planet.<sup>36</sup> In 1957, under Kwame Nkrumah's leadership, Ghana had won its independence from British colonial rule, and in 1960 alone, the independence of eighteen former African colonies was recognized by the United Nations (UN).<sup>37</sup> Anti-colonial struggles and mass movements against military dictatorships swept across much of Asia and Latin America and inspired student and youth uprisings throughout Europe and North America.<sup>38</sup> The liberatory potential of a new world order was palpable. As Argentine journalist Adolfo Gilly observed in his introduction to political philosopher Frantz Fanon's *Studies in a Dying Colonialism*, "The whole of humanity has erupted violently, tumultuously onto the stage of history, taking its own destiny in its hands."<sup>39</sup>

In the United States, the civil rights movement of the 1950s and early 1960s had accomplished certain of its legislative and judicial goals, most notably the acknowledgment that legally mandated apartheid violated the Constitution's guarantee of equal protection, as well as the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act.<sup>40</sup> Nonetheless, very little had changed for most people of color in the United States,<sup>41</sup> and hundreds of urban rebellions occurred

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36. For some representative examples, see generally THE THIRD WORLD IN THE GLOBAL 1960s (Samantha Christiansen & Zachary A. Scarlett eds., 2013); on the impact of African liberation movements on African American organizing, see Theodore M. Shaw, *The Race Convention and Civil Rights in the United States*, 3 N.Y. CITY L. REV. 19, 23-26 (1998).

37. See JAMES H. MERIWETHER, PROUDLY WE CAN BE AFRICANS: BLACK AMERICANS AND AFRICA, 1935-1961 150 (2002); *The United Nations and Decolonization, Trust and Non-Self-Governing Territories, 1945-1999*, UNITED NATIONS, <http://www.un.org/en/decolonization/nonselgov.shtml> (last visited Apr. 9, 2015).

38. See generally GEORGE KATSIAFICAS, THE IMAGINATION OF THE NEW LEFT: A GLOBAL ANALYSIS OF 1968 (1987).

39. Adolfo Gilly, *Introduction* to FRANTZ FANON, *STUDIES IN A DYING COLONIALISM* 1-2 (1965).

40. See *supra* note 7.

41. See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 101 (1994) (quoting psychology professor Kenneth Clark's 1967 observation that "[t]he masses of Negroes are now starkly aware that recent civil rights victories benefited a very small number of middle-class Negroes while their predicament remained the same or worsened.").

in U.S. cities over the next few years.<sup>42</sup> Analyzing these “riots,” the National Advisory Commission on Civil Disorders, better known as the Kerner Commission, determined that their primary causes were “pervasive discrimination and segregation in employment, education and housing” and the resulting “frustrations of powerlessness” which permeated the “ghettos.”<sup>43</sup> Significantly, the Commission—composed of powerful political and business leaders appointed by President Lyndon Johnson—bluntly acknowledged that “White institutions created [the racial ghetto], White institutions maintain it, and White society condones it.”<sup>44</sup>

Against this backdrop, powerful movements emerged in African American, American Indian, Chicano, Puerto Rican, and Asian American communities that identified themselves, to some degree or another, as internally colonized peoples, and it was not uncommon for scholars of color to also articulate this perspective.<sup>45</sup> Invoking a long tradition of describing African Americans as a “nation within a nation,”<sup>46</sup> many leaders in the 1960s referenced emerging international law that condemned genocide, racial discrimination and colonialism, and defined their struggles in terms of the right to self-determination.<sup>47</sup> Thus, for example, in 1966 the Black Panther Party for Self

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42. For background, see generally *URBAN RIOTS: VIOLENCE AND SOCIAL CHANGE* (Robert H. Connery ed., 1968); *CITIES UNDER SIEGE: AN ANATOMY OF THE GHETTO RIOTS, 1964-1968* (David Boesel & Peter H. Rossi eds., 1971).

43. *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 10-11* (1968).

44. *Id.* at 1.

45. See, e.g., STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 5 (1967) (“black people in this country form a colony, and it is not in the interest of the colonial power to liberate them”); HAROLD CRUSE, *REBELLION OR REVOLUTION* 74 (2009 [1968]) (“The Negro has a relationship to the dominant culture of the United States similar to that of colonies and semi-dependents to their particular foreign overseers.”); ROBERT J. ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY* 2 (1969) (“The fact of black America as a semicolony, or what has been termed “domestic colonialism,” . . . [is] the most profound conclusion to be drawn from a survey of the black experience in America.”); Robert Blauner, *Internal Colonialism and Ghetto Revolt*, 16(4) *SOCIAL PROBLEMS* 393 (1969). Rodolfo Acuña described Chicana/os as internally colonized, most explicitly in his first edition of *OCCUPIED AMERICA: THE CHICANO’S STRUGGLE TOWARD LIBERATION* (1st ed. 1972). See also Tomas Almaguer, *Toward the Study of Chicano Colonialism*, *AZTLÁN: CHICANO J. OF SOC. SCI. & ARTS* 7 (1971); Mario Barrera, Carlos Muñoz & Carlos Ornelas, *The Barrio as an Internal Colony*, 6 *URBAN AFFAIRS ANN. REVS.* 465 (1972).

46. See, e.g., KOMOZI WOODARD, *A NATION WITHIN A NATION: AMIRI BARAKA (LEROI JONES) AND BLACK POWER POLITICS* 17 (1999) (quoting Martin R. Delaney and Frederick Douglass).

47. This emphasis on international law was not new to the African American community. See generally HENRY J. RICHARDSON, III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008). On early post-World War II efforts, see *CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS*

Defense issued a ten-point Platform and Program that began: “We want freedom. We want power to determine the destiny of our Black Community.”<sup>48</sup> After addressing employment, housing, education, military service, police brutality, and criminal justice, as well as restitution for slavery and genocide, it identified its “major political objective” as a plebiscite supervised by the United Nations “for the purpose of determining the will of black people as to their national destiny.”<sup>49</sup>

These themes were echoed in the platforms of other organizations, including the Chicano Brown Berets, the Puerto Rican Young Lords, and the Asian American Red Guards.<sup>50</sup> In October 1971, some ten thousand people responded to a call from the Young Lords to march to the United Nations and demand, among other things, an end to the United States’ colonial occupation of Puerto Rico.<sup>51</sup> Emerging in 1968 from the broader Red Power movement, the American Indian Movement (AIM) quickly expanded its focus from resisting police brutality to struggles for land rights, treaty enforcement, and the protection and promotion of traditional cultural and spiritual practices.<sup>52</sup> In the mid-1970s, on the instruction of traditional Lakota elders, AIM was instrumental in organizing Indigenous peoples from North and South America to demand recognition of their issues by the United Nations, beginning a process that resulted in the international acknowledgment of Indigenous peoples’ rights.<sup>53</sup>

While these groups represent only a handful of the hundreds of organizations that emerged during this period, they are regarded as iconic, perhaps because of their ability to galvanize the popular imagination. Providing a liberatory vision of what could be, each had a

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FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (1970 [1951]); CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955* (2003).

48. *The Black Panther Party Platform & Program: What We Want, What We Believe*, reprinted in *THE SIXTIES PAPERS: DOCUMENTS OF A REBELLIOUS DECADE 1959-64* (Judith Clavir Albert & Stewart Edward Albert eds., 1984).

49. *Id.*; see also LAURA PULIDO, *BLACK, BROWN, YELLOW, AND LEFT: RADICAL ACTIVISM IN LOS ANGELES* 168 (2006); Malcolm X, *The Ballot or the Bullet?*, in *MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS* 23-44 (George Breitman ed., 1965) (urging Black Americans to take their case for human rights to the United Nations). See generally JEFFREY O.G. OGBAR, *BLACK POWER: RADICAL POLITICS AND AFRICAN AMERICAN IDENTITY* (2004).

50. See PULIDO, *supra* note 49, at 282-84; Morales & Oliver-Velez, *supra* note 32, at 9-13.

51. Morales & Oliver-Velez, *supra* note 32, at ix.

52. See Ward Churchill, *American Indian Movement* in *ENCYCLOPEDIA OF AMERICAN INDIAN HISTORY* 638, 640 (Bruce E. Johansen & Barry M. Pritzker eds., 2008).

53. See *id.* at 641-42; see also *infra* notes 467-73 and accompanying text.

network of local chapters that established programs to empower communities in their struggles for the basic necessities of life and participated in local, national, and international coalitions transcending the boundaries of race and ethnicity. Their analyses situated their communities' problems and potential solutions within the global context of anti-colonial movements and evolving interpretations of collective rights under international law, particularly the right to self-determination.

### B. *Persistent Disparities*

Despite the hope and energy, theorizing and mobilizing, that accompanied these movements, some fifty years later it is clear that neither racial justice nor community control was achieved. For all the talk of this being a “postracial” era, the continuing reality of race-related privilege and racial hierarchy in the United States is evidenced by virtually all measures of socioeconomic wellbeing, as well as statistics reflecting the disproportionate criminalization of people of color.<sup>54</sup> More than one-quarter of all Black, Latina/o, and American Indian residents live below the poverty line, compared to about one tenth of White residents.<sup>55</sup> As of 2010, the median income of Black households was less than 60% of that of their White counterparts, a percentage that has not changed significantly since 1972.<sup>56</sup> Moreover, a majority of African Americans born to middle-income families in the late 1960s have been “downwardly mobile” since then.<sup>57</sup> At the end of the 1990s, “the average on-reservation [American] Indian citizen still had per capita income of less than \$8,000, compared to more than \$21,500 for the average U.S. resident,” making American Indians “the economically

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54. See OMI & WINANT, *supra* note 41, at 50 (noting the need for a theory of “racial formation” that accounts for “the extent to which U.S. society is racially structured from top to bottom”). See generally Cho, *supra* note 9.

55. CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 17 (2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf>; see also Alicia Parlapiano, *50 Years of Poverty*, N.Y. TIMES (Jan. 4, 2014), [http://www.nytimes.com/interactive/2014/01/04/business/50-years-of-poverty.html?\\_r=0](http://www.nytimes.com/interactive/2014/01/04/business/50-years-of-poverty.html?_r=0).

56. DENAVAS-WALT ET AL., *supra* note 55, at 6, 9.

57. JULIA B. ISAACS ET AL., GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 5 (2008), available at <http://www.brookings.edu/research/reports/2008/02/economic-mobility-sawhill>; see also Barnes et al., *supra* note 9, at 986. The median wealth of White households in 2009 was twenty times that of Black households and eighteen times that of Hispanic households. Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CENTER (July 26, 2011), <http://www.pewsocial-trends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

poorest identifiable group in America.”<sup>58</sup> Similar disparities are found in statistics relating to healthcare,<sup>59</sup> housing,<sup>60</sup> education,<sup>61</sup> and employment.<sup>62</sup>

The effects of poverty and unemployment are reflected in and compounded by rapidly rising and disparate rates of arrest and incarceration as well as instances of abuse and death at the hands of the police.<sup>63</sup> Since 1972, the American prison population has grown sixfold to over 2.2 million people, giving the United States the dubious distinction of having the world’s largest prison population and highest rate of incarceration.<sup>64</sup> In addition, some 4.8 million people are being moni-

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58. Rob Capriccioso, *The State of Indian Economic Development*, NEWS FROM INDIAN COUNTRY (Apr. 26, 2012), <http://www.indiancountrynews.com/index.php/news/26-main-stream-politics/1615-the-state-of-indian-economic-development?showall=1>.

59. See generally Centers for Disease Control, *Fact Sheet—CDC Health Disparities and Inequalities Report—U.S., 2011*, available at <http://www.cdc.gov/minorityhealth/CHDIR/2011/FactSheet.pdf>. As of 2010, some 30% of Latina/os and American Indians and 20% of Black and Asian Americans were without health insurance, as compared to about 12% of Whites. DENAVAS-WALT ET AL., *supra* note 55, at 24-25; *Minority Health: American Indian & Alaska Native Populations*, CDC, <http://www.cdc.gov/minorityhealth/populations/REMP/aian.html#Disparities> (last updated Feb. 3, 2015).

60. As of 2004, about three quarters of White families owned homes, as compared to just under half of African American and Latina/o families, and subsequently homeowners of color were disproportionately hurt by the mortgage crisis. Richard Marsico & Jane Yoo, *Racial Disparities in Subprime Home Mortgage Lending in New York City: Meaning and Implications*, 53 N.Y. L. SCH. L. REV. 1011, 1013 (2008-2009); see also André Douglas Pond Cummings, *Families of Color in Crisis: Bearing the Weight of the Financial Market Meltdown*, 55 HOW. L.J. 303, 303-12 (2012). On American Indian housing issues, see *infra* note 202 and accompanying text.

61. In 2013, over 35% of the White population had a bachelor’s degree or higher, as compared to 22% of the Black population and about 15% of Latina/os. See *Digest of Education Statistics*, NAT’L CENTER FOR EDUC. STAT., [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_104.10.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_104.10.asp) (last visited Apr. 1, 2015).

62. As of October 2014, the official Black unemployment rate was 10.7%, more than twice the White unemployment rate of 4.6%. See Table A-2 *Employment Status of the Civilian Population by Race, Sex, and Age*, BUREAU OF LAB. STAT., available at <http://www.bls.gov/news.release/empsit.t02.htm>. American Indian unemployment rates are dramatically higher. See *infra* notes 200-01 and accompanying text.

63. Some 80% of all persons facing felony charges are indigent, and communities of color are disproportionately poor. See Stephen B. Bright, *The Accused Get What the System Doesn’t Pay for*, in PRISON NATION: THE WAREHOUSING OF AMERICA’S POOR 6 (Tara Herivel & Paul Wright eds., 2003).

64. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (2010); *Facts about Prisons and People in Prison*, THE SENTENCING PROJECT, [http://sentencingproject.org/doc/publications/inc\\_Facts%20About%20Prisons.pdf](http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf) (last visited Apr. 1, 2015) [hereinafter *Facts about Prisons*]. On the racialized history of mass incarceration, see generally Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807 (2011).

tored under conditions of probation or parole.<sup>65</sup> Over 60% of the prison population is comprised of racial or ethnic minorities, and almost 40% is African American.<sup>66</sup> In human terms, these statistics mean that, among other things, communities of color are stripped of some of their most vital human and economic resources and have diminished political power due to the disenfranchisement of those with felony convictions.<sup>67</sup> As summarized by law professor Michelle Alexander, “The stark and sobering reality is that, for reasons largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history.”<sup>68</sup>

The history of the mass movements that propelled the resistance of the mid-twentieth century has been virtually erased from public consciousness and the resulting reforms are portrayed not as a necessary first step toward substantive justice, but as its realization.<sup>69</sup> We see occasional demonstrations protesting particularly egregious incidents of police brutality, select executions, or draconian immigration policies but no sustained mass movements challenging the racial inequities that still pervade American society.<sup>70</sup> The absence of collective vision and energy is palpable. What happened to that energy, and to the analyses that linked the situations of communities of color in the United States to global movements for decolonization, assessed their material and psychological conditions in terms of internal colonialism,

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65. NICOLE D. PORTER, *THE STATE OF SENTENCING 2012: DEVELOPMENTS IN POLICY AND PRACTICE 1* (2013), available at [http://sentencingproject.org/doc/publications/sen\\_State%20of%20Sentencing%202012.pdf](http://sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202012.pdf).

66. See *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Apr. 1, 2015); *Facts about Prisons*, *supra* note 64 (also noting that 32% of Black men, compared to 6% of White men, serve time in prison).

67. See generally Nekima Levy-Pounds, *Par for the Course? Exploring the Impacts of Incarceration and Marginalization on Poor Black Men in the U.S.*, 14 J. L. SOCIETY 29 (2013) (noting that 38% of the prison population is African American).

68. ALEXANDER, *supra* note 64, at 8; see also Ted Sampsell-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 190 (2003) (noting that “we should fear that the criminal law is functioning perfectly” in terms of “mark[ing] others as inferior”).

69. See Barnes et al., *supra* note 9, at 976 (likening the claim that America is postracial to one senator’s proposal that the United States simply declare victory and withdraw from Vietnam).

70. On the failure of the Occupy movement, perhaps the closest we have seen to a mass mobilization, to address racial issues, see generally Sandy Grande, *Accumulation of the Primitive: The Limits of Liberalism and the Politics of Occupy Wall Street*, 3 SETTLER COLONIAL STUD. 369 (2013), available at <http://www.tandfonline.com/doi/abs/10.1080/2201473X.2013.810704#.VQDrWPnF98E>; see also Kenyon Farrow, *Occupy Wall Street’s Race Problem*, THE AM. PROSPECT (Oct. 24, 2011), <http://prospect.org/article/occupy-wall-streets-race-problem>.



and articulated political goals within the framework of the right of all peoples to self-determination?

### C. *Retrenchment and Repression*

The late author/activist Maya Angelou observed,

In these bloody days and frightful nights when an urban warrior can find no face more despicable than his own, no ammunition more deadly than self-hate and no target more deserving of his true aim than his brother, we must wonder how we came so late and lonely to this place.<sup>71</sup>

This sentiment rings as true today as it did in 1991, and Angelou's question still haunts us.

Direct governmental repression is, no doubt, part of how we came to this place, one that has not changed significantly over the past several decades, despite the surge of optimism that accompanied President Obama's election in 2008.<sup>72</sup> All of the movements of the mid-1950s through early 1970s were subjected to intensive surveillance, infiltration, and the use of disinformation to create splits within organizations and to discredit them in the public eye, most famously through the COINTELPRO (counter-intelligence) operations of the Federal Bureau of Investigation (FBI).<sup>73</sup> Organizations perceived as the most "radical" also faced a barrage of criminal prosecutions that relied on false testimony and planted evidence to divert their resources and incarcerate their leaders.<sup>74</sup> In some instances, when these tactics failed to accomplish their stated purpose of "neutralizing" threats to the status quo, leaders such as Fred Hampton and Mark Clark of the Chicago Black Panthers were simply assassinated.<sup>75</sup> In other cases, as in the government's siege of American Indian Movement activists and

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71. Maya Angelou, *I Dare to Hope*, N.Y. TIMES, Aug. 25, 1991, at E15, quoted in Bell, *supra* note 2, at 375.

72. See Tibbs, *supra* note 2, at 48.

73. See Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1078-104 (2002) [hereinafter Saito, *Whose Liberty*]. See generally WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* (2d ed. 2002).

74. See Ward Churchill, "To Disrupt, Discredit and Destroy": *The FBI's Secret War Against the Black Panther Party*, in LIBERATION, IMAGINATION AND THE BLACK PANTHER PARTY 78, 82-106 (Kathleen Cleaver & George Katsiaficas eds., 2001).

75. See *id.* at 106-08; see also Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *rev'd in part*, 446 U.S. 754 (1980), *remanded* 499 F. Supp. 640 (1980) (finding the killings actionable). See generally JEFFREY HAAS, *THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER* (2010).

supporters at Wounded Knee in 1973, intense military force was deployed, and military counterinsurgency tactics were subsequently used to undermine support for AIM on the Pine Ridge Reservation.<sup>76</sup>

Despite being condemned as illegal and unconstitutional by no less than a Senate oversight committee, no one was held responsible for the violations of constitutional rights resulting from these operations, and many of their victims remain incarcerated.<sup>77</sup> Organizations that advocated self-determination for people of color under U.S. jurisdiction have been erased, for the most part, from mainstream history and are portrayed in the popular media as “gangs” of criminals and thugs.<sup>78</sup> Many COINTELPRO tactics have been legalized in the “war on terror,”<sup>79</sup> and advocates of “separatism” are now classified as extremists and potential terrorists not only by the FBI, but also by liberal organizations such as the Southern Poverty Law Center.<sup>80</sup> It is not surprising, therefore, that Maya Angelou’s “urban warriors” might consider defending their communities and creating alternative institutions to be, at best, exercises in futility.

Broader policies and programs, less explicitly targeting activists, also help explain some of what appears to be political apathy.<sup>81</sup> Responding to the mass movements that swept the country in the 1960s, the urban rebellions, and the recommendations of the Kerner

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76. See WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 140-70 (2d ed. 2002); Ward Churchill, *The Bloody Wake of Alcatraz: Political Repression of the American Indian Movement During the 1970s*, in *AMERICAN INDIAN ACTIVISM: ALCATRAZ TO THE LONGEST WALK* 242-84 (Troy Johnson et al. eds., 1997).

77. See SENATE SELECT COMM. TO STUDY GOV'T OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *FINAL REPORT: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS*, S. Rep. No. 755, 94th Cong., 2d Sess. bk. III, at 8 (1976) (declaring these programs “abhorrent in a free society”) [hereinafter *SENATE SELECT COMMITTEE, FINAL REPORT*].

78. See Michael K. Smith, “*The Black Panthers: Revolutionaries, Not Thugs*,” *DISSIDENT VOICE* (Jan. 1, 2014), <http://dissentvoice.org/2014/01/the-black-panthers-revolutionaries-not-thugs/>.

79. See Saito, *Whose Liberty*, *supra* note 73, at 1104-28.

80. The Senate committee responsible for investigating these operations identified five overarching categories of targets: the Communist Party USA, the Socialist Workers Party, “White Hate Groups,” “Black Nationalist Hate Groups,” and the “New Left.” *SENATE SELECT COMMITTEE, FINAL REPORT*, *supra* note 77, at 4. The Southern Poverty Law Center, dedicated to “seeking justice for the most vulnerable members of our society,” lists “Black Separatists” along with the Ku Klux Klan and Neo-Nazis as “extremist” hate groups. *Who We Are*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/who-we-are> (last visited Apr. 9, 2015); *Extremist Files*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/ideology> (last visited Apr. 9, 2015).

81. See Tibbs, *supra* note 2, at 52 (“[F]rom 1966 through 1980, the state pursued two primary strategies in repressing the Black liberation struggle: to criminalize Black expressions of sovereignty and to criminally assault Black people everywhere.”).

Commission, the federal government instituted a wide range of programs intended to improve employment, education, the welfare system, and housing in poor communities.<sup>82</sup> Despite evidence that these programs were making a difference and that crime rates were not rising, the government's focus soon shifted to an ever-intensifying "war on crime."<sup>83</sup> As summarized by Christian Parenti, "Crime meant urban, urban meant Black, and the war on crime meant a bulwark built against the increasingly political and vocal racial 'other' by the predominantly white state."<sup>84</sup>

By the early 1970s, the war on crime had morphed into the "war on drugs," whose disproportionate effect on African Americans is well documented and succinctly summarized in the fact that by 1999, Black people comprised about 13% of the U.S. population and its drug users, but 74% of those imprisoned for drug offenses.<sup>85</sup> The drug war was accompanied by a rise in the militarization of police forces throughout the country, altering their character, in Kenneth Nunn's terms, "from law enforcement agencies to military occupation forces."<sup>86</sup> All of these dynamics have intensified in the "war on terror," which is generally associated with the attacks of September 11, 2001, but can be more accurately traced, at least domestically, to draconian legislation passed

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82. See Annie Lowrey, *50 Years Later, War on Poverty is a Mixed Bag*, N.Y. TIMES, Jan. 2, 2014, at A1, available at <http://www.nytimes.com/2014/01/05/business/50-years-later-war-on-poverty-is-a-mixed-bag.html>.

83. See PETER EDELMAN, *SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA* 18 (2013) (noting that poverty in the U.S. was "cut in half between 1959 and 1973," at least in part because of President Lyndon Johnson's "war on poverty") [hereinafter EDELMAN, *SO RICH, SO POOR*]; JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 26-30 (1996) (noting relative stability of crime rates); see also ROBERT M. CIPES, *THE CRIME WAR* 3, 8 (1968).

84. CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* 7 (1999).

85. See Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 719 (2000); ALEXANDER, *supra* note 64, at 95-137. See generally John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991). On government involvement in the influx of drugs into Black communities, see generally ALFRED W. MCCOY, *THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE* (rev'd ed. 2003).

86. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. GENDER, RACE & JUST. 381, 404 (2002). See generally AMERICAN CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* (June 2014), available at <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf>. This framing was not new, of course. See ELDRIDGE CLEAVER, *TARGET ZERO: A LIFE IN WRITING* 127 (Kathleen Cleaver ed., 2006) (noting that the Black Panther Party intended to "drive the occupying army of the police out of the black community").

in the 1990s.<sup>87</sup> In the name of fighting drugs, crime and terrorism, governmental power has dramatically expanded, constitutional rights have been eviscerated, and immigrants' rights have been dramatically—and retroactively—curtailed.<sup>88</sup>

In the meantime, people of color have been particularly hard-hit by the deindustrialization of the American economy and the attendant shift from relatively stable manufacturing jobs to low-wage, part-time service sector employment.<sup>89</sup> Welfare “reform” has virtually eliminated any safety net with the result that—to give just one example—as of 2011, six million Americans had no income besides food stamps.<sup>90</sup> These rollbacks had a disproportionate impact on people of color but, as Peter Edelman has observed, were instituted with little explicit discussion of race because “welfare,” like “crime,” “had become a code word for race.”<sup>91</sup>

We are not talking simply about poverty or discrimination but about an intensifying regime of “structural violence.”<sup>92</sup> Under these circumstances, it is not difficult to understand why the energy fueling the movements of the 1960s has dissipated.<sup>93</sup> When the dynamics of oppression are apparent, or made conscious, it is easier to define oneself in opposition to systemic subordination, as happened when people of color mobilized against legally mandated apartheid in the United States.<sup>94</sup> But resistance becomes much more complicated when the institutional dynamics are so deeply rooted that they no longer have a human face, when they perpetuate themselves without any particularized discriminatory intent, and it is easy to believe that we—or those closest to us—are the primary source of our own problems.<sup>95</sup>

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87. See Natsu Taylor Saito, *For “Our” Security: Who is an “American” and What is Protected by Enhanced Law Enforcement and Intelligence Powers?* 2 SEATTLE J. FOR SOC. JUST. 23, 40-45 (2003).

88. *Id.*

89. See Tibbs, *supra* note 2, at 55 (noting that as a result of deindustrialization “between 1965 and 1990, Black family income fell fifty percent, and Black youth unemployment quadrupled”).

90. EDELMAN, *SO RICH, SO POOR*, *supra* note 83, at xviii.

91. Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. POVERTY L. & POL'Y 389, 397 (2004).

92. Tibbs, *supra* note 2, at 53.

93. See *id.* at 65.

94. See ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 49 (2003) (“Jim Crow was twentieth-century America’s experience with petty and not so petty apartheid.”).

95. On the intensified psychological damage that results from this perception, see WARD CHURCHILL, *KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS* 71 (2004) [hereinafter CHURCHILL, *KILL THE INDIAN*]; see also Ward Churchill, *Kizhiibaabinesik: A Bright Star Burning Briefly*, in LEAH RENAE KELLY, IN

Limiting our consideration of remedies for racial inequities to the due process and equal protection offered by constitutional theory has proven futile, I believe, because this approach derives from a paradigm that dismisses racial realities as exceptional. Racial realism is another way of saying that we have to be willing to look honestly at our histories and contemporary realities, foregoing the comfort of a narrative that promises constant if gradual “progress.” Racial realism also requires that we see beyond “race,” for, as Gerald Torres observes, “race in the United States has consistently functioned as a proxy for power.”<sup>96</sup> If the issues of day-to-day racism encountered by people of color—the stereotyping, the exclusions, the micro-aggressions, and even the physical attacks—are not the root of the problem but some of its myriad manifestations, neither postracialism nor multicultural pluralism will help us resolve these problems, for they do not address the structural dynamics of power.

#### D. *Racial Realism and Colonial Relations*

What can be done to transform the self-nullification that results from trauma and despair into creative and energized responses to political, economic, and sociocultural subordination? Theory will not liberate us, but it can expand or constrain our ability to envision alternatives that have the potential to move us beyond the status quo. As noted above, during the 1960s, it was fairly common for Black and Latina/o communities within the United States to be described by political activists as internally colonized.<sup>97</sup> In recent decades, a strong body of scholarly analysis has emerged that assesses Indigenous peoples within the United States as colonized.<sup>98</sup> However, the situation of

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MY OWN VOICE: EXPLORATIONS IN THE SOCIOPOLITICAL CONTEXT OF ART AND CINEMA 24-27 (2001).

96. Gerald Torres, *American Blood: Who Is Counting and for What?*, 58 ST. LOUIS U. L.J. 1017, 1019 (2014).

97. See *supra* notes 45-52 and accompanying text.

98. See, e.g., ROBERT ODAWI PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER (2005) [hereinafter PORTER, SOVEREIGNTY]; Ward Churchill, *The Indigenous Peoples of North America: A Struggle Against Internal Colonialism*, in STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 15-22 (2002) [hereinafter Churchill, *The Indigenous Peoples*]; HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (1993) [hereinafter TRASK, FROM A NATIVE DAUGHTER]; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986).

other peoples of color within the United States is rarely discussed, much less theorized, in terms of colonialism.<sup>99</sup>

At least with respect to non-Indigenous peoples, internal colonialism, as a theoretical tool, has come to be regarded, at best, as an empowering analogy rather than a framework for meaningful structural analysis.<sup>100</sup> The demise of this approach has been attributed to the systematic and violent repression of organizations and movements that framed their goals in terms of national liberation, as well as the (perhaps related) failure of mainstream social science to recognize it as a legitimate inquiry.<sup>101</sup> These developments, however, tell us only that such an approach is perceived as a threat to the status quo; they do not address the underlying question of whether ongoing colonization accounts for significant aspects of contemporary American “race relations.”

Moving beyond social and political pressures to abandon the construct of internal colonialism, I suspect that a major theoretical weakness of this approach is that it has tended to employ the lens of external or “classic” colonialism, as exemplified by European colonialism in Africa and Asia. Settler colonialism is structurally distinct from classic colonialism and, as a result, a model that relies on a classic colonial framework can only yield analogies when applied to settler states.<sup>102</sup> While the United States has maintained external colonies, it is first and foremost a settler society. In other words, the early colo-

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99. *But see* Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 *BERKELEY J. AFR.-AM. L. & POL'Y* 156, 159 (2009) (arguing that “to the extent racism exists in the United States, colonialism is also present”); Anthony Paul Farley, *The Black Body as Fetish Object*, 76 *OR. L. REV.* 457, 518-19 (1997) (describing the “black inner-city” as “the Neocolony”); ROBERT STAPLES, *THE URBAN PLANTATION: RACISM AND COLONIALISM IN THE POST CIVIL RIGHTS ERA* 9-28 (1987) (arguing that the internal colony theory best explains race and class in America). *See generally* Charles Pinderhughes, *Toward a New Theory of Internal Colonialism*, 25 *SOCIALISM AND DEMOCRACY* 235, 235-56 (2011) (arguing that contemporary African American realities are best understood in terms of internal or domestic colonialism); Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 *VAND. L. REV.* 1691, 1718 (2007) (discussing Latina/os as an internal colony). For a brief argument that African Americans, unlike Latina/os, should not be considered internally colonized, see Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 *HARV. C.R.-C.L. L. REV.* 297, 306 n.65 (2009).

100. *See, e.g.*, Robert L. Allen, *A Reply to Harold Baron*, 40-41 *SOCIALIST REVIEW* 121 (1978) (describing the “colonial analogy” as not having “take[n] us very far toward a theoretical and programmatic understanding of our situation as black Americans”).

101. *See* MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* 81-84 (2d rev'd ed. 2013).

102. On the distinctions between classic and settler colonialism, see VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 2-6.

nists of North America came not simply to exploit its land, labor, or natural resources and then return to their “mother country,” but to settle permanently and, as part of that process, to exercise sovereignty over the territories they occupied.<sup>103</sup>

In the past few decades, settler colonial studies has emerged as a (sub)discipline in its own right, providing an immensely useful framework for understanding the complex relations between population subgroups in settler societies such as the United States, Canada, Australia, New Zealand, South Africa, and Israel.<sup>104</sup> Addressing the most fundamental dynamic that defines relationships between the colonizer and the colonized, settler colonial theory has focused primarily (and appropriately) on the relations between settlers and people indigenous to the lands being settled. Much less attention has been paid to how peoples brought involuntarily or less-than-voluntarily onto Indigenous lands relate to the colonial settler state.<sup>105</sup> Understanding the structural dynamics of the United States through the lens of settler colonial theory can provide us with analytical tools that facilitate a realistic assessment not only of the conditions currently faced by Indigenous peoples, but also peoples brought to this country as enslaved workers, incorporated by virtue of territorial annexation, or induced to migrate without the option of becoming part of the settler class. Such assessments, in turn, allow us to contemplate an array of remedial options for race-based injustices that are excluded from mainstream discourse. The following Part II provides a basic framework of colonialism that will be used to analyze American racial hierarchy in the following Parts.

## II. COLONIAL RELATIONS

*What? Post-colonialism? Have they left?*

—*Bobbi Sykes*<sup>106</sup>

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103. See HIXSON, *supra* note 22, at 1-2 (characterizing the U.S. as the “most significant example of settler colonialism in world history”).

104. See generally Lorenzo Veracini, “Settler Colonialism”: *Career of a Concept*, 41 J. OF IMPERIAL & COMMONWEALTH HISTORY 313-33 (2013), available at <http://www.tandfonline.com/doi/abs/10.1080/03086534.2013.768099?src=recsys#.U856xIBdVF9>.

105. The only thorough application of the settler colonial framework to non-Indigenous peoples of color in the United States of which I am aware focuses primarily on distinguishing these groups from White working class settlers. See J. SAKAI, *SETTLERS: THE MYTHOLOGY OF THE WHITE PROLETARIAT* (1989).

106. Quoted in LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 25 (2d ed. 2012) [hereinafter SMITH, *DECOLONIZING*].

### A. Colonialism: An Overview

We live today with the legacy of the European colonization of almost all of Africa, the Americas, and much of Asia that took place between the late 1400s and the early 1900s.<sup>107</sup> Just a century ago, some 84% of the world's territory was under some form of colonial domination.<sup>108</sup> It should come as no surprise, therefore, that colonial relationships persist in much of the world today, including settler societies like the United States that emerged from European colonial expansion.<sup>109</sup>

Colonialism has taken many forms, and has been described in numerous ways. The *Oxford English Dictionary* defines a colony as “[a] settlement in a new country; a body of people who settle in a new locality, forming a community subject to or connected with their parent state.”<sup>110</sup> This captures the benign way early Anglo-American settler colonists are routinely portrayed in mainstream histories.<sup>111</sup> It also erases the fact that “‘forming a community’ in a new land necessarily meant *unforming* or re-forming [or forcibly relocating] the communities that existed there already, and involved a wide range of practices including trade, plunder, negotiation, warfare, genocide, enslavement and rebellions.”<sup>112</sup>

A key element of colonial ideology is its “civilizing mission,” described by Antony Anghie as “the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.”<sup>113</sup> Such redemption, in turn, has been the rationale for imposing extensive ad-

107. See generally Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995); Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INT'L J. LEGAL INFO. 387 (2008).

108. See JOAN FERRANTE, *SOCIOLOGY: A GLOBAL PERSPECTIVE* 11 (7th ed. 2010).

109. See Mutua, *supra* note 107, at 1160 (“[T]he post-colonial state is, in concept and substance, the colonial state in another guise.”).

110. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 469 (1971).

111. See *infra* notes 153-58 and accompanying text.

112. ANIA LOOMBA, *COLONIALISM/POSTCOLONIALISM* 2 (1998); see also VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 2-3 (“‘colony’ implies the localized ascendancy of an external element,” whether it is “a political body that is dominated by an exogenous agency” or “an exogenous entity that reproduces itself in a given environment”).

113. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 3 (2007); see also JÜRGEN OSTERHAMMEL, *COLONIALISM: A THEORETICAL OVERVIEW* 17 (Shelley Frisch trans., 2005) (“Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule.”).



ministrative structures intended to eradicate the cultures, languages, and histories, as well as the social, economic, legal, and political structures and institutions of the colonized. This project is rendered more-or-less permanent by what Anghie terms the “dynamic of difference,” an “endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized.”<sup>114</sup> Colonial domination is justified only to the extent that “civilization” is being promoted, and, thus, the colonized must be rendered perpetually inferior.<sup>115</sup>

“A triumphant colonial society,” according to Lorenzo Veracini, is one in which “the promised equality between colonizer and colonized . . . is forever postponed, where colonizer and colonized know and ultimately retain their respective places.”<sup>116</sup> This state of affairs is achieved not only—or even primarily—by brute force, but by what Kenyan scholar Ngũgĩ wa Thiong’o calls the “cultural bomb” that “annihilate[s] a people’s belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves,” thus “mak[ing] them want to identify with that which is furthest removed from themselves.”<sup>117</sup>

As European colonialism extended into Africa, Asia, and the Americas, “race” emerged as a shifting political and social construct that incorporated the notion of more and less civilized peoples and provided markers of the “difference” relied upon by colonizing powers to justify their ventures.<sup>118</sup> Race had the added benefit, from the colonizers’ perspective, of being considered a “scientific” descriptor of physical characteristics, serving to perpetuate the “dynamic of difference” by linking cultural traits—real or imagined—to relatively immutable biological factors.<sup>119</sup> Thus, colonial powers could claim to be uplifting and civilizing the colonized through assimilationist measures intended to eradicate their identities, while simultaneously invoking allegedly im-

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114. ANGHIE, *supra* note 113, at 4.

115. See OSTERHAMMEL, *supra* note 113, at 108 (describing the “construction of ‘inferior otherness’”).

116. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 22.

117. NGŪGĨ WA THIONG’O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 3 (1986).

118. See *generally* RONALD SANDERS, *LOST TRIBES AND PROMISED LANDS: THE ORIGINS OF AMERICAN RACISM* (1992).

119. For a nuanced discussion of race and colonial ideology, see LOOMBA, *supra* note 112, at 104-83. On the (pseudo)science underlying theories of racial difference, see STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 30-72 (1981). See *generally* WILLIAM STANTON, *THE LEOPARD’S SPOTS: SCIENTIFIC ATTITUDES TOWARDS RACE IN AMERICA, 1815-59* (1982).

mutable, race-based characteristics to “cap” their political, social, or economic rights.<sup>120</sup>

Colonialism has taken different forms. Most commonly, the term refers to external or “classic” colonialism, characterized by Jürgen Osterhammel as “a relationship of domination between an indigenous (or forcibly imported) majority and a minority of foreign invaders.”<sup>121</sup> In classic colonial regimes, decisions are made and implemented by colonial administrators in pursuit of interests often defined in a distant metropolis and generally involve exploitation of the land, labor, and natural resources of territories where, for the most part, the colonists do not intend to settle permanently.<sup>122</sup> By contrast, settler colonists plan not only to profit from, but also to live permanently in the lands they occupy.<sup>123</sup> These divergent purposes have resulted in distinct colonial narratives and forms of social organization. These distinctions help explain why the global movement for decolonization had so little effect on settler colonial regimes, and why analyses of internal colonialism that rely on models of classic colonial relations have been inadequate to explain racialized domination and subordination in the United States.

### B. *Settler Colonization*

Settler colonialism can be seen as replacing classic colonialism’s hierarchical relationship of center to periphery with a triangulated structure in which the colonizers reject the hegemony of the metropolitan center or colonial “motherland,” and directly assert control over Indigenous peoples as well as those who are neither indigenous to the land nor part of the settler class.<sup>124</sup> The settlers arrive with a presumption of sovereign entitlement, an unshakeable belief in their right to establish a state under their exclusive control.<sup>125</sup> Their primary pur-

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120. See ANGHIE, *supra* note 113, at 103-04; VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 22.

121. OSTERHAMMEL, *supra* note 113, at 5-7.

122. *Id.* at 11, 15.

123. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 20, 104; HIXSON, *supra* note 22, at 5.

124. Veracini terms the latter “exogenous Others.” See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 26-27. Jodi Byrd employs “arrivants—a term . . . borrow[ed] from African Caribbean poet Kamau Brathwaite to signify those people forced into the Americas through the violence of European and Anglo-American colonialism and imperialism around the globe.” JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM* xix (2011).

125. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 53-55. Aboriginal scholar Irene Watson observes, “The myth of colonialism is that it carried with it and applied sover-

pose is to establish a territorial base, for this is what allows them to create and control a society of their own imagining, and to generate the profits that enable them to consolidate and expand their sovereign prerogative.<sup>126</sup>

Viewing the occupied lands as the site of their own reproduction, settlers see Indigenous peoples as obstacles to be overcome. Settlers, in Mahmood Mamdani's words, "are made by conquest, not just by immigration."<sup>127</sup> Or, as Patrick Wolfe observes, although settler colonization relies upon the appropriation of Indigenous labor, it is "at base a winner-take-all project whose dominant feature is not exploitation but replacement."<sup>128</sup> While warfare between Indigenous peoples and settlers is central to the origin stories of most settler societies—certainly that of the United States<sup>129</sup>—armed conflict results not from the aggression of Native peoples, but from their mere existence. "People got in the way just by staying home,"<sup>130</sup> as Deborah Bird Rose aptly summarizes.

As Indigenous peoples have been "disappeared"<sup>131</sup> in various ways, settlers have turned to strategies of replacement, and what they describe as putting their newly appropriated lands and resources to "productive" use.<sup>132</sup> This requires active recruitment of a critical mass of settlers; development of a unique cultural identity; formation of in-

eignty. The truth is that state sovereignty was claimed and constituted through colonialism." IRENE WATSON, *ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW: RAW LAW* 5 (2015) [hereinafter WATSON, *ABORIGINAL PEOPLES*].

126. See Patrick Wolfe, *Structure and Event: Settler Colonialism, Time, and the Question of Genocide*, in *EMPIRE, COLONY, GENOCIDE: CONQUEST, OCCUPATION, AND SUBALTERN RESISTANCE IN WORLD HISTORY* 102, 103 (A. Dirk Moses ed., 2008) [hereinafter Wolfe, *Structure and Event*]. On the Anglo-American colonists' imaginings, see GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* 6-14 (2009).

127. Mahmood Mamdani, *When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa* (May 13, 1998), available at <http://citizenshiprightsinafrica.org/docs/mamdani%201998%20inaugural%20lecture.pdf>.

128. WOLFE, *SETTLER COLONIALISM*, *supra* note 25, at 163.

129. See *infra* notes 154-63 and accompanying text.

130. DEBORAH BIRD ROSE, *HIDDEN HISTORIES: BLACK STORIES FROM VICTORIA RIVER DOWNS, HUMBERT RIVER AND WAVE HILL STATIONS* 46 (1991).

131. I use the term "disappeared," as it has come to be recognized in international law, to reference the state-sponsored or sanctioned arbitrary detention or killing of persons perceived as socially or politically undesirable. See Nikolas Kyriakou, *The International Convention for the Protection of All Persons from Enforced Disappearance and Its Contribution to International Human Rights Law, with Specific Reference to Extraordinary Rendition*, 13 MELB. J. INT'L L. 424, 425-44 (2012).

132. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 246-51 (1990) (discussing Anglo-American settlers' reliance on the Lockean notion of transforming "wastelands" into valuable property) [hereinafter WILLIAMS, *AMERICAN INDIAN*].

dependent structures of governance and social control, including but not limited to law; and maintenance of military and economic power sufficient to sustain the settlers in these endeavors.<sup>133</sup> Settlers also perceive a need for labor, as well as strategies to subordinate and control the labor force.<sup>134</sup> While some migrants are recruited as fellow settlers, most come—voluntarily or involuntarily—to join someone else’s society, on someone else’s terms. They bring with them no presumption of sovereign prerogative, and this distinguishes such migrants from the settlers as well as from the peoples indigenous to the lands being occupied.<sup>135</sup>

Settler states establish, maintain, and protect their hegemony by exercising virtually complete control over Indigenous peoples, non-Indigenous Others, and “deviant” members of the settler class.<sup>136</sup> Settlers presume a prerogative to determine who will be allowed to enter and who may—or must—remain within their claimed boundaries, which peoples will be accorded particular civil or political rights, and the extent to which settler privilege will be promoted and protected by the state.<sup>137</sup> Many of these determinations are enshrined in the settler state’s legal system, which is also utilized to ensure that each population subgroup remains in its assigned place, geographically, socially, economically, and politically.<sup>138</sup> For all of these reasons, Wolfe observes that settler colonial “invasion is a structure not an event.”<sup>139</sup>

The settlers depict these powers as prerogatives of sovereignty, but their exercise remains in constant tension with the settlers’ ideological justifications for that sovereignty—their superior civilization,

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133. See generally VERACINI, *SETTLER COLONIALISM*, *supra* note 23; Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 *J. OF GENOCIDE RES.* 387-409 (2006) [hereinafter Wolfe, *Settler Colonialism and the Elimination of the Native*].

134. See BYRD, *supra* note 124, at xxiv-xxv (cautioning that a focus on labor needs can subsume Indigenous issues).

135. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 3; see also James Belich, *The Rise of the Anglo World: Settlement in North America and Australasia, 1784-1918*, in *REDISCOVERING THE BRITISH WORLD* 39, 53 (Phillip Buckner & R. Douglas Francis eds., 2005) (noting that an “emigrant joined someone else’s society, a settler or colonist remade his own”).

136. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 67. On the perceived need to control the settler population as well, see NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW* 66-68 (2010) [hereinafter SAITO, *MEETING THE ENEMY*].

137. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 32, 67.

138. On the relationship between law and social control, see generally DONALD BLACK, *THE BEHAVIOR OF LAW* (Special ed. 2010). On spatial “assignment,” see generally Ford, *supra* note 28.

139. See Wolfe, *Settler Colonialism and the Elimination of the Native*, *supra* note 133, at 388.

their democratic and humanitarian values, the leading role they play in their own narrative of progressive human development.<sup>140</sup> On the one hand, settler society is presumed sacrosanct and the inclusion of Others cannot be allowed to corrupt it; on the other, it needs to demonstrate, continuously, that humanity at large will benefit from accepting its social and political structures and internalizing its worldview. This tension is mediated by the dynamic of difference<sup>141</sup>—i.e., the construction of racial identities in a manner that ensures that the assimilationist vision proffered by the settlers will remain just out of reach—and this explains much about the construction and perpetuation of racialized hierarchy in the United States.

### C. *Triangulation*

As noted above, the prime directive of settler colonization to secure a territorial base requires—from the settlers' perspective—the elimination of those who, since time immemorial, have lived on, defined themselves in terms of, and taken responsibility for that land.<sup>142</sup> Two central points emerge from this foundational premise. The first is that settler societies, including the United States, cannot continue to function as such without continuously enforcing their jurisdiction, political and military, over their claimed territories and doing everything in their power to ensure that their assertion of sovereignty is accepted as legitimate within the larger global order, notwithstanding any illegalities involved in the acquisition of the lands at issue.<sup>143</sup> The second point is that settler colonial states cannot be decolonized unless their underlying territorial claims are challenged.<sup>144</sup> Reforming settler societies to be kinder, gentler, more environmentally sustainable, or more inclusive legitimizes and, therefore, entrenches the underlying colonial relationships; such reforms do not deconstruct settler hierarchies of power and privilege.

Moving from a settler-Indigenous binary to a triangulated analysis that distinguishes migrants who are not intended to become part

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140. On this dynamic in colonial relations generally, see ANGHIE, *supra* note 113, at 96-97; with respect to European colonization, see generally ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500-C.1800* (1998); on its utilization by Anglo-American settlers, see SAITO, *MEETING THE ENEMY*, *supra* note 136, at 18-34.

141. See *supra* note 114 and accompanying text.

142. See *supra* notes 126-30 and accompanying text.

143. For an explication of this premise in U.S. history, see generally SAITO, *MEETING THE ENEMY*, *supra* note 136.

144. See Wolfe, *Structure and Event*, *supra* note 126, at 103.

of the settler class from both settlers and Indigenous peoples runs the risk of glossing over the centrality of territorial occupation, thereby reinforcing settler hegemony. For this reason, Native Hawaiian scholar Haunani-Kay Trask insists that portraying immigrants to Hawai'i as anything other than the functional equivalent of settlers means that "[t]he history of our colonization becomes a twice-told tale," with the political and economic "success" story of Asian immigrants who labored for wealthy White planters for many generations reinforcing an occupation that keeps Native Hawaiians landless and poor, lacking access to decent health care or education, institutionalized in the military, and disproportionately imprisoned.<sup>145</sup> From this perspective, the status of Asians in Hawai'i should be defined solely in terms of "their relationship to Indigenous peoples in a settler state."<sup>146</sup>

The same, of course, could and should be said about all other non-Indigenous peoples living in settler societies. Those of us who are not Indigenous to this land would not be here but for settler occupation and appropriation, and our primary relationship to the structures of power and privilege must be understood in that context. Our very presence as non-Indigenous peoples can serve to legitimize settler society and its occupation of Indigenous lands; struggles to remediate disparities between the settler class and non-Indigenous Others run the risk of rendering settler colonial institutions invisible while simultaneously reinforcing them.<sup>147</sup> This is one of the pitfalls of portraying the United States as a "nation of immigrants." As Veracini puts it, "the colonising

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145. Haunani-Kay Trask, *Settlers of Color and 'Immigrant' Hegemony*, in *ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAII* 45, 46-47 (Candace Fujikane & Jonathan Y. Okamura eds., 2008). For more detail on Native Hawaiian conditions of life, see Healani Sonoda, *A Nation Incarcerated*, in *ASIAN SETTLER COLONIALISM* 99-115; David Stannard, *The Hawaiians: Health, Justice, Sovereignty*, in *ASIAN SETTLER COLONIALISM* 161-69.

146. Candace Fujikane, *Introduction: Asian Settler Colonialism in the U.S. Colony of Hawai'i*, in *ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAII* 1, 12 (Candace Fujikane & Jonathan Y. Okamura eds., 2008); see also Eiko Kosasa, *Ideological Images*, in *ASIAN SETTLER COLONIALISM* 209, 227 (arguing that "[a]s Japanese settlers, we have ascended from being collaborators in a colonial system to being enforcers and keepers of that system and have an obligation to support—but not presume to direct—Native Hawaiian self-determination"). See generally Dean Itsuji Saranillio, *Why Asian Settler Colonialism Matters: A Thought Piece on Critiques, Debates, and Indigenous Difference*, 3 *SETTLER COLONIAL STUD.* 280, 280-94 (SPECIAL ISSUE) (2013), available at <http://dx.doi.org/10.1080/2201473X.2013.810697>.

147. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 33-34 (noting that "exogenous Others, unlike their indigenous counterparts, do not challenge with their very presence the legitimacy of the settler entity" and that "the sustained presence of exogenous Others confirms the indigenisation of the settler collective").

settler can disappear behind the subaltern migrant” and settler states “can then be recoded as postcolonial migrant societies.”<sup>148</sup>

This danger must not be ignored or minimized. I do not believe, however, that it needs to preclude development of accurate analyses of structural racism in the United States through particularized inquiries that address how the settler class (defined as those who came with or have adopted the presumption that this is *their* society) has facilitated the migration—voluntary or involuntary—of persons it never intended to fully incorporate into American society and how it has developed a panoply of social institutions to ensure that non-settler migrants remain subordinated within the settler state. Such analyses can help us understand the significance of the differences between the treatment of Indigenous peoples and non-Indigenous Others, and how these distinctions are rooted in the diverse purposes served by various segments of the population over whom the settler class asserts hegemonic control.

Clarifying these relationships can, in turn, help us better understand the persistence of race-based injustices and disparities, the ways in which the subordination of so-called racial minorities is rooted in the displacement of Indigenous peoples, and the need to give primacy to Indigenous struggles for self-determination.<sup>149</sup> Structural analyses are rooted in the narratives through which we define ourselves and our actions. Some of the ways in which these narratives can either reinforce or begin to deconstruct the racialized structures of settler hegemony are addressed in the following Part.

### III. RECASTING THE NARRATIVE

*The silent spaces of history raise the most profound questions.*

—Howard Berman<sup>150</sup>

Narratives of origin, identity, and purpose structure social relations, identifying who belongs, their status with respect to others, and how decisions for the collective will be made and enforced. They tell us who we are, where we have come from and where we are going, what

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148. *Id.* at 108.

149. In other words, a failure to align oneself with the colonized places one in the position of functioning as a colonizer. As Albert Memmi said, “[T]he facts of colonial life are not simply ideas, but the general effect of actual conditions. To refuse means either withdrawing physically from those conditions or remaining to fight and change them.” ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 19 (1965).

150. Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 125, 126 (Oren R. Lyons & John C. Mohawk eds., 1992).

we should fear, what we should want, and how we should try to get it.<sup>151</sup> Our stories also shape what will be recognized as substantive justice or injustice, and define remedial options in terms of both means and ends, for, as the late Robert Cover observed, “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”<sup>152</sup> To understand the limitations of the legal remedies available within the constraints of constitutional rights as interpreted by the Supreme Court, and to expand our vision to include more liberatory alternatives, it is helpful to consider the narratives within which we understand our histories and our futures.

### A. *Settler Origin Stories*

Settler origin stories typically begin with their own arrival, rendering invisible the societies being replaced, or recasting them as part of the wilderness tamed by the colonists’ “civilizing mission.”<sup>153</sup> The American history most of us were taught is such a story, generally starting with a reference to Christopher Columbus and quickly skipping to the Pilgrims and Puritans, and the “pioneers” who settled the West.<sup>154</sup> The dominant narrative of U.S. history portrays the American “founding fathers” as making a decisive break with British colonialism, thus banishing colonial relations to the distant past and leaving no room for assessing the extent to which they may account for institutionalized structures of privilege and subordination.<sup>155</sup> The founders’ desire for democratic governance and religious freedom is emphasized, and the selectivity with which various groups were encouraged—or not—to migrate is obfuscated by the mantra that this is a “nation of immigrants.”<sup>156</sup>

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151. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435-41 (1988). See generally Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 47 LAW & SOC’Y REV. 247 (2012).

152. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

153. See ANGHIE, *supra* note 113 and accompanying text.

154. See JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* 31-134 (2007).

155. See Lorenzo Veracini, *Telling the End of the Settler Colonial Story*, in *STUDIES IN SETTLER COLONIALISM: POLITICS, IDENTITY AND CULTURE* 204, 211-12 (Fiona Bateman & Lionel Pilkington eds., 2011) (explaining how the “national” replaces what is indigenous and the colonizer is depicted as a colonized subject) [hereinafter Veracini, *Telling the End*].

156. See, e.g., *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (“As a nation we exhibit extraordinary hospitality to those who come to our country, which is not surprising for we have often been described as ‘a nation of immigrants.’”); Juanita Sales Lee, *We Are a Nation of Immigrants*, 56 FED. LAW. MONTHLY 3, 3-4 (2009) (Message from the President of the Federal Bar Association).



The American origin story provides a highly sanitized version of the violence employed against, and the exploitation of, Indigenous peoples, persons of African descent, and occasionally some immigrant groups, but relegates these actions to a past for which no one is today responsible. Such injustices are described as unfortunate rather than willfully cruel, as the inevitable growing pains of an emergent democracy or, at a minimum, as mitigated by the assertion that those in power were acting for a higher purpose and in accordance with the standards of their time.<sup>157</sup> The latter perspective is aptly summarized by Israeli historian Benny Morris' observation that "[e]ven the great American democracy could not have been created without the annihilation of the Indians. There are cases in which the overall, final good justifies harsh and cruel acts in the course of history."<sup>158</sup>

The "final good" is represented in the characterization of the United States as not only "the most prosperous, powerful nation on Earth," but also a beacon of freedom and democracy for the rest of the world.<sup>159</sup> It is the culmination of Western civilization, we are told, the product of a genealogy that, as historian Eric Wolf puts it, takes us from ancient Greece and Rome to Christian Europe, from the Renaissance and the Enlightenment to political democracy and the industrial revolution.<sup>160</sup> "Industry, crossed with democracy, in turn yielded the United States, embodying the rights to life, liberty, and the pursuit of happiness."<sup>161</sup> Historic exclusions from political processes, as well as legalized apartheid, are noted as passing phases in the gradual extension of democratic rights to White women and people of color.<sup>162</sup>

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157. See generally WARD CHURCHILL, *To Judge Them by the Standards of Their Time: America's Indian Fighters, the Laws of War and the Question of International Order*, in *PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLE & ANGLOAMERICAN LAW* 303, 303-403 (2003).

158. See Ari Shavit, *Survival of the Fittest?: An Interview with Benny Morris*, COUNTERPUNCH (Jan. 16-18, 2004), <http://www.counterpunch.org/2004/01/16/an-interview-with-benny-morris/> (reproducing Morris' interview originally published in Ha'aretz).

159. President Barack Obama, Inaugural Address (Jan. 20, 2009), available at <http://www.inaugural.senate.gov/swearing-in/address/address-by-barack-obama-2009>; see also President Ronald Reagan, Farewell Address (Jan. 11, 1989) available at <http://www.americanrhetoric.com/speeches/ronaldreaganfarewelladdress.html> (stating that America is "still a beacon, still a magnet for all who must have freedom"); President George W. Bush, Address to the Nation (Sept. 11, 2001) available at <http://www.americanrhetoric.com/speeches/gwbush911addresstothetation.htm> ("America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world.").

160. ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* 5 (1982). On this lineage, and its fallacies, see generally JOHN C. MOHAWK, *UTOPIAN LEGACIES: A HISTORY OF CONQUEST AND OPPRESSION IN THE WESTERN WORLD* (2000).

161. WOLF, *supra* note 160, at 5.

162. See LOEWEN, *supra* note 154, at 204-18, 280-300.

In this history, colonialism is referenced only with respect to the settlers' insistence on independence from Britain; the founders were the victims, not the perpetrators, of colonial exploitation and violence, and any violence they engaged in was in self-defense.<sup>163</sup> This is a comforting narrative for those who benefit from—or believe, or want to believe, they benefit from—the status quo. However, there are many for whom the hegemonic American narrative rings hollow. Its “silent spaces” are filled with alternate histories and grim realities that do not comport with the storyline of ever-expanding human wellbeing in the United States and the world more generally. Developing the capacity to envision liberatory alternatives requires narratives capable of accounting for the experiences of all peoples in this society in structural terms, without dismissing their hardships as anomalies or resorting to exceptionalism and its “greater good” justifications.

### B. *The Stories of Others*

In *A Way of Being Free*, Nigerian author Ben Okri says, “In a fractured age, when cynicism is god, here is a possible heresy: we live by stories, we also live in them . . . . We live stories that either give our lives meaning or negate it with meaninglessness.”<sup>164</sup> If the liberal democratic narrative of the United States as a “nation of immigrants” moving inexorably toward equal rights and opportunities for all of its citizens is structurally unattainable because it conflicts with the fundamental realities and purposes of settler colonialism, what we perceive as apathy about struggles for equality may be a perfectly reasonable response to a story that negates meaning in our lives. But we need not be limited by the narratives that purport to define us for, as Okri also notes, “[i]f we change the stories we live by, quite possibly we change our lives.”<sup>165</sup>

#### 1. Indigenous Perspectives

If we acknowledge this to be a colonial settler state, we cannot ignore the fact that its land base and natural resources—its very existence, as well as its wealth and power—derive from the elimination of Indigenous peoples and the appropriation of their lands. Any narrative that ignores or glosses over this foundational reality serves to reinforce

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163. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 79-81.

164. THOMAS KING, *THE TRUTH ABOUT STORIES: A NATIVE NARRATIVE* 153 (2003) (quoting BEN OKRI, *A WAY OF BEING FREE* 46 (1997)).

165. *Id.*

settler hegemony by entrenching the myth that this was, or might as well have been, unoccupied land.<sup>166</sup> Histories that begin from that premise, implicitly or explicitly, cannot accurately reflect the origins of this country, explain its subsequent history, or account for current structural realities. This is much more than a theoretical problem because strategies to empower our communities or redress structural inequities cannot be effective within the constraints of such narratives.

Getting beyond these constraints involves some appreciation of what settler society has sought to erase and replace, i.e., the hundreds of nations of diverse peoples who trace their origins to this continent. It is estimated that, prior to European contact, some fifteen million people lived in what is now identified as the continental United States.<sup>167</sup> They had highly developed cosmologies and cultures;<sup>168</sup> extensive agricultural production;<sup>169</sup> complex languages and systems of governance, including not only internal but also international law;<sup>170</sup> and extensive networks of trade and communication across the continent.<sup>171</sup> Indigenous sovereignty over their lands and territories was a given. As an Onondaga diplomat pointed out to the British governor of New York in

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166. See Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2296-97 (1989) (describing the eradication or caricaturization of American Indians within standard versions of the U.S. origin story). On the development of and controversy over the Columbus story, see generally TIMOTHY KUBAL, *CULTURAL MOVEMENTS AND COLLECTIVE MEMORY: CHRISTOPHER COLUMBUS AND THE REWRITING OF THE NATIONAL ORIGIN MYTH* (2008).

167. See KIRKPATRICK SALE, *THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY* 316 (1990); see also Lenore A. Stiffarm with Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 23, 26-28 (M. Annette Jaimes ed., 1992).

168. See MOHAWK, *supra* note 160, at 15-28. See generally Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175 (1992).

169. See Oren R. Lyons, *The American Indian in the Past*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 13, 31 (Oren R. Lyons & John C. Mohawk eds., 1992); see also JACK WEATHERFORD, *INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD* 63 (1988) (noting that some 60% of contemporary agricultural products originated in the Americas).

170. See John C. Mohawk & Oren R. Lyons, *Introduction in EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 1, 3 (Oren R. Lyons & John C. Mohawk eds., 1992). See generally Rennard Strickland, *Wolf Warriors and Turtle Kings: Native American Law Before the Blue Coats*, 72 WASH. L. REV. 103 (1997); Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981 (1994).

171. See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 786-98 (2001).

1684, “We being a Free People . . . may give our Lands, and be joynd to the Sachem we like best.”<sup>172</sup>

Against this backdrop, the Anglo-American colonists’ “notion of a pre-emptive right to the continent,” embodied in their colonial charters that “designated the Pacific Ocean . . . as the western boundary of the several colonies,”<sup>173</sup> and their presumption of sovereignty over territory that they had never seen,<sup>174</sup> explains much about the means they employed and the ideology they invoked to support their endeavors. As charitably put by historian Walter LaFeber, “[t]he genius of the Founding Fathers” lay in their perception that a “reciprocal relationship” could be developed between “landed and maritime expansion” and the new American empire’s “ideals of justice, political representation, and opportunity.”<sup>175</sup>

We can see that the settlers’ racialized depictions of American Indians as lawless, godless, warlike and wandering “savages” were not merely the result of ignorance or prejudice—their own documentation refutes this—but provided the rationale for their seemingly contradictory claims that the lands occupied were both “vacant” and legitimately obtained by conquest.<sup>176</sup> Because the settlers had no incentive to distinguish civilians from combatants in their quest for land, they waged “total war on a local scale.”<sup>177</sup> By 1890, when the federal government

172. Quoted in Berman, *supra* note 150, at 159.

173. RICHARD W. VAN ALSTYNE, *THE RISING AMERICAN EMPIRE* 8 (1974); *see also* WOOD, *supra* note 126.

174. *See* WARD CHURCHILL, *Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America*, in *PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLE & ANGLoAMERICAN LAW* 1, 8-9 (2003) (noting that Justice Marshall extended his characterization of American Indians as “domestic dependent nations” even to those nations that had not yet encountered the United States “in any appreciable way”) [hereinafter CHURCHILL, *Perversions of Justice*]. *See generally* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010) (noting the attitudes of the early settlers); Joshua Simon, *Review Essay: The United States as Settler Empire*, 2 *SETTLER COLONIAL STUD.* 253-67 (2012), available at <http://dx.doi.org/10.1080/2201473X.2012.10648835>.

175. Walter LaFeber, *Foreign Policies of a New Nation: Franklin, Madison, and the Dream of a New Land to Fulfill with People in Self-Control, 1750-1804*, in *FROM COLONY TO EMPIRE: ESSAYS IN THE HISTORY OF AMERICAN FOREIGN RELATIONS* 9, 10-11 (William A. Williams ed., 1972).

176. *See* WILLIAMS, *AMERICAN INDIAN*, *supra* note 132, at 208-12.

177. A. Dirk Moses, *Empire, Colony, Genocide: Keywords and the Philosophy of History*, in *EMPIRE, COLONY, GENOCIDE: CONQUEST, OCCUPATION, AND SUBALTERN RESISTANCE IN WORLD HISTORY* 3, 26 (A. Dirk Moses ed., 2008) (distinguishing colonial wars from wars between European powers, which tended to have limited aims) [hereinafter Moses, *Empire*]; *see also* DAVID STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* 15, 104-06 (1993) [hereinafter STANNARD, *AMERICAN HOLOCAUST*]; FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 206-27 (1976); RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING* 35-57 (1980).

officially declared the “frontier” closed, it estimated that fewer than 250,000 Indians remained, residing on less than 3% of their original land base.<sup>178</sup> This had been accomplished directly by military force; by purportedly “rogue” settlers who were, in fact, encouraged to occupy Indian lands; and by individuals motivated by the scalp bounties offered by local governments and “civic” organizations throughout the country.<sup>179</sup> Most of the remaining Indigenous peoples had been forcibly removed from their homelands, interned en masse in unlivable conditions, and confined to alien and inhospitable reservations—processes that predictably resulted in the deaths of 40 to 50% of those removed or interned.<sup>180</sup>

Some of these realities are acknowledged in mainstream history, albeit in highly sanitized fashion, because they contribute to the perception that American Indians can safely be relegated to the past, notwithstanding their consistent resistance and lived assertion of their right to self-determination. This focus on the “vanishing Indian”<sup>181</sup> has preempted acknowledgement of the equally genocidal measures implemented by the federal government following consolidation of its territorial base. Often framed as assimilative measures and implemented without consultation or consent through a series of “head-snapping changes in federal policy,” to quote Gerald Torres,<sup>182</sup> these have included the individualized allotment of reservation lands;<sup>183</sup> the imposition of identity through “blood quantum” requirements;<sup>184</sup> the banning of Indigenous cultural and spiritual practices;<sup>185</sup> and the forced relocation of about half of all Native children, for some five gen-

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178. See CHURCHILL, *Perversions of Justice*, *supra* note 174, at 12.

179. See WARD CHURCHILL, “Nits Make Lice”: *The Extermination of North American Indians, 1607-1996*, in A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT 129-288 (1997).

180. See SIDNEY L. HARRING, CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 204-06 (1994); RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 75-77 (1990); see generally also GRANT FOREMAN, INDIAN REMOVAL: THE IMMIGRATION OF THE FIVE CIVILIZED TRIBES (1953).

181. For background on this pervasive characterization, see generally DAVID R.M. BECK, THE MYTH OF THE VANISHING RACE (2001); BRIAN W. DIPPIC, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY (1991).

182. Torres, *supra* note 96, at 1037.

183. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7-16 (1995).

184. See generally Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 70 MICH. L. REV. 955 (1972).

185. See generally GEORGE E. TINKER, MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN CULTURAL GENOCIDE (1993).

erations, to boarding schools whose stated mission was to “kill the Indian, save the man” in each student.<sup>186</sup>

The unconstrained power of the federal government to dictate all aspects of American Indian life was affirmed in a 1903 case, *Lone Wolf v. Hitchcock*, in which the Supreme Court asserted that “plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>187</sup> While historically inaccurate, this was an entirely apt summary of the settler state’s presumed prerogative. It was a prerogative exercised in 1924 to unilaterally declare Indians to be U.S. citizens,<sup>188</sup> and in 1934 to “reorganize” and “recognize” so-called tribal governments under terms dictated by the United States, facilitating the continued appropriation of the natural resources such as oil, coal, and uranium being discovered on Indian lands.<sup>189</sup> After World War II, the federal government began “terminating” federally recognized tribes and once again moved to relocate American Indians, this time from reservation lands to urban areas.<sup>190</sup> In the 1970s, under intensifying domestic pressure and international scrutiny, Congress passed legislation claiming to recognize Indigenous “self-determination.”<sup>191</sup> This, however, has been consistently belied by the state’s continued (and oxymoronic) insistence that American Indians are sovereign only to the extent acceptable to the federal government.<sup>192</sup>

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186. See generally CHURCHILL, *KILL THE INDIAN*, *supra* note 95; DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928* (1995).

187. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); see also BLUE CLARK, *LONE WOLF v. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2* (1994).

188. See Porter, *Demise*, *supra* note 30, at 123-28.

189. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL’Y 72, 83-85 (1997); Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 87, 94-98 (M. Annette Jaimes ed., 1992).

190. See *id.* at 98-100.

191. See *id.* at 100-04; see also Vine Deloria, Jr., “Congress in Its Wisdom”: *The Course of Indian Legislation*, in *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880s* 105, 112 (1984) (explaining that the Indian Self-Determination and Education Assistance Act “provided for more extensive subcontracting of certain federal services” but did not “bolster the political status of tribes”).

192. See Mark Trahan, *Elections 2012: My Sovereign Debate, Recalling George W. Bush’s Sovereignty Speech*, INDIAN COUNTRY TODAY (Oct. 2, 2012), available at <http://indiancountrytodaymedianetwork.com/2012/10/02/elections-2012-my-sovereign-debate-recalling-george-w-bushs-sovereignty-speech-137303> (recounting President George W. Bush’s 2004 pronouncement that “tribal sovereignty” means “you’ve been given sover-

The judiciary continues to allow this exercise of unfettered state power. Courts routinely invoke the plenary power doctrine and Chief Justice Marshall's 1831 characterization in *Cherokee Nation v. Georgia* of Indians as "domestic dependent nations."<sup>193</sup> This conclusion, in turn, rests on the explicitly colonial "doctrine of discovery" and its attendant depiction of American Indians as savage or uncivilized.<sup>194</sup> Acknowledging the logical and legal problems with this construction, in the 1823 case of *Johnson v. McIntosh*,<sup>195</sup> Justice Marshall aptly summarized the rationale of settler colonial occupation: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."<sup>196</sup>

At this point, American Indians have been forced off some 97% of their homelands.<sup>197</sup> Even so, taking into account only those lands and resources the federal government acknowledges as Indian-owned, American Indians should be, per capita, the richest demographic group in the U.S., but they are, instead, the poorest.<sup>198</sup> The U.S government has consistently asserted a right to control Indigenous lives, lands, and resources, claiming to be acting as the "guardian" of its Indian "wards."<sup>199</sup> Among other consequences, in 2005, American Indians living on or near reservations had a 49% unemployment rate, and 29% of those with jobs earned wages below poverty level.<sup>200</sup> On many reserva-

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eighty," apparently by the federal government); see also Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 91-94 (2002).

193. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). On the Court's continued reliance on the plenary power doctrine, see CLARK, *supra* note 187, at 106-11; see also ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 89-95 (2005) (commenting on the Marshall Cases) [hereinafter WILLIAMS, LOADED WEAPON].

194. On the inconsistencies underlying the doctrine of discovery, see Ward Churchill, *The Law Stood Squarely on its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663, 673-80 (2002) [hereinafter Churchill, *The Law Stood Squarely*]. On the continued effect of this doctrine and its racialized presumptions, see generally WILLIAMS, LOADED WEAPON, *supra* note 193.

195. See generally *Johnson v. McIntosh*, 21 U.S. 543 (1823).

196. *Id.* at 588. See generally Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992).

197. See Churchill, *The Law Stood Squarely*, *supra* note 194, at 679.

198. See RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 52-54 (1998) [hereinafter STRICKLAND, TONTO'S REVENGE].

199. *Cherokee Nation*, 30 U.S. at 17; see also Nell Jessup Newton, *Federal Power over Indians: Its Sources and Limitations*, 132 U. PA. L. REV. 195, 207 (1984) [hereinafter Newton, *Federal Power over Indians*].

200. U.S. DEPT INTERIOR, BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION AND LABOR REPORT, 1, available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf>.

tions, especially on the Northern Plains, unemployment rates over 80% or even 90% are common.<sup>201</sup> American Indian households are five times more likely than the average American household to lack complete plumbing, over three times as likely to be without complete kitchens, and more than twice as likely to be overcrowded.<sup>202</sup> Among other predictable results, Indigenous peoples have the lowest life expectancies, highest infant mortality rates, highest suicide rates, and highest rates of death from exposure and communicable diseases in the United States.<sup>203</sup>

After overseeing almost a decade of litigation over the federal government's mismanagement of individual Indian trust accounts, Federal District Judge Royce Lamberth concluded,

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few.<sup>204</sup>

This summary simply skims the surface of what has been done, and continues to be done, to sustain the territorial base of the U.S. settler state. Once we are clear about the foundations on which American society rests *now*, not just in some distant past for which we are not responsible, we can begin to flesh out narratives capable of accounting for and, potentially, decolonizing structures of racialized domination and subordination affecting both Indigenous peoples and non-Indigenous peoples of color within American society. Policies and practices that seem aberrational, contradictory, or simply mean-spirited begin to make sense structurally, when viewed in light of the tensions generated by the settler imperative. This imperative encompassed the settlers' perceived need to maintain total control of the land, to develop

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201. See Vincent Schilling, *Getting Jobbed: 15 Tribes with Unemployment Rates Over 80 Percent*, INDIAN COUNTRY TODAY (Aug. 29, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/29/danger-zone-15-tribes-unemployment-rates-over-80-percent-151078>.

202. See U.S. DEP'T HOUS. & URBAN DEV., CONTINUITY AND CHANGE: DEMOGRAPHIC, SOCIOECONOMIC, AND HOUSING CONDITIONS OF AMERICAN INDIANS AND ALASKA NATIVES, xv (2014), available at [http://www.huduser.org/portal/publications/pdf/housing\\_conditions.pdf](http://www.huduser.org/portal/publications/pdf/housing_conditions.pdf) (using data from 2006-2010).

203. See STRICKLAND, TONTO'S REVENGE, *supra* note 198, at 53.

204. Cobell v. Norton, 229 F.R.D. 5, 7 (D.D.C. 2005). Citing this and other portions of the opinion, the court of appeals removed Judge Lamberth from the case in July 2006. See Cobell v. Kempthorne, 455 F.3d 317, 326-35 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1317 (2007).



a labor force capable of maximizing the wealth generated from that land, to restrict the benefits of economic growth, to grant political participation to those envisioned as members of the settler class and, simultaneously, to justify these ends and the means used to achieve them in terms of the “greater good” being achieved for “all of humanity.”<sup>205</sup>

## 2. Non-Indigenous Others

Standing outside the triumphalist narrative of American history allows us to grasp the significance of the African slave trade and the institution of chattel slavery in terms of the material and cultural losses systematically inflicted upon those who were, through these processes, both externally and internally colonized. It also allows us to examine the extent to which enslaved labor provided the agricultural and industrial base for settler consolidation and expansion. According to historian Howard Zinn, the early Anglo-American colonists were disinclined to agricultural labor, unable to enslave a sufficient number of Indians, and did not have enough indentured servants to meet their perceived needs.<sup>206</sup> The African slave trade appeared to provide the solution, for by 1619, when John Rolfe purchased twenty African workers in Jamestown, about one million enslaved Africans had already been brought to European colonies in the Western Hemisphere.<sup>207</sup> By 1800, this total had reached ten to fifteen million, the result of a process of warfare, captivity, and transportation that robbed the African continent of perhaps fifty million people.<sup>208</sup>

Africans, of course, came to the Americas with rich histories of their own; they were from hundreds of different Indigenous societies, each with a distinctive culture and religious, political, and legal tradi-

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205. See *supra* notes 126, 132-34, 140-41, 158-62 and accompanying text.

206. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 25-26 (2003). On the enslavement of American Indians, see Gregory Ablavsky, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 U. PA. L. REV. 1457, 1466 (2011) (noting the enslavement of some 30,000 to 50,000 Indians in the British colonies in North America).

207. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 53 (1988); ZINN, *supra* note 206, at 25-26.

208. See MARCUS REDIKER ET AL., *Introduction in MANY MIDDLE PASSAGES: FORCED MIGRATION AND THE MAKING OF THE MODERN WORLD* 8 (Rediker et al. eds., 2007); ZINN, *supra* note 206, at 29; see also WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA*, 96-97 (rev. ed., 1982). See generally THE ATLANTIC SLAVE TRADE: EFFECTS ON ECONOMIES, SOCIETIES, AND PEOPLES IN AFRICA, THE AMERICAS, AND EUROPE (Joseph E. Inikori & Stanley L. Engerman eds., 1992).

tions established over millennia.<sup>209</sup> From the settler perspective, the creation of a labor force suitable to rendering occupied lands productive entailed eliminating these identities and cultures. As Vincent Harding observed, “besides setting up legal barriers against the entry of black people as self-determining participants into the developing American society, the laws struck another cruel blow of a different kind” by proscribing African cultural and religious practices, as well as languages.<sup>210</sup> “Thus, [slaveholding society] attempted to shut black people out from both cultures, to make them wholly dependent neuters.”<sup>211</sup>

Beginning in the mid-1600s, laws were promulgated in the colonies that not only instituted perpetual, hereditary slavery, but also denied all basic political rights to persons of African descent, forbade their ownership of property, prohibited their education, limited their freedom of movement, and proscribed any means of self-defense.<sup>212</sup> In contrast to the master narrative’s refrain of constant, if gradual, progress toward full equality, the patterns that emerge from the subsequent history of Afrodescendant peoples in the United States evidence rhetorical and legal shifts toward formal equality consistently accompanied by measures intended to maintain settler domination.

Thus, following the formal abolition of slavery in 1866,<sup>213</sup> slave codes were replaced by “Black codes” intended to accomplish much of the same purposes.<sup>214</sup> These new laws had the added benefit, from the settlers’ perspective, of criminalizing much of the Black population for activities such as idleness, vagrancy, or “disrespect” of White people,

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209. See generally JOHN G. JACKSON, *INTRODUCTION TO AFRICAN CIVILIZATIONS* (2001 [1970]).

210. VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* 27 (1981).

211. *Id.*; see also IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 112, 123-24, 149-50 (1998).

212. See Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 230-46 (2006); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO: 1550-1812* 109-10 (1968). On the subordination of Black people in Northern states, see generally LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES: 1790-1860* (1961).

213. U.S. CONST. amend. XIII § 1 (“[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States”).

214. See *Slaughter-House Cases*, 83 U.S. 36, 70-71 (noting that Black codes had been passed so that “the condition of the slave race would . . . be almost as bad as it was before”); see also A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 84-87 (1996).

while fueling a system of convict labor that served essentially the same purposes as chattel slavery, often at a lower cost to the settlers.<sup>215</sup> Following the Fourteenth Amendment's granting (or imposition, depending on one's perspective) of citizenship to African Americans and its guarantee of due process and equal protection under law,<sup>216</sup> racial segregation was legally mandated in many states and upheld by the Supreme Court in the 1896 case of *Plessy v. Ferguson*.<sup>217</sup> And of course, in the wake of the Court's overturning of *Plessy* and Congress' passage of the Civil Rights and Voting Rights Acts of the mid-1960s, we have again seen that while formal structures of law have changed, the grim realities of life in many Black communities have not.<sup>218</sup>

Viewing settler policy in terms of the shift from an initial drive to create an ever-expanding slave labor force to the perception of Black people as a "surplus" population to be contained and controlled lends consistency and coherence to a history that moves from slavery to convict labor to our present carceral state.<sup>219</sup> It can explain how Jim Crow laws—apartheid—functioned to exclude African Americans from the settler class, why a "colorblind" legal regime is incapable of remedying racial disparities, why integrationist visions are never realized, and why separatist movements and small-scale efforts for community empowerment are treated as threats.<sup>220</sup>

Each community has its own narratives, of course, only a few of which can be mentioned here. Historian Rodolfo Acuña's characterization of Chicanos as internally colonized<sup>221</sup> and the contemporary

215. See LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA* 273 (6th ed. 1987) ("[C]hain gangs were integral parts of the system . . . leased to private individuals and companies, which made large fortunes on their miseries."). See generally ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* (1996); MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928* (1996); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": *PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

216. After declaring "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof" to be citizens, the 14th Amendment says that no state shall "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.

217. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966).

218. See *supra* notes 55-57, 59-66 and accompanying text.

219. See PARENTI, *supra* note 84, at 238.

220. On the legal and ideological history of the construct of colorblindness, see generally Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) [hereinafter Haney López, "A Nation of Minorities"]. For White perspectives on Black nationalism, see Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 835-44 (1990).

221. See ACUÑA, *supra* note 45, at 3.

realities of life in Mexican American communities are difficult to comprehend without a rudimentary understanding of the Anglo-American settler occupation of Texas that preceded its annexation and the 1848 war of aggression that, together, resulted in the expropriation of the northern half of Mexico.<sup>222</sup> These lands were “cleared” for settler occupation by vigilante action and by requiring Mexican residents to affirmatively prove their title claims in U.S. courts with documentation that generally did not exist in the Mexican legal system.<sup>223</sup> Continuous attempts have since been made to convert Mexican communities on both sides of the border into a pool of readily available and easily disposable labor, resulting in the ongoing cycles of reliance upon and rejection of undocumented workers.<sup>224</sup> The inability of the settler society to reconcile these realities with its self-perception is reflected in the recent efforts to ban Mexican American history in Arizona high schools on the premise that such courses “promote racial resentment.”<sup>225</sup>

Similarly, the incorporation of Alaska and Hawai‘i are glossed over in a narrative that, apparently, needs no explanation beyond “more natural resources and militarily strategic territory must be a good thing.”<sup>226</sup> In a series of events paralleling the establishment of the “Republic of Texas” by White settlers and its subsequent absorption by the United States,<sup>227</sup> Anglo-American settlers, with the backing of U.S. military forces, overthrew the Kingdom of Hawai‘i in 1893 and persuaded the federal government to annex the territory shortly

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222. See Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. Rev. 283, 287-91 (2003).

223. See, e.g., *United States v. Sandoval*, 167 U.S. 278, 298 (1897) (rejecting communal land rights). See generally Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife,”* 4 MICH. J. RACE & L. 39 (1998).

224. See Perea, *supra* note 222, at 303-10.

225. See Roque Planas, *Arizona’s Law Banning Mexican-American Studies Curriculum is Constitutional, Judge Rules*, HUFFINGTON POST (Mar. 11, 2013), [http://www.huffingtonpost.com/2013/03/11/arizona-mexican-american-studies-curriculum-constitutional\\_n\\_2851034.html](http://www.huffingtonpost.com/2013/03/11/arizona-mexican-american-studies-curriculum-constitutional_n_2851034.html).

226. See WALTER NUGENT, *HABITS OF EMPIRE: A HISTORY OF AMERICAN EXPANSION* 237-51, 256-65 (2008). For judicial accounts of these acquisitions see *Rice v. Cayetano*, 528 U.S. 495, 501-05 (2000) (describing the “cession” of all Crown and public lands to the United States); and *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014-15 (D. Ala. 1977), *aff’d* 612 F.2d 1132 (9th Cir. 1980), *cert. denied* 449 U.S. 888 (1980) (describing provisions of law allowing Alaska Natives to “use” their traditional lands but reserving mineral rights to the government). For a Native Hawaiian perspective, see generally TRASK, *FROM A NATIVE DAUGHTER*, *supra* note 98.

227. See ACUÑA, *supra* note 45, at 10-24.

thereafter.<sup>228</sup> In 1993, Congress formally acknowledged that these actions were illegal and a violation of Native Hawaiians' right to self-determination, but the U.S. government nonetheless steadfastly rejects assertions of Native Hawaiian sovereignty.<sup>229</sup> Alaska is referenced as having been "purchased" from Russia in 1867, with no reference to the rights or preferences of the Alaska Natives who have been organized into "corporations" that do not even have the very limited autonomy "granted" to those American Indian nations the federal government chooses to recognize, but are capable of relinquishing their lands and natural resources.<sup>230</sup>

Another glaring narrative gap erases the fact that the United States continues to exercise jurisdiction over some four million people in the unincorporated territories—i.e., external colonies—of Puerto Rico, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands.<sup>231</sup> None of these territories is recognized as an independent country or a state of the union, and all are subject to the absolute and unconstrained—"plenary"—power of the U.S. government.<sup>232</sup> After the United States took "possession" of Puerto Rico in 1898, following the so-called Spanish-American War, the Court struggled with the question of whether constitutional rights applied to such unincorporated territories. Concluding that it did not, Justice Brown, who just five years earlier had authored the majority opinion in *Plessy v. Ferguson*,<sup>233</sup> assured us that we need not fear that despotism would result, for "[t]here are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legis-

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228. See WARD CHURCHILL, *Stolen Kingdom: The Right of Hawai'i to Decolonization*, in PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLE & ANGLOAMERICAN LAW 73, 74-84 (2003).

229. Apology Resolution of 1993, Pub. L. No. 103-150, 107 Stat. 1510 (acknowledging that "the illegal overthrow of the Kingdom of Hawaii . . . resulted in the suppression of the inherent sovereignty of the Native Hawaiian people"). On the United States' ongoing obligation to remediate this illegal action, see generally Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995).

230. See Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1 (Christina Duffy Burnett & Burke Marshall eds., 2001).

231. See NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLE-NARY POWER AND THE PREROGATIVE STATE 32-34 (2006) [hereinafter SAITO, FROM CHINESE EXCLUSION].

232. See *infra* notes 354-55, 364-67.

233. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

lation manifestly hostile to their real interests.”<sup>234</sup> This is still the law that governs American settler state relations with externally colonized peoples.<sup>235</sup>

Finally, it is difficult to make sense of the complex and often contradictory dynamics affecting migrant communities of color without deconstructing the mantra of America as a “nation of immigrants.”<sup>236</sup> It is a myth that not only erases Indigenous peoples, but obscures the ways in which immigration and naturalization policy has been used to provide low-cost labor while simultaneously limiting popular imagery of “real” Americans to persons of exclusively European—preferably northern and western European—descent. Until the late nineteenth century, immigration was not perceived as a threat to settler goals because “the free global movement of labor was essential to economic development in the New World,”<sup>237</sup> and all people of color were precluded from U.S. citizenship. Naturalized citizenship had been limited to “free white person[s]” since 1790—a racial prerequisite that remained in place, in some form, until 1952<sup>238</sup>—and non-Indigenous people of color did not become citizens by virtue of birth in the territory until 1868.<sup>239</sup>

When the Chinese labor that had serviced settler society on the West Coast and built the transcontinental railroad became superfluous, the federal government implemented its first immigration

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234. *Downes v. Bidwell*, 182 U.S. 244, 280 (1901); see also Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 246-47 (1996).

235. See generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

236. See, e.g., *Connelie*, 435 U.S. at 294 (noting that “we have often been described as ‘a nation of immigrants’” while upholding a New York statute requiring police officers to be U.S. citizens); White House, Office of the Press Secretary, *Remarks by the President in Address to the Nation on Immigration*, Nov. 20, 2014 (President Barack Obama concluding his statement on immigration policy with: “My fellow Americans, we are and always will be a nation of immigrants.”), available at <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

237. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 17 (2004) (adding that “[t]his was the case even if many of the laborers themselves were not free but, rather, were enslaved or indentured”).

238. Naturalization Act of 1790, 1 1st Cong., 1 Stat. 103 (1790) (repealed by the Act of January 19, 1795, which re-enacted most of its provisions, including its racial restrictions). Following passage of the Fourteenth Amendment, this provision was modified to allow the naturalization of “persons of African descent.” See Act of July 14, 1870, 41st Cong. § 7, 16 Stat. 254 (1870). The racial restriction was removed by the Immigration and Nationality (McCarran-Walter) Act, 82nd Cong. Ch. 477, 66 Stat. 163 (1952).

239. See U.S. CONST. amend. XIV, § 1 (providing that “[a]ll 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”).

restrictions.<sup>240</sup> As the Supreme Court explained in the *Chinese Exclusion* cases, the settlers' sovereign prerogative gave them absolute authority to control who would be allowed to enter or remain within their claimed territorial boundaries, regardless of otherwise applicable constitutional constraints.<sup>241</sup> By the 1920s, an upsurge in immigration from southern and eastern Europe had triggered a "nativist"<sup>242</sup> backlash that converged with a shift toward reliance on technology rather than continued expansion of the manufacturing workforce.<sup>243</sup> In response, Congress enacted its first comprehensive restrictions on immigration in 1924, imposing an annual limit on the total number of immigrants from outside the Western Hemisphere and allocating that total according to national origin quotas.<sup>244</sup> These quotas, which remained in effect until 1965, excluded virtually all peoples of color and limited European immigration in proportion to the countries of origin of the White population as of 1910.<sup>245</sup>

Narratives incorporating the exclusion or exploitation of those deemed Other illustrate not only how the dynamic of difference has been maintained, but also how the settler class began to see itself as White and, as Cheryl Harris has documented, converted Whiteness into a form of property.<sup>246</sup> This Part is not intended to provide anything resembling a comprehensive overview of alternative narratives of American history, but simply to point out some of the salient historical realities that tend to be omitted or glossed over in the master narrative. As we begin to apply racial realism to our histories, we can begin to see patterns emerge, and these patterns facilitate the con-

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240. See ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 16-20 (2004).

241. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding the exclusion of all Chinese workers despite apparent conflicts with the 1868 Burlingame Treaty and the due process clause of the Fifth Amendment); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (allowing the deportation of three permanent residents because they had no White witnesses to attest to their residency).

242. The appropriation of the term "nativist" by settlers opposed to subsequent immigration reflects an intent to reinforce the notion that they—not Indigenous peoples—are "native" to this land. Veracini describes this need to "perform their indigenization" as "a typically settler colonial inversion." VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 79.

243. See NGAI, *supra* note 237, at 19-20; DANIELS, *supra* note 240, at 27-58.

244. NGAI, *supra* note 237, at 21-55.

245. *Id.* at 26 (quoting Johnson-Reed Act, 43 Stat. 153, § 11(d) (1924)).

246. See generally Harris, *Whiteness*, *supra* note 22; LIPSITZ, *supra* note 22. For a case study, see generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (2008). On ways in which the insights developed in Harris' *Whiteness as Property* can contribute to settler colonial theory, see generally Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. (forthcoming Spring 2015).

struction of theoretical frameworks capable of explaining historical consistencies and disparities in structural, rather than exceptional, terms. With, again, no pretense of developing a comprehensive framework, the following Part IV illustrates how some of the strategies employed by the settler state can be gleaned from this history.

#### IV. STRATEGIES OF COLONIZATION

*What colonization has done, then, is to . . . induce a state of affairs in which it actually has become necessary to advocate that survival should be chosen over extinction.*

—Robert B. Porter<sup>247</sup>

Developing narratives—the stories we live by—outside the linear, universalizing and triumphalist discourse of settler ideology helps us to recognize how we all, including those who identify as White, have been assigned racialized identities and to recognize ways in which these identities shape our relationship to the social, economic, and political status quo and, therefore, to each other. Narrative shifts may thus be a necessary first step in understanding the dynamics of racialized injustice, but they do not provide strategies for change. In order to envision effective remedial measures, we need to understand not only that harm has been and continues to be done, but also how it is being done, for this is what allows us to make structural change. Theoretical analyses of settler colonialism are beginning to identify strategies utilized to bring to fruition the settlers’ goals of effectively occupying land, controlling natural resources, and rendering their claimed territory “productive.”<sup>248</sup> Understanding how specific strategies have been used to institutionalize colonial relations lays the groundwork, I believe, for envisioning strategies of decolonization.

Relying on, and loosely following Lorenzo Veracini’s identification of “transfer strategies” used by settler societies to remove Indigenous peoples, literally and conceptually, from settler spaces,<sup>249</sup> this Part provides examples of what I have chosen to call (a) strategies of elimination, primarily targeting Indigenous peoples; (b) strategies of subjugation directed at peoples of African descent; and (c) strategies of subordination and manipulation utilized with respect to peoples of color generally understood to be voluntary migrants. It is an attempt to

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247. Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 132 (2002) [hereinafter Porter, *Pursuing the Path*].

248. See *supra* note 132 and accompanying text.

249. See VERACINI, SETTLER COLONIALISM, *supra* note 23, at 35-50.



begin applying a settler colonial analysis not only to Indigenous peoples, but also to other peoples of color in the United States.

I realize, of course, that speaking at this level of generality necessarily omits large sectors of the population, as well as enormously significant distinctions in our histories and our contemporary realities. I have not attempted to address the combinations of strategies utilized against Chicana/os, for example, who are in large measure peoples indigenous to this continent, initially subjected to a different colonizing power,<sup>250</sup> or the situation of Puerto Ricans, whose homeland remains an external U.S. colony, but more than half of whom now live in the continental United States.<sup>251</sup> I also believe that what might be termed strategies of control or regimentation have long been employed to ensure that those identified as White in this society act in a manner that reinforces, rather than undermines, settler privilege.<sup>252</sup> An assessment of those strategies, however, is well beyond the scope of this preliminary exploration. My intent is not to provide a comprehensive analysis, but simply to illustrate that injustices we often attribute to personal prejudice or view as holdovers of a bygone era may retain considerable power because they serve systemic purposes. Without understanding those purposes, I do not believe we can fashion effective remedial measures.

#### A. *Strategies of Elimination: Indigenous Peoples*

I begin with some of the strategies used to obtain and maintain territorial control, as they were, and remain, integral to the maintenance of the American settler state. As Patrick Wolfe notes, land “is not merely a component of settler society but its basic precondition.”<sup>253</sup> The “logic of elimination” central to settler societies “requires the elimination of the owners of that territory, but not in any particular way.”<sup>254</sup> Veracini identifies twenty-six practices, which he terms

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250. See generally ACUÑA, *supra* note 45.

251. See Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 87 (2013).

252. For a few examples, see DRINNON, *supra* note 177, at 9-13 (describing the Puritan's 1627 persecution of Thomas Morton for “going native”); LILLIAN SMITH, *KILLERS OF THE DREAM* 13 (photo. reprint 1994) (1949) (explaining that, as a White person, she “had to find out what life in a segregated culture had done to me”). Use of the term “race traitor” to describe Euroamericans who resist racial hierarchy demonstrates that being “White” requires complicity, as well as pedigree. See generally RACE TRAITOR (Noel Ignatiev & John Garvey eds., 1996); MAB SEGREST, *MEMOIR OF A RACE TRAITOR* (1994).

253. Wolfe, *Structure and Event*, *supra* note 126, at 103.

254. Wolfe, *Settler Colonialism and the Elimination of the Native*, *supra* note 133, at 402.

“transfer strategies.”<sup>255</sup> Initially, Anglo-American colonists relied primarily on two of these strategies: direct killing and conceptual displacement. The concept of direct killing encompasses the deliberate introduction of disease, i.e., biological warfare; organized military force; and localized violence by the civilian settler population, including that resulting from scalp bounties.<sup>256</sup> Later, less direct methods were utilized, such as the involuntary sterilization of over 40% of Native women, and the requirement that Indian children attend boarding schools with 50% mortality rates.<sup>257</sup>

Conceptual displacement refers to the characterization of Indigenous peoples as “pathologically mobile and ‘nomadic,’” i.e., coming from somewhere else and/or nowhere in particular.<sup>258</sup> This is illustrated by Justice Johnson’s concurring opinion in *Cherokee Nation v. Georgia*, describing Indian “tribes” as “nothing more than wandering hordes, held together only by ties of blood and habit.”<sup>259</sup> A related strategy is one Veracini terms “perception transfer,” in which Indigenous peoples do not really exist, except as part of the natural landscape.<sup>260</sup> Thus, for example, in recruiting settlers for the territory that would, in 1620, become the Plymouth Colony, John Smith described it as “so planted with Gardens and Corne fields” and “well inhabited with a goodly, strong and well proportioned people” that it constituted his favorite “of all the [ ] parts of the world that [he had] yet seene not inhabited.”<sup>261</sup> A variation of this strategy can be seen in George Washington’s pronouncement that “the gradual extension of our settlements will as certainly cause the savage, as the wolf, to retire; both being beasts of prey, tho’ they differ in shape.”<sup>262</sup>

As the American Indian population base and, therefore, its ability to resist, was reduced to the point where complete physical elimination no longer made economic or military sense, the most desir-

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255. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 35-50.

256. See generally CHURCHILL, “*Nits Make Lice*,” *supra* note 179; on scalp bounties, see *id.* at 178-88. See generally STANNARD, *AMERICAN HOLOCAUST*, *supra* note 177.

257. On sterilization, see ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 80-88 (2005). On boarding schools, see *supra* note 186.

258. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 36.

259. *Cherokee Nation*, 30 U.S. at 27-28 (Johnson, J., concurring).

260. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 37.

261. NEAL SALISBURY, *MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500-1643* 98 (1982) (quoting *TRAVELS AND WORKS OF CAPTAIN JOHN SMITH*).

262. Quoted in DRINNON, *supra* note 177, at 65. In fact, Washington engaged in a prolonged and brutal war to wrest territorial control from the well-organized Iroquois League. See generally BARBARA ALICE MANN, *GEORGE WASHINGTON’S WAR ON NATIVE AMERICA* (2009).

able lands were “cleared,” and the remaining population interned and removed to what were perceived to be the least desirable lands.<sup>263</sup> Veracini calls this “ethnic transfer,” noting that one of its effects is to transform those who survive into refugees of a sort, because they have been torn from the traditional lands that have defined their identities and cultures and relocated to lands to which they are not truly indigenous.<sup>264</sup>

Measures that go beyond direct killing or physical removal illustrate some of the less obvious ways in which settler state policies and popular culture have rendered Native peoples invisible, eviscerated their cultures, and portrayed their “disappearance” as inevitable. Thus, for example, historical and purportedly scientific narratives are deployed to deny that Indigenous peoples come from any given location so that “when really existing Indigenous people enter the field of settler perception, they are deemed to have entered the settler space and can therefore be considered exogenous.”<sup>265</sup> This version of conceptual displacement supports settler claims that *everyone* in the United States has descended from immigrants and, as a result, has an “equal” right to land. It can also be combined with a “narrative transfer” that acknowledges Indigenous peoples only in the past tense. In addition to rendering American Indians invisible in the present, conceptual displacement facilitates the repression of resistance, for when Indigenous peoples’ “defeat is irretrievably located in the past, their activism in the present is [rendered] illegitimate.”<sup>266</sup>

Settler society also uses its self-appointed prerogative to construct “authentic” indigeneity “as a frozen precontact essence” whose “primary effect is to provide a formula for disqualification.”<sup>267</sup> Indigeneity is also erased by racialization, which collapses innumerable distinct polities, cultures, and relational networks into a vacuous identity based on arbitrarily assigned phenotypical and cultural characteristics, and redefines multiple nations as a single “minority group” within the settler body politic.<sup>268</sup> This lays the groundwork for

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263. See *supra* note 180 and accompanying text.

264. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 35-37.

265. *Id.* at 36-37.

266. *Id.* at 41.

267. WOLFE, *SETTLER COLONIALISM*, *supra* note 25, at 204; see also VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 40.

268. See VERACINI, *SETTLER COLONIALISM* *supra* note 23, at 43 (describing “multicultural transfer” as “when indigenous autonomy is collapsed with exogenous alterity”); *id.* at 48 (characterizing Indigenous incorporation into a racial binary as “transfer by racialization”). On the relationship between racialization and the subversion of Indigenous sovereignty in the United States, see generally Torres, *supra* note 96.

“resolving” the underlying problem of illegitimate occupation through a “reconciliation” process intended to result in “relegitimation and settler self-supersession.”<sup>269</sup>

The federal government’s unilaterally imposed definitions of who is an “Indian,” including its use of “blood quantum” rules to restrict access to various “benefits” like individual land allotments, have predictably shrunk the officially recognized American Indian population base,<sup>270</sup> a process Veracini terms “transfer by accounting.”<sup>271</sup> This strategy is also illustrated by the selective federal—and state—recognition of American Indian “tribes,” a process that, by definition, also gives these governments the right to un-recognize or “terminate” them.<sup>272</sup> Federal authorities “allow” tribal governments some discretion with respect to membership while allocating “benefits” in lump-sum fashion, a process that predictably results in the internalization of transfer by accounting, as tribal authorities pare down their membership rolls to maximize benefits for remaining members.<sup>273</sup>

Since the late 1800s, when the Indigenous population had been reduced to a small fraction of the overall polity, American policy has emphasized assimilation.<sup>274</sup> Ultimately, assimilation is futile, because its success is “never dependent on indigenous performance” but, instead, requires absorption by settler society.<sup>275</sup> This does not happen, except in isolated instances, because the maintenance of settler privilege requires unassimilable difference. In the meantime, however, it “allows Indigenous people to be envisaged as only *temporarily* excluded” and supports settler claims to be “*ultimately* representing all

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269. VERACINI, SETTLER COLONIALISM, *supra* note 23, at 50.

270. See John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It’s a Race Thing*, 80 NEB. L. REV. 171, 216-18 (2001); Ward Churchill, *The Crucible of American Indian Identity: Native Tradition Versus Colonial Imposition in Postconquest North America*, in CONTEMPORARY NATIVE AMERICAN CULTURAL ISSUES 39, 50 (Duane Champagne ed., 1999).

271. VERACINI, SETTLER COLONIALISM, *supra* note 23, at 39.

272. See Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 330-31 (1998).

273. See generally James D. Diamond, *Who Controls Tribal Membership? The Legal Background of Disenrollment and Tribal Membership Litigation*, in BEST PRACTICES FOR DEFENDING TRIBAL MEMBERSHIP CASES 37-54 (2013); Margo S. Brownell, *Who’s an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REF. 275 (2000-2001).

274. See Michael G. Lacy, *The United States and American Indians: Political Relations*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 83-101 (Vine Deloria, Jr., ed., 1985) (discussing assimilationist programs as “cooptation” of the threat posed by American Indians to the legitimacy of the American political system).

275. VERACINI, SETTLER COLONIALISM, *supra* note 23, at 38.

residents.”<sup>276</sup> It also provides the rationale for extinguishing Indigenous culture and identity, an ultimately genocidal aim aptly captured by the stated objective of the boarding schools to “kill the Indian, save the man.”<sup>277</sup> Assimilationist ideology paves the way for vilifying and criminalizing those Indigenous peoples who are either structurally prevented from assimilating or do not wish to do so. The dysfunction that is found in all impoverished, colonized, and traumatized communities is, in this case, attributed to Indians being “drunk,” “lazy,” “violent,” or “incompetent,” and is used to justify high rates of incarceration.<sup>278</sup> The removal of Indian children from their communities is also justified by depicting their parents in these terms.<sup>279</sup> Such forms of criminalization are, as Veracini observes, “crucial to the disavowal of the inherently political character of indigenous demands.”<sup>280</sup>

Articulating these—and many other—strategies of elimination allows us to deconstruct and therefore resist the processes—sometimes hidden or denied, sometimes valorized—by which the American settler state has appropriated and legitimized control of its territorial base. In attempting to better understand the dynamics that have shaped, and continue to define, the status of other peoples of color in this country—those who are neither indigenous to this land nor intended to become part of the settler population—we see a distinct but overlapping set of strategies employed to recruit and control a labor force adequate to

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276. *Id.* at 39 (emphasis in original).

277. CHURCHILL, *KILL THE INDIAN*, *supra* note 95, at 14 (quoting an 1895 speech by the architect of the boarding school system, U.S. Army Captain Richard Henry Pratt); *see also* Patrick Wolfe, *Recuperating Binarism: A Heretical Introduction*, in 3 *SETTLER COLONIALISM AND INDIGENOUS ALTERNATIVES IN GLOBAL CONTEXT* (2): *RECUPERATING BINARISM* 257, 263 (2013), available at <http://dx.doi.org/10.1080/2201473X.2013.830587> (noting that “Native assimilation is not primarily a recruitment into Whiteness” but “an elimination of Indigeneity”) [hereinafter Wolfe, *Recuperating Binarism*].

278. *See* Richard Braunstein & Steve Feimer, *South Dakota Criminal Justice: A Study of Racial Disparities*, 48 S.D. L. REV. 171, 172 (2002-2003) (noting disparities in the criminalization and victimization of American Indians as well as pervasive “negative and degrading stereotypes”).

279. *See* Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 238 (2013) (“Stereotypes of Native Americans as alcoholics, drug addicts, and gamblers underlie current agency decisions to remove Native American children from their homes.”); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989) (noting that by the early 1970s 25-35% of all American Indian children were in adoptive homes, foster care, or institutions; that they were placed for adoption at eight times the rate of non-Indian children; and that 90% of these placements were in non-Indian homes).

280. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 45. In fact, the political status of American Indians results in their being subject to federal criminal jurisdiction for offenses usually prosecuted by states and, as a result, they often receive significantly harsher sentences. *See generally* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723 (2008).

meeting perceived settler needs. As noted above, this is a dimension of historical and theoretical analysis that is not well developed. The following sections offer some examples that are neither definitive nor comprehensive, in the hopes of stimulating thinking about the colonization of peoples of color within the United States.

### B. *Strategies of Subjugation: Afrodescendant Peoples*

As settler societies employed strategies of elimination to claim and occupy lands, the predictable result was that the occupied lands could only be made “productive” by importing a large labor force.<sup>281</sup> While it was foreseen that some of these workers would join the settler class, the bulk of this workforce had to be subordinated if the settler class was to maintain its political and economic hegemony.<sup>282</sup> Thus, we begin considering the role of “non-Indigenous Others” from the premise, articulated by Patrick Wolfe, that “two distinct colonial relationships of inequality are involved here: one (the dispossession of Natives) centring on land and the other (the exploitation of immigrants) centring on labour.”<sup>283</sup> In other words, “the two societies, Red and Black, were of antithetical but complementary value to White society.”<sup>284</sup>

In considering U.S. history, the relationship “centring on labour” is multidimensional and historically contingent in many respects. The situation of African Americans requires distinct analysis, I believe, because enslaved Africans cannot appropriately be described as “immigrants,” with the connotations that term carries of at least minimal volition. Of course, all people racialized as Black in this country are not the descendants of slaves, and many of the strategies of subordination used against other migrant groups are directly applicable to recent African immigrants. Nonetheless, the Black identity attributed to such immigrants often blurs distinctions that are otherwise very significant within African American communities.<sup>285</sup> Thus, for example, the unarmed Amadou Diallo was most probably shot forty-one times by New York City police officers in 1999 because he

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281. See WOLFE, *SETTLER COLONIALISM*, *supra* note 25, at 1-2.

282. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857) (observing that persons of African descent, “whether emancipated or not, yet remained subject to [the] authority” of “citizens of the United States”).

283. Wolfe, *Recuperating Binarism*, *supra* note 277, at 264.

284. Wolfe, *Race and the Trace*, *supra* note 29, at 275.

285. See generally Maurice R. Dyson, *Racial Free-Riding on the Coattails of a Dream Deferred: Can I Borrow Your Social Capital?*, 13 WM. & MARY BILL RTS. J. 967 (2005).

was a Black man pulling a wallet out of his jacket, not because he was a recent immigrant.<sup>286</sup>

The strategies employed by Anglo-American settler society to subordinate enslaved Africans and their descendants—or perceived descendants—have shifted over time, as labor needs have changed and overtly supremacist ideology and law have become incompatible with the image of American democracy that the settler class relies on for its legitimacy, both domestically and internationally. An analysis of this history yields parallels to the strategies utilized to erase Indigenous identity, if not physical presence; to promote assimilation while simultaneously perpetuating the dynamic of difference; and more generally, to foster a narrative justifying settler colonization in terms of the larger trajectory of human progress. Historically, strategies of subjugation have played a larger role than strategies of elimination with respect to Afrodescendants, but as Black people have come to be perceived as “surplus” population we see certain strategies of elimination being prioritized.

The African slave trade was, of course, a direct consequence of external European colonization, and the millions of Africans brought to this continent were Indigenous peoples forcibly removed from their traditional lands and cultures.<sup>287</sup> The trans-Atlantic slave trade resulted in dramatic population decimation within African societies, but its primary purpose was to generate profit for the colonizers, not to eliminate African peoples directly. While it did not further colonial interests to declare enslaved persons non-existent, a variant of perception transfer can be seen in the characterization of enslaved persons as property, and in their depiction—like that of other Indigenous peoples—as part of “nature,” wild animals or subhuman “savages.”<sup>288</sup> Thus, for example, South Carolina’s initial slave code was modeled on that of Barbados, which declared enslaved Africans to be “of barbarous, wild, savage natures, [ ] such as renders them wholly unqualified to be governed by the laws, customs and practices” of the colonizers.<sup>289</sup>

The slave trade may be history’s largest example of involuntary ethnic transfer, forcing Indigenous peoples off of their traditional lands and onto alien terrain.<sup>290</sup> Indigenous African identities—cultural and spiritual practices, languages, histories, family ties, even names—were

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286. See William B. Moffitt, *Racial Discrimination in America*, CHAMPION MAGAZINE, May 2000 at 9 (“[H]is only crime was the color of his skin.”).

287. See *supra* notes 207-09 and accompanying text.

288. See *supra* note 262 and accompanying text.

289. JORDAN, *supra* note 212, at 109-10.

290. See VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 35.

erased to the best of settler ability in order to facilitate control over enslaved workers, to justify their classification as property, and to enhance the credibility of settler claims to be uplifting the “uncivilized.”<sup>291</sup> This involved what Veracini terms “transfer by coerced lifestyle change,”<sup>292</sup> as well as conceptual displacement, the portrayal of Afrodescendant peoples as simultaneously from “somewhere else” and “nowhere in particular.”<sup>293</sup>

Legally, persons of African descent have been “disappeared” from settler society by denying them legal personhood, excluding them from citizenship, and limiting their agency by minutely regulating all aspects of their lives.<sup>294</sup> Their intended exclusion from settler society was clearly articulated by Chief Justice Taney in his 1856 *Dred Scott* opinion, which bluntly concluded that “a negro whose ancestors were imported into this country, and sold as slaves” was most definitely not “a member of the political community formed and brought into existence by the Constitution of the United States.”<sup>295</sup> In fact, Taney went on, even “free negroes” were not part of “this people” and, as far as the founders were concerned, a person of African descent “had no rights which the White man was bound to respect.”<sup>296</sup>

The most obvious difference in the treatment of American Indian and Afrodescendant populations arises from the settlers’ desire to encourage the reproduction of enslaved persons.<sup>297</sup> Thus, in the case of the Black population, we see an inverse form of transfer by accounting. Instead of employing exclusionary blood quantum rules to diminish the population over time, settlers instituted increasingly inclusive racial classification schemes resulting, ultimately, in the “one-drop” rule.<sup>298</sup> Rather than expanding the settler class or allowing for its “dilution,” the offspring of Afrodescendant persons were always to be subordinated, if not directly enslaved. In the meantime, of course, the settler class came to identify itself as White, and to define Whiteness with as

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291. See *supra* notes 118-20, 152 and accompanying text.

292. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 44.

293. *Id.* at 35-36.

294. See *supra* note 212 and accompanying text.

295. *Scott*, 60 U.S. at 403.

296. *Id.* at 407.

297. See HENRY WIENCEK, *MASTER OF THE MOUNTAIN: THOMAS JEFFERSON AND HIS SLAVES* 259 (2012) (explaining that Jefferson, who paid particular attention to the “breeding” of enslaved persons, stated that “a child raised every 2 years is of more profit than the crop of the best laboring man”).

298. See generally Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007) (discussing the evolution of these classifications).



much exclusivity as possible. The illogical system by which persons continue to be assigned Black or White identities in American society can thus be traced directly to settler interests.

Faced with the prospect of the abolition of slavery, American political leaders seriously considered the viability of wholesale ethnic transfer “back to Africa.”<sup>299</sup> When that proved impracticable, other means of constricting rights and maintaining social control were developed to undermine the impact of the abolition of slavery, as well as the Fourteenth Amendment’s recognition of birthright citizenship and its guarantees of equal protection and due process of law.<sup>300</sup> One solution was criminalization, and the control it offered over Black lives.<sup>301</sup> Thus, for example, the convict labor system effectively ensured that an ample supply of Black workers would be available, frequently to their former “owners,” and often at a cost less than that of sustaining enslaved labor.<sup>302</sup> Such formal policies of subjugation were supplemented, consistently, by the tolerance and even encouragement of vigilante violence by the settler population at large.<sup>303</sup>

Black labor—both enslaved and nominally free—sustained the earliest Anglo-American settler colonies, provided the agricultural base that supported settler expansion, and generated the material base of American industrialization.<sup>304</sup> Over the past several decades, however, manufacturing jobs have been replaced by technology and/or the outsourcing of production, making African American labor increasingly superfluous to settler goals.<sup>305</sup> One result is that strategies of subjugation have shifted from those which increase the settlers’ ability to extract wealth from Black labor to those of containment and control.

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299. See Michael Daly Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1, 10 (2000) (noting that Congress in 1819 “declare[d] it the official policy of the United States to return free Blacks—both kidnapped Africans and emancipated former slaves—to Africa”).

300. See *supra* notes 213, 216.

301. See generally THE AGE OF JIM CROW: SEGREGATION FROM THE END OF RECONSTRUCTION TO THE GREAT DEPRESSION (Paul Finkelman ed., 1992); see also VERACINI, SETTLER COLONIALISM, *supra* note 23, at 45 (discussing criminalization as a settler colonial strategy).

302. See *supra* note 215.

303. See generally HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY (1988).

304. See generally GAVIN WRIGHT, SLAVERY AND AMERICAN ECONOMIC DEVELOPMENT (2006).

305. See Tibbs, *supra* note 2, at 55 (noting that 50% of Black men employed in manufacturing jobs in five Midwestern states lost their jobs to deindustrialization between 1979 and 1980 and that Black youth unemployment quadrupled and Black family income fell 50% between 1965 and 1980).

Criminalization, of course, has again been employed to accomplish these purposes.<sup>306</sup>

Having erased—to the fullest extent possible—the awareness of the African cultures, histories, and communities that would allow Black people in the United States to understand themselves independently of settler culture, American society has attempted to replace self-definition with assimilation.<sup>307</sup> In other words, like colonized peoples throughout the world, Afrodescendants in North America were to be “‘uplifted’ out of existence.”<sup>308</sup> Assimilation, however, was an illusory goal because it requires not only the willingness of those deemed Other to conform to mainstream standards, values, and cultural norms, but their acceptance by settler society.<sup>309</sup> This, however, occurs only on a sporadic basis because maintenance of settler sovereign prerogative and the “value” associated with Whiteness requires the perpetuation of some form of unassimilable difference.<sup>310</sup> Thus, the conflation of “Black” with crime, drugs, and dependency discussed above serves to ensure the dynamic of difference that characterizes colonial relations.<sup>311</sup>

As I hope this illustrates, viewing racial discrimination in terms of the imperatives of settler colonialism helps explain how racial hierarchy has been maintained in this society even as the mechanisms have shifted from enslavement to legalized apartheid and exclusion and, most recently, to “colorblind” or “postracial” means of subjugation. This framework also sheds light on why many people of color persist in pursuing assimilative goals, for if there is no perception of a past to reconstruct and no viable alternatives for the future, engaging in an

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306. See PARENTI, *supra* note 84, at 238. See generally Floyd D. Weatherspoon, *Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007). On social containment, see generally CENTER FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (2012), available at <http://stopandfrisk.org/the-human-impact-report.pdf>; Donald F. Tibbs & Tyron P. Woods, *The Jena Six and Black Punishment: Law and Raw Life in the Domain of Nonexistence*, 7 SEATTLE J. FOR SOC. JUST. 235 (2008).

307. See MEMMI, *supra* note 149, at 89 (noting that for the colonizers’ “legitimacy to be complete, it is not enough for the colonized to be a slave, he must also accept his role”). On the problematic nature of assimilation, see *infra* notes 427-434 and accompanying text.

308. VERACINI, SETTLER COLONIALISM, *supra* note 23, at 37.

309. See *id.* at 38 (noting that assimilation requires “absorption” by the settler body politic).

310. See *supra* notes 114-16 and accompanying text.

311. See *supra* notes 84, 91 and accompanying text.

apparently Sisyphean struggle is understandably preferable to despair.<sup>312</sup>

C. *Strategies of Subordination and Manipulation:  
“Voluntary” Immigrants*

Peoples of color in contemporary American society who are neither indigenous to this land nor the descendants of enslaved Africans migrated to this continent for reasons that encompass the entire spectrum of volition. Given the United States’ remarkably successful campaign to depict this as a “land of opportunity” for all, many undoubtedly came voluntarily, believing—accurately or not—in their ability to share in the benefits accrued by the settler class.<sup>313</sup> Many others, however, have migrated under very different circumstances, from Chinese laborers literally kidnapped and forced to migrate;<sup>314</sup> to Filipinos, Puerto Ricans and Pacific Islanders driven from their homelands by U.S. colonial occupation and its economic consequences;<sup>315</sup> to Central American refugees, themselves Indigenous peoples, forced off their lands by U.S.-backed military governments;<sup>316</sup> to those, like Mexican subsistence farmers, no longer able to feed their families as a

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312. HOMER, ODYSSEY 175-76 (Stanley Lombardo, trans., Hackett Publishing Co. Inc. 2000) (describing Sisyphus’ condemnation to forever rolling a large boulder up a hill, only to have it always roll back down); *see also* Alperin v. Vatican Bank, 410 F.3d 532, 555 (9th Cir. 2005) (explaining the term).

313. *See, e.g.*, Jim Lockwood, *Land of Opportunity Attracts Immigrants*, CITIZENVOICE (May 26, 2013), <http://citizensvoice.com/news/land-of-opportunity-attracts-immigrants-1.1492463>.

314. *See* Renee C. Redman, *From Importation of Slaves to Migration of Laborers: The Struggle to Outlaw American Participation in the Chinese Coolie Trade and the Seeds of United States Immigration Law*, 3 ALB. GOV’T L. REV. 1, 2-5 (2010).

315. *See* John Enriquez Andres, *The Raiding of the Pearl: The Effects of Trade Liberalization on Philippine Labor Migration, and the Filipino Migrant Worker’s Experience*, 10 RUTGERS RACE & L. REV. 523, 530-31 (2009) (documenting the pressure to migrate resulting from poverty in the Philippines); Torruella, *supra* note 251, at 82-87 (demonstrating the nexus between colonization, economic exploitation and migration in Puerto Rico); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 488-519 (2002) (explaining the ongoing effects of U.S. colonialism in the Pacific Islands).

316. *See, e.g.*, Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 317-18 (1985) (explaining the relationship between Salvadoran migrants and U.S. foreign policy).

result of global economic agreements;<sup>317</sup> to refugees generated by U.S. wars, from Southeast Asia to Iraq and Afghanistan.<sup>318</sup>

Some of these peoples have been subjected to the push-pull dynamics of perceived labor needs. In these cases, governmental policies have facilitated the importation of labor from, for example, China and Mexico, when otherwise available labor was inadequate to settler territorial or economic expansion, and implemented exclusionary policies in response to economic downturns.<sup>319</sup> In other cases, such as the influx of refugees generated by U.S. wars, the diversification of the population seems less intentional, accepted, often grudgingly, as the collateral damage of the policies and actions perceived as necessary to achieve or maintain global hegemony.<sup>320</sup> Regardless of the motivations impelling people of color to the United States, certain commonalities, or patterns, can be seen in terms of their subordination, i.e., how they have been racially identified and incorporated into settler hierarchies of power and privilege, and what I have termed their manipulation, i.e., how their status as migrants who are neither Black nor White has been used to further the subjugation of peoples of African descent and reinforce the perceived legitimacy of the settler state and its elimination of Indigenous peoples.

Some of the strategies employed against more-and-less voluntary migrants of color overlap with those used to subordinate Afrodescendant and Indigenous peoples in this country. Assimilation is probably the most obvious. While it has tended to be less coercively enforced with respect to migrant Others, the pressure to abandon languages, cultures, and histories has been consistent.<sup>321</sup> This results in a

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317. See Marc Belanger, *Immigration, Race, and Economic Globalization on the U.S.-Mexico Border: Tangled Histories and Contemporary Realities*, 10 J. GENDER RACE & JUST. 1, 2-3, 13-16 (2006).

318. See Thomas Hedges, *U.S. Breaks Promises to Iraqi and Afghan Refugees*, TRUTHDIG (Mar. 27, 2013), [http://www.truthdig.com/report/item/us\\_breaks\\_promises\\_to\\_iraqi\\_and\\_afghan\\_refugees\\_20130327](http://www.truthdig.com/report/item/us_breaks_promises_to_iraqi_and_afghan_refugees_20130327) (noting that about 80,000 of 1.5 million refugees fleeing Iraq have been resettled in the U.S.). See generally Gary Kar-Chuen Chow, *Exiled Once Again: Consequences of the Congressional Expansion of Deportable Offenses on the Southeast Asian Refugee Community*, 12 ASIAN AM. L.J. 103, 106-11 (2005) (providing background on Vietnamese, Cambodian, Laotian, and Hmong refugees).

319. See generally Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711 (2012).

320. See, e.g., A.O. Scott, *Witnesses to the Collapse: "Last Days in Vietnam" Looks at Fall of Saigon*, N.Y. TIMES, (Sept. 4, 2014), <http://www.nytimes.com/2014/09/05/movies/last-days-in-vietnam-looks-at-fall-of-saigon.html> (reviewing a movie addressing the evacuation of "[t]housands of Vietnamese who had loyally served the American cause").

321. See Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 378-89 (1997). See generally Sylvia R. Lazos Vargas, *Deconstructing Homogeneous Americanus:*

form of conceptual displacement because those whose past has been erased come from “nowhere” and only what is “here” matters. Thus, the fact that a refugee may be a medical doctor becomes irrelevant, invisible, to those who only see a taxi driver.<sup>322</sup> Ethnic transfer has also been employed, as illustrated by the mass deportations of Mexicans and Mexican Americans in the 1930s,<sup>323</sup> and the mass internment of Japanese Americans, both “aliens” and U.S. citizens, during WWII.<sup>324</sup> In both cases, much of the political pressure for these enforced removals came from “nativists,” i.e. White settlers who viewed this as *their* country and resented not only the competition of cheap labor but also the occupation and cultivation of *their* agricultural lands in Western states.<sup>325</sup>

The racialization of migrant Others is a strategy that has been used to subordinate peoples of color in a way that erases their particular histories and identities, replacing them with artificially constructed identities that are then used to reinforce a multi-layered racial hierarchy. Just as Indigenous peoples from hundreds of nations in North America or Africa have been categorized, officially and in public perception, as simply “American Indian” or “Black,”<sup>326</sup> those of Chinese, Vietnamese, Korean or Filipino ancestry are all “Asians,”<sup>327</sup> while those from origins as diverse as Mexico, Puerto Rico, and Argentina

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*The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998).

322. See Paul McDaniel, *Licensing Barriers Leave Immigrant Doctors Driving Cabs Instead of Practicing Medicine*, AM. IMMIGR. COUNCIL (Dec. 17, 2013), <http://immigrationimpact.com/2013/12/17/licensing-barriers-leave-immigrant-doctors-driving-cabs-instead-of-practicing-medicine/>.

323. See Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror,”* 26 PACE L. REV. 1, 4-9 (2005) (discussing the removal of an estimated one million Mexicans and Mexican Americans during the Depression and noting that it would today be considered a form of “ethnic cleansing”) [hereinafter Johnson, *Forgotten Repatriation*].

324. See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 489, 508 (1945) (noting that a majority of those interned were U.S. citizens, and that German and Italian aliens were not interned en masse).

325. See Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 115-18 (1998) (discussing the role of the Native Sons of the Golden West in the Japanese American internment). See generally Johnson, *Forgotten Repatriation*, *supra* note 323.

326. See Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 256 (2011) (noting a shift in admissions practices away from a unified “Black” category).

327. See Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947, 952-56 (2013). On the shifting racialization of South Asians, see Vinay Harpalani, *Desi Crit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 104-09 (2013).

are “Hispanic.”<sup>328</sup> In recent decades, the classification system has become somewhat more complex but no more accurate.<sup>329</sup>

One result of this process is that characteristics attributed to one subgroup may be applied, at will, to those with whom they have been racially conflated. From this emerges the logic, if one can use that term, that allowed a jury in Detroit to acquit White workers, allegedly upset by layoffs at a Japanese-owned auto plant, for beating Vincent Chin, a fifth generation Chinese American, to death with a baseball bat while disparaging him as a “gook.”<sup>330</sup> In a related phenomenon, we have seen Arab Americans and persons from a wide range of countries in the Middle East, North Africa, and South Asia, collapsed into a racialized identity whose predominant feature might be described as “presumed terrorist.”<sup>331</sup>

Regardless of the vagaries of the taxonomy, the first and probably most important point is that all of these categories are Not-White.<sup>332</sup> Functionally, this means that persons so classified are presumed not to be eligible for inclusion in the settler class. Simultaneously, however, such migrant Others are deemed Not-Black, giving them an incentive to collaborate in the maintenance of racial hierarchy.<sup>333</sup> The possibility of assimilation, i.e., “honorary” settler status,<sup>334</sup> is held out as an incentive to conform, to undermine coalition building with Black communities as well as other migrant groups and Indige-

328. See Francisco Valdes, *Race, Ethnicity, and Hispanismo in a Triangular Perspective: The “Essential Latina/o” and Latcrit Theory*, 48 UCLA L. REV. 305, 313-17 (2000).

329. On the shifting definitions used in the U.S. Census, see Alaina R. Walker, *Choosing to Be Multiracial in America: The Sociopolitical Implications of the “Check All That Apply” Approach to Race Adopted in the 2000 U.S. Census*, 21 BERKELEY LA RAZA L.J. 61, 64-67 (2011).

330. See SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 176-78 (1991).

331. See Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 11-15 (2001). For a more nuanced discussion of this phenomenon, see generally Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER SOC. POL’Y & L. 411 (2010).

332. On the legal construction of the White/non-White distinction, see generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) [hereinafter HANEY LÓPEZ, *WHITE BY LAW*].

333. See Mari Matsuda, *We Will Not Be Used*, 1 ASIAN AM. PAC. IS. L.J. 79, 79 (1993) (noting that the “racial middle” can “reinforce white supremacy if the middle deludes itself into thinking that it can be just like white if it tries hard enough”) [hereinafter Matsuda, *We Will Not Be Used*].

334. This phrase echoes the apartheid-era South African policy of classifying Japanese as “honorary whites” because of the importance of Japanese trade and investment. See Seiro Kawasaki, *The Policy of Apartheid and the Japanese in the Republic of South Africa*, 5 TOKYO KASEIGAKUIN TSUKUBA WOMEN’S UNIVERSITY BULLETIN 53, 54 (2001), available at <http://www.tsukuba-g.ac.jp/library/kiyou/2001/4.KAWASAKI.pdf>.

nous peoples, and as evidence of the settler myth that it is not structural racism but some variant of cultural dysfunction that keeps people of African descent and American Indians at the lowest rungs of social and economic wellbeing.<sup>335</sup>

This is perhaps best illustrated by the depiction of Asian Americans as the “model minority.”<sup>336</sup> The label itself reflects its intent to both subordinate and manipulate. Asians are a “minority”—i.e., *not* settlers—and thus to be relegated to a subordinate status within settler society. Simultaneously, however, we are the “model,” presumably for other “minorities.”<sup>337</sup> This phrase evokes the imagery of Asians as hardworking, economically successful, and anxious to assimilate. It masks the distinct problems faced by particular subgroups, as when refugees from Laos or Cambodia are assumed to have the resources accumulated by Chinese or Japanese American communities over many generations.<sup>338</sup> It sends the not-so-subtle message to Asian Americans that we should be “grateful” not to be at the bottom of settler racial hierarchy, reinforcing settler hegemony by creating barriers to our ability to see common patterns of subordination.<sup>339</sup>

The benefits that migrant Others purportedly gain from assimilation are consistently undermined by another strategy that may be termed the construction of “perpetual foreignness,” or excludability.<sup>340</sup> As noted above, until after the Civil War, birthright citizenship was presumed to extend only to White settlers and their offspring (assuming those children were also White),<sup>341</sup> and naturalized citizenship was explicitly limited to persons who were, among other things, “free white person[s].”<sup>342</sup> This racial prerequisite to naturalized citizenship was not completely eliminated until 1952,<sup>343</sup> and in the interim “ineligibil-

335. See Matsuda, *We Will Not Be Used*, *supra* note 333, at 80-81.

336. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 474-84 (rev'd ed. 1998).

337. See Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71, 71-73 (1997).

338. See Kia Xiong, *Missing the Hmong: A Need for More from Asian American Legal Studies*, 18 *ASIAN PAC. AM. L.J.* 119, 123-24 (2012-2013).

339. See generally Matsuda, *We Will Not Be Used*, *supra* note 333.

340. See Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 *OR. L. REV.* 261, 295-325 (1997); Keith Aoki, “Foreign-ness” & Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 *ASIAN PAC. AM. L.J.* 1, 3 (1996) (noting that Asian Americans are “race-ed” not only as “non-Whites” but also as “foreign”).

341. See *supra* notes 213, 216, 295-96 and accompanying text.

342. See *supra* note 238. See generally HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 332 (discussing cases that interpreted this racial prerequisite to naturalization).

343. See *supra* note 238 and accompanying text; see also HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 332, at 43-44.

ity to citizenship,” code for “non-White,” was used to restrict the rights and privileges available to immigrants of color.<sup>344</sup> This strategy was deployed effectively to prevent “aliens ineligible to citizenship” from owning land in many Western states, thus ensuring that they would not, in U.S. Senator James Phelan’s terms, “destroy[] the area for White settlement and the desirable element.”<sup>345</sup>

The federal government’s plenary authority over immigration has been used to shape the immigrant population on the basis of race and national origin, to impose ideological and political restrictions on immigrants, and to deport them or imprison them indefinitely without due process or otherwise applicable constitutional protections.<sup>346</sup> The government’s ability to retroactively change the terms under which even long-term permanent residents may remain renders these groups even more vulnerable to settler control and manipulation.<sup>347</sup>

As a result of policies restricting “legal” immigration to numbers far below the perceived labor needs of the agricultural and service sectors, as well as the economic pressures generated by international free trade agreements, there are large communities of undocumented migrants in the United States.<sup>348</sup> This facilitates a strategy of subordination that may be termed “presumption of illegal presence,” as the conflated racialization of Mexicans and Central Americans, for example, colors them all as “illegal aliens.”<sup>349</sup> The result is not only the sociocultural subordination that attends stereotyping, but also a particular form of criminalization that encourages racial profiling and normalizes the idea that immigrants of color may be disappeared by governmental authorities at any time.<sup>350</sup>

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344. See HANEY LÓPEZ, *WHITE BY LAW*, *supra* note 332, at 90-91.

345. Quoted in NGAI, *supra* note 237, at 39; see also *Oyama v. California*, 332 U.S. 633, 650-63 (1948) (Murphy, J., concurring) (finding California’s alien land law unconstitutional and explaining the racism underlying its reliance on ineligibility to citizenship). See generally Keith Aoki, *No Right to Own? The Early Twentieth Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998).

346. See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

347. See López, *supra* note 319, at 1718 (arguing that “[t]he U.S. has built its prosperity, while Mexico has managed its distress” with undocumented Mexican migration).

348. See AVIVA CHOMSKY, *UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL* 63 (2014).

349. See *id.* at 14-20. See generally Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997).

350. NGAI, *supra* note 237, at 2 (“[T]he presence of large illegal populations in Asian and Latino communities has historically contributed to the construction of those communities as illegitimate, criminal, and unassimilable.”).



Racialization, harsh immigration laws, and the historic use of race-based restrictions on birthright and naturalized citizenship have thus combined to produce perpetual foreignness. As Ngai notes,

the association of these minority groups as unassimilable foreigners has led to the creation of “alien citizens”—persons who are American citizens by virtue of their birth in the United States but who are presumed to be foreign by the mainstream of American culture and, at times, by the state.<sup>351</sup>

One result is the often unspoken assumption that White people may have roots in other countries, but are *from* here. It is grudgingly accepted that persons of African descent cannot, generally, be sent back to Africa, but they are to be excluded from settler space where possible. Everyone else is from somewhere else, and must constantly prove the legitimacy of their presence. The pervasiveness of this presumption of foreignness, and therefore illegitimate presence, was most starkly brought home to me in a sadly ironic incident shortly after September 11, 2001, when a young Creek woman in Oklahoma was run over and killed by young White men who assaulted a group of Native youth while shouting “Go back to your own country!”<sup>352</sup>

The point of developing analytical tools that explain the dynamics of racial, economic, and political domination and subordination is not simply to better understand what is, and how we got here, but to enable us to envision and implement more effective strategies of resistance and transformation. In this process, law is tremendously influential because it is offered and generally accepted as a path to racial justice, and because it often implements strategies of elimination and subordination that we need to recognize. Law will not liberate us, but may, at times, serve as a tool of decolonization. The following Parts V and VI address the inadequacies of legal remedies for racial justice within the limitations of U.S. constitutional law, and the potential—as well as limitations—of emerging frameworks of international law.

## V. CONSTITUTIONAL PROTECTION AND THE DYNAMIC OF DIFFERENCE

*[T]he power to acquire territory . . . implies, not only the power to govern such territory, but to prescribe upon what terms the United*

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351. *Id.* at 2.

352. See MICHAEL NEWTON, HATE CRIME IN AMERICA, 1968-2013: A CHRONOLOGY OF OFFENSES, LEGISLATION AND RELATED EVENTS (2014) (entry dated Sept. 15, 2001).

*States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the “American empire.”*

—*Downes v. Bidwell*<sup>353</sup>

In contemporary U.S. culture, it is almost axiomatic that full incorporation of the population under U.S. jurisdiction into the settler state is the intended result of constitutionally recognized civil and political rights, as well as the aspirational goal of people of color living in the United States or its claimed territories. It is presumed that any vestiges of discriminatory treatment are best addressed through legal enforcement of the Constitution’s guarantees of due process and equal protection, and that assimilation will overcome any remaining limitations imposed as a result of perceived difference. However, if one accepts that the United States is—still—a colonial settler state, it follows that the primary purpose of this state’s legal system would be to sustain the territorial claims and the relationships of privilege and subordination that ensure control of political, economic, and social institutions by the settler class. Simultaneously, however, the legal system must shore up the ideological justifications of settler society, framed in terms of extending the “American values” of freedom, democracy, and human rights to the world at large.

Thus, the dynamic of difference characterizes not only racial attitudes and social relations, but the legal system as well. The tensions and contradictions between the law’s stated purposes and its lived realities limit its utility while simultaneously providing opportunities to use this dissonance to extend the reach of formally recognized rights. This Part addresses why struggles to implement formal guarantees of equal protection have failed to ensure racial justice. First, it notes that large sectors of the population are explicitly excluded from constitutional protection by virtue of the plenary power doctrine. Second, even when constitutional protections are available, they have been interpreted in formalistic ways that facilitate the dynamic of difference by both requiring and precluding assimilation. It concludes by observing that even if assimilation were not precluded, it is a problematic goal because it would come at the cost of eliminating Indigenous identity and rights, as well as the right of all other peoples to self-determination. At best, it would ensure the domestic consolidation of settler society, without dismantling its colonial foundations or limiting the global reach of its economic, political, or military ambitions.

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353. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901).

### A. Plenary Power

The first thing to note about constitutional protections is that the Supreme Court has simply decreed that they do not apply to very broad and significant sectors of the population over whom the United States asserts jurisdiction.<sup>354</sup> Instead, power that is explicitly colonial may be exercised over American Indian nations, immigrants, and residents of unincorporated territories by the political branches of government, i.e., Congress and the Executive. This is known as the plenary power doctrine, under which the Court has said the federal government can exercise plenary—full or complete, and therefore unchallengeable—authority over these peoples.<sup>355</sup>

Early Anglo-American settlers understood that their ability to establish an independent state was contingent upon acknowledging the sovereignty of American Indian nations and negotiating treaties with these nations.<sup>356</sup> Their intent, however, was always to exercise their presumed prerogative to control not only the lands at issue but also the structures of institutional power. By the 1830s, the Supreme Court had unilaterally declared Indigenous peoples to be “domestic dependent nations” whose relationship to the United States was that of a “ward” to a “guardian.”<sup>357</sup> The doctrine was more formally articulated in 1903, with the Supreme Court’s clearly counterfactual statement that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>358</sup>

Using this rationale, the Court upheld the 1887 Allotment Act, which converted collectively held Indian lands into individual allotments and allowed “surplus” land to be transferred to White settlers,

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354. See generally SAITO, FROM CHINESE EXCLUSION, *supra* note 231; THOMAS ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002) [hereinafter ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY]; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

355. See SAITO, FROM CHINESE EXCLUSION, *supra* note 231, at 13-49.

356. See Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 591 (1995) (noting that the U.S. initially “enter[ed] into treaties of friendship and alliance on a perfectly level playing field with the Indian nations . . . extending to them the same courtesies as to other nations of the then overwhelmingly European international legal order”).

357. *Cherokee Nation*, 30 U.S. at 17. See generally Helen W. Winston, “An Anomaly Unknown:” *Supreme Court Application of International Law Norms on Indigenous Rights in the Cherokee Cases (1831-32)*, 1 TULSA J. COMP. & INT’L L. 339 (1994).

358. *Lone Wolf*, 187 U.S. at 565. See generally CLARK, *supra* note 187.

despite the fact that the law violated both the due process clause of the Fifth Amendment and the explicit terms of an 1867 treaty.<sup>359</sup> This judicial doctrine of plenary power has since been invoked to allow Congress and the Executive to engage in otherwise unconstitutional actions against American Indian nations with no semblance of judicial restraint,<sup>360</sup> resulting, for example, in generations of American Indian children being forced into abusive “boarding schools,”<sup>361</sup> and the government’s recent failure to account for more than one hundred billion dollars it confiscated and held “in trust” for individual American Indians.<sup>362</sup> As Philip Frickey notes, the “practical effect [of federal Indian law] has been to legitimate the colonization of this continent—the displacement of its native peoples—by the descendants of Europeans.”<sup>363</sup>

Similarly, the United States has, since 1898, exercised jurisdiction over “unincorporated territories” without extending constitutional protections to their inhabitants. From 1898 to 1946, the U.S. considered Filipinos “wards” of the United States, “nationals” who owed allegiance to the U.S. but were not entitled to the full benefits of citizenship.<sup>364</sup> In 1901, Justice White declared in *Downes v. Bidwell* that the colony of Puerto Rico “was foreign to the United States in a domestic sense.”<sup>365</sup> This description is still accurate after a century of U.S. rule, as Puerto Ricans still have no representation in Congress, only qualified citizenship, and no right to determine their own political status.<sup>366</sup> Similarly, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa are not recognized as independent states

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359. Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 441 (2002).

360. See generally Newton, *Federal Power over Indians*, *supra* note 199.

361. See generally CHURCHILL, *KILL THE INDIAN*, *supra* note 95.

362. See *Cobell v. Norton*, 334 F.3d 1128, 1133-35 (D.C. Cir. 2003) (ruling in class action suit filed in 1996 for unaccounted-for individual American Indian trust monies); see also Jennifer Talhelm, *Inside Washington: Cowboy Judge in Indian Case Holds Little Back*, AP ALERT, Nov. 28, 2005 (noting claims that the Interior Department mishandled more than \$100 billion in royalties); Diana Marrero, *Tribal Members Place Renewed Urgency on Resolving Landmark Lawsuit*, MUSKOGEE DAILY PHOENIX & TIMES DEMOCRAT, Nov. 18, 2005, at 1 (noting charges of governmental “squandering” of \$137 billion).

363. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).

364. See Avelino J. Halagao, Jr., *Citizens Denied: A Critical Examination of the Rabang Decision Rejecting United States Citizenship Claims by Persons Born in the Philippines During the Territorial Period*, 5 ASIAN PAC. AM. L.J. 77, 77-78 (1998).

365. *Downes*, 182 U.S. at 341 (1901) (White, J., concurring).

366. See Burnett & Marshall, *supra* note 230, at 12. See generally EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* (2001).

or as states of the union, and their residents remain subject to the plenary authority of the U.S. government.<sup>367</sup>

Since the 1880s, the plenary power doctrine has been relied upon to protect the settlers' assumption of control over who could enter or reside within their claimed territorial boundaries. In 1889, a Chinese permanent resident challenged a statute that was passed while he was abroad and prevented the reentry of Chinese persons into the United States.<sup>368</sup> The Supreme Court refused to apply the provisions of a treaty with China or the Fifth Amendment's due process clause on the grounds that Congress' "determination is conclusive upon the judiciary."<sup>369</sup> This rationale was extended during the Cold War to the indefinite detention of those whom the government wished to deport, but had nowhere to go.<sup>370</sup> The plenary power doctrine continues to be the foundational principle of U.S. immigration law.<sup>371</sup> It has been invoked to justify intercepting Haitians and asylum seekers on the high seas, or detaining them off-shore,<sup>372</sup> because persons not admitted to the territory "have no constitutional rights with regard to their applications, and must be content to accept whatever statutory rights and privileges they are granted by Congress."<sup>373</sup> This assertion of power permits the indefinite detention of undocumented migrants, as well as the increasingly harsh immigration measures referenced above.<sup>374</sup> In

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367. See Burnett & Marshall, *supra* note 230, at 1-2.

368. Chae Chan Ping, 130 U.S. at 600 (noting that "the last expression of the sovereign will must control").

369. *Id.* at 606; see also Fong Yue Ting, 149 U.S. at 730-34 (1893) (extending plenary authority from exclusion to deportation and refusing to characterize deportation as punishment that would trigger constitutional scrutiny).

370. See Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208 (1953) (allowing a returning permanent resident to be held indefinitely on Ellis Island, without a hearing, on the Attorney General's assertion that his entry would be "prejudicial to the public interest").

371. See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Motomura, *supra* note 346; ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY*, *supra* note 354.

372. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (holding that neither the Refugee Convention nor U.S. immigration statutes would be applied to actions on the high seas). See generally Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993).

373. *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984). The Supreme Court ruled that the Eleventh Circuit should not have reached the constitutional question and declined to revisit the Cold War plenary power cases. *Jean v. Nelson*, 472 U.S. 846, 854-55 (1985). The following year the Court refused to grant certiorari in *Garcia-Mir v. Meese*, in which the Eleventh Circuit noted specifically that international human rights law was inapplicable to the indefinitely detained Mariel Cubans. 788 F.2d 1446, 1453-55 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986).

374. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court found detained migrants to have some due process rights, but this has not eliminated indefinite detention or limited the plenary power doctrine. See generally Michelle Carey, "You Don't Know If They'll Let You

combination with the state's claim to plenary authority over unincorporated territories, it has also been used to justify the United States' failure to provide detainees at Guantanamo Bay with otherwise applicable legal or constitutional protections.<sup>375</sup>

This judicial doctrine puts us on notice that although contemporary legal decisions may employ more sanitized language, and layers of precedent may be invoked to mask the underlying reasoning, only the "principles of natural justice inherent in the Anglo-Saxon character" stand between those deemed Other and "manifestly hostile" state action.<sup>376</sup> The government may choose to extend certain rights or privileges to the peoples at issue, but only as an exercise of its own prerogative, not because it recognizes an obligation to do so.<sup>377</sup> What this means is that, while constitutional protections may be utilized to alleviate injustice or enhance equal treatment amongst those who, from a settler perspective, have no identity outside the settler polity, the lines have been clearly drawn. The judiciary will not interpret the Constitution to limit, to any significant degree, the settler prerogative to occupy lands and appropriate resources, to erase Indigenous sovereignty, or to determine who may enter or remain on those lands. Regardless of how reasonably, equitably, or effectively constitutional principles may be applied to some sectors of the citizenry, underlying colonial structures will remain intact.

### B. *Equal Protection and Due Process*

The plenary power doctrine thus exempts certain sectors of the population from constitutional protection. For those to whom the Constitution does apply, it is generally presumed that the guarantees of due process and equal protection provided by the Fifth and Fourteenth Amendments can be used to dismantle racial hierarchy.<sup>378</sup> This pro-

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*Out in One Day, One Year, or Ten Years . . ."* *Indefinite Detention of Immigrants after Zadvydas v. Davis*, 24 CHICANO-LATINO L. REV. 12 (2003); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIG. L.J. 365 (2002).

375. See generally Ernesto Hernández-López, *Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 U.C. IRVINE L. REV. 193 (2012); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1 (2004).

376. *Downes*, 182 U.S. at 280-81.

377. This is, itself, a strategy of both elimination and subordination that parallels the imposition of dual legal systems in classic colonial societies. See Jeffrey R. Dudas, *Law at the American Frontier*, 29 L. & SOC. INQUIRY 859, 869 (2004) (discussing dual legal systems in colonial contexts).

378. For an overview of the developments addressed in this section, see generally Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (explaining how equal

position, however, warrants scrutiny. The triumphalist narrative of American legal history generally moves from the Constitution as originally framed, with its articulation of a broad range of rights for a limited sector of the population and its protection of the institution of slavery, to the Reconstruction Amendments that abolished slavery, instituted birthright citizenship, guaranteed equal protection under law, and prohibited racial discrimination in voting rights. It portrays the subsequent century of legalized apartheid as a transitional phase to the current implementation of these rights through judicial decisions and legislation passed during the civil rights era.<sup>379</sup> From this perspective, the law may have once been, but is no longer a tool of racialized subordination, and any disparities in its enforcement, or in access to social resources more generally, are attributable either to vestigial prejudice or the failure of racial “minorities” to take advantage of the opportunities available to all.

The problem with this narrative—like that of the Anglo-American origin story more generally—is that it fails to account for the persistent patterns of exclusion, elimination, and subordination throughout U.S. history, and the reality that racial disparities in wealth, income, housing, education, employment, access to healthcare, and incarceration rates have not diminished significantly since legalized apartheid was abolished.<sup>380</sup> A brief review of key legal decisions implementing constitutional rights and legislation purporting to protect civil rights illustrates how structural inequality has been maintained.

In the *Civil Rights Cases* of 1883, the Supreme Court declared unconstitutional portions of the Civil Rights Act of 1875 prohibiting private owners of public accommodations from discriminating on the basis of race.<sup>381</sup> In the Court’s opinion, it was time for former slaves to “cease[] to be the special favorite of the laws.”<sup>382</sup> As observed by Mario Barnes, Erwin Chemerinsky, and Trina Jones, “Just eighteen years after the end of slavery . . . the Supreme Court was ready to declare that

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protection jurisprudence has come to protect the racial status quo) [hereinafter Haney-López, *Intentional Blindness*]; Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931 (2008) (addressing the shortcomings of equal protection theory).

379. For a critique of the standard narrative, see LOEWEN, *supra* note 154, at 131-163, 223-31.

380. See *supra* notes 54-66.

381. *Civil Rights Cases*, 109 U.S. 3, 11-15 (1883) (finding these prohibitions to violate the Tenth Amendment’s protection of state powers, and holding that the Fourteenth Amendment’s guarantee of equal protection extended only to state action).

382. *Id.* at 25.

U.S. society was ostensibly post-racial.”<sup>383</sup> Shortly thereafter, in *Plessy v. Ferguson*, it found “separate but equal” accommodations (meaning legally mandated apartheid) to comport with the Fourteenth Amendment’s guarantee of equal protection.<sup>384</sup> As succinctly summarized by Justice Powell in the *Bakke* case, for all practical purposes the equal protection clause had been “strangled in infancy.”<sup>385</sup>

Confronted with the constitutionality of internment of U.S. citizens of Japanese descent during World War II, the Supreme Court declared laws restricting civil rights on the basis of race to be “immediately suspect,”<sup>386</sup> thus introducing the notion of “strict scrutiny” into American jurisprudence. Despite its claim to be rigidly scrutinizing mass incarceration on the basis of race, the Court upheld the internment, accepting at face value the government’s assertion that it was necessary for national security.<sup>387</sup> A decade later, in *Brown v. Board of Education*, the Supreme Court expanded the reach of Fourteenth Amendment equal protection, using evidence of the effects of segregation on Black school children to overturn *Plessy* and declare segregated schools to be inherently unequal.<sup>388</sup> But the Justices did not actually address the history of racism in this country. Instead, they characterized legalized apartheid as aberrational, noting in a companion case to *Brown* that “[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”<sup>389</sup> Since then, the Court has employed strict scrutiny not only to strike down overtly discriminatory laws, such as those prohibiting miscegenation,<sup>390</sup> but also laws or policies intended to remedy historic racial inequities through some variant of

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383. Barnes et al., *supra* note 9, at 973.

384. *Plessy*, 163 U.S. at 550-51.

385. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978) (internal citation omitted). Justice Powell notes that, by contrast, “the Due Process Clause flourished as a cornerstone in the Court’s defense of property and liberty of contract.” *Id.*

386. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

387. *Id.* at 217-19. See generally Rostow, *supra* note 324 (debunking the government’s claim of military necessity).

388. *Brown*, 347 U.S. at 494-95.

389. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (finding racial segregation in District of Columbia schools to be unconstitutional under the due process clause of the Fifth Amendment) (emphasis added).

390. See *Loving v. Virginia*, 388 U.S. 1, 9-12 (1967).



what is commonly termed “affirmative action.”<sup>391</sup> The presumption in this line of equal protection cases is that race should not matter.<sup>392</sup>

As a result, the principle that law should not be used to exclude or disadvantage people on the basis of race or ethnicity has been transformed into an ahistorical proposition that does not allow for the recognition of any privilege that White people, collectively, have accrued over several centuries of institutionalized racism.<sup>393</sup> This is reflected in Justice Powell’s assertion in *Bakke* that “‘societal discrimination’ does not justify . . . impos[ing] disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”<sup>394</sup> Those who have historically benefitted from White privilege are, individually, “innocent.”<sup>395</sup> As Cheryl Harris explained, they have accrued a property interest in Whiteness, and any attempt to dispossess them of its advantages becomes a taking.<sup>396</sup> Dissenting in the *Wards Cove* case in 1989, Justice Blackmun “wonder[ed] whether the majority still believes that race discrimination—or more accurately, race discrim-

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391. See Haney-López, *Intentional Blindness*, *supra* note 378, at 1826-28; see also Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 637 (2003) (noting that laws burdening historically privileged groups have been most frequently struck down). The Court may be slowly shifting back toward the incorporation of context to strict scrutiny analyses. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“[c]ontext matters when reviewing race-based governmental action”); see also Eric K. Yamamoto et al., *Contextual Strict Scrutiny*, 49 HOW. L.J. 214, 248-56 (2006) (pointing out the Court’s acknowledgment of context in a range of cases).

392. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that a general history of past racial discrimination did not justify the use of racial quotas in public works contracts); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Bakke*, 438 U.S. at 265 (precluding consideration of race in medical school admissions, except as part of a broader process of enhancing diversity).

393. On institutionalized racism, see generally John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008) [hereinafter Powell, *Structural Racism*]. On the failure to meaningfully implement civil rights legislation, see generally John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998) (criticizing the implementation of fair housing laws).

394. *Bakke*, 438 U.S. at 310; see Haney-López, “*A Nation of Minorities*,” *supra* note 219, at 1035-37 (noting Justice Powell’s transformation of Whites from the majority to a collection of ethnic “minorities”); see also Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1993-97 (2000); Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL. REV. 1, 46-49 (2001). See generally Charles R. Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUMBIA L. REV. 928 (2001).

395. See, e.g., *Wygant*, 476 U.S. at 276 (eschewing “discriminatory legal remedies that work against innocent people”) (emphasis in original).

396. See generally Harris, *Whiteness*, *supra* note 22.

ination against nonwhites—is a problem in our society, or even remembers that it ever was.”<sup>397</sup>

The Supreme Court’s erasure of this country’s history of state-sanctioned racism has freed the settler class from any collective legal responsibility for its consequences, and allowed the judiciary to limit redress to cases in which individuals of any “race” can demonstrate that they have been denied equal treatment as the direct result of racial animus.<sup>398</sup> Judicial remedies for wrongs resulting from the most ingrained—i.e., unconscious—racial biases continue to be constricted, even in the face of overwhelming evidence of racial disparities.<sup>399</sup> Since its 1976 ruling in *Washington v. Davis*, the Court has insisted that equal protection claims based on disparate impact without proof of discriminatory intent will be subject only to rational basis review, not strict scrutiny.<sup>400</sup> Increasingly, even claimants under Titles VI and VII of the Civil Rights Act of 1965, which allow consideration of disparate impact, are being required to offer proof of causation in addition to evidence of racialized disparity.<sup>401</sup> According to John Powell, “From a structural perspective, causation is understood as cumulative within and across domains.”<sup>402</sup> However, from the decontextualized perspective of American jurisprudence, evidence of causation is constrained to a narrow range of discrete, individualized decisions or actions. Only by erasing historical realities could Justice Powell assert in *Bakke* that

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397. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

398. See, e.g., R.A. Lenhardt, *Localities as Equality Innovators*, 7 *STANFORD J. C. RTS. & CIV. LIBERTIES* 265, 266 (2011) (discussing the Court’s refusal to afford deference to municipal policies and programs intended to address racial disparities).

399. Barnes et al., *supra* note 9, at 993-97 (noting that the increasingly “postracial” or “colorblind” approach of the Supreme Court is not new, but harkens back to its jurisprudence of the pre-*Brown v. Board of Education* era); see also André Douglas Pond Cummings, *The Associated Dangers of ‘Brilliant Disguises,’ Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 *INDIANA L.J.* 1277, 1277-91 (2010).

400. *Washington v. Davis*, 426 U.S. 229 (1976).

401. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there is no private right of action under Title VI to challenge the disparate impact of regulations permitting drivers license examinations to be offered only in English); Olatunde C.A. Johnson, *Disparity Rules*, 107 *COLUMBIA L. REV.* 374, 390-401 (2007); see also *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (finding that New Haven’s refusal to certify the results of firefighters’ promotional examinations on the basis of racial disparity violated Title VII’s prohibition of disparate treatment); Girardeau A. Spann, *Postracial Discrimination*, 5 *MODERN AM.* 26, 34 (2009) (concluding that the *Ricci* majority “constructed a previously undetected tension between the disparate-treatment and disparate-impact provisions of Title VII, and then resolved that tension in a way that strained against [Title VII’s] overall antidiscrimination objective”).

402. Powell, *Structural Racism*, *supra* note 393, at 796.

“[t]here is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.”<sup>403</sup>

Challenges to the stark racial disparities evident in the criminal justice system face similar hurdles. Thus, for example, in *McCleskey v. Kemp*, the Supreme Court concluded that statistical evidence of racial disparity in the imposition of death sentences did not establish that the Constitution’s guarantee of due process had been violated.<sup>404</sup> It reasoned, “Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving ‘the existence of purposeful discrimination.’”<sup>405</sup> Going further, it required the defendant to “prove that the purposeful discrimination ‘had a discriminatory effect’ on him.”<sup>406</sup> Over the next twenty years, there were no instances in which Black defendants successfully challenged the imposition of the death penalty in cases where the victims were White.<sup>407</sup>

While the Supreme Court insists on interpreting the constitutional protections afforded criminal defendants in a purportedly “colorblind” or “postracial” manner, it continues to allow race to play a significant role in law enforcement. Thus, through the mid-1960s, the Supreme Court had consistently interpreted the Fourth Amendment to require that stops and searches by police be justified by probable cause that a crime had been or was about to be committed.<sup>408</sup> However, in *Terry v. Ohio*—a case that arose in the wake of the urban rebellions of that era, most of which had been triggered by abusive police practices<sup>409</sup>—the Court authorized police to stop and frisk individuals based on “reasonable suspicion” alone.<sup>410</sup> While the *Terry* opinion barely mentions race, the officer’s suspicions of John Terry arose from the fact that he was a Black man who walked back and forth in front of a store window and then stopped to talk to a White man.<sup>411</sup>

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403. *Bakke*, 438 U.S. at 296 (1978).

404. *McCleskey v. Kemp*, 481 U.S. 279, 296-97 (1987).

405. *Id.* at 292 (internal citations omitted).

406. *Id.* (internal citations omitted).

407. See Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 179-80 (2007) (discussing *State v. Kelly*, 502 S.E.2d 99 (S.C. 1998), the only successful *McCleskey* challenge, and one involving a Black defendant and Black victims).

408. See Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 883, 884 (2013).

409. See *id.* at 887-88.

410. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

411. See Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 248 (2010).

Since then, the Court has found that, while race alone is not sufficient to constitute reasonable suspicion, race plus any number of otherwise innocent factors may suffice—factors so varied as to be meaningless.<sup>412</sup> The “totality of the circumstances” may be considered,<sup>413</sup> resulting, as Donald Tibbs puts it, in a standard under which “0 + 0 + 0 + 0 = reasonable suspicion.”<sup>414</sup> The results are highlighted in a study by the Center for Constitutional Rights, which found that, in 2012, the New York Police Department engaged in some 700,000 stops and frisks, with Black and Latina/o persons targeted in nearly 85% of all stops.<sup>415</sup> In 90% of the cases, the stops did not result in arrests or summons, but they often involved the use of force by the police.<sup>416</sup> As a very predictable consequence, residents of targeted communities feel themselves to be living “under siege,” literally trapped in their apartments because “simply being in the hallways, stairwells, or elevators of their apartment buildings, in front of their buildings, or anywhere outside including: walking on the street, on the subway, in a park, at the corner store, or while driving” renders them vulnerable to humiliation and abuse.<sup>417</sup>

As noted above, a plaintiff alleging race-based violations of equal protection in a civil action must establish discriminatory intent. However, in the criminal law context, the Court has deemed police officers’ “[s]ubjective intentions”—i.e., their discriminatory intent—to be irrelevant.<sup>418</sup> As a result, policing may be conducted in an entirely racialized manner, as long as some—any—facially race-neutral rationale can be provided. There is no legal remedy for the glaring disparities in the rates of stops, searches, arrests, convictions, and incarceration that result from this license.<sup>419</sup> As Paul Butler observes,

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412. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 269-72 (2002) (finding “suspicious” both the driver’s failure to wave at a border patrol agent and his children’s waving at the agent); see also *United States v. Sokolow*, 490 U.S. 1, 13-14 (1989) (Marshall, J., dissenting) (criticizing airport stops relying on a “profile” that included, among other factors, acting nervously, acting too calmly, traveling alone, traveling with a companion, being the first to deplane, being the last to deplane, and deplaning in the middle).

413. See *Illinois v. Gates*, 462 U.S. 213, 214 (1983) (announcing the “totality of the circumstances” test for establishing probable cause).

414. See Tibbs, *supra* note 2, at 65.

415. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 306, at 3.

416. *Id.* at 5-6.

417. *Id.* at 17.

418. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

419. See generally THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013), available at [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf).

the Fourth Amendment does not function so much as a guarantee of individual rights but as “a project . . . to expand the power of the police against people of color,” “construct[ing] the criminal as colored, and the White as innocent,” and facilitating the “racial policing of space.”<sup>420</sup> Police officers, as well as prosecutors and judges, have almost unlimited discretion to use criminal law to keep people of color in “their place,” quite literally.<sup>421</sup>

In the meantime, the state’s prerogative to maintain structures of racial privilege and subordination by almost any means it deems appropriate is protected by the extension of qualified and/or absolute immunity to an expanding range of actors. The federal and state governments are immune from legal accountability except to the extent they consent to being sued.<sup>422</sup> Judges, prosecutors, police officers, prison guards (even in private prisons), and a wide range of elected or appointed government officials are also given immunity, absolute or qualified, from personal liability.<sup>423</sup> The bottom line is that “[s]overeign immunity allows the government to violate the Constitution or laws of the United States without accountability . . . [and] [c]onstitutional and statutory rights can be violated, but individuals are left with no remedies.”<sup>424</sup>

### C. Assimilationism

The cases discussed in the previous sections reveal how the legal doctrines that continue to define relationships within this society—not simply the discriminatory laws of previous eras—function as strategies of subordination, regardless of whether they are consciously intended as such. A significant dimension of what keeps us locked into pursuing remedies within a system whose rules preclude racial justice

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420. Butler, *supra* note 411, at 246-47.

421. On prosecutorial discretion, see generally Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007). For an example of the reach of judicial discretion, see Paige Williams, *Double Jeopardy*, NEW YORKER (Nov. 17, 2014), available at <http://www.newyorker.com/magazine/2014/11/17/double-jeopardy-3> (“In Alabama, a judge can override a jury that spares a murderer from the death penalty.”).

422. See generally Denise Gilman, *Calling the United States’ Bluff: How Sovereign Immunity Undermines the United States’ Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591 (2007); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

423. On the injustices arising from such immunities, see generally Timothy M. Stengel, *Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity*, 84 TEMP. L. REV. 1071 (2012); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (2005).

424. Chemerinsky, *supra* note 422, at 1213.

is, I believe, the presumption that assimilation into settler society is and should be the ultimate solution for racialized injustice. There are competing visions of what this means, as illustrated by the so-called culture wars, along a spectrum that ranges from explicit Anglo-Saxon hegemony to “multiculturalism,” but they are all visions of what this *settler* state should look like.<sup>425</sup> Within this paradigm, it becomes entirely reasonable to recognize legal rights and implement remedial measures only to the extent they further the assimilationist goals proffered by settler society.<sup>426</sup>

Assimilationist ideology presumes that the dominant culture is both normative and superior to all other cultures, offering to share the benefits of White privilege with persons of color willing to abandon whatever may be distinctive about their cultures and histories.<sup>427</sup> As Jerome Culp observed, “What is the ultimate aim of eliminating discrimination? The courts have consistently answered this question by assuming that assimilation and cultural degradation were the only two courses available.”<sup>428</sup> Thus, in *Brown v. Board of Education*, the Court justified its intervention on the grounds that education “is the very foundation of good citizenship . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>429</sup> On its face, this appears to be a neutral observation, but the cultural values being referenced, and the environment to which children should “adjust normally,” are exposed in the Court’s assertion that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children,” “retard[ing]” their development and depriving them of “benefits they would receive in a racial[ly] integrated school system.”<sup>430</sup>

As Neil Gotanda points out, this construction conflates the “reified systemic subordination” of people of color with their cultures,

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425. See generally COURTS AND THE CULTURE WARS (Bradley C. S. Watson ed., 2002).

426. See Delgado, *Centennial Reflections*, *supra* note 20, at 436-37 (explaining that paradigms of racial thought determine what is relevant and constrain disagreements to a narrow range of options).

427. See Barbara J. Flagg, “And Grace Will Lead Me Home”: *The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 107-08 (2013) (describing Whiteness as the normative cultural baseline). This process also affects European immigrants, of course. See generally Dagmar Rita Myslinska, *Contemporary First-Generation European Americans: The Unbearable “Whiteness” of Being*, 88 TUL. L. REV. 559 (2014).

428. See Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665, 678 (1995).

429. *Brown*, 347 U.S. at 493.

430. *Id.* at 494.

communities, and consciousness.<sup>431</sup> It reflects the perception, fostered by assimilationist ideology, that any non-settler culture, community, or consciousness is devoid of social value. This is a presumption that, of course, entrenches racial hierarchy. In addition to thus harming all peoples of color, assimilation into the “mainstream”—i.e., settler society—requires acceptance of the legitimacy and superiority of that society. This, in turn, further legitimates the ongoing occupation of Indigenous lands and concomitant efforts to eliminate Indigenous peoples. As Chickasaw scholar Jodi Byrd observes, “When the remediation of the colonization of American Indians is framed through discourses of racialization that can be redressed by further inclusion into the nation-state, there is a significant failure to grapple with the fact that such discourses further reinscribe the original colonial injury.”<sup>432</sup>

According to Byrd, one result of this assimilationist framing is that other “minorities” within settler society are given the “impossible choice” of “articulat[ing] freedom at the expense of another.”<sup>433</sup> This is, indeed, the choice presented to us by the dominant narrative, but it, too, is illusory. Assimilation offers non-Indigenous Others the possibility of gaining limited access to some of the privileges of the settler class at the expense of other peoples, but this does not equate to freedom. We are not free to define ourselves or to maintain our cultures except in the most superficial of ways, and we certainly are not free to restructure the core institutions of settler society in ways that might truly benefit our communities.<sup>434</sup>

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431. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 56 (1991); see also John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1498 (1993) (discussing the difference between integration and “nonsegregation”); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1469 (1993) (criticizing the Court’s failure to allow public funding of historically Black colleges and universities on the basis of “‘neutral’ assimilationist principles” both because of Black students’ continued exclusion from White institutions and because such defunding “acts to sever the tie between African-American students and their own community”).

432. BYRD, *supra* note 124, at xxiii.

433. *Id.* at xxiv.

434. See MALCOLM X, *BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER* 17 (George Brietman ed., 1970) (noting that the real message of those advocating the integration of public schools “is that the whites are so much superior that just their presence in a black classroom balances it out”); see also George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1, 6 (1999) (noting that the *Brown* opinion captures three key requirements of assimilationist ideology: compliance with dominant norms, rejection of race consciousness, and “repudiat[ion of] the equal value of cultures”).

Thus viewed through the lens of racial realism, the limitations of domestic legal remedies for racialized injustice become apparent. There are large sectors of the population—notably the most directly colonized—to whom constitutional protections simply do not apply.<sup>435</sup> For those formally entitled to the Fifth and Fourteenth Amendments' guarantees of equal protection, legal remedies are constrained to measures that promote assimilationism while ensuring that structures protecting the status quo will remain intact. These remedies are not insignificant, for they can provide some degree of relief from egregious wrongs, but they will not allow for the sort of institutional change that substantive justice requires, and the relief provided often comes at the cost of reinforcing underlying structures of domination and subordination.<sup>436</sup>

Derrick Bell challenged us to deploy racial realism in a manner that “frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.”<sup>437</sup> If our goal is to eliminate racial injustice and the racialized privilege that perpetuates it, and if racial hierarchy is a structural phenomenon necessary to the maintenance of a settler colonial state, it seems that we need to imagine and implement strategies capable of deconstructing colonial relations. I have argued here that, as a general rule, domestic law cannot be relied upon to decolonize the social, economic, or political institutions that maintain the status quo. Does international law provide more liberatory options? This question is considered in the following Part.

## VI. THE ROLE OF INTERNATIONAL LAW

*Whenever you are in a civil-rights struggle, whether you know it or not, you are confining yourself to the jurisdiction of Uncle Sam. . . . Civil rights means you're asking Uncle Sam to treat you right. Human rights are something you were born with.*

—Malcolm X<sup>438</sup>

Since the founding of the United States, international law has been invoked by peoples within its borders to support their claims to basic human rights. The Declaration of Independence, if read carefully, reveals itself to be a listing of the British Crown's violations of interna-

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435. See *supra* notes 354-77 and accompanying text.

436. See Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 451 (2001) (noting the tendency to interpret the overturning of wrongful convictions as evidence that “the system works”).

437. Bell, *supra* note 2, at 374.

438. Malcolm X, *The Ballot or the Bullet*, *supra* note 49, at 34-35.



tional law, proffered as evidence for the settler colonists' right to establish and be recognized as an independent state.<sup>439</sup> The settlers relied upon treaties with Indigenous nations not only to justify their claims to territory but as evidence of their own sovereignty, and American Indians have consistently attempted to enforce their rights under these treaties and under international law more generally.<sup>440</sup>

Other peoples whose territories have been claimed by the United States—including Chicana/os, Native Hawaiians, Alaska Natives, Puerto Ricans, and various Pacific Islanders—have contested, and continue to contest, the occupation of their lands under international law.<sup>441</sup> Throughout U.S. history, international law has been invoked consistently by persons of African descent to challenge slavery, legalized apartheid, and continuing manifestations of racialized subordination.<sup>442</sup> And from the *Chinese Exclusion* cases of the 1880s to the present, immigrants have relied upon treaties and customary international law to challenge U.S. immigration law and the manner in which it is enforced.<sup>443</sup>

For the most part, these efforts have met with very limited success. This is due, in part, to the nature of the international legal system and, in part, to the United States' history of selectively exempting itself from compliance with international law. Contemporary international law is explicitly Euroderivative in origin and many of its foundational principles emerged from the attempts of colonial powers to regulate relations among themselves as they expropriated the land, labor, and natural resources of peoples they characterized as “uncivilized.”<sup>444</sup> The substance of the law derives, for the most part, from the practice of states and the agreements made between them. Legal statehood depends, in turn, on recognition by other states and, until well

439. THE DECLARATION OF INDEPENDENCE paras. 3-28 (U.S. 1776).

440. See CHURCHILL, *Perversions of Justice*, *supra* note 174, at 5-6. See generally Kirke Kickingbird, *What's Past Is Prologue: The Status and Contemporary Relevance of American Indian Treaties*, 7 ST. THOMAS L. REV. 603 (1995).

441. See, e.g., Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 91-94 (1991); Jacqueline N. Font-Guzmán & Yanira Alemán, *Human Rights Violations in Puerto Rico: Agency From the Margins*, 12 J. L. & SOC. CHALLENGES 107, 149 (2010); Marie Rios-Martinez, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and Its Covenant with the United States*, 3 SCHOLAR 41, 48-52 (2000).

442. See Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 571-75 (1997); see also RICHARDSON, *supra* note 47.

443. See *supra* note 241 and accompanying text. See generally Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995).

444. See generally ANGHIE, *supra* note 113.

into the twentieth century, such recognition was contingent upon a determination that the entity wishing to be recognized was sufficiently “civilized” by European standards.<sup>445</sup> Nonetheless, since the founding of the United Nations and, more significantly, the movements for independence that swept the globe in the aftermath of World War II, the number of recognized states has grown dramatically and this, in turn, has led to substantive changes in international law.<sup>446</sup>

The transformation of external colonial territories into at least nominally independent states has fueled the expansion of a body of international human rights law that affirms the right of all peoples to self-determination, acknowledges Indigenous rights, and prohibits racial discrimination.<sup>447</sup> Much of this law is directly relevant to the issues of racialized hierarchy we confront in the United States today. While the international legal system is not, for the most part, capable of providing effective remedies for the dispossession and subjugation of peoples within settler states, international law can serve at least two important functions.

The first is that, despite being constrained by state power, international law articulates rights and remedies that go beyond those recognized within our constitutional framework.<sup>448</sup> As explained in more detail below, discrimination, particularly on the basis of race, has been universally proscribed and the need for remedies that address structural racism has been explicitly stated. Indigenous peoples’ rights, not only to survival, but also to control over their traditional lands, resources, cultures, and identities are acknowledged. Attempts to eliminate group identity have been condemned as genocide. These developments provide opportunities for contesting U.S. policies and practices in international forums, and encourage us to envision legal remedies that transcend the strictures of constitutional rights, as they have been interpreted and implemented by U.S. courts.

More significantly, international law confirms the legitimacy of struggles that go beyond asking, or pressuring, the state for more

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445. See *id.* at 98-100; DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 52-57 (3d ed. 2010).

446. The number of United Nations member states has grown from 51 to nearly 200. See *Member States*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Apr. 2, 2015). See generally ROLAND BURKE, *DECOLONIZATION AND THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* (2010) (discussing the impact of newly independent states on the expansion of international human rights law).

447. See *infra* notes 451-83, 511-46 and accompanying text.

448. See generally Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975) (explaining why the Constitution should be interpreted to encompass internationally recognized human rights).

rights, or better enforcement of existing rights, to a more liberatory paradigm. It affirms human dignity as the foundational principle of all other human rights. This empowers us to challenge any regime of rights that strips individuals or communities of their dignity, reminding us, as Malcolm X emphasized, that as human beings we have inherent rights—and responsibilities—regardless of what we are told by those in power.<sup>449</sup> Perhaps most fundamentally, international law acknowledges the right of *all peoples* to self-determination. This foundation enables us to begin envisioning what it would mean for all peoples within the United States to “freely determine [our] political status and freely pursue [our] economic, social and cultural development.”<sup>450</sup>

### A. Racial Discrimination and “Minority” Rights

A large body of international law deals with the rights of “minorities,” a term that encompasses national minorities as well as racial, ethnic and religious groups.<sup>451</sup> I have argued throughout this article that the institutionalized racism of settler colonial society cannot be effectively redressed by assimilationist measures designed to more effectively incorporate “minorities.” Nonetheless, struggles for racial justice are a necessary part of maintaining human dignity within settler society and enabling communities of color to move past the most basic struggles for survival to envisioning and implementing structural change. In this effort, international human rights law can help us see that the principle of non-discrimination need not be limited by the constraints we encounter within the U.S. legal system.

The prohibition on racial discrimination is articulated in the United Nations Charter and the 1948 Universal Declaration of Human Rights (UDHR), as well as the two major human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>452</sup> It is regarded by many to be not only customary international law—and therefore binding on all states—but also a *jus cogens*

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449. See *supra* note 438 and accompanying text.

450. See *infra* note 515 and accompanying text.

451. See, e.g., Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. GAOR, 47th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/47/49 (Vol. 1) (Dec. 18, 1992).

452. See U.N. Charter, art. 1, para. 3; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 2, 7 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, arts. 2(1), 26, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social

or preemptory legal norm.<sup>453</sup> The Convention on the Elimination of All Forms of Racial Discrimination (CERD), a treaty with 177 states parties, defines racial discrimination as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>454</sup>

This body of law prohibiting racial discrimination moves significantly beyond the United States' formal commitment to equal protection in several important ways.

First, it recognizes the right of ethnic, religious or linguistic minorities, "in community with the other members of their group," to maintain their own identity and culture.<sup>455</sup> Assimilation must be truly voluntary, and equal treatment may not be conditioned on assimilation. Thus, for example, in 2007, the Committee charged with monitoring compliance with the CERD observed that "policies of forced assimilation amount to racial discrimination and constitute grave violations of the convention."<sup>456</sup>

Second, as illustrated by the "purpose or effect" language of the CERD's definition, the prohibition is not limited to discriminatory intent but encompasses disparate impact as well.<sup>457</sup> In 2014, the CERD Committee noted its concern that U.S. law does not comport with the Convention, "which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but are discriminatory in effect."<sup>458</sup> Illustrating its recognition of the need to address struc-

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and Cultural Rights, art. 2(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR].

453. See McDougall, *supra* note 442, at 577-78.

454. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, para. 1, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]. For status of parties, see *Treaty Collection*, UNITED NATIONS, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (last visited Apr. 2, 2015).

455. See ICCPR, *supra* note 452, at art. 27; see also Convention on the Rights of the Child, art. 30, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

456. Concluding Observations, Comm. on the Elimination of Racial Discrimination, 67th Sess., Aug. 2-19, 2005, U.N. Doc. CERD/C/TKM/CO/5, para. 12 (Mar. 27, 2007); see also Council Directive 2000/43, art. 11, 2000 O.J. (L 180) 22, 25 (EC) (rejecting forced assimilation).

457. See *supra* note 454 and accompanying text.

458. Concluding Observations on the Combined Seventh and Ninth Periodic Reports of the United States of America, Comm. on the Elimination of Racial Discrimination, 85th

tural racism, the Committee's 2014 report on U.S. compliance noted its concerns with, among other problems, illegal government surveillance and monitoring, the use of excessive force by law enforcement, the "school-to-prison pipeline," and inadequate access to legal aid in both civil and criminal contexts, and recommended that the United States "adopt a National Action Plan to combat structural racial discrimination."<sup>459</sup>

A third point of note is that international law acknowledges the necessity of "special measures" (what we might broadly think of as affirmative action) to enable a minority group to achieve political, economic, and social equality while, if it desires, maintaining its cultural and ethnic identity.<sup>460</sup> In contrast to current U.S. jurisprudence, the CERD explicitly states that such special measures are *not* to be considered a form of racism,<sup>461</sup> and the United States has been criticized for placing "increasing restrictions on the use of special measures as a tool to eliminate persistent disparities in the enjoyment of human rights and fundamental freedoms based on race or ethnic origin."<sup>462</sup>

Thus, although international human rights law continues to be criticized for inadequately addressing the structural underpinnings of racial hierarchy,<sup>463</sup> its insistence that equal protection not be conditioned on assimilation, its broad understanding of what is encompassed within the construct of racial discrimination, and its promulgation of remedial measures that go beyond formal equality help us to think critically about the constraints imposed on us by equal protection jurisprudence, as well as the plenary power doctrine. This broader framing of rights can help us better analyze how U.S. legal doctrine continues to be used to subordinate peoples of color, and provides opportunities to empower our communities by bringing claims to the

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Sess., Aug. 11-29, 2014, U.N. Doc. CERD/C/USA/CO/7-9, para. 5 (Sep. 25, 2014) [hereinafter Concluding Observations (2014)].

459. *Id.* at paras. 8, 17, 21, 23, 25.

460. *See* CERD, *supra* note 454, at art. 2, para. 2; McDougall, *supra* note 442, at 585.

461. *See* CERD, *supra* note 454, at art. 1, paras. 4, 2. *See generally* YUSSUF NAIM KLY, INTERNATIONAL LAW AND THE BLACK MINORITY IN THE U.S. (3d. ed. 1985).

462. Concluding Observations (2014), *supra* note 458, at para. 7.

463. *See, e.g.,* Celina Romany & Joon-Beom Chu, *Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions*, 36 CONN. L. REV. 831, 837 (2004) (noting that even in international law a "failure to acknowledge a contextual identity brings about inadequate adjudicative and remedial frameworks that, within structurally limited systems, perpetuate the false neutrality covering up systemic inequality and discrimination").

international bodies that will acknowledge the inadequacies of U.S. remedies for racial injustice.<sup>464</sup>

### B. *Rights of Indigenous Peoples*

As noted above, many Indigenous peoples have resisted incorporation into settler societies.<sup>465</sup> This resistance is reflected in the fact that they have long struggled for legal recognition as sovereign nations rather than internal minorities.<sup>466</sup> Since 1977, Indigenous activists have regularly gone to the United Nations in an attempt to have “our rights to our territories, our lands, our resources, our treaties and our right to self-determination to be recognized and accepted by the other nations of the world as set out in the UN Charter.”<sup>467</sup> Cree attorney Sharon Venne notes that when they initiated these efforts, “[w]e could not use international mechanisms then in existence to decolonize ourselves, because the United States, Canada and other states refused to allow Indigenous peoples to use the UN Committee on Decolonization.”<sup>468</sup>

After three decades of this work, the UN General Assembly promulgated the Declaration on the Rights of Indigenous Peoples in 2007, addressing self-determination, land rights, and cultural and spiritual rights, among many other topics.<sup>469</sup> The Declaration acknowledges injustices resulting from Indigenous peoples’ “colonization and dispossession of their lands, territories and resources.”<sup>470</sup> Recognizing their right to maintain their cultures and identities, it prohibits their

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464. See, e.g., Malcolm X Center for Self Determination, *U.S. Called to Account for Imprisoned COINTELPRO and Civil Rights Era Activists at United Nations Convention to End Racial Discrimination (CERD) Review* (Aug. 14, 2014), [http://www.n2pp.info/print/UN\\_CERD\\_Review\\_2014.pdf](http://www.n2pp.info/print/UN_CERD_Review_2014.pdf).

465. See, e.g., Porter, *Pursuing the Path*, *supra* note 247, at 170.

466. See Yousef T. Jabareen, *Redefining Minority Rights: Successes and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples*, 18 U.C. DAVIS J. INT’L L. & POL’Y 119, 121-31 (2011) (explaining the distinction between minorities and Indigenous peoples).

467. Sharon H. Venne, *The Road to the United Nations and Rights of Indigenous Peoples*, 20(3) GRIFFITH L. REV. 557, 564 (2011) [hereinafter Venne, *The Road*]; see also José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Last Part) Submitted by the Special Rapporteur*, E/CN4/Sub.1/1983/21/Add 8 (Sept. 30, 1983), paras. 376-77 (noting the importance of respect for Indigenous culture, language, and social and legal institutions). See generally John Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Indigenous Peoples in International Law*, 17 BUFF. L. REV. 669 (1978); Williams, *Encounters*, *supra* note 24.

468. Venne, *The Road*, *supra* note 467, at 564.

469. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, (Sept. 13 2007) [hereinafter UNDRIP].

470. *Id.* at Preamble.

forced assimilation and forcible removal from their lands.<sup>471</sup> This is of significance with respect to ongoing struggles for land rights, to the preservation of Indigenous cultural and religious traditions, and in efforts to obtain redress for past takings.<sup>472</sup> The Declaration does not directly acknowledge Indigenous sovereignty, but does require states to “consult and cooperate in good faith” with Indigenous peoples to obtain their “free, prior and informed consent before adopting legislative or administrative measures that may affect them.”<sup>473</sup>

The United States, Canada, Australia, and New Zealand wielded their considerable international influence to ensure that early drafts of the Declaration were substantially “watered down,”<sup>474</sup> leaving it open to criticism for “fail[ing] to enable or open up space for a dialogue on coexisting sovereignties” and allowing settler state “hegemony and Indigenous subjugation” to “remain unchanged.”<sup>475</sup> Nonetheless, global consciousness has been transformed by Indigenous utilization of UN mechanisms,<sup>476</sup> and the fact that only the world’s largest settler states voted against the Declaration indicates that they perceive even this rather benign articulation of Indigenous rights as threatening their claimed prerogative to exercise unfettered control over Indigenous peoples.<sup>477</sup>

Since 2001, the Inter-American Commission on Human Rights and its Court of Human Rights have played vital roles in protecting Indigenous rights to property and natural resources, recognizing that “for Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural

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471. *Id.* at arts. 5, 8-15.

472. See generally Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141 (2008).

473. UNDRIP, *supra* note 469, at art. 19. See generally Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301 (2011).

474. Irene Watson, *The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival—Where to From Here?* 20(3) GRIFFITH L. REV. 507, 507 (2011).

475. *Id.* at 508.

476. Venne, *The Road*, *supra* note 467, at 575-76. See generally Ward Churchill, *A Travesty of a Mockery of a Sham: Colonialism as “Self-Determination” in the UN Declaration on the Rights of Indigenous Peoples*, 20(3) GRIFFITH L. REV. 526 (2011).

477. The Declaration was affirmed by 144 United Nations member states; 11 abstained and Australia, Canada, New Zealand, and the United States voted “no.” Since 2007, these four states have all stated that they support the Declaration while maintaining that it is not legally binding. See Nicole Friederichs, *A Reason to Revisit Maine’s Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. IND. L. REV. 497, 499 (2010-2011).

legacy and transmit it to future generations.”<sup>478</sup> The Inter-American Court’s jurisprudence has evolved to recognize the enforceability of traditional land claims, even when Indigenous peoples have been dispossessed, upon a showing of their unique relationship with those lands.<sup>479</sup> While the United States is notorious for disregarding recommendations from the Inter-American Commission on Human Rights, the Commission’s findings have been instrumental in, for example, the ability of Western Shoshone people to remain on their traditional lands and to limit, to some extent, the devastation caused by mining ventures.<sup>480</sup>

Interestingly, the Inter-American Court has extended its recognition of Indigenous land and resource rights to Afrodescendant peoples who have maintained “a strong spiritual relationship” with the lands they have long occupied.<sup>481</sup> The Court explicitly based its findings on the similarities between Indigenous peoples and the Afrodescendant communities at issue.<sup>482</sup> As a result, this body of jurisprudence is not directly applicable to more dispersed or urbanized Afrodescendant peoples, but it recognizes that the descendants of enslaved Africans in the Americas have a distinct place in settler societies. It certainly supports the efforts of the Gullah/Geechee, for example, to maintain an autonomous land base on the southeastern

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478. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 266 (2010-2011) (citing *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 149 (Jan. 31, 2001); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, paras. 124, 131 (June 17, 2005); *Case of the Plan de Sanchez Massacre v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, para. 85 (Nov. 19, 2004)) [hereinafter *Inter-American Commission on Human Rights, Indigenous and Tribal Peoples’ Rights*].

479. *Id.* (citing *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006)).

480. See generally Julie Ann Fishel, *United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level*, 31 AM. INDIAN L. REV. 619 (2006/2007).

481. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights*, *supra* note 478, at 266 (citing *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174, para. 82 (Nov. 28, 2007)); see also *Moiwana Community v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 124 (2005) (recognizing the land rights of a Maroon Afrodescendant community).

482. See generally Ariel E. Dulitzky, *When Afro-Descendants Became “Tribal Peoples”: The Inter-American Human Rights System and Rural Black Communities*, 15 UCLA J. INT’L L. & FOREIGN AFF. 26 (2010) (arguing that adding consideration of racial discrimination to the “strategy of culturalization of claims” would enhance the rights of Afrodescendant communities in Latin America).



coast of the United States.<sup>483</sup> More generally, it opens the door for remedial measures incorporating Afrodescendant peoples' cultural and historical realities in international law, and also helps us envision changes that could be made in domestic law.

### C. Genocide

The prohibition of genocide is universally acknowledged to be a *jus cogens* norm of international law, i.e., one from which there can be no derogation.<sup>484</sup> In contesting the assimilationist framework of settler colonial law, the condemnation of genocide plays a particularly significant role. It is clear that the settler drive to eliminate and replace Indigenous populations necessarily involves genocidal processes, although the settler narrative contests this characterization.<sup>485</sup> It is less well-understood why the treatment of African Americans has been characterized as genocidal as, for example, in the 1951 petition entitled "We Charge Genocide: The Crime of Government Against the Negro People," delivered to the United Nations by Paul Robeson and William Patterson in 1951.<sup>486</sup> Much of the debate over whether American settler society has, or is still, engaged in genocidal policies is rooted in a failure to understand that the term genocide is not synonymous with "mass murder" but encompasses the drive to eliminate "a national, ethnical, racial, or religious group, as such."<sup>487</sup> In other words, it is the erasure of "groupness" that is at issue.

The term "genocide" was coined by Raphael Lemkin, a Polish Jewish attorney who wanted to clarify that it was criminal to "destroy,

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483. See generally Marquetta L. Goodwine, *Yeddi Wi: Gullah/Geechee Living Ways*, in *IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION: COLLECTED PAPERS & PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON THE RIGHT TO SELF-DETERMINATION & THE UNITED NATIONS, GENEVA 2000 107-13* (Y.N. Kly & D. Kly eds., 2001). See also Faith R. Rivers, *The Public Trust Debate: Implications for Heirs' Property Along the Gullah Coast*, 15 *SOUTHEASTERN ENVTL. L.J.* 147 (2006).

484. See Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT'L L.J.* 286, 287 (1999).

485. See generally Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 *DEPAUL L. REV.* 911 (2002); WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT* (1997) (providing a detailed historical account).

486. See CIVIL RIGHTS CONGRESS, *WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE* (William Patterson ed., New York: International Publishers 1970); see also PERO GAGLO DAGBOVIE, *AFRICAN AMERICAN HISTORY RECONSIDERED 158-72* (2010) (providing background information). See generally ANDERSON, *supra* note 47.

487. See *infra* note 489 and accompanying text.

cripple, or degrade entire nations, racial and religious groups,” thereby destroying their cultures and erasing the contributions they had made or might make to humanity.<sup>488</sup> Lemkin’s initial draft of the UN Convention on the Prevention and Punishment of the Crime of Genocide was substantially diluted, but his intent is reflected in the treaty’s definition of genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]lausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.<sup>489</sup>

In his writings, Lemkin emphasized that genocidal processes include physical debilitation, the limiting of reproductive capacity, the eradication of self-government, the appropriation of economic resources, the prohibition of peoples’ language (especially in education), attacks on intellectuals, suppression of religions, and the undermining of “spiritual resistance” by means such as the promotion of alcohol and “cheap” pleasures.<sup>490</sup> As historian and genocide scholar Dirk Moses explains, Lemkin “defined the concept as intrinsically colonial.”<sup>491</sup> In his seminal work, *Axis Rule in Occupied Europe*, Lemkin explained:

Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition . . . may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after the removal of the population and the colonization of the area by the oppressor’s own nationals.<sup>492</sup>

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488. See Moses, *Empire*, *supra* note 177, at 12 (quoting Memorandum from Raphael Lemkin to R. Kempner, June 5, 1946).

489. International Convention on the Prevention and Punishment of the Crime of Genocide, art. II, 102 Stat. 3045, 78 U.N.T.S. 277 (Dec. 9, 1948, entered into force Jan. 12, 1951) at 280, [hereinafter Genocide Convention]. The Convention criminalizes actual and attempted genocide, as well as “[d]irect and public incitement” of and complicity in genocide. *Id.* at art. III.

490. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 82-90 (1944); see also Moses, *Empire*, *supra* note 177, at 13-14.

491. See Moses, *Empire*, *supra* note 177, at 9.

492. LEMKIN, *supra* note 490, at 79; see also Moses, *Empire*, *supra* note 177, at 9.

This is, of course, the historical pattern characteristic of settler colonial states.<sup>493</sup>

Lemkin described the enslavement of North American Indians as “cultural genocide par excellence . . . the most effective and thorough method of destroying a culture, and of de-socializing human beings.”<sup>494</sup> This description applies equally to the enslavement of African peoples, of course. Moreover, the forced assimilation, impoverishment, and mass incarceration of Afrodescendant peoples in the United States since the abolition of slavery can be understood in these terms.<sup>495</sup> While it is difficult and, to many, controversial to describe American settler colonialism as genocidal, doing so clarifies that the problems we face are not simply the result of “discrimination” that can be remedied by legislating formal equality or by a gradual process of social (re)education. Rather, they result from policies intended to “destroy, in whole or in part,” the group identity of subordinated peoples.<sup>496</sup> Remediation entails an immediate halt to genocidal policies, and the implementation of measures that support the reconstitution and continued vitality of “national, ethnic[,], racial, or religious groups.”<sup>497</sup> With each passing generation, our histories and identities are further obscured. International law reminds us that, to the extent genocidal policies continue to affect our communities, we cannot afford to rely on a system that has failed to bring about substantial change for more than a half-century. As João Costa Vargas puts it, “the urgency that genocide generates . . . creates the imperatives of decolonization.”<sup>498</sup>

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493. Wolfe, *Structure and Event*, *supra* note 126, at 121 (describing the “concrete empirical relationships between spatial removal, mass killings, and biocultural assimilation” in settler colonial regimes as “structural genocide”).

494. John Docker, *Are Settler-Colonies Inherently Genocidal? Re-reading Lemkin*, in *EMPIRE, COLONY, GENOCIDE: CONQUEST, OCCUPATION, AND SUBALTERN RESISTANCE IN WORLD HISTORY* 81, 94 (A. Dirk Moses ed., 2008).

495. See Charles Green, *Genocide, Victimization, and America's Inner Cities*, in *GENOCIDE, WAR, AND HUMAN SURVIVAL* 111-23 (Charles B. Strozier & Michael Flynn eds., 1996). See generally Leavy Mathews, III, *The Inoculations of the Eternal Spirit into International Law: How the United States Must Save Itself and the World*, 40 *HOW. L.J.* 709 (1997) (discussing U.S. concerns that ratification of the Genocide Convention would increase international criticism of its treatment of Black Americans).

496. Genocide Convention, *supra* note 489, at art. II.

497. *Id.*

498. JOÃO H. COSTA VARGAS, *NEVER MEANT TO SURVIVE: GENOCIDE AND UTOPIAS IN BLACK DIASPORA COMMUNITIES* xxvii (2008).

#### D. Human Dignity

As discussed above, well-established international law goes further than U.S. law in its interpretation of the prohibition of racial discrimination, its recognition of the unique status of Indigenous peoples, and its acknowledgment of forced assimilation—among other measures—as inherently genocidal. It also creates opportunities for Indigenous peoples and other peoples of color in the United States to have their grievances acknowledged—if not actually remedied—as legal wrongs. While we will not be liberated by law, international law does incorporate two precepts that are fundamental to liberatory processes: it recognizes the centrality of human dignity to any rights regime, and it acknowledges that all peoples have the right to self-determination.

Dignity is a core value underlying all of the human rights norms that have evolved in international law.<sup>499</sup> The preamble to the UN Charter notes the member states' determination "to reaffirm faith . . . in the dignity and worth of the human person,"<sup>500</sup> and the UDHR asserts that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>501</sup> The ICCPR and ICESCR, the two overarching human rights treaties of the modern era, emphasize that the rights they articulate "derive from the inherent dignity of the human person."<sup>502</sup> Even when interpreting treaties that do not explicitly reference the concept, international judicial bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights have incorporated human dignity into their opinions.<sup>503</sup>

The dignity principle lays the foundation for a body of human rights law with "a strong emphasis on the will and consent of the governed," according to legal scholar Oscar Schachter.<sup>504</sup> In other words, "the coercive rule of one or the few over the many is incompatible with

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499. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 849 (1983) (noting that "[n]o other ideal seems so clearly accepted as a universal social good").

500. U.N. Charter, *supra* note 452, at Preamble.

501. UDHR, *supra* note 452, at Preamble.

502. ICCPR, *supra* note 452, at Preamble; ICESCR, *supra* note 452, at Preamble.

503. See Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 341-43 (2012).

504. Schachter, *supra* note 499, at 850.

a due respect for the dignity of the person.”<sup>505</sup> Moreover, the concept is rooted in a framework of respect for human life in the dynamic, organic context of community, culture, history, and identity. Thus, Schacter notes, “nothing is so clearly violative of the dignity of persons as treatment that demeans or humiliates them. This includes not only attacks on personal beliefs and ways of life but also attacks on the groups and communities with which individuals are affiliated.”<sup>506</sup>

Acknowledging the fundamental importance of human dignity takes us beyond statistical disparities, or the progress purportedly reflected in the inclusion of “minorities” in mainstream institutions. It gives us terms with which to articulate the underlying harm caused by, for example, depicting American Indians as the caricatured mascots of sports teams.<sup>507</sup> Similarly, it speaks to the underlying disrespect entailed in allowing Michael Brown’s body to lie in the street in Ferguson, Missouri, for hours after he was shot by the police.<sup>508</sup>

Dignity also connotes respect for the ability of persons to make and be responsible for their own actions.<sup>509</sup> Recognition of the capacity for acting responsibly, in turn, implies the right to do so. This is particularly significant because, in many cultures, human dignity is manifested not by the defensive assertion of rights, but by the fulfilling of responsibilities that extend to one’s family, the broader community, future generations, other forms of life, and the earth itself.<sup>510</sup> We do not need the law to tell us that we have an inherent right to live with dignity. Nonetheless, those who struggle to protect their communities and to create a better world for their children are often informed—by the police, the courts, the education system, or the media—that they have no “right” to do so. The fact that international law explicitly acknowledges dignity as a foundational principle of all human rights can help empower them by undergirding their legal claims and, perhaps more importantly, by affirming the legitimacy of the work in which they are engaged.

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505. *Id.*

506. *Id.*

507. See WARD CHURCHILL, INDIANS ARE US? CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA 62-87 (1994).

508. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES, Aug. 24, 2014, at A1, available at [http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html?\\_r=0](http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html?_r=0).

509. See Schachter, *supra* note 499, at 850.

510. See VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 78-97 (2d ed. 1992). See generally GUSTAVO ESTEVA & MADHU SURI PRAKASH, GRASSROOTS POST-MODERNISM: REMAKING THE SOIL OF CULTURES (1998).

### *E. Self-Determination*

The decolonization of settler society is not something that will be imposed from above, but something that must be effectuated from below. The right to self-determination articulated in international law “is understood generally, at its core, as encompassing the idea that human beings, individually and as groups, should be in control of their own destiny, and that systems of government should be devised accordingly, and not imposed upon them by alien domination.”<sup>511</sup> This is a fundamental right that few directly contest, but it is also a principle that, when taken seriously, has great potential for the decolonization of settler societies. The consistent assertions of American Indian sovereignty and the calls for self-determination made by organizations such as the Black Panther Party, Chicano Brown Berets, and Puerto Rican Young Lords in the 1960s and 1970s were and are well-grounded in international law.

The UN Charter identifies the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” as one of the United Nations’ primary functions.<sup>512</sup> The General Assembly’s 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514) “[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.”<sup>513</sup> It states forthrightly: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>514</sup> This is repeated almost verbatim in Common Article 1 of the ICCPR and the ICESCR.<sup>515</sup> According to the UN Human

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511. Robert A. Williams, Jr., *Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights to Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. 51, 51 (1991) (paraphrasing S. James Anaya’s explanation).

512. U.N. Charter, *supra* note 452, at art. 1, para. 2; *see also* W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 104-13 (1977) (providing background on the intent of the drafters).

513. G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (Dec. 14, 1960); *see also* OFUATEY-KODJOE, *supra* note 512, at 115-22 (discussing the background of the resolution).

514. G.A. Res. 1514 (XV), *supra* note 513, at 66.

515. ICCPR, *supra* note 452, at art. 1; ICESCR, *supra* note 452, at art. 1; Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.N. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMPLE INT’L & COMP. L.J. 443, 448-78 (2006) (discussing the evolving concept of self-determination); *see also* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1 (1993) (providing a more orthodox summary).

Rights Committee, the right to self-determination was given primacy in the ICCPR because “its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”<sup>516</sup> According to the International Court of Justice, “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character”—in other words, it is binding on all.<sup>517</sup>

As with any legal principle, the real debate emerges in its application.<sup>518</sup> Richard Falk notes that much hinges on

whether the criteria relied upon to clarify the right to self-determination are to be determined in a top-down manner through the mechanisms of statism and geopolitics or by a bottom-up approach that exhibits the vitality and potency of emergent trends favoring the extension of democratic practices and the deepening of human rights.<sup>519</sup>

Three primary strategies characterize statist resistance to implementing the right to self-determination. Because self-determination is articulated as a right of “peoples,” a state’s first line of defense is often to claim that a particular group is simply a “minority,” or a subset of the general population, not a distinct “people.”<sup>520</sup> Building on this argument, states then invoke the international legal principle of “non-

516. Human Rights Committee, General Comment 12, art. 1, para. 1 (21st Sess., 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994).

517. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102, para. 29 (June 30) (citing *Namibia Opinion*, *infra* note 530, as well as *W. Sahara, Advisory Opinion*, 1975 I.C.J. 12, 31-33, paras. 54-59 (Oct. 16)); *see also* Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT’L L.J. 209 (1991) (identifying the norm as customary law, binding on all states); Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT’L L.J. 553, 567 (2010) (noting that “the classical right of colonial self-determination has acquired *jus cogens* status”).

518. Richard Falk, *Preface to IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION: COLLECTED PAPERS & PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON THE RIGHT TO SELF-DETERMINATION & THE UNITED NATIONS*, GENEVA 2000 6, 6 (Y.N. Kly & D. Kly eds., 2001) (noting that self-determination “bears directly on many of the bloodiest and persistent struggles that presently beset every region of the planet, and bring intense suffering and continuous frustration to millions of peoples”).

519. *Id.*

520. *See* Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. OF INT’L AFFAIRS 7, 12-13 (2008). The United States and other settler states delayed finalization of the UN Declaration on the Rights of Indigenous Peoples by many years with their attempt to substitute the term “populations” for “peoples.” *See* Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 11, 18 (Stephen Allen & Alexandra Xanthaki eds., 2011).

interference in the internal affairs” of states.<sup>521</sup> Finally, settler states, and other entities with internally colonized peoples, rely on what has been termed the “salt water” or “blue water” doctrine, which attempts to limit decolonization to territories that are “geographically separate” as well as “distinct ethnically and/or culturally” from the “administering” state.<sup>522</sup>

A different picture emerges when self-determination is viewed from the bottom up. States do not have an exclusive right to determine which groups within their population constitute peoples. Rather, as legal scholar Howard Vogel observes, “the definition of the term ‘peoples’ in a minority rights context must be left to the people themselves.”<sup>523</sup> According to Erica-Irene Daes, a Special Rapporteur for the UN’s Sub-Commission on Human Rights and former chair of the UN’s Working Group on Indigenous Populations,<sup>524</sup> the “true test of self-determination . . . is whether Indigenous peoples themselves actually feel that they have choices about their way of life.”<sup>525</sup>

Groups previously relegated to “minority” status are increasingly recognized as having a right to self-determination.<sup>526</sup> In 1998, the Canadian Supreme Court noted with respect to the status of Quebec that “a people” may be a minority within a state,<sup>527</sup> and that a “definable group” may have the right to determine its own political status when consistently excluded from political, social, and cultural partici-

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521. G.A. Res. 1514 (XV), *supra* note 513, at para. 7; *see also* The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (Oct. 24, 1970), UN Charter, *supra* note 452, at art. 2(4) (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”).

522. *See* G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc A/4684, at 29 (Dec. 15, 1960); *see also* WATSON, *ABORIGINAL PEOPLES*, *supra* note 125, at 88.

523. Vogel, *supra* note 515, at 447.

524. The group was formally titled the “Working Group on Indigenous Populations.” Because of the problematic nature of the term “populations,” it was often referenced by Indigenous experts as the “Working Group on Indigenous Peoples.” *See* Venne, *The Road*, *supra* note 467, at 560 n.12.

525. Erica-Irene A. Daes, *Striving for Self-Determination for Indigenous Peoples*, in *IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION: COLLECTED PAPERS & PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON THE RIGHT TO SELF-DETERMINATION & THE UNITED NATIONS*, GENEVA 2000 50, 58 (Y.N. Kly & D. Kly eds., 2001) [hereinafter Daes, *Striving for Self-Determination*].

526. *See* Vogel, *supra* note 515, at 448; *see also* KLY, *supra* note 461, at 124 (noting that “the term ‘peoples’ which appears in the [UN] Charter and common article 1 of the two [major human rights] Covenants, is becoming generally accepted to include minorities or nationalities as it is being applied frequently in practice”).

527. *Reference re Secession of Quebec*, 2 S.C.R. 217 (1998), at 70.



pation in government.<sup>528</sup> A similar sentiment was expressed in the 1976 Universal Declaration on the Rights of Peoples (“Algiers Declaration”), which states that “[e]very people has an imprescriptible and unalienable right to self-determination . . .” including “the right to break free from any colonial or foreign domination, whether direct or indirect, and from any racist regime.”<sup>529</sup>

Peoplehood is often conceived in static or essentialist terms but it can be actively constructed. In the *Namibia* case, the International Court of Justice rejected South Africa’s argument that “tribalism” within Namibia prevented its population from constituting a people.<sup>530</sup> Addressing “the Namibians’ status of a people,” International Court of Justice Vice President Fouad Ammoun’s separate opinion recognizes the role of agency in this process by pointing out that “the Namibian people . . . asserted its international personality by taking up the struggle for freedom” and as a result, despite South Africa’s objections, had been recognized by UN General Assembly and Security Council resolutions, as well as by the Court.<sup>531</sup>

Statist arguments to territorial integrity are undermined by evidence that the viability of the state system itself is increasingly being called into question and that state boundaries have always been, and continue to be, in flux.<sup>532</sup> Settler states have no superior claim to colonized territories simply because those lands have been incorporated into their claimed boundaries. Colonialism is defined by structural relations, not by the geographic distance separating the colonizer from the colonized. Thus, in attempting to deflect criticism of its overtly colonial policies, Belgium argued that the UN’s trusteeship powers should be applied as well to “those part of the ‘metropolis inhabited by

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528. *Id.* at 76. The International Court of Justice has concluded that groups in the Western Sahara, East Timor, and Palestine constitute peoples with a right to self-determination. See Wojciech Kornacki, *When Minority Groups Become “People” Under International Law*, 25 N.Y. INT’L L. REV. 59, 79 (2012) (citing Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 68 (Oct. 16); Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 106 (June 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 183 (July 9)).

529. See RICHARD A. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY, 185-94, 225-28 (1981).

530. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Reports 16, 63 [hereinafter *Namibia Opinion*] (declaration of President Muhammad Zafrulla Khan).

531. *Id.* at 69 (separate opinion of Vice-President Fouad Ammoun).

532. See RICHARD A. FALK, THE DECLINING WORLD ORDER: AMERICA’S IMPERIAL GEOPOLITICS 9-11 (2004) (noting that “the state system [ ] at the core of the Westphalian experience . . . [is] both a guiding and incoherent myth that does not now and never did correspond with patterns of behavior in international politics”).

peoples whose degree of actual subordination to the rest of the state community in the midst of which they lived placed them in a colonial situation.”<sup>533</sup> As summarized by Wolfe, “Nothing . . . about settler colonialism requires there to be a spatial hiatus (or ‘blue water’) between metropole and colony. Settler colonization occurs and persists to the extent that a population sets out to replace another one in its habitation, regardless of where the colonizing population originated.”<sup>534</sup>

Similarly, sustained occupation does not, *per se*, alter the nature of the relationship. As Justice Ammoun observed with respect to South African claims to Namibia (South West Africa), neither Germany’s colonization of Namibia nor South Africa’s administrative “mandate” erased Namibia’s legal personality.<sup>535</sup> “Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression.”<sup>536</sup>

Finally, it is worth noting that the right to self-determination is a “continuing right,” meaning that the status of a people subject to the jurisdiction of any state may always be reassessed.<sup>537</sup> In the words of international legal scholar Antonio Cassese, “The issue of whether the government of a sovereign State is in compliance with [Common Article 1 of the ICCPR and the ICESCR] is a legitimate question, with reference to any State, at any point in time.”<sup>538</sup> It is not a static right. As Daes emphasizes,

[I]t is very important to think of self-determination *as a process*. *The process of achieving self-determination is endless*. This is true of all peoples—not only Indigenous peoples. Social and economic con-

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533. Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT’L L.J. 209, 245 (1992) (quoting A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 103 (1973)); *see also* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 100 (1979) (noting that “self-determination units” may encompass “entities part of a metropolitan State but which have been governed in such a way as to make them in effect non-self-governing territories”).

534. Wolfe, *Structure and Event*, *supra* note 126, at 122.

535. Namibia Opinion, *supra* note 530, at 68 (separate opinion of Vice-President Ammoun).

536. *Id.*; *see also* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 107 (2004) (noting that “[d]ecolonization demonstrates that self-determination’s remedial aspect may trump or alter otherwise applicable legal doctrine,” including claims to territorial sovereignty).

537. *See* ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 54 (1995) (emphasis omitted).

538. *Id.* at 55. It should be noted, however, that Cassese does not see this right as applying to “internal minorities.” *Id.* at 62.

ditions are ever-changing in our complex world, as are the cultures and aspirations of peoples. For different peoples to be able to live together peacefully, without exploitation or domination—whether it is within the same state or in two neighboring states—they must continually renegotiate the terms of their relationships.<sup>539</sup>

The real question is what steps we will take to exercise our right to self-determination.<sup>540</sup> As we consider our options, we must remain aware that in international law both substantive rights and remedial measures are framed and limited by state actors, and states have little incentive to empower internally subordinated groups or peoples they have colonized.<sup>541</sup> Even when it can be demonstrated that clearly articulated international law is being violated by state actors, enforcement mechanisms tend to be cumbersome, slow, and relatively easily subverted by governmental recalcitrance.<sup>542</sup> Non-compliant states are usually induced to conform to international norms through some combination of diplomatic, economic, and military pressure, means that are likely to have the least impact on the most powerful states.<sup>543</sup> As the world's dominant "superpower," the United States has effectively exempted itself from the jurisdiction of most international courts and often fails to participate in or comply with human rights treaty regimes.<sup>544</sup>

What all of this means is that we cannot expect international law to step in and liberate us, any more than we can expect domestic law to do so. Nonetheless, largely as a result of the widespread movement for decolonization that resulted in formerly colonized territories being recognized as independent states, international law has evolved

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539. Daes, *Striving for Self-Determination*, *supra* note 525, at 57-58 (emphasis in original); see also Vogel, *supra* note 515, at 478 ("The right to self-determination serves the well-being of groups who define themselves as a people by addressing the conditions under which they live and are governed through an on-going process of negotiation of the terms on which they live with their neighbors.").

540. An important corollary is how we will defend others engaged in pursuit of their right to self-determination. While this topic is beyond the scope of this article, it is worth noting that domestic law may not be invoked to justify the violation of a state's international obligations and that international law recognizes a special obligation to protect human rights defenders. See Vienna Convention on the Law of Treaties arts. 26-27, May 23, 1969, 1155 U.N.T.S. 331; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

541. See ESTEVA & PRAKASH, *supra* note 510, at 10-11 (describing the universalization of human rights as part of a process of "recolonization").

542. See generally Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935 (2002).

543. For a detailed analysis of compliance, see generally *id.*

544. See SAITO, MEETING THE ENEMY, *supra* note 136, at 205-17.

to acknowledge fundamental rights that can play a key role in efforts to deconstruct racial hierarchy and dismantle structures that perpetuate colonial relations. While such rights are not likely to be fully implemented by extant domestic, regional, or global legal institutions, the fact that they are recognized as fundamental legal principles can help us to imagine and implement liberatory options outside the constraints of a dominant narrative that depicts current settler colonial realities as right, natural, or inevitable.<sup>545</sup>

## VII. IMAGINING DECOLONIZATION

*Of course, the decolonization of settler colonialism needs to be imagined before it is practised.*

—Lorenzo Veracini<sup>546</sup>

Racial realism forces us to acknowledge that privilege and subordination are systemic and persistent in contemporary American society. I have argued that assessing racial realities in terms of the presumptions, perceived needs, and goals of those who benefit most from settler colonialism can provide a framework that explains the historic subordination of people of color and the apparent intractability of institutionalized racism in a manner that is consistent and coherent rather than riddled by contradiction. Material realities often require us to work within settler colonial institutions, employing opportunities provided by the ideological framework of formal equality and constitutional rights to protect the most vulnerable where possible. However, it is illogical to believe that we can rely on settler state law or legal institutions to undo the very hierarchy they constructed and are intended to protect.<sup>547</sup> The question, then, becomes how we begin to envision liberatory options.

As noted above, Kenyan author Ngũgĩ wa Thiong’o cautions that the most powerful weapon utilized against oppressed peoples is a “cultural bomb” intended to induce despair by eviscerating our belief in our capacities and, “ultimately, [our]selves.”<sup>548</sup> If racialized subordination in the United States is rooted in and perpetuates colonial relationships, its remediation will require us to step outside the triumphalist narrative of American settler culture and to consider what

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545. On the importance of anti-colonial, international perspectives for critical race theory, see generally John Hayakawa Török, *Race Consciousness and the Work of Decolonization Today*, 48 *How. L.J.* 351 (2004).

546. Veracini, *Telling the End*, *supra* note 155, at 211.

547. See Smith, *The Moral Limits of the Law*, *supra* note 17, at 70.

548. See *supra* note 117 and accompanying text.

is entailed in the decolonization of the relationships between Indigenous peoples, those who see themselves as part of the settler class, and those who are neither indigenous to this land nor intended to benefit from settler privilege.

Imagining the decolonization of any settler state is a daunting task, for we have no readily available models to consult. Decolonization in the classic colonial context has generally meant that the colonizers “go home” as formerly colonized territories are recognized as independent states. As the strife that pervades many former colonies in Africa and Asia illustrates, formal independence alone has not necessarily been liberatory. Neocolonial exploitation has frequently ensured the continued impoverishment of the formerly colonized and the maintenance of colonially imposed territorial boundaries has precluded peoples within those borders from exercising their right to self-determination.<sup>549</sup> In settler states, we are faced with different and even more complicated circumstances because the territory at issue is considered “home” by both colonized and colonizer.<sup>550</sup> What does it mean for all peoples to be self-determining under these conditions?

There are no easy answers or formulaic solutions, for decolonization is always context-specific. It cannot be legislated or decreed from above. True decolonization entails the ability of the formerly colonized to exercise their right to self-determination and, thus, is a process that must be envisioned and implemented from the ground up. Colonial powers may withdraw, or negotiate alternate arrangements with the formerly colonized, but if they presume to dictate the terms of decolonization, the end result is simply a different variant of colonial domination. Patrick Wolfe’s insight that settler colonial “invasion is a structure not an event”<sup>551</sup> tells us that decolonization, likewise, will not be an event but a process of deconstruction and reconstruction. The good news is that regardless of the policies maintained by those in power, there are innumerable opportunities to assert human dignity, to exercise the right to self-determination, and to set in motion processes that are, themselves, liberatory.

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549. See Ibrahim J. Gassama, *Africa and the Politics of Destruction: A Critical Re-Examination of Neocolonialism and Its Consequences*, 10 OR. REV. INT’L L. 327, 328-37 (2008) (explaining the construct and the economic consequences of neocolonialism). On the process and consequences of maintaining colonial boundaries, see generally Mutua, *supra* note 107.

550. Noting that the United States is “only a political entity,” Cherokee artist/author Jimmie Durham asks if at the end of American empire, “Would *my* country become free of the US? If so, where is America? If not, do I really not come from any place?” JIMMIE DURHAM, *A CERTAIN LACK OF COHERENCE: WRITINGS ON ART AND CULTURAL POLITICS* 175 (1993).

551. Wolfe, *Settler Colonialism and the Elimination of the Native*, *supra* note 133, at 388.

Indigenous scholars and activists in settler colonial states, including the United States, are constantly furthering the theoretical and practical work of decolonization.<sup>552</sup> I would not presume to engage directly in that discussion, but I believe their work can be of tremendous value to non-Indigenous peoples of color concerned about racial justice in the United States. Drawing upon this work, and in the hope of sparking further discussion, this concluding Part considers steps that may help us move beyond despair and toward constructive endeavors.

#### A. *Changing the Stories We Live By*

A first step in moving beyond colonial dynamics of power and privilege is to “change the stories we live by.”<sup>553</sup> There are several dimensions to this process. Perhaps most obviously, we can reclaim our histories, refusing to concede to narratives that erase our identities, our lived realities and, often, even our humanity.<sup>554</sup> This can happen at many levels, and can take many forms. We may need to re-value our personal stories and ensure that our children understand their genealogies, contextualized within the histories of their communities. We can appreciate the oral histories in which every person has a place, and in which the “diversities of truth” are represented.<sup>555</sup> The more formal narration of collective memory can be encouraged by providing venues designed to compile testimonies, as was done, for example, in the “people’s tribunals” where survivors of Hurricanes Katrina and Rita gave testimony, or evidence of the dispossession of Native Hawaiians was gathered.<sup>556</sup>

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552. See, e.g., FOR INDIGENOUS MINDS ONLY: A DECOLONIZATION HANDBOOK (Waziyatawin Angela Wilson & Michael Yellow Bird eds., 2012); FOR INDIGENOUS EYES ONLY: A DECOLONIZATION HANDBOOK (Waziyatawin Angela Wilson & Michael Yellow Bird eds., 2005); PORTER, SOVEREIGNTY, *supra* note 98; Churchill, *The Indigenous Peoples*, *supra* note 98. For an analysis from a “critical settler” perspective, see generally Ingrid Huygens, *Developing a Decolonisation Practice for Settler Colonisers: A Case Study from Aotearoa New Zealand*, 1 SETTLER COLONIAL STUD. 53 (2013), available at <http://dx.doi.org/10.1080/2201473X.2011.10648812>.

553. See *supra* note 165 and accompanying text.

554. See SMITH, DECOLONIZING, *supra* note 106, at 144-46.

555. See *id.* at 146.

556. On the Hurricane Katrina and Rita People’s Tribunal, see AMY GOODMAN & DAVID GOODMAN, STANDING UP TO THE MADNESS: ORDINARY HEROES IN EXTRAORDINARY TIMES 29 (2008); on the potential of international law to address issues identified at this tribunal, see generally George E. Edwards, *International Human Rights Law Violations Before, During, and After Hurricane Katrina: An International Law Framework for Analysis*, 31 T. MARSHALL L. REV. 353 (2006). For the record of the Hawai’i Tribunal, see generally ISLANDS IN

Changing the stories by which we live keeps alive our histories of survival, resistance, and contributions to humanity. But it also entails acknowledging that contemporary American society is neither postracial nor postcolonial, confronting harsh and unpleasant truths that we may wish to deny.<sup>557</sup> Racial realism does not allow us to remain in denial about the persistence of overt hostility, as well as unemployment, mass incarceration, and the human consequences of living in families and communities rendered dysfunctional by the stress of day-to-day survival. Derrick Bell's advocacy of racial realism has been criticized for leaving us with no alternative to despair,<sup>558</sup> but that is not the message I take from his stark assessment. I see it, instead, as an opportunity to constructively confront the depressing circumstances in which we find ourselves.<sup>559</sup> Thus, for example, collective acknowledgment of the trauma induced by persistent and ongoing dehumanization can trigger processes of healing and transformation.<sup>560</sup> As Linda Tuhiwai Smith observes, it can be enormously empowering to realize that often "such things as mental illness, alcoholism and suicide, for example, are not about psychological and individualized failure but about colonization or lack of self-determination," and to take more control over the ways in which such issues are addressed.<sup>561</sup>

Changing our narrative requires moving from the debunking of stories that attempt to negate our worth to relearning or constructing stories that actually "give our lives meaning."<sup>562</sup> Such stories cannot be constrained by the parameters of a colonial worldview that is linear, hegemonic, and triumphalist. Meaningful stories require us to step outside of that "box" and place ourselves within a fundamentally different paradigm. Serious consideration of alternatives to the status quo requires acknowledging that we live in a "pluriverse" of worldviews, as

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CAPTIVITY: THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (Ward Churchill & Sharon H. Venne eds., 2005).

557. See *supra* notes 54-68 and accompanying text.

558. See, e.g., John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 550 (1992).

559. Like Cheryl Harris, I find Derrick Bell's emphasis on the permanence of racism—within American society as it is currently constructed—to be "tremendously hopeful, not despairing—regenerative, not dark." Cheryl I. Harris, *Bell's Blues*, 60 U. CHI. L. REV. 783, 784 (1993).

560. These are, in fact, "crucial strategies in any approach that asks a community to remember what they may have decided unconsciously or consciously to forget." SMITH, *DECOLONIZING*, *supra* note 106, at 147.

561. *Id.* at 154.

562. See *supra* note 164 and accompanying text.

Gustavo Esteva and Madhu Suri Prakash remind us.<sup>563</sup> Western civilization is not necessarily the inevitable final stage of the entirety of human history, and settler colonial regimes are but one of many ways in which human societies can be organized. Both sovereignty and identity can be, and have been, constructed in ways that are layered and overlapping, rather than exclusive. One can view lands and natural resources as sites of responsibility rather than possession.<sup>564</sup> In order to render decolonization thinkable, to develop theoretical frameworks capable of accounting for contemporary realities and allowing us to envision creative change, we must be willing to think—and live—outside the constraints of paradigms in which the status quo is presumed to be right, natural, and inevitable.

### B. *Thinking Strategically*

Lorenzo Veracini observes that settler colonial narratives “move forward along a story line that cannot be turned back.”<sup>565</sup> The settlers’ vision of establishing a new, superior, and more civilized society undergirds their claims to legitimacy and justifies their assertion of sovereign prerogative. This is reflected in the construct of American exceptionalism, whose central thesis is that the United States represents the pinnacle of Western civilization and, therefore, the highest stage of human progress to date.<sup>566</sup> There is no endpoint to this vision; settler colonialism ultimately succeeds when it has “ceased being settler colonial” by virtue of permanently normalizing settler hegemony.<sup>567</sup> Within this worldview, “the discontinuation of a settler colonial circumstance remains unthinkable.”<sup>568</sup>

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563. ESTEVA & PRAKASH, *supra* note 510, at 115-16. See, e.g., Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples’ Rights, Identity and Resources*, 15 TEX. WESLEYAN L. REV. 207 (2009) (arguing for a legal pluralism incorporating Indigenous paradigms of knowledge and property).

564. See, e.g., WATSON, *ABORIGINAL PEOPLES*, *supra* note 125, at 149 (suggesting that we “think about the condition of dispossession outside the ‘logic of possession (as a hallmark of modernity, liberalism, and humanism)’”) (citation omitted); WILLIAM G. ROY, *MAKING SOCIETIES: THE HISTORICAL CONSTRUCTION OF OUR WORLD* xv (2001) (“Not all societies divide people into fixed races, assign everyone to only one of two sexes, or accord higher status to those who accumulate wealth. Many societies treat time as a cycle more than a line . . . Few societies think of space in terms of abstract coordinates that can have meaning apart from the activities that happen in particular places.”).

565. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 98.

566. See SAITO, *MEETING THE ENEMY*, *supra* note 136, at 18-34.

567. VERACINI, *SETTLER COLONIALISM*, *supra* note 23, at 22.

568. *Id.* at 104-05 (noting that this “narrative gap contributes crucially to the invisibility of anti-colonial struggles in settler colonial contexts”).



Theory is crucial because it renders decolonization “thinkable.” In attempting to theorize strategically, it seems particularly useful to identify the processes through which colonial structures of domination and subordination are constructed and maintained. By understanding settler strategies of elimination, subjugation, subordination and manipulation—the ways in which colonization is effectuated—we can begin to develop, envision, and implement strategies to counter those processes.<sup>569</sup>

If settler colonization’s foundational requirement is the occupation of other peoples’ lands, a key precept of any theory of decolonization will be the primacy of Indigenous struggles. As Patrick Wolfe notes, “[n]o amount of good intentions or improved racial theorizing” will alter the underlying colonial reality unless “accompanied by territorial (re-)cession.”<sup>570</sup> While this may be a point that “many will wish to deny, but none can refute,”<sup>571</sup> any end run around this premise leaves us engaged in “an exercise in *settler* nation building.”<sup>572</sup> Within this framework, as Veracini points out, “even well meaning processes of indigenous and national reconciliation, or the incorporation of indigenous governance structures within the settler polity, ultimately contribute to the erasure of variously defined indigenous sovereignties and therefore to the reproduction of settler colonizing practices.”<sup>573</sup>

In other words, if the structures that maintain the subordination, not only of Indigenous peoples, but also peoples of African descent and immigrants of color, are an integral part of the settler colonial enterprise, if they are maintained to ensure the continued profitability of the occupation of Indigenous lands, it is illogical to believe that they can or will be dismantled until the legitimacy of that occupation is effectively challenged. From my perspective, this is why movements for equal rights within the settler polity have not eliminated racial subordination, and why it is in the interest of all peoples who wish to dismantle racial hierarchy to embrace Indigenous decolonization as an integral part of our own struggles for liberation.

This is the point at which we often encounter what I think of as the “fear factor.” In my experience, it is difficult to have rational discussions about decolonizing American society with anyone who is not Indigenous because the very idea triggers a defensive reaction that generally manifests as “but then we’d have to leave,” quickly followed

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569. See *supra* part IV (providing examples of such analyses).

570. Wolfe, *Structure and Event*, *supra* note 126, at 103.

571. Bell, *supra* note 2, at 373.

572. Veracini, *Telling the End*, *supra* note 155, at 211.

573. *Id.* at 211-12.

by “and I don’t have anywhere to go.”<sup>574</sup> As this reaction demonstrates, it is useful for settler culture to project sovereignty and identity as all-or-nothing propositions, leaving non-Indigenous peoples to imagine that their disappearance is the only alternative to the status quo. Because this is not a thinkable alternative, it allows them to dismiss the foundational issue of colonial occupation without even addressing it.

In fact, however, as Dean Saranillio observes, “[i]maged violence on the part of Indigenous movements is a common trope that allows Native savagery to stand in for settler self-critique.”<sup>575</sup> It was Anglo-American settlers, not American Indian nations, who imposed their presumption of exclusivity, who arrived with a firm conviction that they could live on this land only if Indigenous peoples were eliminated. What decolonization entails is a relinquishment of the settlers’ claimed prerogative to encompass everything and everyone within *their* state; in other words, the conviction that only they are self-determining.<sup>576</sup> Indigenous nations are not calling for the departure of all settlers or other migrants, “but rather accountability for their discourses and practices that ultimately come at Native expense.”<sup>577</sup> The presumption that relinquishing exclusive settler sovereignty equates to a wholesale evacuation of the territory by non-Indigenous peoples does not reflect any material reality but simply an inability to conceive of living with, or within, others’ polities.

What imagining decolonization does require is the capacity to envision forms of social and political organization outside the settler colonial paradigm. Paradigm shifts are, of course, disconcerting, but they can also be immensely liberating.<sup>578</sup> In supporting the ability of Indigenous peoples to be self-determining, we open up the possibility for all peoples on this continent to be self-determining. If we recognize that the institutions that perpetuate racism and other variants of social, political, and economic exploitation are maintained by the ongoing

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574. See Mari Matsuda, *Are We Dead Yet? The Lies We Tell to Keep Moving Forward*, 40 CONN. L. REV. 1035, 1041-42 (2008) (discussing the fears engendered by acknowledging Native Hawaiian sovereignty).

575. Saranillio, *supra* note 146, at 285.

576. “The western subject knows that it is self-determining because it compares itself to ‘others’ who are not. In other words, I know who I am because I am not you. These ‘others’ of course are racialized.” Andrea Smith, *The Problem with “Privilege”*, ANDREA366 (Aug. 14, 2013), <http://andrea366.wordpress.com/2013/08/14/the-problem-with-privilege-by-andrea-smith/>.

577. Saranillio, *supra* note 146, at 284.

578. See Delgado, *Centennial Reflections*, *supra* note 20, at 458-59 (discussing the relationship between paradigms and social power).

colonization of this land, we can see that it is in our collective self-interest to participate in its decolonization.

In other words, challenging the legitimacy of the occupation of this continent, consistently and straightforwardly, is a necessary part of our own liberation. This means not only supporting Indigenous efforts to gain particular land rights within the strictures of settler society, but also supporting Indigenous peoples' struggles for self-determination more generally.<sup>579</sup> Non-Indigenous peoples cannot prescribe what Indigenous self-determination should look like, any more than the U.S. government can dictate the terms upon which Indigenous peoples are "allowed" to be self-determining.<sup>580</sup> To the extent we impose our own value judgments on other peoples' exercise of their right to self-determination, we are, in essence, invoking a variant of Justice Brown's uncontrovertibly colonial assertion that we can rely on Congress to protect U.S. "dependencies" in accordance with the "principles of natural justice inherent in the Anglo-Saxon character."<sup>581</sup>

The struggle for the liberation of all peoples thus requires, I believe, understanding—and acting upon—the principle that colonialism cannot be dismantled so long as Indigenous peoples remain colonized. While I see this as a necessary step, understanding and addressing the subjugation of other peoples, including but not limited to peoples of color, within settler society will also entail identifying and confronting the strategies of elimination, subjugation, subordination, and manipulation employed to maintain racial hierarchy and protect settler privilege. This is a strikingly under-theorized dimension of settler colonial studies and my purpose here is simply to point out that this framework can be of great utility. The complex dynamics of racialization and institutionalized racism have been explored in law and in virtually all social science disciplines. Building upon this work, if we consider the ways in which any given example—say, racial profiling in traffic stops—serves as a strategy of subjugation or subordination, we can begin to build a conceptual framework that connects seemingly disparate manifestations of racism.

By understanding the purposes served by such policies and practices in the context of the settler colonial state, we can more cre-

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579. For an illustration of this process, see Venne, *The Road*, *supra* note 467, at 572-74 (noting not only the struggles between Indigenous peoples and state representatives at the United Nations, but discussions that Indigenous peoples had to have amongst themselves in order to understand the importance, for example, of sea ice to the Inuit and trees to peoples of the Amazon).

580. See *supra* notes 191-92 and accompanying text.

581. *Downes*, 182 U.S. at 280.

actively envision remedial measures and assess their ability to empower our communities rather than reinforcing the status quo.<sup>582</sup> Thus, for example, Andrea Smith proposes that, rather than engaging in what amount to moral appeals to a legal system that has facilitated genocide, slavery, and racism, we should divest the current legal system of its moral authority and think strategically about how it can be used to further a decolonizing agenda.<sup>583</sup> She goes on to propose an approach to gender violence in Native communities that incorporates traditional means of fostering justice and accountability to the community—rather than criminalization and incarceration—within a context that recognizes decolonization as the ultimate goal.<sup>584</sup> Similar approaches could, of course, be undertaken within any given community and in response to a wide range of problems.

Andrea Smith's example illustrates not only the possibility of exercising some degree of self-determination with respect to a particular issue, but the potential for envisioning entirely different bodies of substantive law and systems of enforcement. Robert Cover's oft-cited observation that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" was referenced earlier.<sup>585</sup> Moving beyond this descriptive statement, he noted that "[t]he position that only the state creates law . . . confuses the status of interpretation with the status of political domination."<sup>586</sup> In other words, we can actively and collectively engage in the construction of the law. The same, of course, could be said for developing political, economic, and cultural institutions.

In this effort, we can look to international law. International law does not provide us with any quick fixes, but its emphasis on human dignity affirms that we cannot be free within social structures that accord "rights" while crushing the human spirit, and it articulates clearly that *all peoples* have the right to self-determination. Exercising the right to self-determination can take an infinite variety of forms,

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582. Lorenzo Veracini, *Settler Colonialism and Decolonisation*, 6 BORDERLANDS para. 26 (2007), available at [http://www.borderlands.net.au/vol6no2\\_2007/veracini\\_settler.htm](http://www.borderlands.net.au/vol6no2_2007/veracini_settler.htm) ("[M]ulticultural remaking . . . does not involve unsettling foundational settler narratives. Multiculturalism allows for an expanded definition of who can claim belonging to the settler body politic that leaves settler colonial structures unchallenged."). For an example of an empowering process in action, see generally From Civil Rights to Human Rights and Self-Determination? Proceedings of the IHRAAM CHICAGO CONFERENCE 2012 (2012).

583. See Smith, *The Moral Limits of the Law*, *supra* note 17, at 85.

584. *Id.* at 77-82; see also Christine Zuni, *Strengthening What Remains*, 7-Wtr KAN. J.L. & PUB. POL'Y 17 (1997) (emphasizing the need to preserve, strengthen and incorporate Indigenous principles of law and justice into tribal court systems).

585. Cover, *supra* note 152, at 4.

586. *Id.* at 43.

from a community's demand for a stop sign at a dangerous intersection; to local control of policing, education, and/or healthcare services; to the reorganizing of economically self-sufficient and politically independent nations. The litmus test, as I see it, is whether any given action empowers communities and promotes decolonization, or further entrenches extant relationships of domination and subordination.

#### CONCLUSION

This exploration of the potential utility of settler colonial theory in addressing issues of racial justice was motivated by my concern that young people of color in the United States today continue to face the deeply entrenched racial disparities and injustices that were the focus of many movements in the 1960s and early 1970s, without the collective energy and vision that inspired activists of that era. Remembering the impact that the global struggles for decolonization had on movements for social change within the United States, I began by considering whether the analysis of people of color within the U.S. as internally colonized, frequently proffered a half-century ago, was theoretically unsound. Concluding that this perspective was not so much unsound as incomplete, I have suggested that applying settler colonial theory to the racial realism Derrick Bell urged us to embrace can provide a historically accurate basis for understanding how and why racialized privilege and subordination have become so deeply institutionalized in American society. My hope is that developing this theoretical framework from a multiplicity of perspectives will help us envision and implement liberatory alternatives to the status quo.