

## TAXONOMY AND RESTORATIVE JUSTICE: CAN WE EVEN SEE THE PROBLEM?

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Reparations are an internationally recognized human right.<sup>1</sup> The violation of international law triggers a right to repair even when reparations are not explicitly mentioned in specific treaties that have been violated.<sup>2</sup> Nevertheless, claims for redress, repair, or relief made to the United Nations by people of African descent<sup>3</sup> have consistently been denied or deflected,<sup>4</sup> even during the period that racial

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<sup>1</sup> U.N. G.A. Res. 60/147, annex, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec. 16, 2005), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>. See also *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), ¶ 68 (“[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”), and *The Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11). See also Dinah Shelton, *The Right to Reparations for Acts of Torture: What Right, What Remedies?*, 17 TORTURE 97 (2007), and Durban Declaration and Programme of Action (2001), [https://www.ohchr.org/sites/default/files/Documents/Publications/Durban\\_text\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf).

<sup>2</sup> See *supra* note 1 and accompanying text; see also *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26), [https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie\\_A/A\\_09/28\\_Usine\\_de\\_Chorzow\\_Competence\\_Arret.pdf](https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf) (“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.”).

<sup>3</sup> The terms Black, people of African descent, and afrodescendant are used interchangeably herein.

<sup>4</sup> See generally Ursula T. Doyle, *Strange Fruit at the United Nations*, 61 HOWARD L.J. 187 (2018); see also NAACP, *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America*

discrimination was legalized in the United States, contrary to the Universal Declaration of Human Rights, the UN Charter, and key international treaties.<sup>5</sup> Thus, for people of African descent, reparations for the legalized racial atrocity of the trade and trafficking in enslaved Africans and colonialism, or for the ongoing, transnational systemic racism it created, have been elusive<sup>6</sup> . . . even as racial inequity and inequality thrive.

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*and an Appeal to the United Nations for Redress* (1947); National Negro Congress, *A Petition to the United Nations on Behalf of 13 Million Oppressed Negro Citizens of the United States of America* (June 6, 1946); Human Rights Council Res. 43/1, U.N. Doc. A/HRC/RES/43/1 (June 19, 2020) (condemning “continuing racially discriminatory and violent practices perpetrated by law enforcement agencies against Africans and people of African descent,” deploring “recent incidents of excessive use of force and other human rights violations by law enforcement officers against peaceful demonstrators,” requesting reporting on systemic racism and violations of international human rights law and on government responses to peaceful protests, and asking for cooperation by member states and for those with relevant expertise, instead of calling for a Commission on Inquiry).

<sup>5</sup> For example, Article 2 of the Universal Declaration of Human Rights provides for equal enjoyment of rights and freedoms “without distinction of any kind, such as race, color, sex . . . .” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). The International Convention on the Elimination of Racial Discrimination (“ICERD”), Art. 1(1), mandates that any distinction, exclusion, restriction, or preference based on prohibited grounds must be considered as racial discrimination when it has “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms,” *see* ICERD ¶¶ 1 & 2. Similarly, the International Covenant on Civil and Political Rights (“ICCPR”), adopted by the UN General Assembly in 1976, prohibits discrimination and conduct leading to discrimination. *See* ICCPR ¶¶ 2, 4, 20, 24, 26 6. Article 20 (2) expressly prohibits “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” *Id.* Even more robustly, the Durban Declaration and Programme of Action (“DDPA”) reasserts equality and non-discrimination as core human rights, and assigns primary responsibility for combating racism, racial discrimination, xenophobia and related intolerance to States, as duty bearers, with active involvement by international and non-governmental organizations, political parties, national human rights institutions, the private sector, the media and civil society. *See* United Nations, *Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence*, September 8, 2001, available at: <https://www.refworld.org/docid/3db573314.html>.

<sup>6</sup> Although transnational systemic racism related to the transatlantic trade and trafficking might be genuinely addressed by an intergovernmental entity, and perhaps *only* in such a forum, the United Nations has declined the invitation to do so, perhaps recognizing its limitations within a geopolitical balance of power among countries that continue to instrumentalize race. *See* Doyle, *supra* note 4, at 235 (“[the] lack of an advisory opinion concerning [systemic racism] perhaps shows that at issue was not the court’s readiness to answer a difficult question but rather the broader UN’s readiness to ask it”). *See also* Human Rights Council, *Statement on the Human Rights Council Urgent Debate Resolution by the Working Group of Experts on People of African Descent and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Jun. 19, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25977&LangID>

The discourse of reparations for racism has gained momentum in recent years, moving from a theoretical inquiry defined by scholars and activists into action-oriented possibilities promoted by policymakers. Increasingly, interventions focused on remedying ongoing racial inequity and inequality have been labeled reparations.<sup>7</sup> But even as the reparations become a more mainstream interrogation of the public imaginary,<sup>8</sup> defining reparations in the context of ongoing systemic racism nearly everywhere inevitably privileges certain histories and experiences over others.<sup>9</sup>

However, even beyond the location where an individual found themselves at the end of the Middle Passage, or the political entity that holds the most culpability for an ancestor's enslavement, the question of reparations requires a reckoning with harm. Sojourner Truth, who delivered a powerful demand for the recognition of dignity and humanity,<sup>10</sup> made sustained demands for reparations: "America owes to my people some of the dividends. She can afford to pay and she must pay. I shall make them understand that there is a debt to the Negro people which they can never repay. At least, then, they must make

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=E) (expressing "serious concern that extreme pressure by certain powerful and influential countries—including countries that publicly voiced support for the need to take action in the face of systemic racism—has operated to dilute the strength of the planned consensus resolution of the Urgent Debate" and calling "on the Human Rights Council to adopt, through a vote if necessary, a strong, substantive resolution").

<sup>7</sup> See, e.g., Adam Beam, *11 US mayors pledge to pay reparations for slavery to small groups of Black residents*, THE ASSOCIATED PRESS (Jun. 19, 2021), <https://apnews.com/article/joe-biden-race-and-ethnicity-government-and-politics-a9edb3b1292e40b1e82f33257b8d3222>.

<sup>8</sup> See, e.g., H.R. REP. NO. 117-40 (2021-2022).

<sup>9</sup> See, e.g., *Evanston Local Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> (last visited Oct. 18, 2022) (defining reparations for housing based discrimination for Black people who were Evanston, IL residents between 1919 and 1969); Soumya Karlamangla, *California Task Force Votes to Offer Reparations Only to Descendants of Enslaved People*, THE N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/us/california-reparations.html> (limiting reparations to Black Californians who were descended from people enslaved in the United States).

<sup>10</sup> See "Ain't I a Woman?" *Speech Transcript – Sojourner Truth*, REV, <https://www.rev.com/blog/transcripts/aint-i-a-woman-speech-transcript-sojourner-truth> (last visited Oct. 18, 2022) ("Look at me, look at my arms, I have plowed, and planted, and gathered in the barns, and no man can head me. And ain't I a woman? I could work as much, and eat as much as a man when I could get it, and bear the lash as well. And ain't I a woman? I have borne 13 children and seen most all sold off to slavery. And when I cried out with my mother's grief none but Jesus heard me. And ain't I a woman?").

amends.”<sup>11</sup> The staggering nature of the injury suffered was reaffirmed by calls for reparations at the time and ever since, by people of African descent, religious leaders, activists, and public intellectuals.<sup>12</sup>

Even in its most expansive form, racial reparations are structured by the extent of the racism society wishes to repair or redress. How we categorize certain experiences or issues, including whether we acknowledge their racialized content, frequently leaves a lot of racism on the table. If transphobic slurs, or even violence, are deployed against a Black transperson, is that not also a racialized attack? Can race have been perceived to tacitly license transphobia in that context and is that not a central, rather than ancillary, consideration?<sup>13</sup> Institutionally, limiting taxonomies shave away at the acknowledged, expansive racism of everyday life. For example, in managing its own personnel, the leadership of NYPD, the largest police force in the United States, defines racial profiling and biased policing explicitly to *exclude* the use of racial slurs against Black persons.<sup>14</sup> They are not alone in this;<sup>15</sup> the burden of proof for

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<sup>11</sup> See Cecilia Conrad ET AL., *AFRICAN AMERICANS IN THE U.S. ECONOMY* (2005), at 319 (quoting Sojourner Truth).

<sup>12</sup> Formal demands for robust, structured reparations issued from Christian religious leaders, the Nation of Islam, the Black Panther Party, *see id.* at 319-20, as well as from intergovernmental spaces like the Office of the U.N. High Commissioner for Human Rights and the U.N. Working Group of Experts on People of African Descent.

<sup>13</sup> For example, in policing (and elsewhere), officer misconduct is classified according to exclusive categories that, beyond failing to recognize intersectionality, may obscure the racialized nature of significant amounts of misconduct. See N.Y.C. Civilian Complaint Review Board, *PRIDE, PREJUDICE AND POLICING: AN EVALUATION OF LGBTQ-RELATED COMPLAINTS FROM JANUARY 2010 THROUGH DECEMBER 2015* (2016), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/issue\\_based/20160630\\_lgbtq-report.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20160630_lgbtq-report.pdf) (“Interactions between law enforcement and the LGBTQ community are not monolithic. Each instance can be viewed through the lens of race, class, age, immigration status, gender identity or expression.”).

<sup>14</sup> See Office of the Inspector General for N.Y.P.D., *COMPLAINTS OF BIASED POLICING IN NEW YORK CITY* (Jul. 2019) (“The inability of the NYPD/CCRB investigative processes to categorize and treat the [racial slurs] issue as biased policing may have negative implications for explicitly holding officers accountable..., as well as for the City’s ability to track the full range of patterns and trends related to biased policing.”).

<sup>15</sup> *Gammon v. Flowers*, 211 Fed. Appx. 523 (8<sup>th</sup> Cir. 2006) (finding that racial slurs alone do not render work environment “hostile” as matter of law.); *Nettles v. LSG Sky Chefs*, 941 N.Y.S.2d 643 (2d Dep’t 2012) (finding that the sole, lesser-compensated African-American vice-president’s claims of racial harassment, including disparaging his attempted management of incident of racial harassment of another employee, constitute “intermittent work-related conflict” and does not implicate Title VII); *Forrest v. Jewish Guild for the Blind*, 819 N.E.2d 998 (N.Y. 2004) (noting that supervisors’ intermittent use of racial slurs, without corroboration, could not trigger Title VII sanctions as a matter of law); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8<sup>th</sup> Cir. 1981) (“Racial comments that are merely

actionable racial harassment in the workplace often seems to require terror and impunity<sup>16</sup> and, as bad, the resiliency required for racialized persons' survival may be a barrier to recognition.<sup>17</sup>

Redefining the issue of racism to exclude everyday experience, intersectionality, and covert systemic racism severely limits any conceptualization of repair. It is not accidental that racialized taxonomies, i.e., taxonomies of racism, structure this conversation and the varied conceptualizations and definitions of reparations. The current law and policy framework may occult a genuine engagement with the concept of reparations at this late stage, where systemic racism persists, via "race-making institutions" transformed from enslavement to legalized discrimination to mass incarceration and more.<sup>18</sup> Instead, a paradigm shift away from defining the adequacy of injury to trigger repair and toward anticipatory futures may be warranted.

## I. A WORD ON SOCIAL CONSTRUCTS

Race is a social construct. Despite persistent attempts to locate a scientific basis for racial hierarchy over time, race has no biological basis.<sup>19</sup> Racism is a social construct as well. The economy is also a social construct, as is the market. Education, employment, health care and retirement planning are all social constructs. And yet, anyone who has gone to work feeling ill, because they had no sick days (another social construct) is well-aware of the power of a social construct to outweigh biological realities. Anyone who has skipped a meal to pay

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part of casual conversation, are accidental, or are sporadic do not trigger Title VII's sanctions."); *Turner v. Wong*, 832 A.2d 340, 345 (N.J. Super. Ct. App. Div. 2005) (finding that the lack of "severe emotional distress" precludes claim of intentional infliction of emotional distress against shop owner who racially harassed and slurred dissatisfied Black customer).

<sup>16</sup> See, e.g., *N.Y. State Div. of Human Rights v. A.R. Heflin Painting Contractor, Inc.*, 101 A.D.3d 1442, 956 N.Y.S.2d 666 (3d Dep't 2012) (establishing racial discrimination in constructive discharge of employee experiencing repeated, unabated racial insults by other employees, despite numerous complaints to the employer, a colleague's corroboration of both the racial insults and the employee's complaints to the employer, and employee's departure from job site after another employee used racial slur and then *jabbed him in the buttocks with a painting pole*).

<sup>17</sup> See, e.g., *Turner v. Wong*, 832 A.2d 340, 345 (N.J. Super. Ct. App. Div. 2005) (finding that a lack of "severe emotional distress" precludes claim of intentional infliction of emotional distress against shop owner who racially harassed and slurred dissatisfied Black customer).

<sup>18</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1-19, 178-220 (The New Press 2010).

<sup>19</sup> See generally Dorothy Roberts, *FATAL INVENTION* (2012).

for public transit, or the electric bill, or their student loans, at the end of the month has recognized the power of a social construct to structure their survival. Like other social constructs, racism is an incredibly powerful organizing principle for Black lives transnationally.<sup>20</sup> Racism has a pervasive and widespread impact today: among other things, it forces Black people to accommodate violence, disrespect, disregard, and mistake, all on the basis of race.

The social construct of race, and its progeny, racism, have been transnational, from their earliest inception as guidelines to exploit new, transnational profit opportunities in the triangular trade in enslaved persons between Europe, Africa, and the Americas.<sup>21</sup> The modern global economy was created by Black bodies, specifically the labor, resources, intellectual property, and ingenuity of people of African descent.<sup>22</sup> Licensing the exploitation of Black bodies, labor, intellectual property, resources, and more was seen as a key precursor to accretive profit and growth,<sup>23</sup> although the role of enslaved people

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<sup>20</sup> “Systemic racism against Africans and people of African descent affects the enjoyment of human rights in every part of life.” See Office of the U.N. High Commissioner for Human Rights, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/53 (Jun. 2021) and *Conference Room Paper*, A/HRC/47/CRP.1, at ¶¶ 18, <https://www.ohchr.org/en/documents/reports/ahrc4753-promotion-and-protection-human-rights-and-fundamental-freedoms-africans>.

<sup>21</sup> See generally Philomena Essed, ET AL., (eds.), *RELATING WORLDS OF RACISM: DEHUMANISATION, BELONGING, AND THE NORMATIVITY OF EUROPEAN WHITENESS* (2018); Neil MacMaster, *RACISM IN EUROPE: 1870-2000* (2001).

<sup>22</sup> Ibrahima Thiaw & Deborah L. Mack, *Atlantic Slavery and the Making of the Modern World: Experiences, Representations, and Legacies: An Introduction to Supplement 22*, 61 *CURRENT ANTHROPOLOGY* S145, S146 (“One of [Atlantic slavery’s] most enduring effects was the creation of a global economy, deeply rooted in the operations of the Atlantic capitalist system that connected different world regions beginning in the fifteenth century. The production of sugar cane, tobacco, coffee, cacao, rubber, and cotton, alongside the exploitation of mineral ores (gold, iron, silver), and even cowrie shell harvesting, completely or partially transformed modern identities, tastes, human relations, and productive economies.”).

<sup>23</sup> Adam Bledsoe & Willie Jamaal Wright. *The Anti-Blackness of Global Capital*. 37 *ENV’T AND PLAN. D: SOC’Y AND SPACE* 8 (February 2019) (“[A]nti-Blackness is actually an always-present precondition for capital accumulation.... [,] a global, ever-present factor that exists as the basis for expansion and unending space within the symbolic economy of settlement. Such an approach forces us to recognize how anti-Blackness punctuates the modern epoch by identifying the underlying logics that inform concrete manifestations of anti-Black racism around the world.... [and] adds new dimensions to already-existing work on the connections between anti-Blackness and political economy by recognizing that, while capitalism exploits all of the world’s populations, it does not dominate all of them in the same way.”).

in technology and design, as well as the stunning technological advancements once enslaved labor was no longer unconditionally available belies the necessity implied in this statement. Enslaved Africans, traded and trafficked into the Americas, contributed technologies, design, technique, and other intellectual property, well beyond any projected yield from the theft of people into enforced labor, breeding, and more and nearly in disregard of the layers of violence that were normalized in these contexts.<sup>24</sup> The legacies of this persist today, transformed rather than eliminated by social, legal, and policy reform.<sup>25</sup> Nevertheless, a ubiquitous discussion citing race as imaginary, rather than a durable product of the public imaginary, persists unabated.<sup>26</sup>

With respect to people of African descent, systemic racism manifests in remarkably similar ways in different countries and development contexts bespeaks a common root and shared history of “squaring up,” or orienting, around the exploitation and enslavement

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<sup>24</sup> For example, the Afro-Brazilian Museum in Sao Paulo, Brazil, devotes an exhibit to design and technologies contributed by people of African descent trafficked to Brazil in slave ships. See, e.g., *Art, Adornment, Design and Technology in the Time of Slavery, Afro Brasil Museum*, HISOUR, <https://www.hisour.com/art-adornment-design-and-technology-in-the-time-of-slavery-afro-brasil-museum-54172/> (last visited Oct. 18, 2022) (“[T]he exhibition brings together more than 70 objects from urban and rural crafts, composing a set that highlights the contributions of blacks to science and technology in Brazil, [including] sugar mills, tobacco leaf presses, polishing tables, corn mills, blacksmith forges, joiner’s planes, among other objects [from] the 18th and 19th centuries.”).

<sup>25</sup> Entrenched racial disparities in the criminal justice system “reflect harmful stereotypes grounded in the historical legacies of the global trafficking in enslaved Africans, colonisation, and the ways in which modern social narratives evolved from rhetoric designed to justify these institutions and the exploitation of people of African descent.” See U.N. Working Group of Experts on People of African Descent, *Fight against world drug problem must address unjust impact on people of African descent, say UN rights experts* (Mar. 14, 2019), <https://www.ohchr.org/en/news/2019/03/fight-against-world-drug-problem-must-address-unjust-impact-people-african-descent-say?LangID=E&NewsID=24332>. See also Office of the UN High Commissioner for Human Rights, *supra* note 20, at ¶ 8 (“[R]acism and racial discrimination against Africans and people of African descent are often rooted in policies and practices grounded in the debasement of the status of individuals in society. Their impact is particularly apparent in, though not limited to, States with a legacy of or with significant links to enslavement, the transatlantic trade in enslaved Africans and/or colonialism resulting in sizeable communities of people of African descent.”).

<sup>26</sup> Claudia Rankine might situate this irony within the *racial imaginary*, which conceptualizes an “enduring truth of race: [race] is an invented concept that nevertheless operates with extraordinary force in our daily lives, limiting our movements and imaginations. We understand that perceptions, resources, rights, and lives themselves flow along racial lines that confront some of us with restrictions and give others uninterrogated power.” See The Racial Imaginary Institute, <https://theracialimaginary.org/about/> (last visited Oct. 18, 2022).

of Black bodies. In country after country, regardless of development or wealth, people of African descent report similar pervasive barriers to education,<sup>27</sup> opportunity,<sup>28</sup> and more.<sup>29</sup> This tracks; the global and systematic exploitation of Black bodies that the trade and trafficking in enslaved Africans and colonialism entailed could only occur if racial atrocity, wanton violence, and arbitrary surveillance and control were widely normalized. Systemic racism was the product of habituating communities to lesser humanity and lesser rights for Black people globally. As the UN Working Group of Experts on People of African Descent have noted, “[t]he parallel operation of systemic racism in multiple sectors reflects the historical development of interlocking

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<sup>27</sup> See *Report of the Working Group of Experts on People of African Descent - visit to Belgium from 4 to 11 February 2019*, para 57 (A/HRC/42/59/Add.1) (noting the persistent diversion of Black children from university-bound educational paths); WGEPAD, *Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Portugal (29 November-6 December, 2021)* ¶¶ 32, 69, <https://www.ohchr.org/en/statements/2021/12/statement-media-united-nations-working-group-experts-people-african-descent>; WGEPAD, *Report of the Working Group of Experts on People of African Descent on its visit to Netherlands*, para 66, U.N. Doc. A/HRC/30/56/Add.1, (July 20, 2015) (explaining that Black children see high rates of dropout and attrition in Dutch schools); WGEPAD, *Report of the Working Group of Experts on People of African Descent on its visit to Germany*, para 38, U.N. Doc. A/HRC/36/60/Add.2, (August 15, 2017); WGEPAD, *Report of the Working Group of Experts on People of African Descent on its visit to Brazil*, para 32, U.N. Doc. A/HRC/27/68/Add.1, (September 23, 2014) (finding that the highest illiteracy rates are in Black regions).

<sup>28</sup> See *World Bank, Afro-descendants in Latin America: Toward a Framework of Inclusion*, p. 81-82 (Afro-descendants have higher levels of unemployment in all countries, nearly twice the rate of unemployment of non-Afro-descendants in many countries, and a larger share of employed afrodescendants work in low-skilled occupations); see also WGEPAD, *Report of the Working Group of Experts on People of African Descent on its mission to the United States of America*, para 54, U.N. Doc. A/HRC/33/61/Add.2 (August 18, 2016) (significant challenges to employment, adequate wage and salary, and equal opportunity for people of African descent, economic strength); WGEPAD, *Report of the Working Group of Experts on People of African Descent on its visit to Guyana*, para 29, U.N. Doc. A/HRC/39/69/Add.1 (August 15, 2018) (same, particularly with respect to mining); WGEPAD, *Report of the Working Group of Experts on People of African Descent on its sixteenth session: Mission to the Netherlands*, para 55, U.N. Doc. A/HRC/30/56/Add.1 (July 20, 2015) (showing the overrepresentation of people of African descent on unemployment rolls).

<sup>29</sup> People of African Descent faced pervasive obstacles in housing, residential segregation, access to health care, political participation, and more, and were socioeconomically marginalized in country after country. See Office of the UN High Commissioner for Human Rights, *supra* note 20, at ¶¶ 20-38; see also *id.* at ¶ 22 (“[I]n the European Union, people of African descent were among the groups with the highest level of discrimination in employment in 2017, according to data gathered by non-governmental organizations, and were employed in elementary occupations that did not match their level of education, according to a 2018 survey by the European Union Agency for Fundamental Rights.”).



systems that have exploited, rather than protected, people of African descent.”<sup>30</sup>

A growing literature seeks to center racism (rather than race) as a key risk to navigate in planning, policy, and practice,<sup>31</sup> recognizing that disrupting the protective narratives of systemic racism is not a matter of mere proof.<sup>32</sup> For example, existing research demonstrating how the unfettered use of discretion facilitates racial bias did not prevent key decision-makers’ disregard of the risks of racism in the recent COVID-19 pandemic emergency health care.<sup>33</sup> To the contrary,

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<sup>30</sup> WGEPAD, *COVID-19, systemic racism, and global protest*, A/HRC/45/44, September 2020, A/HRC/45/44, ¶ 11, <https://www.ohchr.org/en/special-procedures/wg-african-descent/annual-reports#:~:text=2020%0A45th%20session-,A/HRC/45/44,-Topic%3A%20COVID%2D19>.

<sup>31</sup> See, e.g., Dorothy Roberts, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 28 (2012) (“[T]he most advanced science of human nature has always been shaped by current political contests over racial equality. The burning scientific questions of each period have been framed and answered in terms of race not because rational scientific inquiry compelled it, but because race was presumed to be an essential biological category.”); see also Dave A. Chokshi, et al., *How to Act Upon Racism—not Race—as a Risk Factor*, 3 JAMA HEALTH FORUM e220548 (2022) (“Because racism is a race-conscious system, redressing racial inequities requires race-conscious strategies. Adjusting for socioeconomic status may be necessary but is not sufficient because it cannot fully account for the unmeasurable cumulative effects of racism on health and well-being.”); Michele K. Evans, M.D., *Covid’s Color Line — Infectious Disease, Inequity, and Racial Justice*, 383 N ENGL J MED 408 (2020); Tricia N. Stephens, *Distinguishing Racism, Not Race, as a Risk Factor for Child Welfare Involvement: Reclaiming the Familial and Cultural Strengths in the Lived Experiences of Child Welfare-Affected Parents of Color*, 5 GENEALOGY 1 (2021).

<sup>32</sup> For example, there have not been wholesale policy reform to address persistent, measurable racial disparities, with real impact for Black lives, including in “objective” scientific fields, like medicine. See, e.g., Kelly M. Hoffman, et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences Between Blacks and Whites*, 113 PNAS 4296 (2016) (“[F]alse beliefs about biological differences between blacks and whites . . . predict racial bias in pain perception and treatment recommendation accuracy. . . . [R]acial bias in pain perception is associated with racial bias in pain treatment recommendations.”); Salimah H. Meghani, et al., *Time to Take Stock: A Meta-Analysis and Systematic Review of Analgesic Treatment Disparities for Pain in the United States*, 13 PAIN MED. 150 (2012) (noting that a meta-analysis of twenty years of studies finds Black patients 22% less likely to receive any pain medication.); Tiffani J. Johnson, et al., *The Impact of Cognitive Stressors in the Emergency Department on Physician Implicit Racial Bias*, 23 ACAD. EMER. MED. 297 (2016) (noting that stress and time pressure resulted in increased racial bias in emergency department doctors, and emergency department overcrowding plus high patient volume was consistent with increased pro-white implicit bias).

<sup>33</sup> For example, in the early days of the COVID-19 pandemic, the chief of emergency medicine at NYU Langone Health, Dr. Robert Femia, told doctors that, given the escalating need for ventilators and emergency intervention, that “...we do not have the luxury of time, data, or committees to help with our critical triage decisions.” [D]octors “will have support in your decision making at the department and institutional level to withhold futile

amid immediately apparent racial disparities, systemic racism was sometimes instrumentalized in public narratives as a tool for physical<sup>34</sup> or psychological<sup>35</sup> recovery, *i.e.*, racism influenced policy in the management of a biological threat transnationally.<sup>36</sup>

## II. THE CULTURE OF DENIAL AND REVISIONIST HISTORY

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intubations.” Shalini Ramachandran and Joe Palazzolo, *NYU Langone Tells ER Doctors to ‘Think More Critically’ About Who Gets Ventilators*, WALL STREET J. (Mar. 31, 2020). These instructions were issued despite existing ethics protocols to the contrary. See N.Y.S. Task Force on Life and the Law, *Ventilator Allocation Guidelines* (Nov. 2015), [https://www.health.ny.gov/regulations/task\\_force/reports\\_publications/docs/ventilator\\_guidelines.pdf](https://www.health.ny.gov/regulations/task_force/reports_publications/docs/ventilator_guidelines.pdf); see also *Letter to Gov. Andrew Cuomo RE: Essential Elements of New York Guidelines for Allocation of Health Care Resources During a Pandemic* (Apr. 13, 2020), <https://www.hivlawandpolicy.org/sites/default/files/Ethical%20principles%20for%20care%20rationing%20in%20NYS%20—%20FINAL.pdf>.

<sup>34</sup> In April 2020, in a televised discussion on testing of putative COVID-19 vaccines, two senior medical personnel in France (the chief of the intensive care unit of a large public university hospital in Paris and the research director at the French National Institute of Health and Medical Research, INSERM) discussed the use of Africans as a vaccine testing ground. One doctor stated, ‘If I can be provocative, shouldn’t we be doing this study in Africa where there are no masks, no treatment, no intensive care, a little bit like we did in certain AIDS studies or with prostitutes?’, and the other doctor agreed, referencing just such plans. See Rokhaya Diallo, *No, France. Africa is Not Your Testing Ground*, WASH. POST (Apr. 8, 2020), <https://www.washingtonpost.com/opinions/2020/04/08/no-france-africa-is-not-your-testing-ground/>. At the time, the head of the WHO, Dr. Tedros Adhanom, condemned the statements, unequivocally stating, “Africa cannot and will not be a testing ground for any vaccine. The hangover from colonial mentality has to stop.” See Abdur Rahman Alfa Shaban, *Africa Will Not Be Vaccine Testing Ground: WHO Slams Racist French Medics*, AFRICA NEWS (Jun. 4, 2020), <https://www.africanews.com/2020/04/06/africa-cannot-will-not-be-vaccine-testing-ground-who-slams-racist-french-medics>.

<sup>35</sup> In China, believed to be the location of origin of the COVID-19 virus, a revised narrative in early 2020 situated the COVID risk within Black communities. Unlike other foreign or Chinese people, most or all people of African descent were forcibly tested, mandated to quarantine or self-isolate, and were forcibly evicted from their homes and not allowed to use restaurants or shop in grocery stores. See Human Rights Watch, *China: Covid-19 Discrimination Against Africans: Forced Quarantines, Evictions, Refused Services in Guangzhou* (May 5, 2020), <https://www.hrw.org/news/2020/05/05/china-covid-19-discrimination-against-africans>.

<sup>36</sup> In this context, recent research confirming that reparations for Black Americans would have reduced the COVID-19 impact in the state of Louisiana by 31-68% is particularly powerful, given the present-day policy implications of ongoing systemic racism. See Eugene T. Richardson, ET AL., *Reparations for Black American descendants of persons enslaved in the U.S. and their potential impact on SARS-CoV-2 transmission*, 276 SOCIAL SCIENCE & MEDICINE 113741 (2021) (“...a reparative program targeted towards Black individuals would not only decrease COVID-19 risk for recipients ...[,] the mitigating effects would be distributed across racial groups, benefitting the population at large,” and “Overall, reducing the infectious burden on the most at-risk segment of the population has the greatest impact on the epidemic for the population at large. Reducing severe inequalities is thus not simply just, it is epidemiologically efficacious for outbreak containment”).

Despite the widely available access to information, a culture of denial, pervasive negative stereotypes, and familiar racial inequities persist.<sup>37</sup> These have deep historical roots.

[S]tereotypes were used to reinforce the commodifying of black bodies and, in particular, aspects of enslavement. For example, an enslaved person forced under extreme violence to work more than 16 hours per day during the plantation period could hardly be described as lazy. Yet, historically, laziness, as well as characteristics of docility (despite resistance), backwardness, lasciviousness, treachery, and dishonesty, were projected as characteristic of people of African descent. These images are powerful influences, particularly on how people of African descent are perceived.<sup>38</sup>

Today, racial stereotypes and narratives justifying the surveillance and control of Black bodies continue to deny their ancestry in the legacies of enslavement and ongoing exploitation (even in their deployment of community safety and dangerousness rationales). Narratives of necessity continue to feed anti-Black racism.

Historically, law and public policy have always openly served the “business necessity” rationale in licensing enslavement and exploitation.<sup>39</sup> Today, explicitly and implicitly, business necessity” remains a powerful defense under the law.<sup>40</sup> Under U.S. law, policies

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<sup>37</sup> See Office of the UN High Commissioner for Human Rights, A/HRC/47/CRP.1, *supra* note 20, at ¶40. (“[S]ome States - especially those with links to enslavement, the transatlantic trade in enslaved Africans and colonialism – continue to deny or have failed to acknowledge the existence and impact of systemic racism, especially institutional racism, against Africans and people of African descent; or its linkages with enslavement and colonialism.”).

<sup>38</sup> See, e.g., WGEPAD, *Role of Negative Racial Stereotypes and the Stereotyping of People of African Descent in Perpetuating Racially Biased Decision-Making, Racial Disparities and Racial Injustice*, A/74/274 (Aug. 2, 2019), ¶14; see also Lewis Clarke, “*Leaves from a Slave’s Journal of Life*,” tr. Lydia Maria Francis Child, THE ANTI-SLAVERY STANDARD (Oct. 20, 1842), <https://docsouth.unc.edu/neh/clarke/support1.html> (“There never was anything beat slavery for lying: and of all folks in the world, there’s nobody deceived quite so bad, as the masters down South; for the slaves deceive them, and they deceive themselves. . . . The masters say the slaves are a lying and thieving set; and so they are; for slavery makes a man lie and steal. It won’t let him be honest, if he would.”).

<sup>39</sup> See generally, Isabel Wilkerson, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020); Nikole Hannah-Jones, *THE 1619 PROJECT* (2021).

<sup>40</sup> *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (holding that once a prima facie disparate impact case of racial or other discrimination is made, the burden of proof shifts to the employer to demonstrate that the practice or policy is dictated by “business necessity.”); Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (racially discriminatory effect, i.e., disparate impact, permissible where “the challenged practice is job related for the position in question and consistent with business necessity.”). Business necessity is also a powerful defense to claims of monopoly in antitrust cases, see *Aluminum Shapes, Inc. v. K-*

with racially discriminatory effect need not be essential or indispensable,<sup>41</sup> if job-related, consistent with business necessity, and no apparent alternative practice exists.<sup>42</sup> However, this rationale openly balances racial exploitation and profit, *i.e.*, only the modern articulation of “crimes against humanity” would prohibit the very practices associated with the exploitation of the labor of enslaved Africans traded and trafficked into the Americas. Over time, revisionist history and a culture of denial became entrenched guardians of systemic racism.<sup>43</sup>

Critical scholarship has long explored the redemptive revisions of written history. W.E.B. DuBois famously defined the “double-consciousness” of Black life in the United States of America.<sup>44</sup> More recently, Nikole Hannah-Jones has made powerful arguments that its journey as an economic powerhouse, facilitated by the trade and trafficking in enslaved Africans starting in 1619, more accurately defined the idea of ‘America’ than its political declaration of freedom (for some) in 1776.<sup>45</sup> Some have even argued that all of human history is notional in its instrumentalization of the past to justify the oppressive and hegemonic instead of to uplift the complexity of cooperation and joy that might challenge present-day moral certitude in domination and oppression.<sup>46</sup>

In *Domination and the Arts of Resistance*, James Scott refers to all of written history as merely a “public transcript,” *i.e.*, a “shorthand

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A-Liquidating Co., 290 F. Supp. 356 (D.C. Pa. 1968), and horizontal restraints of trade, *see* Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F. Supp. 893 (DC Ohio 1981). It can also be a powerful tool for landlords in landlord-tenant law, *see e.g.*, L’Antiquaire & The Connoisseur, Inc. v. State Div. of Hous. and Cmty. Renewal, Off. of Rent Admin., 156 A.D.2d 319, 549 N.Y.S.2d 18 (1st Dep’t 1989) (showing of business necessity can terminate rent stabilized tenant’s lease); Henschke v. State Div. of Housing and Community Renewal, 174 A.D.2d 535, 571 N.Y.S.2d 940 (1st Dep’t 1991).

<sup>41</sup> Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659-665 (1989) (finding explicitly that the *Wards Cove* decision “the decision in Wards Cove ... has weakened the scope and effectiveness of Federal civil rights protections,” *see* Civil Rights Act of 1991, § 2 (S. 1745)). Congress strengthened the burden of proof to interpose business necessity as a defense, while affirming the viability and strength of the business necessity argument. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (defining “demonstrates” as “meeting the burdens of production and persuasion.”).

<sup>42</sup> 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) to (ii).

<sup>43</sup> *See* Office of the UN High Commissioner for Human Rights, *supra* note 20, at ¶41-42, [https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/A\\_HRC\\_47\\_CRP\\_1.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/A_HRC_47_CRP_1.pdf).

<sup>44</sup> W.E.B. DuBois, “Of Our Spiritual Strivings,” *THE SOULS OF BLACK FOLK* (1903).

<sup>45</sup> *See* Nikole Hannah-Jones (ed), *THE 1619 PROJECT* (2021).

<sup>46</sup> *See generally* David Graeber & David Wengrow, *THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY* (2021).

way of describing the open interaction between subordinates and those who dominate.”<sup>47</sup> The public transcript is “a highly partisan and partial narrative. It is designed to be impressive, to affirm and naturalize the power of dominant elites, and to conceal or euphemize the dirty linen of their rule.”<sup>48</sup> A parallel, hidden transcript, i.e., “offstage dissent,” permits “a sharply dissonant political culture” where the “relative safety of their quarters” allows enslaved people space for a political discourse grounded in “words of anger, revenge, [and] self-assertion.”<sup>49</sup> Between these categories, outside of the defined taxonomy and yet in plain sight, Scott defines a third category comprised of rumors, gossip, folk tales, double entendre, euphemism, jokes, songs, code, ritual, and more.<sup>50</sup> This “politics of disguise and anonymity” reflects a historicity that is evident but unacknowledged in the public transcript, in part because evasion is within its design.<sup>51</sup> Neither fully public nor fully hidden, these codes and rituals bespeak complex truths about history and the relations of power. Perhaps most importantly, the complex everyday realities of race, racism, and the “subaltern” are only evident in this gray area, unseen and unacknowledged by the dominant taxonomies.

Thus, the culture of denial of systemic racism is neither new nor novel. Law and policy have transformed consistently to perpetuate racial hierarchy, including by denying what is right before our very eyes.<sup>52</sup> Where law and policy no longer license racial hierarchy, the relations of power rely on evasion, denial, and subtler tools that perpetuate racial hierarchy at its core, including the assault to dignity and autonomy.<sup>53</sup> Importantly, the taxonomies implied by the culture of denial and the “public transcript” also delimit the strategic framework for open engagement with the relations of power. This was frequently recognized in first-person narratives of enslaved Africans

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<sup>47</sup> James C. Scott, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1992).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 18-19.

<sup>52</sup> ALEXANDER, *supra* note 18, at 18.

<sup>53</sup> Scott would posit that where denial fails, euphemism is an important fallback tool. Scott, *supra* note 47, at 53 (“[T]he imposition of euphemisms on the public transcript plays a similar role in masking the many nasty facts of domination and giving them a harmless or sanitized aspect. In particular, they are designed to obscure the use of coercion.”).

in the Americas.<sup>54</sup> These also reflect an enduring truth: systemic racism is not perpetuated or impacted by platitudes but by individual decision-making by people whose instincts and training often reflect their social conditioning, in their professional roles, their educations, and their community life, to enforce racial hierarchy, consciously or not.<sup>55</sup> This social conditioning has a powerful organizing effect that is difficult, if not impossible, to disrupt comfortably.<sup>56</sup>

### III. TAXONOMIES OF RACISM

Taxonomies structure our consciousness. Far beyond classification vehicles, various taxonomies organize our thoughts to determine what is important and what is irrelevant. Deconstructing the social conditioning and the taxonomies of racism is a precursor to conceptualizing global restorative justice or reparations. Choice of taxonomy may “hide the racialized impact of certain policy

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<sup>54</sup> “The fact is, slavery’s the father of lies . . . The master says the slave don’t want his freedom, and the slave says he don’t want it; but they both on ‘em lie, and know it.” See Lewis Clarke, “*Leaves from a Slave’s Journal of Life*,” tr. Lydia Maria Francis Child, THE ANTI-SLAVERY STANDARD (Oct. 20, 1842), <https://docsouth.unc.edu/neh/clarke/support1.html>; see also Scott, *supra* note 47, at 34 (“I’ve had to play dumb sometimes-I knowed not to go too far and let them know what I knowed, because they taken exception of it too quick. I had to humble down and play shut-mouthed in many cases to get along, I’ve done it all-they didn’t know what it was all about, it’s just a plain fact. . . . And I could go to ‘em a heap of times for a favor and get it . . . . They’d give you a good name if you was obedient to ‘em, acted nice when you met ‘em an didn’t question ‘em ‘bout what they said they had against you. You begin to cry about your rights and the mistreatin’ of you and they’d murder you.” (Citing THEODORE ROSENGARTEN, ALL GOD’S DANGERS: THE LIFE OF NATE SHAW 545 (Avon Books 1983))).

<sup>55</sup> See DERALD WING SUE & LISA SPANIERMAN, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER & SEXUAL ORIENTATION 112 (Wiley 2010) (“When biases and prejudices become institutionalized and systemized into the norms, values, and beliefs of a society, they are passed on to generations of its citizens via socialization and cultural conditioning. These normative standards and beliefs are enforced by society through education, mass media, significant others, and institutions.”); see also Scott, *supra* note 47 (“The members of dominant groups, one supposes, learn the knack of acting with authority and self-assurance in the course of socialization. For hereditary ruling groups the training has typically begun at birth; the aristocrat learns how to act like an aristocrat, the Brahmin like a Brahmin, the man like a man.”).

<sup>56</sup> Scott, *supra* note 47 (“Being on stage in front of subordinates exerts a powerful influence . . . . For those whose position is not inherited, on-the-job training is required to make them convincing in their roles as bosses, professors, military officers, colonial officials. The performance of mastery is ostensibly staged for the impression it makes on subordinates, but it stiffens the spines of the rulers as well.”).

decisions,”<sup>57</sup> or obscure a “racialized through line that consistently lowers expectations and worsens outcomes along racial lines.”<sup>58</sup> Too often, people of African descent are classified as dangerous,<sup>59</sup> servile, or lacking credibility;<sup>60</sup> racism is often classified as irrelevant, white noise. Black lawyers walk into court and are seen as defendants.<sup>61</sup> When the issue is raised, ‘mistake’ is the defense of choice – although this ubiquitous and systematic inference persists widely – evidencing a powerful culture of denial.<sup>62</sup> However, these incidents are so pervasive and systemic.<sup>63</sup> Thus, even among lawyers, the erasure of individuality, contributions, and achievements reflects a taxonomy of racism silently at play.<sup>64</sup>

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<sup>57</sup> For example, “[t]he COVID-19 pandemic is not exclusively a public health issue where policy decisions fail to prioritize scientific conclusions, but also reflects racialized priorities. Police violence against Black bodies is not exclusively a policing issue where widespread impunity, misconduct and brutality exist within an enabling environment where racialized misconduct persists.”). WGEPAD, *COVID-19, Systemic Racism, and Global Protest*, A/HRC/45/44 (Sept. 2020), A/HRC/45/44, ¶ 11, <https://www.ohchr.org/en/special-procedures/wg-african-descent/annual-reports#:~:text=2020%0A45th%20session-,A/HRC/45/44,-Topic%3A%20COVID%2D19>.

<sup>58</sup> See WGEPAD, *supra* note 57, at ¶ 11.

<sup>59</sup> See Bryan K. Nichols & Medria L. Connolly, *Transforming Ghosts Into Ancestors: Unsilencing The Psychological Case for Reparations to Descendants of America Slavery*, OTHER/WISE 12 (May 14, 2020) (“[O]ne would be hard pressed to find an African American who has not had the experience of being treated like an enemy combatant.”).

<sup>60</sup> See REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS 66 (October 2020) (“Some attorneys of color also told us that they are “believed less often” when making statements to the judges before whom they appear. This problem is magnified when an attorney of color represents a litigant of color in court; ...the bias manifests itself as disbelief of both attorney & client & the failure to take them seriously.”).

<sup>61</sup> See *id.* (“We were struck that almost every attorney of color we spoke with – ranging from criminal defense attorneys to the Bronx DA herself – reported incidents in which they were mistaken for someone other than an attorney or otherwise subjected to disparate treatment.”).

<sup>62</sup> See *id.* (noting that in 2020, attorneys of color reported “being mistaken for a criminal defendant, being mistaken for an interpreter, being mistaken for another attorney of color,” experiencing identification requirements not applied to white attorneys, challenges to sitting in the front row of the court (reserved for counsel), as well as judges and court officers’ comments on appearance).

<sup>63</sup> See *id.* at 66-67 (noting that in New York, attorneys at multiple legal organizations referenced community google documents with running lists of racially inappropriate comments made by judges in court).

<sup>64</sup> See COMMISSION ON WOMEN IN THE PROFESSION AND MINORITY CORPORATE COUNSEL ASSOCIATION, *YOU CAN’T CHANGE WHAT YOU CAN’T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION* (2018) (“Men of color and women of all races receive clear messages that they do not fit with people’s image of a lawyer.”); see also REPORT ON EQUAL JUSTICE, *supra* note 62.

Many racialized taxonomies obscure the depth and complexity of the racialization of our reality. As the treatment of its own personnel implies, the law has always been a racialized taxonomy, where enslavement and systemic racism has been euphemized via the principles of tort, contract, and property.<sup>65</sup> The exploitation of people of African descent was sanctioned by law, policy, and practice in virtually all relevant jurisdictions and remains alive in the public mindset.<sup>66</sup>

Similarly, the modern nation-state embodies a racialized taxonomy.<sup>67</sup> International law focuses primarily on the State as the key interlocutor and protector of its citizen's rights, in large part via the belief that political leadership is representative and legitimate.<sup>68</sup> Yet, with the exception of certain state-like entities, *inter alia*, international law has struggled to give voice to large minority populations within a country (or many countries) that may not constitute a demographic majority, a threat to the political establishment, or an economic powerhouse, including but not limited to people of African descent.<sup>69</sup> The construct of race has always been transnational, birthed at the crux of European and American

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<sup>65</sup> See e.g., Marissa Jackson Sow, *(Re)Building the Master's House: Dismantling America's Colonial Politics of Extraction and Exclusion* (forthcoming 2022), MICH. L. REV., <https://ssrn.com/abstract=3803626> ("Whiteness as contract conceptualizes race as a social, political, and economic agreement that has been given the express force of statutory law, and which also governs society through private ordering."); CHARLES W. MILLS, *THE RACIAL CONTRACT* (Cornell University Press 1999); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1715-16 (1993).

<sup>66</sup> See *supra* at note 34.

<sup>67</sup> Cf. Bledsoe, *supra* note 3 (arguing that the nation-state and "expressions of state sovereignty are co-opted" to transnational business interests, and Black geographies are perceived as "empty and threatening, open to occupation, and subject to surveillance and assault," navigating "perpetual and multifaceted enactments of violence" that instrumentalize anti-Blackness and the precariousness of Black life in service to the accumulation of capital).

<sup>68</sup> Alina Kaczorowska, PUB. INT'L LAW 16 (4<sup>th</sup> ed. 2010) ("[T]he primary subjects of international law are sovereign States."). Non-state entities may have international personality, e.g., entities that are actually or potentially state-like, *inter alia*, and be subject to international law, but typically this implies de facto or de jure territory or governance. *Id.* at 176-221.

<sup>69</sup> Black self-governance initiatives did exist, in limited form, but also struggled to "withstand the overwhelming pressure to situate the emancipation of Black people within and under the control of white people, rather than in autonomous zones, free from white oversight, judgment, and discipline." Katherine Franke, REPAIR: REDEEMING THE PROMISE OF ABOLITION 104-105 (Haymarket Books 2019). People of African descent in the diaspora sought integration, but less often political dominance or separateness vis-à-vis the peoples who had trafficked and enslaved. This also centered a recognition of what Black people had built in these spaces.



cooperation to exploit the profit opportunities in the development of the triangular trade and, eventually, a staggering capital market.<sup>70</sup> The borders of the modern nation-state have fragmented not only Black identity and collective memory, but also the putative reparations claim.

Taxonomy has been a powerful tool for maintaining supremacy, for delegitimizing struggle and resistance, and for narrowly defining injury and repair. As importantly, these frameworks persist, subtly reinforced by society, even as legal and social norms evolve over time.<sup>71</sup> Historically, even where the colonialism or enslavement narratives self-identified as comparatively gentle, racial atrocity was suborned, if not openly supported.<sup>72</sup> Even as enslavement and racialized oppression were made illegal, the racialized weapon of the denial of dignity and autonomy persists.<sup>73</sup> A common theme pervades this discourse: the devil is in the details. The organizing of information about race, *i.e.*, the taxonomies of racism, delimits

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<sup>70</sup> See *e.g.*, RELATING WORLDS OF RACISM: DEHUMANISATION, BELONGING, AND THE NORMATIVITY OF EUROPEAN WHITENESS (Philomena Essed, et al., eds., Palgrave MacMillan 2019); see also NEIL MACMASTER, RACISM IN EUROPE: 1870-2000 (Red Globe Press 2001).

<sup>71</sup> One powerful example is the outlawing of enslavement in the state of New Jersey in 1846. See *New Jersey Orders Black Servitude for Life*, EQUAL JUSTICE INITIATIVE, (Apr. 18, 2022), <https://calendar.eji.org/racial-injustice/apr/18> (“New Jersey enacted a law which bound enslaved Black people to indefinite servitude as “apprentices for life” to work at the will of their white enslavers.”). Under the Act to Abolish Slavery, “white enslavers continued to exploit and profit from the labor of Black...apprentices...” who were “still unable to obtain freedom without a written certificate of discharge from their ‘masters or mistresses.’”) *Id.* The Act prohibited Black “apprentices” from leaving the State of New Jersey, for instance, and imposed criminal penalties on any person who hid or harbored an “apprentice” or helped them run away.” *Id.*

<sup>72</sup> See Lewis Clarke, “*Leaves from a Slave’s Journal of Life*,” tr. Lydia Maria Francis Child, THE ANTI-SLAVERY STANDARD (Oct. 20, 1842), <https://docsouth.unc.edu/neh/clarke/support1.html> (“Kentucky is the best of the slave States, in respect to the laws; but the masters manage to fix things pretty much to their own liking. The law don’t allow ‘em to brand a slave, or cut off his ear; but if they happen to switch it off with a cow-hide, nobody says anything about it.”); see also Rui Braga, *Portugal, Colonialism and Racial Justice – From Denial to Reparation*, OPEN DEMOCRACY (Aug. 31, 2020) (“How can it be that up until this day, we’ve settled for a narrative of having been benevolent colonizers . . . ? Portugal was the initiator of the trans-Atlantic slave trade in the 15th century . . . . From the 16th to the late 19th century, we became one of the most prolific slave traders globally, kidnapping, enslaving and deporting approximately 5.8 million [African] people overseas, more than any other colonizing nation.”).

<sup>73</sup> See, *e.g.*, Scott, *supra* note 47 (“[O]ppression [of enslavement] . . . den[ies] subordinates the ordinary luxury of negative reciprocity: trading a slap for a slap, an insult for an insult. Even in the case of the contemporary working class it appears that slights to one’s dignity and close control of one’s work figure as prominently in accounts of exploitation as do narrower concerns of work and compensation.”) (Emphasis added).

understanding the scope of racism, global justice, and reparations for impacted communities.<sup>74</sup>

#### IV. DISRUPTING SYSTEMIC RACISM WITH ANTICIPATORY FUTURES

Reparations must acknowledge all of this in its complexity. In this regard, robust analyses exist that tackle the nuances of reparations from different vantage points. These offer a rich set of resources and a clear reminder that ‘repair’ for the racial atrocities attendant in the trade and trafficking in enslaved Africans is a complicated construct that must confront ongoing legacy practices and mindsets. The Caribbean community, via the CARICOM ten-point plan approved by Caribbean nations in 2014, defines reparations via development metrics vis-à-vis historical policies that precluded development under colonization.<sup>75</sup> The CARICOM ten-point plan also accounts for the psychological harms and devastating impact to knowledge production, public health, technological advancement, climate, financial development, and more resulting from systemic racisms that normalized extractive and exploitative practices (and their legacies) in defining Black bodies, innovations, intellectual property, families, fertility and more as available for use.<sup>76</sup>

Individual scholars have also contributed deep negotiations of reparations that double as ancillary evidence of systemic racism and a culture of denial in the academy’s significant disregard of perhaps the central moral quandary of the modern age. One prominent scholar posits that a genuine commitment to reparations requires “remaking the world,”<sup>77</sup> citing climate justice as a site of transnational relevance

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<sup>74</sup> Many have called 2020 a watershed year for the global conversations about race and justice it engendered. Yet, even the realizations of 2020 looked quite different on the basis of race. In the most general of senses, Black narratives began to explore the durability and consistency of anti-Black racism transnationally. White narratives began to acknowledge harsh realities many Black people in their own communities had always held as a caution for the past, present, and future. And of course, the public reckoning and institutional revisions predicted in 2020 have not actually come to pass thus far. Instead, narratives of reforming and defunding police quickly were decentered in the face of upticks in crime, economic uncertainty, and global stress during the pandemic.

<sup>75</sup> See *CARICOM Ten Point Plan for Reparatory Justice*, <https://caricom.org/caricom-ten-point-plan-for-reparatory-justice> (last visited Oct. 18, 2022).

<sup>76</sup> See *id.*

<sup>77</sup> OLÚFÈMI O. TÁÍWÒ, *RECONSIDERING REPARATIONS* (Oxford University Press 2022) (arguing that a “constructive” of reparations situates reparations discourse within a distributive justice framing that is future-oriented and broadly restorative in that has the capacity to rebalance society, dismantle ongoing historically-determined inequities,

and proof of concept, as we confront the consequences of local and national decision-making that continues to exploit the global south and Black communities and to perpetuate the legacies of colonialist values, specifically, in extractivist, insular, and self-interested policy. Other prominent American scholars focus on the debt owed to Black American descendants of slavery in order to close the racial wealth gap in the United States,<sup>78</sup> and at least one specific state political initiative deploys lineage, rather than race, as a filter to construct a reparations initiative that may be more politically feasible.<sup>79</sup>

Prominent voices in the field of psychology suggest reparations requires “a politics of love” that may allow mainstream voices to find the psychological and emotional availability to engage our “ghosts,” i.e., systematized racial atrocity and a moral wound “split off and segregated into unconsciousness, buttressed by our bifurcated histories.”<sup>80</sup> Reparations requires reckoning with the legacies of colonialism and the trade and trafficking in enslaved Africans and these include the trauma that exists in the collective cultural unconscious that occults necessary engagement via denial and mythologies of merit.<sup>81</sup> Still others note that reparations cannot be

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characterize the unearned power and privilege conferred by white supremacy as a site of moral liability, and create an opportunity for descendants of enslavers and beneficiaries of white privilege to discharge their moral burden by taking on the costs of repair).

<sup>78</sup> See WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (The University of North Carolina Press 2020).

<sup>79</sup> See, e.g., *California reparations to be limited to descendants of enslaved people, taskforce decides*, THE GUARDIAN (Mar. 29, 2022), <https://www.theguardian.com/us-news/2022/mar/29/california-slavery-reparations-taskforce>; see also Press Release, Attorney General of the State of California, *California Reparations Task Force Releases Interim Report Detailing Harms of Slavery and Systemic Discrimination on African Americans* (Jun. 1, 2022), <https://oag.ca.gov/news/press-releases/california-reparations-task-force-releases-interim-report-detailing-harms>.

<sup>80</sup> See Bryan K. Nichols & Medria L. Connolly, *Transforming Ghosts Into Ancestors: Un-silencing The Psychological Case for Reparations to Descendants of American Slavery*, OTHER/WISE 12 (May 14, 2020), <https://ifpe.wordpress.com/2020/05/14/transforming-ghosts-into-ancestors-un-silencing-the-psychological-case-for-reparations-to-descendants-of-american-slavery/> (citing Jeffrey Prager, *Do Black Lives Matter? A Psychoanalytic Exploration of Racism and American Resistance to Reparations*, 38 POLITICAL PSYCHOLOGY 637 (2017) (“Like many traumatic events, slavery is generally “known” in a matter-of-fact way, while the emotional impact of slavery is split off. . . . This lack of integration between the fact of slavery and its emotional resonance creates a dual consciousness that prevents the moral wound of slavery from healing.”)).

<sup>81</sup> See Nichols, *supra* note 80, at 9, 11 (“[Th]e moral injury residing in the United States white collective is largely unconscious and protected by various forms of denial.... The ways in which white Americans have benefitted from the institutionalization of white privilege

linked to a single moment in time, even one as significant as the trade and trafficking in enslaved Africans, given how subsequent, ongoing systems of racism encoded in law, policy, and practice persist, transformed, today.<sup>82</sup> Recent research has also linked reparations to staggering health benefits, including a 31-68% reduction in COVID-19 impact for Black Americans, as well as a concomitant decrease in risk throughout society.<sup>83</sup>

These intersecting and divergent views show the complexity of a calculation, even if reparations are ultimately reduced to an apology and a check. How do we restore or quantify the presumptions of innocence, competence, engagement, motivation, intelligence that systemic racism has stripped of Black people? What is the cost of that repair? How will reparations commodify or repair the hypersexualization of Black girls, the objectification of Blackness, and the extreme anti-Black violence embedded in a law enforcement model that grew from slave patrols? To be reparative, an intervention must reflect the nuanced realities of Black life, the similarities and differences that persist across borders and oceans, and the rich nature of the costs imposed, ongoing even until today.

In addition, legitimacy requires that repair must be defined by impacted communities, even though ignorance of the scope of genuine reparations is inherent in the injury of enslavement, systemic racism, and racialized trauma. Existing intergenerational trauma, despair, loss, and lowered expectations, all associated with systemic racism and all measurable in modern life, must be channeled into dreams for the question of repair to truly be answered.

Using this understanding, most reform should not be given the label of reparations without a deep reckoning with what repair entails. Nor may repair be defined by political expediency, practicality, or a desire to “move on” from talking about race. The process of reparations must acknowledge the complexity of a harm centuries in

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and white control, derivatives of hundreds of years of forced labor by African Americans, is discounted and obfuscated by our rugged individual and meritocratic mythologies.”).

<sup>82</sup> See generally Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC MONTHLY (Jun. 2014); see also Alexander, *supra* note 18.

<sup>83</sup> Eugene T. Richardson, et al., *Reparations for Black American descendants of persons enslaved in the U.S. and their potential impact on SARS-CoV-2 transmission*, 276 SOC. SCI. & MED. 113741 (2021) (“Overall, reducing the infectious burden on the most at-risk segment of the population has the greatest impact on the epidemic for the population at large. Reducing severe inequalities is thus not simply just, it is epidemiologically efficacious for outbreak containment”).

the making without defining repair via the white gaze. Reparations must disrupt the taxonomies that baseline whiteness as norm and goal, limit expectations, impose a predefined notion of satisfaction or repair, and mute our dreams. Reparations have not issued if the casual, everyday racism of Black life is unabated.

Thus, a commitment to reparations cannot leave systemic racism untouched, yet most disruptive plans fail to target the public imaginary and its long dance with anti-Black racism. Reparations must include freedom from the everyday racisms not actionable under law and the everyday racisms that the law may license against Black families and communities. An important resource in this complex inquiry could be anticipatory futures work, which has been successfully applied in post-conflict situations.<sup>84</sup> Anticipatory futures work offers one roadmap to the necessary work that must be done in law, policy, practice, and society-at-large in the present via our imagination of the future we want to see.<sup>85</sup> Revealing and renegotiating “anticipatory assumptions” may disrupt constraining taxonomies of racism that continuously serve more of the same.<sup>86</sup> Importantly, anticipatory futures work, and futures literacy, “potentially enhances our capacity to act in ways that are consistent with our values and aspirations.”<sup>87</sup>

Anticipatory futures are particularly relevant to ridding the law of systemic racism, or at least conceptualizing it. The taxonomies of racism have perpetuated law and policy that reeks of the legacy norms and mindsets of the trade and trafficking in enslaved Africans and colonialism. Its evolution has been incrementalistic and derivative, failing to disrupt the taxonomies of racism, among other things.<sup>88</sup> The

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<sup>84</sup> See generally UNESCO: TRANSFORMING THE FUTURE ANTICIPATION IN THE 21ST CENTURY (Riel Miller, ed., 2018).

<sup>85</sup> *Id.*

<sup>86</sup> See UNESCO, *supra* note 84 (“[T]he task when describing [futures literacy] is to reveal the anticipatory assumptions (AA) that determine why and how futures are imagined...[Anticipatory assumptions] are like the particles exposed by an accelerator in a physics lab – elements of the underlying structure behind the surface of appearances. [Anticipatory assumptions] describe in specific terms the contours and functioning of anticipatory systems (AS). Different [Anticipatory assumptions] generate different ‘imaginary’, not-yet-existent futures.”).

<sup>87</sup> *Id.* at 67.

<sup>88</sup> Cf. Elen Stokes, *Beyond Evidence: Anticipatory Regimes in Law*, 43 LAW & POL’Y 73, 74 (2021) (“[L]egal texts and actions are deeply implicated in producing the futures they then seek to govern, in ways that are not always recognized as such. Law, in other words, is an important but neglected site of anticipation” but “law also operates on an affective plane,

law instead privileged traditions built on racial atrocity and crimes against humanity and ignored pressing demands for legitimacy and relevance, instead of considering the potential of an anticipatory futures framework.<sup>89</sup> In the law, anticipation<sup>90</sup> could consider the possibility of “law’s capacity to dynamize the future, bringing previously unregistered potential to life.”<sup>91</sup> The work of anticipation is to identify a desirable future and invite it, or its building blocks, into the present. In other words, the question of reparations must be asked in concert with an anticipatory interrogation of futures that can disrupt the taxonomies of racism by unleashing the stuff of dreams.

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contributing to various states of hope, possibility, precariousness, and so on, which give the future an immediate and palpable intensity.”).

<sup>89</sup> *Id.* (“[I]deas of anticipatory action emerged in response to challenges unmet by incumbent theoretical and practical approaches to the future.”).

<sup>90</sup> Ironically, in American law, anticipatory futures typically show up very differently in antitrust and financial litigation, amid concern at the manipulation of the market.

<sup>91</sup> Stokes, *supra* note 88, at 80-81. (“The idea that the future may be “felt into existence” is not an unfamiliar one, particularly in political and social theory, but the role of law in this has gone almost without mention . . . . In particular, it requires an understanding of how law stakes out and operates within a field of emergence in which threats or promises remain in potential but exert a powerful pull on the present because they operate affectively — generating an emotional or sensorial response and inducement to action, which then become valuable resources for legal acts and argument.”)