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Foreword: Looking Back, Moving Forward: Latin Roots of the Modern Global and Global Orientation of LatCrit

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Foreword

Looking Back, Moving Forward: Latin Roots of the Modern Global and Global Orientation of LatCrit

Tayyab Mahmud*

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* Professor of Law and Director, Center for Global Justice, Seattle University School of law. This symposium would not have been possible without the leadership of Andrea Freeman, Sumi Cho, and César Cuáhtemoc García Hernández who spearheaded the planning of the LatCrit Conference in Chicago 2013. I remain deeply indebted to the LatCrit community for their friendship, support and intellectual engagements. I want to thank the editors of Seattle Journal of Social Justice for their painstaking efforts to produce this wonderful symposium issue. Anreeka Patel, Student Fellow of the Center for Global Justice, provided invaluable research assistance. Special thanks to Kate Benak for helping me see things anew. Any errors are, of course, mine alone.

Don't you understand that the past is the present; that without what *was*, nothing *is*?¹

Every established order tends to produce . . . the naturalization of its own arbitrariness.²

First of all, epistemological decolonization, as de-coloniality, is needed to clear the way for new intercultural communication, for an interchange of experiences and meanings, as the basis of another rationality which may legitimately pretend to some universality.³

I. INTRODUCTION

Across disciplines of social inquiry, pronouncements of commentators, and quarters of policy makers, the global is at large; often as the purported resting ground of restless globalization. Accounts of ever-increasing quantum and velocity of transnational flows of bodies, capital, information, and goods are ubiquitous. The causes, content, and consequences of these seemingly new phenomena are widely and hotly debated. Unavoidably, inquiries of the law increasingly engage the global, with incessant interrogations of received notions of sovereignty, scales of legal orders, and spatial scope of rights and responsibilities. It was no surprise, then, that many presentations at the 2013 Biennial LatCrit Conference that met in Chicago with the theme *Resistance Rising: Theorizing and Building Cross-Sector Movements*, trained on the global dimensions of issues that have long bedeviled inquiries of the law. The papers in this symposium were first

¹ W.E.B. DUBOIS, *THE WORLD AND AFRICA* 80 (1947).

² PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 164 (Richard Nice trans., 1977).

³ Anibal Quijano, *Coloniality and Modernity/Rationality*, 21 *CULTURAL STUD.* 168, 177 (2007).

delivered at this conference. All of these papers underscore the global orientation of LatCrit and bring into relief multi-faceted intersections of local and global that are critical animating forces for questions of subordination and justice across the world.

That a LatCrit symposium should have the global as its canvas should be no surprise. It is not incidental that the logo of LatCrit is the world turned down-side up.⁴ This evocative image unmistakably signals both a global orientation and a critical posture that form part of the foundational constitutive core of LatCrit. This orientation was unavoidable given the spatial and temporal contexts of LatCrit's emergence and trajectory. LatCrit emerged in the mid-1990s in the North American legal academy as a left intervention in the race discourse and a race intervention in the left discourse.⁵ The inaugural move of LatCrit was to nudge Critical Race Theory beyond a black/white binary and American exceptionalism by placing the Latina(o) question on the table. The Latina(o) question brought in its train issues of colonialism, nationality, culture, language, religion, and

⁴ For the LatCrit logo, see <http://www.lacrit.org/index/>.

⁵ For the genesis, principles and practices of LatCrit, see Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory and Post-Identity Politics in Postmodern Legal Discourses: From Practices to Possibilities*, 9 BERKELEY LA RAZA L. REV. 1 (1996); Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997); Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits, LatCrits*, 53 U. MIAMI L. REV. 1265 (1999); Francisco Valdes, *Race, Ethnicity and Hispanismo in Triangular Perspective: The "Essential Latina/o" and LatCrit Theory*, 48 UCLA L. REV. 305 (2000); Berta Hernandez-Truyol, Angela Harris, and Francisco Valdes, *Beyond The First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 BERKELEY LA RAZA L.J. 169 (2006); Margaret E. Montoya & Francisco Valdes, *"Latinas/os" and Latina/o Legal Studies: A Critical and Self-Critical Review of LatCrit Theory and Legal Models of Knowledge Production*, 4 FIU L. REV. 187 (2008); Francisco Valdes, *Rebellious Knowledge Production, Academic Activism, & Outsider Democracy: From Principles to Practices in LatCrit Theory, 1995 to 2008*, 8 SEATTLE J. SOC. JUST. 131 (2009); Steven W. Bender & Francisco Valdes, *At and Beyond Fifteen: Mapping LatCrit Theory, Community, and Praxis*, 14 HARV. LATINO L. REV. 397 (2011).

immigration—all bearing unavoidable global dimensions. Over the last 18 years, as LatCrit developed into a big tent of critical outsider jurisprudence and coalitions, this global orientation has continued to animate its theory and praxis. This global orientation is particularly evident in LatCrit projects that explicitly focus on the global in general and the relationships between Global South and Global North in particular.⁶ It is also evidenced by the symposia published after each Annual (now Biennial) Conference, perhaps the most revealing record of the scope, depth, and trajectory of the LatCrit project at large.⁷ The papers in this symposium are a testament to this global orientation, critical outsider positionality and coalitional praxis.

⁶ See also, SOUTH-NORTH EXCHANGE, <http://latcrit.org/content/south-north-exchange/>; INTERNATIONAL AND COMPARATIVE COLLOQUIA, <http://latcrit.org/content/colloquium-international-comparative-law-icc/>; and *LatCrit's observer status with United Nations Economic and Social Council (ECOSOC)*, <http://latcrit.org/content/latcrit-ngo/>. Two past and currently inactive projects are: (i) Critical Global Classroom (CGC)—a unique study-abroad program in law, policy and social justice activism offered in partnership with a consortium of universities around the world; and (ii) LatCrit Seminar Series (LCS)—a transportable and adjustable “mini-course” on LatCrit theory and critical outsider jurisprudence, conducted in Spanish and/or English that travels throughout the Americas and beyond to be taught at variable sites or institutions upon the request of sponsoring organizations or schools.

⁷ *Global Justice: Theories, Histories, Futures*, 42 CAL. W. INT'L L.J. 265 (2012) & 48 CAL. W. L. REV. 231 (2012) (LATCRIT XVI), *The Color of the Economic Crisis: Exploring the Downturn from the Bottom Up*, 14 HARV. LATINO L. REV. 243 (2011), 1 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2011) & 22 BERKELEY LA RAZA L.J. (LATCRIT XV), *Outsiders Inside: Critical Outsiders Theory and Praxis in the Policymaking of the New American Regime*, 18 AM. U. J. GENDER SOC. POL'Y & L. 367 (2010) (LATCRIT XIV), *Representation and Republican Governance: Critical Interrogation of Electoral Systems and the Exercise of the Franchise*, 8 SEATTLE J. SOC. JUST. 1 (2009) (LATCRIT XIII), *Critical Localities: Epistemic Communities, Rooted Cosmopolitans, New Hegemonies and Knowledge Processes*, 4 FIU L. REV. 1 (2008) (LATCRIT XII), *Working and Living in the Global Playground: Frontstage and Backstage*, 7 NEV. L.J. 685 (2007) (LATCRIT XI), *Critical Approaches to Economic In/Justice: LatCrit at Ten Years*, 26 CHICANO-LATINO L. REV. 1 (2006) & 17 BERKELEY LA RAZA L.J. 1 (2006) (LATCRIT X), *Countering Kulturkampf Politics through Critique and Justice Pedagogy*, 50 VILLANOVA L. REV. 4 (2005) & 35 SETON HALL L. REV. 1155 (2005) (LATCRIT IX), *City and Citizen: Operations of Power, Strategies of Resistance*, 52 CLEVE. ST. L. REV. 1 (2005) (LATCRIT VIII), *Coalitional Theory and Praxis: Social Movements and LatCrit Community*, 81 OR. L. REV. 587 (2002) & 13 BERKELEY LA RAZA L. J. 113

This Foreword, first, introduces the articles in this symposium. Second, it articulates a foundational challenge of critique that outside jurisprudence must confront. Third, it explores the Latin roots of the modern global and shows that “discovery” and colonization of the Americas in general, and that of Latin America in particular, furnished the grounds where enduring foundations of global capitalism and modern law were assembled. Fourth, it takes account of the twin challenges faced by the contemporary global—neoliberalism and globalization. Finally, it offers some observations about the directions and prospects of contemporary anti-subordination struggles the modern global are taking—struggles that outsider scholarship in general and LatCrit in particular must be part of.

II. ADDRESSING THE GLOBAL INSIDE AND OUTSIDE THE BORDER

The papers in this symposium are in symphony with the tenor of the foundational canon of LatCrit scholarship: continue to learn from other critical theories of law; ever-expand the scope of interdisciplinary approaches to legal inquiry; and cultivate productive self-critique to ensure that LatCrit’s ontological, epistemological, and theoretical scaffolding remains responsive to both the persistent and changing fields of its deployment.⁸ Legal Realism,⁹ Critical Legal Studies,¹⁰ Critical Race

(2002) (LATCRIT VII), *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, 55 U. FL. L. REV. 1 (2003) & 54 RUTGERS L. REV. 803 (2002) (LATCRIT VI), *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENVER U. L. REV. 467 (2001) (LATCRIT V), *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000) (LATCRIT IV), *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999) (LATCRIT III), *Difference, Solidarity and Law: Building Latina/o Communities through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998) (LATCRIT II), *LatCrit Theory: Latinas/os and the Law*, 85 CAL. L. REV. 1089 (1997) & 10 BERKELEY LA RAZA L.J. 1 (1998), *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LATCRIT I).

⁸ For a detailed discussion, see Margaret Montoya & Francisco Valdes, “*Latinas/os*” and *Latina/o Legal Studies: A Critical and Self-Critical Review of Legal Knowledge-Production Models*, 4 FIU L. REV. 187 (2008).

Theory,¹¹ Feminist Legal Theory,¹² Postcolonial Theory,¹³ Third World Approaches to International Law (TWAIL),¹⁴ and Queer Theory¹⁵ were and

⁹ See AM. LEGAL REALISM (William W. Fisher, Morton J. Horwitz, & Thomas A. Reed eds., 1993); Karl N. Llewellyn, THE THEORY OF RULES (Frederick Schauer ed., 2011); Jerome Frank, A MAN'S REACH: THE SELECTED WRITINGS OF JUDGE JEROME FRANK (Barbara Frank Kristein ed., 1964); Brian Leiter, NATURALIZING JURISPRUDENCE: ESSAYS ON AM. LEGAL REALISM & NATURALISM IN LEGAL PHIL. (2007); and PHIL. OF LAW AND LEGAL THEORY: AN ANTHOLOGY (Dennis Patterson ed., 2003).

¹⁰ See ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUD. MOVEMENT (1983); CRITICAL LEGAL THEORY (Costas Douzinas & Colin Perrin eds., 2011); Richard W. Bauman, CRITICAL LEGAL STUD.: A GUIDE TO THE LITERATURE (1996); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Stud.*, 94 YALE L.J. 461 (1984); LEGAL STUD. AS CULTURAL STUD.: A READER IN (POST) MOD. CRITICAL THEORY (Jerry D. Leonard ed., 1995).

¹¹ See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2012); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds., 1995); CRITICAL RACE THEORY: AN INTRODUCTION (2nd ed., 2001); CRITICAL RACE THEORY: THE CUTTING EDGE (2nd ed., 2000); CROSSROADS, DIRECTIONS & A NEW CRITICAL RACE THEORY (Francisco Valdes, Angela Harris, & Jerome McCristal Culp eds., 2002); MIXED RACE AM. & THE LAW: A READER (Kevin Johnson ed., 2003).

¹² See FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); APPLICATIONS OF FEMINIST LEGAL THEORY: SEX, VIOLENCE, WORK & REPROD. (WOMEN IN THE POL. ECON.) (D. Kelly Weisberg ed., 1996); FEMINIST LEGAL THEORY: FOUND. (D. Kelly Weisberg ed., 1993); GENDER & AM. LAW: FEMINIST LEGAL THEORIES (Karen Maschke ed., Routledge 1997); CRITICAL RACE FEMINISM: A READER (2nd ed., 2003).

¹³ See THE POST-COLONIAL STUD. READER (Bill Ashcroft, Gareth Griffiths, & Helen Tiffin, eds., 1995); COLONIAL DISCOURSE & POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994); FEMINIST POSTCOLONIAL THEORY: A READER (Reina Lewis & Sara Mills eds., 2003); COLONIAL DISCOURSE/POSTCOLONIAL THEORY (Francis Baker, Peter Hulme & Margaret Iversen eds., 1994); THE POSTCOLONIAL QUESTION: COMMON SKIES, DIVIDED HORIZONS (Iain Chambers & Lidia Curti eds., 1996).

¹⁴ See INT'L LAW & THE THIRD WORLD: RESHAPING JUST. (Richard Falk, Balakrishnan Rajagopal, & Jacqueline Stevens eds., 2008); DECOLONIZING INT'L REL. (Banwen Gruffydd Jones ed., 2006); THE THIRD WORLD & INT'L ORDER: LAW, POL. & GLOBALIZATION (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., 2003); *Special Issue: Third World Approaches to the Law*, 3.1 TRADE, LAW & DEV. 1 (2011); Antony Anghie & B.S. Chimni, *Third World Approaches to Int'l Law & Individual Resp. in Internal Conflicts*, 2 CHINESE J. INT'L LAW 77 (2003).

¹⁵ See FEMINIST & QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Albertson Fineman, Jack E. Johnson, & Adam P. Romero eds., Ltd. 2009); QUEER THEORY (READERS IN CULTURAL CRITICISM) (Iain Morland &

remain sources of inspiration and nourishment for LatCrit, while it has sustained an ethic of acknowledgement, a recognition that scholars always stand on the shoulders of others that came before. As LatCrit scholarship continues to engage with productive teachings of yesterday and today, it beckons fresh departures and cultivates emerging voices. As a big tent of critical outsider jurisprudence,¹⁶ LatCrit nurtures democratic scholarship by eschewing hierarchy, rejecting dogma, facilitating innovation, and furnishing space to marginalized perspectives and fresh voices. LatCrit scholarship builds theory to serve praxis aimed at anti-subordination, transformation, and global justice.

Viewed from the vantage point of the geographical contours of the United States, the first three papers in this symposium look at the global outside the border, while the latter three look at the global inside the border. Together they raise foundational questions about the spatial and temporal of the modern global. Hernández-Truyol explores the positioning of indigenous communities at the intersection of international human rights and economic development. Monzón places before us possibilities and perils of designing constitutional arrangements unshackled by imperatives of postcoloniality. Ho examines the challenges of coalition building among marginalized communities to effectively resist subordination. Crane trains on the prospects of anti-systemic challenges at this conjuncture of the

Annabelle Willox eds., 2005); THE ROUTLEDGE QUEER STUDIES READER (Donald E. Hall & Annamarie Jagose eds., 2012); BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER (Devon Carbado ed., 1999); TRANSGENDER RTS (Paisley Currah, Richard M. Juang & Shannon Minter eds., U. Minn. Press 2006); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW (2011).

¹⁶ The term “outsider jurisprudence” was coined by Professor Mari Matsuda and refers to the body of literature generated during the past decade or so by scholars who identify with traditionally subordinated communities. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 (1989). See also Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 101 (2000).

modern global. Ahmad brings forth religion at intersections of immigration, identity, and evolution of colonial setter states.

Taken in concert, these papers explicitly and implicitly urge outsider jurisprudence to be ever mindful of the spatial and temporal dimensions of the modern global. With a transnational superclass of “Davos Men” increasingly lording over the contemporary global,¹⁷ and an ominous resurgence of genetic and racial explanations of history,¹⁸ the call of these papers is an urgent one. Responding to this call, this foreword now turns to demarcate structural contours of the modern global. “Discovery” of the Americas and colonization of post-discovery Latin America furnished the primary grounds for the assemblage of the modern global. This colonial lineage has left indelible marks on both the global political economy and contemporary discourses of human rights. Before turning to this task, though, a brief recounting of a perennial challenge that confronts any critique of the modern global is warranted.

III. CRITIQUE, HISTORY, AND THE MODERN GLOBAL

Critique holds the promise of uncovering structures and operations of power in the service of anti-subordination and emancipation. To remain honest to its task, however, critique must move along two tracks concurrently: relentless critique of power and self-critique. Ongoing self-critique is indispensable to ensure that ontological, epistemological, and

¹⁷ Peter Berger, *Introduction: The Cultural Dynamics of Globalization*, in *MANY GLOBALIZATIONS: CULTURAL DIVERSITY IN THE CONTEMPORARY WORLD 1* (Peter Berger and Samuel P. Huntington eds. 2002).

¹⁸ See, e.g., NICHOLAS WADE, *A TROUBLESOME INHERITANCE: GENES, RACE AND HUMAN HISTORY* (2014). This trend is closely related to the ubiquitous focus on climate and culture to the exclusion of power and political economy. See JEROD DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997). *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Lawrence E. Harrison and Samuel P. Huntington 2000), FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006).

programmatic frameworks of critique are conducive to the attainment of its task. This becomes particularly urgent when the subject of inquiry forms part of limit horizons of an age. I designate as limit horizons hegemonic ontological categories that over time so imprint the imaginary¹⁹ of an age that even critique remains imprisoned in the normalcy of these categories—an imprisonment that curtails the transformative potential of critique. Rather than being incidental or accidental, imprisonment in limit horizons is always already a predicament for critique. The very inaugural moment of modern critique reflects this inherent vulnerability, as exemplified by Kant. No sooner than proclaiming the foundational injunction of the Enlightenment—“dare to know”—he proceeds to declare:

The origin of supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. In other words, the subject *ought not* to indulge in *speculations* about its origin with a view to acting upon them, as if its right to be obeyed were open to doubt. . . . Whether in fact an actual contract originally preceded their submission to the state’s authority, whether the power came first, and the law only appeared after it, or whether they ought to have followed this order—these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state.²⁰

Thus, legitimacy of the state and the law, grounded in the originary myth of a social contract, acts as a limit horizon for Kant, and renders knowing

¹⁹ I use the concept of the “imaginary,” developed by Jacques Lacan and Cornelius Castoriadis, as an inclusive category that refers to culturally-specific images, symbols, metaphors, and representations which constitute various forms of subjectivity. See Jacqueline Rose, *The Imaginary*, in *THE TALKING CURE* (Colin MacCabe ed. 1981), and CORNELIUS CASTORIADIS, *THE IMAGINARY INSTITUTION OF SOCIETY* (Kathleen Blamey trans., 1987).

²⁰ KANT’S POLITICAL WRITINGS 143 (Hans Reiss ed. 1991), *quoted in* SLAVO ZIZEK, *FOR THEY DO NOT KNOW WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR* 204 (1991).

not so daring after all. Indeed, as Nietzsche remarked, Kant was “in his attitude towards the State, without greatness.”²¹

The ever-alive agenda of productive critique of the law is to identify liminal spaces²² where law, extra-legality, and illegality are braided to produce the other side of universality—“moral and legal *no man’s land*, where universality finds its *spatial* limits.”²³ This warrants that outsider jurisprudence “rethink the lazy separations between past, present, and future.”²⁴ Contemporary conflicts that appear as new iterations of the binary divides between civilized versus uncivilized, reason versus faith, and modernity versus fundamentalism, only confirm the “presence of the past.”²⁵ This necessitates that critique must be positioned to shift focus, when needed, from “present futures to present pasts.”²⁶ In sum, when faced with intractable conflicts, heed to the admonition: “Always historicize!”²⁷

²¹ FREDERICK NIETZSCHE, *UNTIMELY MEDITATIONS*, quoted in WALTER KAUFMANN, *NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST* 104 (3ed ed. 1968). For limits of the critical project of Enlightenment and the originary violence it engendered, see ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* (1991); JACQUES DERRIDA, *ON GRAMATOLOGY* (Gayatri Chakravorty Spivak trans. 1976); Jacques Derrida, *Force of Law: The “Mystical Foundations of Authority”*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3-67 (Drucilla Cornell et. al. eds. 1992).

²² “The attributes of liminality or liminal personae (‘threshold people’) are necessarily ambiguous, since this condition and these persons elude or slip through the network of classification that normally locate states and positions in cultural space. Liminal entities are neither here nor there, they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial.” VICTOR W. TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* 95 (1969).

²³ Denise Ferreira da Silva, *Towards a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality*, 7:3 *SOCIAL IDENTITIES* 421, 422 (2001).

²⁴ DEREK GREGORY, *THE COLONIAL PRESENT* 7 (2008).

²⁵ Etienne Balibar, *Racism and Nationalism*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 38, 38 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

²⁶ Andreas Huyssen, *Present Pasts: Media, Politics, Amnesia*, in *GLOBALIZATION* 55–57 (Arjun Appadurai ed., 2001).

²⁷ FREDERICK JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 9 (1981).

The task of turning to history presents critique and outsider jurisprudence yet another challenge—that of history itself. The age of colonial expansion of Europe was coterminous with consolidation of History—the unilinear, progressive, Eurocentric, teleological history as the dominant mode of experiencing time and of being.²⁸ In History, time overcomes space—a process whereby the geographically distant Other is supposed to, in time, become like oneself; Europe’s present becomes all Others’ future. Embodying the agenda of modernity, History constitutes a closure that destroys or domesticates alterity of the Other. History, as a mode of being, becomes the condition that makes modernity possible, with the nation-state posited as the repository of agency (the subject of History) that would realize modernity. In Hegel’s canonical construction, nations attain maturity only when a people are fully conscious of themselves as subjects of History, and it is only such nations that realize freedom.²⁹ Those outside History, “non-nations,” have no claims or rights; indeed, nations have the right to bring Enlightenment to non-nations. History thus becomes a master code that informs the “civilizing mission” of Europe, posited as a world-historical task.

This frame of History produced a defining mold for the emerging modern concept race. For example, Social Darwinism, a progeny of the modern constructions of reason, progress, and science, fixed upon race as the repository of attributes that enable or prevent evolution towards civilization. It, thus, combined with History to write a legitimating script for colonialism. In the name of enlightened civilization, a hierarchy of “advanced” and “backward” races emerged. Cast in terms of “natural selection” and “survival of the fittest,” evolutionary racism “offered strong

²⁸ See ROBERT J. YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* (1990) and SAMIR AMIN, *GLOBAL HISTORY: A VIEW FROM THE SOUTH* (2010).

²⁹ See PRASENJIT DUARA, *RESCUING HISTORY FROM THE NATION: QUESTIONING NARRATIVES OF MODERN CHINA 17–50* (1995).

ideological support for the whole colonial enterprise . . . savages were not simply morally delinquent or spiritually deluded, but racially incapable.”³⁰ Thus, evolutionary racialism was “used to justify the worst excesses of expropriation and colonial rule.”³¹ European “race-science”³² consolidated the double binary of fair/dark and civilized/savage, by positing a progressive series of human races with differential mental endowments and civilizational achievements and potential. With the diagnosis accomplished, prescription quickly followed: “Nations in which the elements of organization and the capacity for government have been lost . . . are restored and educated anew under the discipline of a stronger and less corrupted race.”³³ History, then, became a record of progress of superior races and, by that standard, the stagnant, backward races had no History.³⁴

The primary task of critique in general and outsider jurisprudence in particular is to interrogate and disrupt the master narrative of History. A necessary step in this direction is to uncover the historical record of subordination and oppression that the Eurocentric narrative of progressive unfolding of law and progress-bearing modernity over the last five centuries systematically obscures.

IV. LATIN ROOTS OF THE MODERN GLOBAL

As one trains critique upon the modern global, its Latin roots come into sharp relief. This is unavoidable because “discovery” of the Americas gave

³⁰ GEORGE W. STOCKING, *VICTORIAN ANTHROPOLOGY* 237 (1987); *see also* GEORGE W. STOCKING, *RACE, CULTURE, AND EVOLUTION: ESSAYS IN THE HISTORY OF ANTHROPOLOGY* (1968).

³¹ STOCKING, *supra* note 30, at 237.

³² NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN 1800–1960* (1982).

³³ LORD ACTON, *NATIONALITY*, *in* *MAPPING THE NATION* 31 (Gopal Balakrishnan ed., 1996) (first published in 1862).

³⁴ For a detailed discussion, *see* ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1982).

birth to the modern global. Colonization of the “new” world by the “old” triggered the enduring mutually constitutive relationship between the colonizers and the colonized and furnished Latin roots to both modern law and modern political economy. It was in the enabling field of this colonization that “modernity originated not in an exemplary identification with something beyond it but, rather, in an opposition to its antithesis, to the savage.”³⁵ In Edward Said’s reading, the West’s self identity assembled through “setting itself off from the Orient as a surrogate and even underground self.”³⁶ These origins have had an enduring imprint on subsequent manifestation of the modern global.

The foundational building blocks of the modern world—capitalism, racism, and modern law—were forged on the anvil of the colonial encounter inaugurated in Latin America. Indelible marks of the colonial encounter between the “West” and the “Rest” that unfolded in Latin America remain embedded in the structure and design of contemporary globalization, so called. The genealogy of many a canon of global subordination can be traced back to each canon’s Latin roots. Today, this genealogy is palatable in the “two institutional arenas [that] have emerged as new sites for normativity[:] . . . the global political economy and international human rights regime.”³⁷ Outsider jurisprudence concerned with the “dark places of the earth,”³⁸ the “darker nations,”³⁹ the “poorer nations,”⁴⁰ indeed, the “wretched of the earth,”⁴¹ must take account the

³⁵ PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 63 (2001).

³⁶ EDWARD SAID, *ORIENTALISM* 3, 67 (1985).

³⁷ SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* 95 (1998).

³⁸ Joseph Conrad, *Heart of Darkness in THREE SHORT NOVELS* 4 (1960).

³⁹ VIJAY PRASHAD, *THE DARKER NATIONS: A PEOPLES’ HISTORY OF THE THIRD WORLD* (2008).

⁴⁰ VIJAY PRASHAD, *THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH* (2013).

⁴¹ FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963).

Latin roots of the modern global that have an enduring presence. Consequently, uncovering these roots will help us to grapple with the myriad questions raised by this symposium and to direct the trajectory of outsider jurisprudence as it interrogates the global. This section of the foreword takes up this task to bring forth the Latin roots of foundational building blocks of the modern global; namely, modern international law, global political economy, modern law, and international human rights.

In focusing on the Latin roots of the modern global the purpose is not to assign some privileged and essentialist singularity and particularity to Latin America or Latinos. The aim is simply to position a historically situated prism to refract a wider question and a deeper problem—the question of the relationship between the Global South and the Global North, and the problem of enduring colonial grammar of global regimes and discourses of discipline. The hope is that, just as LatCrit helped Critical Race Theory to take account of the question of race beyond the black/white binary and the distorting prism of American exceptionalism by placing the Latina/o question on the agenda of outsider jurisprudence,⁴² LatCrit will also facilitate deeper appreciation of the constitutive and enduring role of the colonial question in operations of modern law in both its national and international iterations by bringing Latin roots of the modern global into sharp focus.

A. Latin Roots of Modern International Law

Before the “Glorious Revolution,” or the Treaty of Westphalia, and before Hobbes, Locke, and Kant spelled out the grammar of the modern social and political, European powers signed the Treaty of Tordessillas of June 7, 1494. No sooner was a new world “discovered,” than a line,

⁴² For a detailed discussion, see Athena Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1998–1999).

Partición del Mar Oceano, was drawn by this treaty.⁴³ This line divided the world beyond Europe between Portugal and Spain, and supplemented Pope Alexander VI's edict *Inter caetera divinae* of May 4, 1494, with an agreement between sovereigns.⁴⁴ The rights of two royal houses of Europe over the division of the non-European world as "lords with full, free, and every kind of power, authority and jurisdiction"⁴⁵ now stood grounded both in divine sanction and sovereign will and consent.⁴⁶ This event initiated the enduring impulse of modern law, its claims of universality notwithstanding, to draw lines of demarcation that separate legality from illegality and create zones where bodies and spaces are placed on the other side of universality, a "moral and legal *no man's land*, where universality finds its spatial limit."⁴⁷

This inaugural act of the modern global order injected colonialism into the genetic code of modern international law.⁴⁸ The "amity lines" initiated

⁴³ The line ran from the North Pole to the South Pole, approximately through the middle of the Atlantic Ocean. Portugal and Spain agreed that all newly discovered territories west of the line would belong to Spain and those east of the line to Portugal. EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, 85, 170-71 (Frances Gardiner Davenport, ed. 1967).

⁴⁴ CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* 88-89 (G. L. Ulmen trans., 2006); Boaventura de Sousa Santos, *Beyond Abyssal Thinking*, EUROZINE June 29, 2007, available at <http://www.eurozine.com/pdf/2007-06-29-santos-en.pdf>.

⁴⁵ Tr. *Dominos cum plena libera et omnimoda potestate, auctoritate et jurisdictione*. The Papal edict besides seeking expansion of *fides catholica* and *Christiana lex*, and conversion of barbarian peoples, expressly effected *donatio* of territories, as in classic feudal law. See SCHMITT, *supra* note 44, at 91, n. 7.

⁴⁶ The treaty both "affirmed the importance of Catholicism as a rationale for empire and undermined papal authority by authorizing sovereigns to act on their own to oppose threats by infidels." LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900 22, n. 62 (2010).

⁴⁷ Denise Ferreira de Silva, *Towards a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality*, 7 SOC. IDENTITIES 421, 422 (2001).

⁴⁸ Modern international law indeed "is a world-historic result of the early colonial experience of transatlantic and eastern trade . . . [I]t is the dialectical result of the very process of conflictual, expanding inter-polity interaction in an age of early state forms

by a secret clause of the Treaty of Cateau-Cambresis of 1559, differentiated between the European “sphere of peace and the law of nations from an overseas sphere in which there was neither peace nor law.”⁴⁹ These “amity lines,” which mandated peaceful cooperation within these lines and gave license to unbridled conflict without, gave rise to the maxim: “Beyond the equator there are no sins.”⁵⁰ In this new global order, “[e]verything that occurred ‘beyond the line’ remained outside the legal, moral, and political values recognized on this side of the line.”⁵¹ In this zone, “beyond the line” and “beyond the equator,” doctrines of “discovery,” “*terra nullius*,” and “*anima nullius*” flourished.⁵²

and mercantile colonialism. . . . [I]nternational law *is* colonialism.” CHINA MIEVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 168–9 (2005).

⁴⁹ A. Claire Cutler, *Towards a Radical Political Economy Critique of Transnational Economic Law*, in *INT’L LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES* 204 (Susan Marks ed., 2008). For details of the amity lines, see SCHMITT, *supra* note 44, at 92–99.

⁵⁰ Quoted in SCHMITT, *supra* note 44, at 90. See also, Santos, *supra* note 44 at 30, n. 10; Eliga Gould, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772*, 60:2 *WILLIAM AND MARY Q.* 471 (2003). One can trace the emergence of spheres of influence in the nineteenth century to the sixteenth century amity lines. For the status of such spheres of influence, see O. KEAL, *UNSPOKEN RULES AND SUPERPOWER DOMINANCE* 179–192 (1983); SCHMITT, *supra* note 44, at 281–294.

⁵¹ SCHMITT, *supra* note 44, at 94. In 1906, it was pointed out that “[t]he color line belts the world,” serving the same purpose. W. E. B. Du Bois, *The Color Line Belts the World*, in *AMERICAN SOCIAL AND POLITICAL THOUGHT: A READER* 313 (Andreas Hess ed., 2003).

⁵² Santos finds the idea of *anima nullius*, colonized people as empty receptacles, embedded in Pope Paul III’s bull *Sublimis Deus* of 1537, that declared that indigenous people of the colonies were “truly men . . . [but] they are not capable of understanding the Catholic Faith but . . . desire exceedingly to receive it.” Santos, *supra* note 44, at 30, n. 12. See also, JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2004). Pope Paul III’s reading of these “empty receptacles” is more optimistic than that of Lord Coke, who said in the landmark *Calvin Case* of 1602, that “if a Christian King should conquer a kingdom of an infidel, and bring them under submission, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue.” *Calvin v. Smith*, 7 *Cooke Rep.* 1a, 77 *Eng. Rep.* 377, 397–8 (K. B. 1608). See also, Robert A. Williams, *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). On the doctrine of

Expansion of colonialism triggered the demise of classical postulates of sovereign equality, which now came to be considered “pseudo-metaphysical notions of what the essential qualities of Statehood ought to be,”⁵³ and triggered the turn to positivism based on actual practice of states. Frames of *jus gentium*, or principles of law common to all peoples, yielded to a positivist ontology of law and sovereignty.⁵⁴ A new construct of differential sovereignty was entrenched in international law—sovereigns and international subjects were not alike in terms of rights, eligibilities, and competencies. Sovereignty was now to be seen as a differentially distributed bundle of rights.⁵⁵ Several classes of sovereign states were constituted—some fully sovereign, others partly so; some part of the “family of nations,” some outside it; some entitled to domination, others with minimal legal competence.⁵⁶ A sliding scale of “layered sovereignty”⁵⁷ emerged, stretching from “Great Powers” to colonies, with suzerains, protected states, and protectorates positioned in between.⁵⁸ The resulting global order was

territorium res nullius, see PAUL KEAL, *EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES* (2003).

⁵³ J. Brierly, *The Shortcomings of International Law*, 5 BRIT. Y.B. INT’L L. 13, 15 (1924).

⁵⁴ Benton characterizes the process as one of “modified positivism,” that derived “not from legislation or from agreements among [European] polities but from proliferating practices and shared expectations about legal process, stretched across the centuries of European imperial expansion and rule.” LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900* 6 (2010).

⁵⁵ David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 123 (1997).

⁵⁶ Anghie argues that the project to align degrees of civilization with recognition by international law was never stable: “The ambivalent status of the non-European entity, outside the scope of law and yet within it, lacking international capacity and yet necessarily possessing it . . . was never satisfactorily denied or resolved.” ANGHIE, *supra* note 14, at 81.

⁵⁷ Frederick Cooper, *Alternatives to Empire: France and Africa after World War II*, in *THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS* 106 (Douglas Howland and Louise White eds., 2008); SUGATA BOSE, *A HUNDRED HORIZONS: THE INDIAN OCEAN IN THE AGE OF GLOBAL EMPIRE* 25 (2006).

⁵⁸ See SIBA N’ZATIOULA GROVOGUI, *SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW* (1996).

that of “differing levels of internal and external self-determination for different territories and people.

The differential sovereignties and the attendant sliding scale of legal eligibility and personality of territories were legitimized by the infamous discourse of civilization.⁵⁹ Doctrines of sovereignty and recognition, foundational building blocks of international law, rest on such assignments.⁶⁰ As Anghie argues, “positivism’s triumphant suppression of the non-European world”⁶¹ rested on the premise that “of uncivilized natives international law t[ook] no account.”⁶² Consequently, in the new global legal order, “[t]o characterize any conduct whatever towards a barbarous people as a violation of the laws of nations, only shows that he who so speaks has never considered the subject.”⁶³ This new and positivist

⁵⁹ See GERRIT W. GONG, *THE STANDARD OF ‘CIVILIZATION’ IN INTERNATIONAL SOCIETY* (1984).

⁶⁰ See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004); See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *Harv. Int’l L.J.* 1, 1 (1999);, Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, in *LAWS OF THE POSTCOLONIAL* 89 (E. Darian-Smith & Peter Fitzpatrick eds., 1999); MARTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE & FALL OF INTERNATIONAL LAW* 98–178 (2001).

⁶¹ Anghie, *Finding the Peripheries*, *supra* note 60, at 7.

⁶² John Westlake, *John Westlake on the Title to Sovereignty*, in *IMPERIALISM* 45, 47 (Philip D. Curtin ed. 1971).

⁶³ John Stuart Mill, *A Few Words on Non-Intervention*, in *THE SPIRIT OF THE AGE: VICTORIAN ESSAYS* (Gertrude Himmelfarb ed. 2007 [1859]). Antony Anghie captures the relationship between international law’s turn to positivism and a particular characterization of colonized people well:

The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these people, presenting them as suitable objects of conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission – the discharge of the white man’s burden.

Anghie, *Finding the Peripheries*, *supra* note 60, at 7.

international law at the service of “states with good breeding”⁶⁴ produced a confluence of people and territory in the category “backward,” and legitimated colonial acquisition of “backward territory.”⁶⁵ Over time, the master-narrative of “civilization” created discourses of “development,” “modernization,” and “globalization”—constructs that took on the work of classifying populations, territories, and desirable social change.

Differentiated coordinates of sovereignty proved enduring and continue to undergird the hierarchical structure of the global political economy. They modulate operations of power globally to animate norms of international governance. These norms array different geopolitical regions along a range of permissible practices of sovereignty that congeal in specific spaces. This global regime of hierarchical sovereignty inserts different spaces into a legal order of global domination/subordination. It both constitutes and reflects distributions of power, attendant material and symbolic economies, and corresponding subjectivities. Today legal regimes bearing enduring traces of the colonial encounter in Latin America engulf the four corners of the globe in ubiquitous regulatory designs that enforce elaborate normative orders over almost all realms of collective life.

B. Latin Roots of Global Capitalism

“Discovery” of the Americas created the field of possibility for the emergence and consolidation of capitalism, a world system since its inception. Plunder of precious metals of the Americas and deployment of modern slavery in Latin America gave birth to capitalism as a new and global mode of production. Bullion extraction and export from Latin

⁶⁴ J. WESTLAKE, COLLECTED PAPERS ON PUBLIC INTERNATIONAL LAW 6 (L. Oppenheim ed. 1914).

⁶⁵ M. F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW, BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (1969 [1926]); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

America, including 134,000 tons of silver between 1493 and 1800,⁶⁶ was perhaps the single most important factor in triggering capitalist production in Europe. Latin America also dominated slavery in the “New World.” Brazil alone received 4.9 million slaves through the Atlantic slave trade compared with 389,000 imported to North America.⁶⁷ The Latin roots of the genesis of capitalism are reflected in the fact that the very use of the word *capital*, in the sense of bases for capitalism as a new mode of production, first came into vogue in the era of capital-intensive but slave-hungry Antillean sugar plantations.⁶⁸ Indeed, capitalism, as the “modern world-system was born in the long sixteenth century. The Americas as a geosocial construct were born in the long sixteenth century. The creation of this geosocial entity, the Americas, was the constitutive act of the modern world-system.”⁶⁹ While colonial primitive accumulation triggered the emergence of capitalism as a new mode of production, accumulation by dispossession remained integral to exploitative global economic relations spawned by capitalism.

Outsider jurisprudence must realize that accumulation by dispossession signifies that markets always rely on nonmarket legal and extralegal

⁶⁶ Ward Barrett, *World Bullion Flows, 1450-1800*, in *THE RISE OF MERCHANT EMPIRES: LONG-DISTANCE TRADE IN THE EARLY MODERN WORLD, 1350-1750* 224, 237, 400 (J. D. Tracy ed. 1990). See generally, EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF PILLAGE OF A CONTINENT* (25th Anniversary ed. 1997).

⁶⁷ Simon Romero, *Rio's Race To Future Intersects Slave Past*, N.Y. TIMES, Mar. 9, 2014, at 5, available at http://www.nytimes.com/2014/03/09/world/americas/rios-race-to-future-intersects-slave-past.html?_r=0. For detailed data on the Atlantic Slave Trade, see <http://www.slavevoyages.org/tast/index.faces>.

⁶⁸ See FERNAND BRAUDEL, *II CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY* 232 (Sian Renolds trans. 1992) (crediting the 1766 publication—translated into English in 1774—of M. TURGOT, *REFLECTIONS ON THE FORMATION AND DISTRIBUTION OF WEALTH* (Anne-Robert Jacques Turgot, trans. 2010 [1774])).

⁶⁹ Anibal Quijano & Immanuel Wallerstein, *Americanity as a Concept, or the Americas in the Modern World System*, 44:134 *Int'l Soc. Sci. J.* 549, 549 (1992), available at <http://www.javeriana.edu.co/blogs/syie/files/Quijano-and-Wallerstein-Americanity-as-a-Concept.pdf>.

coercive forces to facilitate asymmetrical distribution of economic gain and pain.⁷⁰ In the geography of global capitalism, embracing different scales and spaces, this accumulation by extra-economic means is facilitated by myriad legal regimes. These legal regimes range from global to local and formal to customary. Accumulation by dispossession was initiated by “*ex-novo* separation between producers and means of production”⁷¹ secured by the extra-economic coercive power of the state and the law. For example, Enclosure Acts⁷² and Game Laws⁷³ of England were coercive uses of law to dispossess rural farmers, hunters, and other subsistence producers, forcing them to seek a livelihood in the “free” wage market. Labeling this phenomenon as primitive accumulation, canonical critical political economy had relegated it to the prehistory of capitalism.⁷⁴ However, later scholarship on global political economy establishes that primitive accumulation is “a basic ontological condition for capitalist production, rather than just a historical precondition.”⁷⁵ These interventions highlight

⁷⁰ See MICHAEL PERELMAN, *THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION* (2000); Jim Glassman, *Primitive Accumulation, Accumulation by Dispossession, Accumulation by ‘Extra-Economic’ Means*, 30:5 *PROGRESS HUM. GEOGRAPHY* 608 (2006); DAVID HARVEY, *THE NEW IMPERIALISM* 137-182 (2003); Michael Perelman, *Primitive Accumulation From Feudalism to Neoliberalism*, 18:2 *CAPITALISM NATURE SOCIALISM* 44, 54 (2007).

⁷¹ Massimo De Angelis, *Separating the Doing and the Deed: Capital and the Continuous Character of Enclosures*, 12:2 *HISTORICAL MATERIALISM* 57, 63 (2004).

⁷² See JOHN BAKER, VI *THE OXFORD HISTORY OF THE LAWS OF ENGLAND 1483–1558* 650–52, (2003).

⁷³ See E. P. THOMSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* 94, 99, 207, 261 (1975). WILLIAM BLACKSTONE, IV *COMMENTARIES ON THE LAWS OF ENGLAND* 174–75 (1775).

⁷⁴ The portrayal of primitive accumulation by critical political economists was marred by historicism, Eurocentricism, and anti-peasant prejudice of their milieu. See Glassman, *supra* note 70, at 608, 610–12.

⁷⁵ *Id.* at 615. For the scholarship that lead to this conclusion, see ROSA LUXEMBERG, *THE ACCUMULATION OF CAPITAL* 351 (A. Schwarzschild trans. 1968) (1923); HANNAH ARENDT, *IMPERIALISM: PART TWO OF THE ORIGINS OF TOTALITARIANISM* (1968); PAUL BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957); ANDRE GUNDER FRANK,

the continuing role of coercive political forces in underwriting the purportedly extra-political realm of the market, and underscore that “production of value that enters into the circuits of capitalist accumulation through parasitization of formally noncapitalist processes is a deeply embedded feature of capitalism.”⁷⁶ They also alert us that, since its origin, capitalism has been a global phenomenon that co-opts rather than displaces noncapitalist modes of production, and results in uneven development of different geographical zones within its ambit. The enduring nature of accumulation by dispossession can be seen in the various forms of social capital that are required by capital but not paid by it.⁷⁷ In sum, “neither capitalism as a whole nor the capital-labor relationship on which its contradictory and conflictual dynamic depends can be reproduced purely through market relations. Both require supplementary modes of

CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA: HISTORICAL STUDIES OF CHILE AND BRAZIL (1967); IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD ECONOMY* (1979); SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* (1974); SAMIR AMIN, *UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM* (1976); Aiden Foster-Carter, *The Modes of Production Controversy*, 107 *NEW LEFT REV.* 47 (1978); HAROLD WOLPE, *THE ARTICULATION OF MODES OF PRODUCTION: ESSAYS FROM ECONOMY AND SOCIETY* (1980).

⁷⁶ Glassman, *supra* note 70, at 617.

⁷⁷ Examples include publically funded education and infrastructure, gendered and often racialized household and reproductive labor, instrumental use of race, class, and nationality in immigration and land-ownership laws that consolidated agro-capital in California, and new appropriation of the commons for private accumulation whereby the global commons are being enclosed. See Claude Meillassoux, *From Reproduction to Production*, 1 *ECON. & SOC'Y* 93 (1972); CLAUDE MEILLASSOUX, *MAIDENS, MEALS AND MONEY: CAPITALISM AND THE DOMESTIC COMMUNITY* (1981); Nona Y. Glazer, *Servants to Capital: Unpaid Domestic Labor and Paid Work*, 16:1 *REV. OF RADICAL POL. ECON.* 61 (1984); Nancy Hartsock, *Globalization and Primitive Accumulation: The Contributions of David Harvey's Dialectical Marxism*, in *DAVID HARVEY: A CRITICAL READER* 176, 183 (Noel Castree and Derek Gregory eds., 2006); RICHARD WALKERS, *THE CONQUEST: 150 YEARS OF AGRIBUSINESS IN CALIFORNIA* 66 (2004); DAVID HARVEY, *THE LIMITS TO CAPITAL* 146–48 (2007).

reproduction, regulation, and governance—including those provided in part through the operations of the state.”⁷⁸

Accumulation by dispossession also produces a reserve army of labor. While the “creative destruction”⁷⁹ of capitalism destroys traditional entitlements and subsistence economies, and estranges direct producers from their means of labor, all those dislocated are not absorbed in the new production process.⁸⁰ This unabsorbed labor is the so-called “surplus humanity”⁸¹: populations separated from their noncapitalist means of subsistence but not integrated into the productive circuits of wage labor on a stable basis. They are those who are “condemned to the world of the excluded, the redundant, the dispensable, having nothing to lose, not even the chains of wage-slavery . . . the shadowy figures of the rejected, the marginal, the leftovers of capital’s arising, the wreckage and debris.”⁸² This is the remainder of the “sacrifice of ‘human machines’ on the pyramids of accumulation.”⁸³ This “surplus humanity,” the reserve army of labor, remains an enduring and indispensable feature of capitalism.

⁷⁸ BOB JESSOP, *THE FUTURE OF THE CAPITALIST STATE* 11 (2002). See also JONATHAN NITZAN AND SHIMSHON BICHLER, *CAPITAL AS POWER: A STUDY OF ORDER AND CREORDER* (2009).

⁷⁹ See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY*, 81–86 (1950 [1942]).

⁸⁰ See Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, in *NEOLIBERALISM: A CRITICAL READER* 20–23 (Alfredo Saad-Filho & Deborah Johnson eds. 2005); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

⁸¹ Mike Davis, *Planet of Slums: Urban Involution and the Informal Proletariat*, *NEW LEFT REV.* 5, 23 (Mar.–Apr. 2004).

⁸² KALYAN SANYAL, *RETHINKING CAPITALIST DEVELOPMENT: PRIMITIVE ACCUMULATION, GOVERNMENTALITY AND POST-COLONIAL CAPITALISM* 53 (2007).

⁸³ Ferruccio Gambino, *A Critique of the Fordism and the Regulation School*, 19 *COMMON SENSE* 42 (Ed Emery trans. 1996), available at http://www.wildcat-www.de/en/zirkular/28/z28e_gam.htm.

What do those not absorbed in formal markets do while suspended in the “imaginary waiting room” of history?⁸⁴ They tend to their subsistence needs as best they can by exchanging needs and capacities in networks of barter, petty trade, and casual employment under the radar of the law. The result is the emergence of a “need economy”⁸⁵: a zone outside the formal legal frames of contract and regulation signifying “informalization within the accumulation economy.”⁸⁶ This zone is the so-called informal economy. While ostensibly “discovered in Africa in the early 1970s,”⁸⁷ the informal economy has been a perennial and enduring companion of the formal capitalist economy. Its emergence was contemporaneous with the emergence of capitalism, and it endures as capitalism persists.

Global capitalism today betrays its colonial Latin roots in enduring systems of accumulation by dispossession, production of reserve armies of labor, and suturing of liminal bodies and liminal spaces at the margins of law.

C. Latin Grounds of Modern Law

Besides reordering international law and global economy, “discovery” of the “New World” reconstituted the grounds of law in the “old” one. In the process, Latin America played a critical role in the assemblage of modern law. Like modern international law, modern law itself takes its primary constitutive grounds from Europe’s colonial encounter with its racialized other. John Locke’s assertion, “[i]n the beginning all the world was

⁸⁴ DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 10 (2000).

⁸⁵ SANYAL, *supra* note 82, at 208-15.

⁸⁶ *Id.* at 237.

⁸⁷ Martha Alter Chen, *Rethinking the Informal Economy- Linkages with the Formal Economy and Formal Regulatory Environment*, 1 Research Paper 2005/10 (United Nations University—World Institute of Development Economics Research Unu-Wider, 2005).

America,⁸⁸ and Hobbes's portrayal of "the life of man, solitary, poor, nasty, brutish, and short"⁸⁹ are evocative portrayals of the backdrop against which Locke and Hobbes crafted their "modern" theories of the state, civil society, property, and law. The "savage" that as a negative exemplar furnishes the scaffolding of modern political and legal theory is nothing but the one "discovered" in the colonies, starting with the Americas. In the process, modern law emerged "imbued with this negative transcendence . . . imperiously set against certain 'others' who concentrate the qualities it opposes."⁹⁰ For the founding canon of modern political and legal thought, "from this very negation is derived the positive content of the law of the land in its unconditional and unlimited validity."⁹¹ Of course, the "savage" other was not "discovered," it was created:

Enlightenment creates the very monsters against which it so assiduously sets itself. These monsters of race and nature mark the outer limits, the intractable 'other' against which Enlightenment pits the vacuity of the universal and in this opposition gives its own project a palatable content. Enlightened being is what the other is not. Modern law is created in this disjunction.⁹²

The "Indians" of the "New World" were deemed savages because ostensibly they "liv[ed] only by hunting . . . without tilled lands, without cattle, without King, Law, God, or Reason."⁹³ It was in counter distinction of this state of *ni foi, ni loi, ni roi* that "civilized" society of one king, one law, one faith was conceptually assembled as a "negative necessity."⁹⁴ For

⁸⁸ John Locke, *The Second Treaties of Government*, in TWO TREATISES OF GOVERNMENT 343 (1965).

⁸⁹ HOBBS, LEVIATHAN 87 ([1952]).

⁹⁰ PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 10 (1992).

⁹¹ E. CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 19 (1955).

⁹² FITZPATRICK, *supra* note 90, at 45.

⁹³ R. L. MEEK, SOCIAL SCIENCE AND THE IGNOBLE SAVAGE 48–49 (1976). *See also* MARK COCKER, RIVERS OF BLOOD, RIVERS OF GOLD: EUROPE'S CONQUEST OF INDIGENOUS PEOPLES (1998).

⁹⁴ FITZPATRICK, *supra* note 90, at 75.

Hobbes, the lawless savages of “many places of America” stood for the brutish state of nature that was overcome by constituting the Leviathan, the foundational act of law and civil society.⁹⁵ The “savage” of the Americas, the one “without subordination, law, or form of government,” then, animates designs “to civilize this barbarianism, to render it susceptible of laws.”⁹⁶ For Locke, natural rights could only be enjoyed by the “Civiliz’d part of Mankind.”⁹⁷ John Austin fashioned his constructs of sovereignty and civil society against the backdrop of “savages” of the “forests and plains of the North American continent.”⁹⁸ For Blackstone, the right to property, purportedly the foundation of law, “became necessary” in the transition of “the wild and uncivilized” nations to a pastoral existence and the spread of “the art of agriculture.”⁹⁹ Coherence of legal order, then, is made possible “in its originating opposition to savage chaos.”¹⁰⁰ Modern law assembles its content in distinction to what it negates—the ways of the “savage.” After all, “as anthropologists and historians have frequently shown, . . . in order to define ‘Us’ there must be a corresponding ‘Them’ against which ‘We’ come to recognize ourselves as different.”¹⁰¹ We see, then, “the coeval emergence of law and civilized society in their constituent and complete opposition to savagery.”¹⁰² In sum, “from this very negation [of the colonized savage] is derived the positive content of the law of the land in its unconditional and unlimited validity.”¹⁰³ The colonized “savage” then serves as the grounds

⁹⁵ HOBBS, *supra* note 89, at 87–88.

⁹⁶ J. AXTELL, *THE INVASION WITHIN: THE CONQUEST OF CULTURES IN COLONIAL NORTH AMERICA* 50 (1985).

⁹⁷ LOCKE, *supra* note 88, at 331, 367. *See also*, PETER T. MANICAS, *THE DEATH OF THE STATE* 104–109 (1974).

⁹⁸ J. AUSTIN, *1 LECTURES ON JURISPRUDENCE* 184 (1861).

⁹⁹ BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 5, 7 (16th ed. 1825).

¹⁰⁰ FITZPATRICK, *supra* note 90, at 86.

¹⁰¹ Cris Shore, *Inventing the “People’s Europe”: Critical Approaches to European Community “Cultural Policy,”* 28 *MAN* 779, 782 (1993).

¹⁰² PETER FITZPATRICK, *MODERNITY AND GROUNDS OF LAW* 67 (2001).

¹⁰³ E. CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 19 (1955).

for the emergence of modern-law's ever-new regimes of discipline. Perhaps nothing testifies to this phenomenon better than the development of criminal law in England between the seventeenth and nineteenth centuries.¹⁰⁴

Liberalism, the conceptual underpinning of modern law, is forever haunted by the question: how did ideas of equality, liberty, and fraternity lead to Empire, liberticide, and fratricide?¹⁰⁵ The question arises from the intimate entanglement of liberalism with colonialism and Empire.¹⁰⁶ While History furnished the basic contours of modern constructions of race, the notion of the rights-bearing individual posited by liberalism added content to these constructs by reconciling liberty with colonialism. Liberalism and colonialism developed alongside each other. With rare exceptions, liberals approved of colonialism and provided it with a legitimizing ideology. If eligibility for universal rights was conditioned upon recognized subjectivity, claims to these rights could be denied if the subjectivity of some was erased. Liberal discourses of rights, inclusion, and equality could be reconciled with colonial policies of exclusion and discrimination by positing essential differences between different types of individuals and subjectivities.

The universalist claim of liberalism rests on the capacities it identifies with human nature—to be born free, equal, and rational. It is this anthropological premise that anchors the concept of consent, which in turn

¹⁰⁴ See, e.g., E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1976); DOUGLAS HAY, ET. AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* (2011); PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* (2006).

¹⁰⁵ E.P. THOMPSON, *THE ROMANTICS: ENGLAND IN A REVOLUTIONARY AGE 65–66* (New York: New Press, 1997).

¹⁰⁶ See UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (Chicago: University of Chicago Press, 1999); Eileen P. Sullivan, *Liberalism and Imperialism: John Stuart Mill's Defense of the British Empire*, 44 *J. HIST. IDEAS* 599 (1983); R.J. Moore, *John Stuart Mill at the East India House*, 20 *HIST. STUD.* 497 (1983).

grounds liberal institutions of contract, rule of law, and representation. Those designated as being unable to exercise reason are deemed incapable of consent, and thus, they can be excluded from political constituency and governed without consent. The capacity to reason, far from being universal, was posited as a matter of education and “breeding,” by which one is initiated into specifications of time, place, and social norms, with the white, male, propertied adult furnishing the standard.¹⁰⁷ Subordinations based on class, gender, and race were the logical outcome.¹⁰⁸ By making specific cultural norms preconditions for actualization of the supposedly universal capacities, universalism yielded to exclusions, through which liberty was found to have no application to “backward societies.” Liberals posited a Manichean theory of two worlds: civilized societies that had attained individuality, maturity of faculties, and the capacity to be guided to their own improvement, and societies outside History, mired in stagnation and despotism of custom. Individuality and civilization were seen as the unique achievement of the “European race,” and since the non-Europeans were moral and political infants, and thus below the age of consent, a “paternal despotism” by a “superior people” was found perfectly “legitimate” and in the natives’ interest.¹⁰⁹ Colonial rule was to facilitate the natives’ transition to a “higher stage of development” and to train them in “what [was] specifically wanting to render them capable of higher civilization.”¹¹⁰ A typology of savagery, barbarianism, and civilization as a hierarchy of the

¹⁰⁷ See, e.g., JOHN LOCKE, THOUGHTS CONCERNING EDUCATION 187 (1934 [1693]).

¹⁰⁸ See generally C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS AND LOCKE (1962); CAROL PATEMAN, THE SEXUAL CONTRACT (1988); and CHARLES W. MILLS, THE RACIAL CONTRACT (1999).

¹⁰⁹ J.S. MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 224, 382 (1912).

¹¹⁰ *Id.* at 199. See also Bhikhu Parekh, *The West and Its Other*, in CULTURAL READINGS OF IMPERIALISM: EDWARD SAID AND THE GRAVITY OF HISTORY 173 (Keith Ansell-Pearson et al. eds., 1997).

historical stages of man was posited, bringing geography and History together in a generalized scheme of European superiority that identified civilization with race.¹¹¹ The result was a grammar of racial difference that found liberalism to be underwritten by the colonial script.

John Stuart Mill, the canonical champion of liberty, drew what he took to be the crucial distinction between beings in terms of readiness for representative institutions by reference to those “of [our] own blood” and those not of our blood.¹¹² Entry into representative politics, thus, is not open to all, with race posited as a mark of eligibility and lesser races deemed obligated to undergo a process of tutelage by the higher race in order to acquire the requisite certifications of eligibility. This is not as a matter of choice but determined by epistemological foundations of a particular set of ideas. The liberal gaze partakes of a judgmental rationality whereby the strange and the unfamiliar have meaning only within the general structure of what it would mean for facts to hang together rationally, and by their placement along the presumed linear trajectory of History. Indeed, “[l]iberal imperialism is impossible without this epistemological commitment, which by the nineteenth century supports both the paternalism and progressivism—that is, the main theoretical justifications—of the empire.”¹¹³ Rooted in Western philosophical tradition’s posture towards correspondence between language and objects, the conditions for intelligibility forwarded by rationality render the singular intelligible only by reference to the general. This is predicated on the assumption that the strange is just a variation of what is already familiar, because both the

¹¹¹ See J.S. MILL, 1 DISSERTATIONS AND DISCUSSIONS, POLITICAL, PHILOSOPHICAL, AND HISTORICAL 160–205 (1859); ROBERT A. WILLIAMS, JR., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION (2012).

¹¹² John Stuart Mill, *Considerations on Representative Government*, in JOHN STUART MILL, THREE ESSAYS 402 (London: Oxford University Press, 1975) (1861). Several perceptive studies examine Mill’s positions about colonialism. See generally, e.g., Sullivan, *supra* note 106; Moore, *supra* note 106.

¹¹³ MEHTA, *supra* note 106, at 18.

familiar and the strange are deemed to be merely specific instances of a familiar structure of generality. This complex makes modern law's claims of universality possible while maintaining particularities at or outside the margins of law.

Given its colonial Latin origins, it is no surprise that license to colonial subjugation was in the DNA of incipient modern law. This law was integrally associated with settling of the world with adequate occupation and its bestowal of rights on "rightful occupiers," the colonial "possessors and builders of the earth."¹¹⁴ The Declaration of Independence that constituted the United States testifies to this modality by setting the historic venture of founding a republic against "the merciless Indian savages."¹¹⁵ *Johnson v. M'Intosh*, perhaps the foundational case of United States' jurisprudence, eloquently endorsed such grounds of law by finding the "Indians" to be "fierce savages . . . [to] leave them in possession of their country, was to leave the country a wilderness."¹¹⁶ European principles that invalidated Indian title were found validated by "the character and habits of the people whose rights have been wrested from them."¹¹⁷ Suturing doctrines of discovery and conquest Chief Justice Marshall issued an early judicial enunciation of legal positivism to validate extinguishing Indian titles.¹¹⁸ Thus, as a foundational instance of co-facilitation of liberalism and colonial subjugation, a nation and republic defined in terms of justice and

¹¹⁴ E. LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 46 (1979).

¹¹⁵ THE DECLARATION OF INDEPENDENCE, para. 3 (U.S. 1776). *See also generally* JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* (1997); PAUL FIKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (1996); EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

¹¹⁶ 21 U.S. (8 Wheat) 543, 590.

¹¹⁷ *Id.* at 588.

¹¹⁸ "[I]f the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned." *Id.* at 591.

rights was found “only by injustice and alienation of rights”¹¹⁹ And the outcome of “discovery” and subjugation “is not now to be disturbed.”¹²⁰ Indeed, “it is not for the Courts of the country to question the validity of this title” derived from “the sword,”¹²¹ and the “rights” given by “power, war, conquest . . . can never be controverted by those on whom the descend.”¹²² The “Indians” had to occupy a precarious location in the scheme of this law due to “the condition of a people” who could neither be a “distinct” nation, nor “mix” with the settlers on the basis of parity.¹²³ They were a “domestic independent nation” which “looked to our government for protection” in “its kindness and in its power” as would a “ward” or someone in a “state of pupillage.”¹²⁴ This state of independence/dependence and inclusion/exclusion inscribed an enduring grammar of relationship between the Global North and Global South.

This inscription of the law over colonized bodies and spaces subscribed to an enduring grammar of modernity’s engagement with alterity. This grammar is not one of exclusion.¹²⁵ Rather, this engagement with alterity forms a three-pronged matrix: engulfment/exception/subordination. The other does not exist prior to the engagement; it is not “discovered,” left out, or left alone—excluded from operations of power. The other was and is produced by and through engagement. It is engulfed in operations of modernity, located in zones of exception, and positioned in states of

¹¹⁹ ROBERT F. BERKHOFFER, *THE WHITE MAN’S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 28 (1979).

¹²⁰ *Flecher v. Peck*, 10 U.S. (6 Cranch) 87, 142 (1810).

¹²¹ *Johnon v. M’Intosh*, 21 U.S. 543, 588-89 (1823).

¹²² *Worcester v. Georgia*, 31 U.S. 515, 543 (1832).

¹²³ *Johnon*, 21 U.S. at 590.

¹²⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–18 (1831).

¹²⁵ For a critique of the “exclusion” thesis in modern construction of race, see DENISE FERREIRA DA SILVA, *TOWARDS A GLOBAL IDEA OF RACE* (2007). For yet another invocation of the “expulsion” thesis in an otherwise productive study of the contemporary global economy, see SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY* (2014).

subordination. This subordination in and as exception concurrently produces the other and the identity of the modern self.

D. Modern Law in the Colonies

Beyond these origins, the symbiotic relationship of colonialism and modern law continued to sustain both. Law in the colony aimed to “reduce them to civility,” those who had “no skill of submission.”¹²⁶ Violence was deemed a vital instrument of colonial progress,¹²⁷ with law furnishing “the cutting edge of colonialism.”¹²⁸ Violence in general and the violence of law in particular were seen as playing “the leading part in the creation of civilization.”¹²⁹ Colonial rule deemed “our law . . . a compulsory gospel which admits of no dissent and no disobedience.”¹³⁰ This overt concert of law and violence has been aptly characterized “*lawfare*: the effort to conquer and control indigenous peoples by the coercive use of legal means.”¹³¹ The geo-legal space of colonialism brings into sharp relief “the blood that has dried on the codes of law.”¹³²

In the colony, law congealed epistemic, structural, and physical violence. The colonized other, deemed an error of arrested evolution, was prescribed corrective norms of a higher rational order. This “soul-making”¹³³ colonial

¹²⁶ J. AXTELL, *THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA* 136, 271 (1985).

¹²⁷ ASHISH NANDY, *THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM* 69 (1983).

¹²⁸ MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 4 (1998).

¹²⁹ ERIC STOKES, *THE ENGLISH UTILITARIANS IN INDIA* 294 (1959).

¹³⁰ R. C. J. COCKS, *SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE* 87 (1988).

¹³¹ J. L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 *LAW & SOC. INQUIRY* 306 (2001).

¹³² MICHEL FOUCAULT, *quoted in* JAMES MILLER, *THE PASSION OF MICHEL FOUCAULT* 289 (1993).

¹³³ Gayatri Chakravorty Spivak, *Three Women's Texts and a Critique of Imperialism*, 12:1 *CRITICAL INQUIRY* 235, 253 (1985) *quoted in* Benita Parry, *Current Theories of*

project entailed entrenchment of a layered legal order. First, the colony was inserted into the global legal system of hierarchically differentiated sovereignties. Second, metropolitan law was transplanted in the colony supplemented by exceptions that ensured that coercion displaced hegemony as its animating force,¹³⁴ thereby ordering a “rule of difference” that mandated performance of nonidentity between the colonizer and the colonized.¹³⁵ Third, through selective recognition, malleable norms of the colonized were truncated and reconstituted as fixed “customary law.”¹³⁶

The savage and her space, lacking Western understandings of geometry, history, and law, had to be ordered to contain the danger of otherness. The colonized Other deemed an error of arrested evolution by the colonizers, was prescribed the corrective culture of a higher rational order. Claiming the authority of reason and redemption, colonialism undertook its “soul making” mission,¹³⁷ combining with the “epistemic violence” of imperialism.¹³⁸ The colonizers had no doubt that

[t]he Natives must either be kept down by a sense of our power, or they must willingly submit from a conviction that we are more wise, more just, more humane, and more anxious to improve their condition than any other ruler they possibly could have.¹³⁹

Colonial Discourse, in *THE POST-COLONIAL STUDIES READER*, 39 (Bill Ashcroft, et. al., eds., 1995). See also OLUFEMI TAIWO, *HOW COLONIALISM PREEMPTED MODERNITY IN AFRICA* (2010).

¹³⁴ See RANAJIT GUHA, *DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA* (1998).

¹³⁵ PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS* 16–24 (1993).

¹³⁶ See FRANCIS G. SNYDER, *CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION* (1981); SALLY ENGLE MOORE, *SOCIAL FACTS AND FABRICATIONS: CUSTOMARY LAW IN KILIMANJARO, 1880–1980* (1986).

¹³⁷ Perry, *supra* note 133, at 39 (quoting Gayatri Chakravorty Spivak).

¹³⁸ *Id.* at 38. See also RACE AND THE ENLIGHTENMENT: A READER (Emmanuel Chukwudi Eze ed., 1997).

¹³⁹ Gauri Viswanathan, *Currying Favor: The Politics of British Educational Policy in India 1813–54*, in *DANGEROUS LIASONS: GENDER, NATION AND POSTCOLONIAL PERSPECTIVES* 113 (Anne McClintock, Aamir Mufti & Ella Shohat, eds., 1997).

Colonial law substantiates that “violence is not exterior to the order of *droit*. It threatens it from within” and necessitates that we “recognize meaning in a violence that is not an accident arriving from outside law.”¹⁴⁰ Modern law focused on the quality of the relationship between a people and territory to articulate doctrines of “*terra nullius*” and “discovery,” and to fashion new property rights regimes.¹⁴¹ These, in turn, assigned eligibility to membership in political society.

Colonial orders were never uniform or static. Incessant resistance of the colonized was met by adjustments and modifications of systems of subordination.¹⁴² Neither was the location of the colonized in the colonial legal order unchanging. The relationship of the United States with the rest of the “New World” testifies to this. The Haitian revolution was only the opening salvo of Latin America’s long and sustained struggle for autonomy, dignity, and justice.¹⁴³ The failure of the revolution did not stop the unfolding of movements in the colonized continent to sever the colonial ties with Europe. Just as one Latin American colony after another declared independence from its European colonial masters in the first half of the nineteenth century, the hemisphere was declared to be an exclusive preserve

¹⁴⁰ Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 34 (Drucilla Cornell, Michel Rosenfeld & David Carlson eds., 1992).

¹⁴¹ See JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004); Robert A. Williams, *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); PAUL O. KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES (2003); BOYCE RICHARDSON, PEOPLE OF *TERRA NULLIUS*: BETRAYAL AND REBIRTH IN ABORIGINAL CANADA (1993).

¹⁴² For an account of the incessant resistance that accompanied colonization of the Americas, see PETER LINEBAUGH & MARCUS REDIKER, *THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC* (2000).

¹⁴³ CAROLYN E. FICK, *THE MAKING OF HAITI: THE SAINT DOMINGUE REVOLUTION FROM BELOW* (1990); C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSANT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION* (2d ed., 1963).

of US influence and domination. The Monroe Doctrine inaugurated the emergence of the United States as a global contender and injected a new chapter in modern international law's penchant for drawing geographical lines and constituting zones of domination.¹⁴⁴ The Mexican-American War and the Spanish-American War were the bookends of the largest US territorial expansion since the founding of the republic.¹⁴⁵ While spoils of the first war were annexed to be part of the colonial settler state, the spoils of the other were colonized and placed at a remove and in an enduring state of difference and subordination.

European theories of discovery and conquest combined with American theories of Anglo-Saxon racial superiority and the "manifest destiny" of the new nation led the United States to war with Mexico and annexation of northern Mexico.¹⁴⁶ Note that this saga unfolded in an era of "virtual blurring of the distinctions between race and nation."¹⁴⁷ Looking through a Lockean prism, the new occupiers felt justified in forcibly taking over northern Mexico, because Mexicans, like Indians, were unable to make proper use of the land. The Mexicans were seen as an "inferior race The world would benefit if a superior race shaped the future of the

¹⁴⁴ For a detailed analysis see SCHMITT, *supra* note 44, at 281-94; Carl Schmitt, *Großraum Versus Universalism: The International Legal Struggle Over the Monroe Doctrine*, in SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS 46 (Stephen Legg ed. 2011).

¹⁴⁵ See generally GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM* (2007); IVAN MUSICANT, *THE BANANA WARS: A HISTORY OF UNITED STATES MILITARY INTERVENTION IN LATIN AMERICA FROM THE SPANISH AMERICAN WAR TO THE INVASION OF PANAMA* (1990).

¹⁴⁶ The racist character of the war with Mexico comes in sharp relief when compared with the reluctance of Americans to go to war with Britain over the disputed Oregon territory. See DAVID M. PLETCHER, *THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR* (1975).

¹⁴⁷ DUARA, *supra* note 29, at 22. See also, ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISMS SINCE 1780* 108 (1990); RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 172 (1955); Richard Delgado & Juan F. Perea, *Racial Templates*, 112 Mich. L. Rev. 1133 (2014).

Southwest.”¹⁴⁸ War and annexation, however, raised the possibility of adding non-whites to the body politic. Northern Mexico was annexed nevertheless. Racist concerns were assuaged by the Congress changing the terms of the peace treaty as they pertained to rights of property and citizenship arbitrarily.¹⁴⁹ The Supreme Court was quick to validate the changes even if they involved violation of the treaty.¹⁵⁰

The Spanish-American War triggered a debate cast in terms of whether the Constitution “followed the flag” to newly acquired colonies.¹⁵¹ The war had left the United States in control of Cuba, Puerto Rico, Guam and the

¹⁴⁸ REGINALD HORSMAN, RACE AND MANIFEST DESTINY: ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 210 (1981). *See also*, LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007).

¹⁴⁹ Article X of the Treaty of Guadalupe Hidalgo, which stated that Mexican land grants would be respected as valid if they were valid under Mexican law, was deleted by the Senate following a recommendation by President Polk before ratification. Congress proceeded to establish tribunals that put into question all land claimed under grants prior to the war. *See* Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 147–152 (Christina Duffy Burnett & Burke Marshall eds., 2001). Under Article VIII of the Treaty of Guadalupe Hidalgo, Mexicans in the annexed territories had the right to remain in the United States and either by election within one year or by continued residence within the United States, they “shall be considered to have elected to become citizens of the United States.” Article IX in the original draft provided that those Mexicans who become United States citizens “shall be incorporated into the Union of the United States, and admitted *as soon as possible*, according to the principles of the Federal Constitution, to the enjoyment of all rights of citizens of the United States.” The Senate modified this article and the ratified version read: “The Mexicans . . . shall be incorporated into the Union of the United States and be admitted, *at the proper time (to be judged of by the Congress of the United States)* to the enjoyment of all rights of citizens.” Treaty of Guadalupe Hidalgo, U.S.-Mexico, art. VIII, IX, Feb. 2, 1848.

¹⁵⁰ The Supreme Court validated Congress’s establishment of land commissions even if it conflicted with the Treaty. *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889).

¹⁵¹ Christina Duffy Burnett and Burke Marshall, *Between the Foreign and the Domestic: The doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 148, at 2.

Philippines.¹⁵² Article IX of the Treaty of Paris, which concluded the war, provided that “[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”¹⁵³ Legal scholars were so preoccupied with the status of newly-incorporated territories and peoples that five articles in the Harvard Law Review between 1898 and 1899 explored different aspects of the issue whether the phrase “United States” included newly acquired territories.¹⁵⁴

Finally, the Insular Cases¹⁵⁵ resolved the question and in the process “helped shape national identity”¹⁵⁶ of the United States. The Supreme Court

¹⁵² See generally, DAVID TRASK, *THE WAR WITH SPAIN IN 1998* (1981); JULIUS PRATT, *EXPANSIONISTS OF 1898: THE ACQUISITION OF HAWAII AND THE SPANISH ISLANDS* (1959).

¹⁵³ Treaty of Peace Between the United States and the Kingdom of Spain, 30 Statutes at Large 1754 (1899).

¹⁵⁴ See generally Carmen F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV L. REV. 291 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territories*, 12 HARV L. REV. 393 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV L. REV. 365 (1899); James Bradlet Thayer, *Our New Possessions*, 12 HARV L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of our New Possessions – A Third View*, 13 HARV. L. REV. 155 (1899). For a perceptive analysis of these articles, see Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747 (1999).

¹⁵⁵ The name Insular Cases was originally given to a group of nine decisions rendered in 1901: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States* 182 U.S. 222 (1901) [Dooley I]; *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico Steamship Company*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901) [Dooley II]; *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). The designation was later extended to another set of cases decided between 1903 and 1922: *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1901); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham* 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). For a detailed and perceptive analysis of these cases, see Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REVISTA

devised a new theory and a new legal and political category in constitutional discourse: the theory of incorporation and the category of unincorporated territory. According to the Court, Congress enjoys “plenary powers”¹⁵⁷ over such territories and “unincorporated territories” that belong to, but are not part of, the United States.¹⁵⁸ The doctrine gave enormous flexibility to the political branches of government to exert direct rule over lands and peoples without the difficulties of dealing with formally sovereign foreign states and without having to admit colonized people into the American federation. Insular Cases delineated an identity for the United States that could not be extended to the colonized who were deemed “utterly unfit for American citizenship,” and incapable of assuming “the rights which peculiarly belong to the citizen of the United States.”¹⁵⁹ Given

JURIDICA UNIVERSIDAD DE PUERTO RICO 225 (1996); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

¹⁵⁶ Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, in 8 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 226 (Stanley N. Katz ed. 1993).

¹⁵⁷ Plenary power classically has meant absolute and unbridled power. While in 1901, the Court held that such power was restricted by “fundamental limitations in favor of personal rights,” *Downes*, 182 U.S. at 268, Justice Harlan clarified the matter later by holding that the relationship between an unincorporated territory and the United States was not the same as that between a state and the United States. The government of the state does not derive its powers from the United States, while the government of a territory owes its existence wholly to the United States. Therefore, “[t]he jurisdiction and authority of the United States over the territory and its inhabitants, for all legitimate purposes of government is paramount.” *Grafton*, 206 U.S. at 354. The power to acquire territory and to govern its population without its consent and without constitutional protection of rights was variously read by different Insular Cases as emanating from the nation’s inherent right to acquire territory, the Territorial Clause of the Constitution, the treaty making power, and the power to conduct and declare war.

¹⁵⁸ The Court did not expressly expound the doctrine of incorporation in the cases decided in 1901. However, in *Downes*, Justice Brown, writing for the majority described Puerto Rico as “a territory appurtenant and belonging to the United States, but not a part of the United States” *Downes*, 182 U.S. at 287. Justice White had used the term incorporated in *Downes* and in 1904 the Court expressly adopted the incorporation doctrine. *Dorr*, 195 U.S. at 138.

¹⁵⁹ *Id.* at 311, 324.

that the colonized were different in “race, habit, laws and custom,” instead of constitutional guarantees they had to rely on “certain principles of natural justice inherent in the Anglo-Saxon character.”¹⁶⁰

Commentators find the doctrines fashioned by the Insular Cases “tinted with an imperial vision of power,” and seek their demise as they are “untenable in the supposed age of postcolonialism, of respect for self-determination and the generalized appreciation for democratic values.”¹⁶¹ However, nearly a hundred years later, the doctrine of unincorporated territory as a category of domination and justification of colonial rule remains alive.¹⁶² The cases have been used as justification for extra-constitutional conduct of the government in other sovereign states, thus extending the juridical implications of the doctrine espoused by those cases beyond the United States-unincorporated territory relations.¹⁶³ The doctrine

¹⁶⁰ *Id.* at 280, 282.

¹⁶¹ Efrén Rivera Ramos, *Deconstructing Colonialism: The “Unincorporated Territory” as a Category of Domination*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 148, at 113.

¹⁶² In 1978 and 1980 respectively, the US Supreme Court relied on the Insular Cases to hold that Congress could rightfully exclude Puerto Rico from applicability of social security and welfare programs or place limits not applicable to the several states on the amounts of assistance extended to residents of the islands. *See generally* *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980). In 1993 a federal circuit court of appeals concluded that, as pertains to Puerto Rico, “Congress continues to be the *ultimate source of power*.” *United States v. Sanchez*, 992 F.2d 1143, 1152 (11th Cir. 1993). In 1998 a district court held that “the constitution and laws of Puerto Rico cannot limit the plenary power of Congress.” *Popular Democratic Party v. Commonwealth of Puerto Rico*, 24 F.Supp.2d 184, 195 (D.P.R. 1998). In 1998 the US Senate adopted a resolution stating that “[t]he political status of Puerto Rico can be determined only by the Congress of the United States.” S.Res. 279, 105th Cong. (1998).

¹⁶³ In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), Chief Justice Rehnquist recalled “this Court’s decision in the Insular Cases, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power,” and stated that “certainly, it is not open to us in light of the Insular Cases to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.” *Id.* at 268–69. Justice Brennan suggested in his dissent that the Court’s decision had created a situation in which foreign nationals would be subject to US criminal laws without the most fundamental protections afforded by the

of unincorporated territory can be seen as yet another deployment of the engulfment-exception-subordination matrix of the modern global.

E. Colonialism and the Genealogy of Liberal Human Rights

International human rights discourse is designated “the world’s first universal ideology,”¹⁶⁴ supposedly moving along “a trajectory . . . to global humanity.”¹⁶⁵ Closer examination, however, shows this discourse to be a “globalized Western localism,” resting on “a well-known set of presuppositions, all of which are distinctly Western,” and often “appropriated by regulatory agendas.”¹⁶⁶ International human rights discourse, like modernity itself, “originated not in an exemplary identification with something beyond it but, rather, in an opposition to its antithesis, to the savage.”¹⁶⁷

The colonized and the enslaved were essential to the genealogy of modern discourse of human rights. We can trace a genealogy of human rights to the resort to Roman law and the *ius gentium* in the colonization of the Americas, that legacy being sustained in the subsequent European adoption of “natural rights.”¹⁶⁸ The inaugural assemblage of modern human rights came from Francisco de Vitoria, especially in his lectures *De Indis*.¹⁶⁹ Vitoria drew on the inclusive, universal reach of scholastic natural law which he aligned with the *ius gentium* of Roman Law: “the law of nations

constitution against actions of governmental agents that enforce such laws. *Id.* at 282 [prelude to post 9/11 laws and regulations].

¹⁶⁴ HUMAN RIGHTS, CULTURE AND CONTEXT: ANTHROPOLOGICAL PERSPECTIVES 10 (Richard A. Wilson ed. 1997).

¹⁶⁵ RONALD ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 133 (1992).

¹⁶⁶ BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 336–39 (1995).

¹⁶⁷ FITZPATRICK, MODERNISM, *supra* note 35, at 63.

¹⁶⁸ *See generally* ANTHONY PAGDEN, SPANISH IMPERIALISM AND THE POLITICAL IMAGINATION (1990).

¹⁶⁹ F. DE VITORIA, POLITICAL WRITINGS 233 (J. Lawrance trans., 1991).

(*ius gentium*) . . . either is or derives from natural law.”¹⁷⁰ For Vitoria this *ius gentium* included another category of Roman Law, the *ius inter gentes*, the law governing relations between different peoples, different nations.¹⁷¹ Here Vitoria found the opening to bring the natives of colonized Americas within the folds of the law.

For Vitoria the colonized “Indians” of “the New World” had affective abilities and subsisted within the range of the *ius gentium*, as befits the all-inclusiveness of the universal. By virtue of being human and hence possessed of reason, the Indians had *dominium*; or in other words they had a mastery of property and a mastery of rule evidenced by their modes of living in some similarity to those of the Spanish.¹⁷² These same Indians, however, were also different to the Spanish, deemed afflicted with certain undesirable behaviors which they were to overcome. These supposed defects and deficiencies were then made grounds to ensure the efficacy of imperial rule by combining these with paths to acquire “just title” and “the legitimate titles by which the barbarians could have been subjected to Christian rule.”¹⁷³ Vitoria emphasized two of these. The first emanated from a right to trade, to travel, and to dwell in the countries of the “barbarians”—a universal right extending beyond trade narrowly conceived to include intercourse and communication generally.¹⁷⁴ The second was a right to proselytize: “Christians have the right to preach and announce the Gospel in the lands of the barbarians” and to do so even against their will, conversion being “necessary for their own salvation” with the barbarians being “obliged to accept the faith” if it were adequately presented to them.¹⁷⁵ This right provided the limit where the assumed universality of a Christianized

¹⁷⁰ *Id.* at 278.

¹⁷¹ P. STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 94–95 (1999).

¹⁷² VITORIA, *supra* note 168, at 239–50.

¹⁷³ *Id.* at 252.

¹⁷⁴ *Id.* at 278–84.

¹⁷⁵ *Id.* at 271, 284–85.

ius gentium broke down. As Carl Schmitt tersely put it: “It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions.”¹⁷⁶ The “savage” found resistant to these “particular” rights of the colonizers, “it becomes lawful” for the Spaniards “to do everything necessary to the aim of war” to ensure compliance; territorial acquisition by conquest ensued even to the point of the elimination in this “just war” of those who resisted, and Spain’s imperial domination could continue with at best marginal adjustments.¹⁷⁷ So, the barbarians were concurrently included in the ambit of the law but also rendered subordinated on account of exceptions based on their deficiencies and refusal to abide by the colonizers’ rights to sojourn and proselytize. That condition of subordinated-though-included was confirmed in terms which were to become more pervasive with the emergence of imperial racisms. So, Vitoria found the barbarians included in universality of the law but ineligible of equality because they were like madmen or children, cannibalistic, sexually perverted, and resistant to “natural” rights of the colonizers.¹⁷⁸ In this schema, human rights became “the perfect instrument of empire,” of a globalized *imperium*.¹⁷⁹ Here we see incipient human rights that derive content from a “universal” natural law that is “the specific cosmic vision of a particular ethnics.”¹⁸⁰ Thus, while the Pope Alexander VI’s *Partición del Mar Oceano* inaugurated the modern global and legitimated post-discovery colonialism, Vitoria inaugurated modern discourse of international human rights by declaring the colonized native to

¹⁷⁶ SCHMITT, *supra* note 44, at 113.

¹⁷⁷ VITORIA, *supra* note 168, at 185–86, 280–83, 291–92.

¹⁷⁸ *Id.* at 207–30, 290–91; *see also* PAGDEN, *supra* note 167, at 86–91, 100–03.

¹⁷⁹ ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 59 (1990).

¹⁸⁰ A. Quijano, *Coloniality and Modernity/Rationality*, 21 CULTURAL STUD. 168, 177 (2007).

be a human being while firmly placing this being in a position of subordination within the matrix of colonialism.

Vitoria's colonial template inaugurated a shift from a Christianized to a secular *imperium*. Vitoria managed to reject various papal dictates about colonization of the Americas and the division of the world. In rejecting the authority of the head of the "universal" church in this regard, and even though the rejection was founded on the *ius gentium*, Vitoria aligned the imperial mission with the proto-nationalist Spanish empire. The claims to a national sovereignty were underlined by Vitoria's invoking Aristotle's conception of "the perfect community," such perfection involving being "complete in itself."¹⁸¹ This entailed an emerging shift from "the superiority of Christians and then [to that] of the whites."¹⁸² Vitoria's expanded scope of the category of "human" within universal *ius* would match the idea of the unity of the species in incipient modern racist discourse. That, however, sets an inescapable problem. How can unity coexist with a fundamental division and subordination within? It is the very preservation of the universalized "purity" of the species that requires division, that requires dividing the pure from the impure, the exemplar from the deviant, the normal from the abnormal. Indeed, as Foucault would add, division is somehow primary: "That is the first function of racism: to fragment, to create caesuras within the biological continuum"¹⁸³ The transition from a monotheistic Christianity to secular modernity rendered resort to transcendent determination of things impossible. Instead of a positive reference for self-identity and grounds of law and society, a negative universal reference to the colonized and racialize Other was and is established. With this negative

¹⁸¹ VITORIA, *supra* note 168, at 301.

¹⁸² W. D. Mignolo, *Preamble: The Historical Foundation of Modernity/Coloniality and the Emergence of De-colonial Thinking*, in *A COMPANION TO LATIN AMERICAN LITERATURE AND CULTURE* 13 (F. Castro-Klaren ed. 2013).

¹⁸³ MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED* 255 (R. Hurley trans. 2003).

universal reference in place, a constitutive divide marks the universal. The entity elevated in negation, the modern European, becomes what certain alterities and “others,” are not. Being purely negative while insisting on being universal, the division and exclusion are complete. What is beyond the universal can only be utterly beyond. Hence there is racism and the irreducible alterity of the relegated race. Yet that very appropriation of a universality must, as universal, also be all-inclusive. So the negative universal reference generates an antithesis but then includes that antithesis with-in itself. The now-included take on an operative part with-in the universal scheme while still being excluded from it. There is a consistency to this. While the exclusion in its completeness is an utter denial of independent being, so also is the completeness of the inclusion. To resolve, in a way, what is still for them an impossible positioning, the excluded are required in an entirely conformist way to progress, or reform, or in some other way achieve full inclusion. Here we see yet another deployment of the engulfment-exception-subordination matrix of the modern global.

The imperative of conformity by the deficient through progress and reform now formed the primary agenda of the pervasive conjunction of modern biopower and disciplinary normalization¹⁸⁴ This preoccupation of imperial modernity surfaces in the verities of “development” it mandates, the “abnormalities” it proscribes as well as the “normalization” it prescribes.¹⁸⁵ Over time, these mandates mature into the innumerable disciplinary imperatives issued as “structural adjustment,” “conditionalities,” “poverty reduction strategies,” requirements attached to trade, aid and debt relief, and programs installing the rule of law in conjunction with measures of security and counter-terrorism—the list could

¹⁸⁴ For a more detailed engagement, see REREADING FOUCAULT: ON LAW, POWER AND RIGHTS (Ben Golder ed., 2013).

¹⁸⁵ Arturo Escobar, *Discourse and Power in Development: Michel Foucault and the Relevance of his Work to the Third World*, 10 ALTERNATIVES 377, 388–89 (1984).

go on.¹⁸⁶ As with the negative universal reference of racism modern biopower, and discipline created the “abnormal,” the “anomaly,” and the deviant, to provide the formative force of the normal and the conforming.¹⁸⁷ The abnormal and such are both “interior and foreign,” subjected to “an inclusion through exclusion.”¹⁸⁸ What is more, with the negative universal reference the criteria of normality assume an untouchable positivity. They become possible and persist in themselves, there being no positive counter to challenge them, to challenge their elevated essence, except such as may be allowed by the protocols of their own formative knowledge. Subject to that intimate exception, the negative universal reference not only enables the

¹⁸⁶ These mandates, explicitly or implicitly, see societies through the binary lens of modern/traditional, this model prescribed diffusion of modern technologies, laws, and ways of life as the panacea for underdevelopment. The resulting economic policies, crafted under the watchful eyes of experts from the Global North, focused on growth of leading sectors of the economy, whose trickle-down effect was supposed to, in time, take care of lagging sectors and poverty. The capacity for effective control rather than the representative nature of the state was deemed the yardstick of an appropriate political order. See W. W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1960); CHARLES KINDLEBERGER, *ECONOMIC DEVELOPMENT* (3d. ed. 1995). For critiques of this model, see SAMIR AMIN, *UNEQUAL DEVELOPMENT* (1976); SUSAN BODENHEIMER, *THE IDEOLOGY OF DEVELOPMENTALISM: THE AMERICAN PARADIGM FOR LATIN AMERICAN STUDIES* (1971); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995). This model of development was an extension of colonial designs of social development. See VINAY GIDWANI, *CAPITAL INTERRUPTED: AGRARIAN DEVELOPMENT AND THE POLITICS OF WORK* (2008). It was in this context that the “law and development” project emerged as part of the ensemble of prescribed legal designs far removed from the culture, practices, and material needs of the vast populations of the Global South. See JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 7:2 *GLOBAL JURIST* 1 (2007), available at <http://www.bepress.com/gj/vol7/iss2/art1>; Issa G. Shivji, *Law's Empire and Empire's Lawlessness: Beyond Anglo-American Law*, 1 *J. L. SOC. JUST. & GLOBAL DEV.* (2003), available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/shivji2.rtf.

¹⁸⁷ See e.g. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 229 (1979).

¹⁸⁸ MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* xxiv (1970).

posited to persist in itself but to do so in a way that transcends and formatively draws into itself the illimitability beyond it.

Today, human rights discourse appears integral to the global imposition of neoliberal economic designs and regimes on the Global South, the zone deemed deficient in rights, by the Global North, the zone deemed replete with rights. Even critics, who nevertheless retain a utopian and universalist conception of human rights, discern in the “global human rights regime” four “sub regimes.”¹⁸⁹ Here “the European” comes first, of course, the repository of “overall strength” with a few “weaknesses.” Then follow the other three—the “inter-American,” “the African,” and “Asia and The Middle East”—where rights are seen as very weak or simply non-existent.¹⁹⁰ Human rights, both in attendant claims of universality and positioning as measures of the new standard of civilization, appear to rehearse the engulfment-exception-subordination matrix of the modern global.¹⁹¹

Universal human rights are conceptualized in opposition to excessive particularity. “Cultural absolutism” is deemed “the antithesis of human rights,” with the earlier seen as closed, status-bound, exclusionary, and static.¹⁹² This is then followed by a command for the earlier to “change” and to conform to the latter, accompanied by determination that “many aspects of culture . . . have nothing to do with human rights and can be safely preserved, even enhanced, when other rights-abusive practices are corrected.”¹⁹³ While the duty to “change” is the lot of the Global South, the right to “correct”—the right of humanitarian interference, so called—

¹⁸⁹ *Id.* at 33–34.

¹⁹⁰ *Id.*

¹⁹¹ See GONG, *supra* note 59, at 81–93; Colin Perrin, *Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples*, in LAWS OF THE POSTCOLONIAL 19 (Eve Darian-Smith & Peter Fitzpatrick eds. 1999).

¹⁹² Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 325 (1992).

¹⁹³ *Id.* at 332, 337.

implicitly belongs to the Global North. Of course, promotion of human rights cannot be left to voluntary adoptions and adaptations by the Global South. Humanitarian intervention, so called, furnishes the iron fist to accompany the hidden hand of the market and the velvet glove of the rule-of-law project.¹⁹⁴

Here human rights appear to share with globalization the tenuous bridging of global and local, homogeneity and heterogeneity, the universal and the particular, convergence and divergence.¹⁹⁵ Again, with globalization human rights share with globalization an ambivalence about the uniformity/division of zone(s) of operation: The global/universal is attended with its own quasi-universals such as the market, the economy, the culture, or the community, all endowed with a transcendent and neutral value. Claims of “world interdependence . . . there are no Others,” are accompanied by paradoxical acknowledgment of still extant “conditions of

¹⁹⁴ Humanitarian intervention has been defined as the “use of physical force within the sovereign territory of another state by other states or the United Nations for the purpose of either the protection of, or the provision of emergency aid to, the population within the territory.” Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT’L J. REFUGEE L. 4, 18 (1992). See generally Terry Nardin, *The Moral Basis of Humanitarian Intervention*, 16 ETHICS & INT’L AFF. 57 (2002); Jarat Chopra & Thomas G. Weiss, *Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT’L AFF. 95 (1992); Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT’L L. 323 (1996); NORRIE MACQUEEN, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 15–18 (2011); TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION (2007); HUMANITARIAN INTERVENTION: NOMOS XLVII (Terry Nardin & Melissa S. Williams eds. 2006); Tobias Debiel et al., *Norm-building Through the Practice of Interventionism: How the U.N. Security Council Contributed to the Emergence of the R2P*, 5 J. INTERVENTION & STATEBUILDING (SPECIAL ISSUE) 72 (2011); Jonah Eaton, *Note, An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. J. INT’L L. 765 (2011); Ruth Gordon, *Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEX. INT’L L.J. 43 (1996); Karen Engle, “*Calling in The Troops*”: *The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 205–06 (2007).

¹⁹⁵ RONALD ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 11, 112 (1992).

grossly uneven development.”¹⁹⁶ Resolution of the paradox is sought in constructs of evolution, growth, progress, development—the canonical scripts of the modern global where the today of the Global North becomes the tomorrow of the Global South. Again, foreclosed are agency, initiative, imagination, and alternatives of the Global South. Not surprisingly, then, the “white man’s burden” and the “civilizing mission” stand resurrected, most pointedly in the “rule of law project” with attendant harmonization, transplantation, and liberalization of laws with an occidental orientation.¹⁹⁷ The unabashed aim here is “to reform the legal system [in countries and regions of the Global South] to make it more like those in the core countries.”¹⁹⁸ Of course, this project comes with an insistence of a “depoliticized origin” and an “apolitical character.”¹⁹⁹ Presumably, such origin and character is evidenced by, for example, the Peruvian Constitution of 1993, which embraces the free market and foreign investment, and limits public welfare and state economic activity.²⁰⁰

In the general frame of human rights discourse, then, the “human” and the Global North remain coterminous. Biological evolution and culture are refracted through the racist prism of History—“The rise of the West is an event not just in history but also in human evolution.”²⁰¹ In this schema, the Global South must emulate but can never become the Global North. In this

¹⁹⁶ Anthony D. King, *The Times and Spaces of Modernity (or Who Needs Post-modernism?)*, in *GLOBAL MODERNITIES* 108, 114 (Mike Featherstone et. al. eds. 1995).

¹⁹⁷ See, e.g., *GLOBAL LAW WITHOUT THE STATE* (Gunther Teubner ed. 1997); Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, XLV *THE AM. J. COMP. L.* 149 (1997); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, in *LAWS OF THE POSTCOLONIAL* 145 (Eve Darian-Smith and Peter Fitzpatrick eds. 1999).

¹⁹⁸ David M. Trubek, et. al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. L. REV.* 407, 481–82 (1994).

¹⁹⁹ Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT THE STATE* 21–22 (Gunther Teubner ed. 1997).

²⁰⁰ *CONSTITUCIÓN POLÍTICA DEL PERU [CONSTITUTION]* Dec. 29, 1993.

²⁰¹ WADE, *supra* note 18.

reading, human rights are but a chapter in the autobiography of Europe that continues to masquerade as universal history. The other stands engulfed in universality, but with alterity making an exception must stand apart and subordinated.

V. MODERN GLOBAL TODAY: THE CHALLENGE OF NEOLIBERAL GLOBALIZATION

In the imperial grammar of the modern global, the more things change the more they remain the same. Centuries ago, Vitoria had insisted that the colonized native be receptive to sojourn, trade and proselytization by the colonizer to avoid “just war” and extermination by the latter. Today, neoliberal globalization backed by force insists that the Global South be receptive to free trade designs of the WTO and the narrow first-generation package of human rights to avoid humanitarian intervention, so called. Primitive accumulation in the post-discovery Americas inaugurated capitalism as a global system. Today, neoliberal globalization siphons value from the Global South to the Global North, ever increasing the gulf between the rich and the poor and conjuring ever-new structures of economic subordination and exploitation.

A. Neoliberalism

Since the late 1970s, a neoliberal counterrevolution has been afoot on a global scale.²⁰² To secure unfettered rights to private property and profits, it expands and deepens the logic of the market, collapses the distinctions between culture and economy, undermines state sovereignty and national

²⁰² See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009); Costas Lapavistas, *Mainstream Economics in the Neoliberal Era*, in *NEOLIBERALISM: A CRITICAL READER*, *supra* note 80, at 30–40; Gerard Dumenit & Dominique Levy, *The Neoliberal (Counter-) Revolution*, in *NEOLIBERALISM: A CRITICAL READER*, *supra* note 80, at 9; William I. Robinson & Jerry Harris, *Towards a Global Ruling Class: Globalization and the Transnational Capitalist Class*, 64 *SCIENCE & SOCIETY* 11 (2000).

autonomy, and links local and global political economies to facilitate transnational accumulation of capital.²⁰³ Through new regimes of trade, finance, and property rights, a state's sovereignty transfers to international institutions and dominant states.²⁰⁴ The result is acceleration of accumulation by dispossession, enlargement of the surplus army of labor, and expansion of the informal sectors of economies.²⁰⁵ Rural and urban areas are sutured in new networks to accelerate siphoning of value.²⁰⁶ Every year since 2007, 10 million hectares of arable land pass from public to

²⁰³ See Boaventura de Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 J. LAW & SOC'Y 297 (1987); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); WILLIAM I. ROBINSON, A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD (2004); HISTORICAL MATERIALISM AND GLOBALIZATION (M. Rupert and H. Smith eds. 2002).

²⁰⁴ See B. S. Chimni, *International Institutions Today: An Imperial State in the Making*, 15 EUR. J. INT'L L. 1 (2004); Nico Kirsch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 161 (M. Byers and G. Nolte eds. 2003); Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 957 (2002); J. BRAITHWAITE & P. DRAHOS, GLOBAL BUSINESS REGULATION 475-77 (2000); B.S. Chimni, *WTO and Environment: The Legitimization of Unilateral Trade Sanctions*, 37.2 ECON. & POL. WKLY. 133 (Jan. 12, 2002); B. S. Chimni, *India and the Ongoing Review of the WTO Dispute Settlement System: A Perspective*, 34 ECON. & POL. WKLY. 264 (Jan. 30, 1999). Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 RECUEIL DES COURS 272, 297, 312 (1999); H. Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 NETH. INT'L L. REV. 143 (2001); M. Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L. J. 399 (2002).

²⁰⁵ See David Harvey, *Neoliberalism as Creative Destruction*, 610:1 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (2007); DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND MARKETPLACE THAT IS REMAKING THE MODERN WORLD (1998).

²⁰⁶ See P. J. TAYLOR, WORLD CITY NETWORK: A GLOBAL URBAN ANALYSIS (2004); J. Friedman, *Where We Stand: A Decade of World City Research*, in WORLD CITIES IN A WORLD-SYSTEM 21-47 (P. J. Knox and P. J. Taylor eds. 1996); Julie Skurski & Fernando Coronil, *Country and City in a Post-colonial Landscape: Double Discourse and the Geo-Politics of Truth in Latin America*, in VIEW FROM THE BORDER: ESSAYS IN HONOR OF RAYMOND WILLIAMS 231, 233 (Dennis Dworkin & Leslie Romnan eds. 1992).

private hands while 925 million people risk starvation in the face of increasing food prices.²⁰⁷ Deeper penetration of market forces accelerates migration of uprooted rural farmers to urban areas.²⁰⁸ With the state rolled back, privatization becomes “the cutting edge of accumulation by dispossession.”²⁰⁹ As flexible production shrinks regulated formal economies, informal shadow economies become the only source of livelihood for the urban poor. Today, the informal sector engages two-fifths of the economically active population of the Global South.²¹⁰ This informal economy cultivates “myriad secret liaisons with outsourced multinational production systems.”²¹¹

Neoliberalism is an ensemble of interconnected ideas and practices. It rests on a theory of capitalist market fundamentalism—markets are optimal and self-regulating, and if allowed to function without restraint, they optimally serve all economic needs, efficiently utilize all resources, and generate full employment for everyone.²¹² It mandates tight fiscal and monetary policies, unbridled private property rights, unencumbered

²⁰⁷ STEFANO LIBERTI, *LAND GRABBING: JOURNEYS IN THE NEW COLONIALISM* xi, 1 (2014).

²⁰⁸ See LORI ANN THRUPP ET. AL., *BITTERSWEET HARVESTS FOR GLOBAL SUPERMARKETS: CHALLENGES IN LATIN AMERICA’S AGRICULTURAL EXPORT BOOM* (1995); JAN BREMAN, *FOOTLOOSE LABOR: WORKING IN INDIA’S INFORMAL ECONOMY* (2008); JAN BREMAN, *WAGE HUNTERS AND GATHERERS: SEARCH FOR WORK IN THE URBAN AND RURAL ECONOMY OF SOUTH GUJARAT* (1994).

²⁰⁹ HARVEY, *supra* note 77, at 157.

²¹⁰ U.N. HUMAN SETTLEMENTS PROGRAM [UN-HABITAT], *THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS 103-04* (2003); JAN BREMAN, *THE LABORING POOR: PATTERNS OF EXPLOITATION, SUBORDINATION, AND EXCLUSION* 174 (2003).

²¹¹ Mike Davis, *The Urbanization of Empire: Megacities and the Laws of Chaos*, 81:22 *SOC. TEXT* 9, 11 (2004).

²¹² See generally HARVEY, *supra* note 201; ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009); Lapavistas, *supra* note 201, at 30–40; Dumenit & Levy, *supra* note 201; W. I. Robinson and J. Harris, *Towards a Global Ruling Class: Globalization and the Transnational Capitalist Class*, 64 *SCI. & SOC.* 11 (2000); DAVID HARVEY, *THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM* (2010).

markets, and free trade.²¹³ It is an ideology of the market and private interests as opposed to state intervention to safeguard collective interests.²¹⁴ It envisages the state limited to minimal executive and juridical functions necessary to secure private property rights and to support freely functioning markets.²¹⁵ By extension, neoliberalism deems globalization of free markets the best way to extend these benefits to the whole world.²¹⁶

The neoliberal project aims to unfold a new social order across the globe to reverse the setbacks that the economic power and political hegemony of the wealth-owning classes had suffered on account of Keynesian welfare in the West, socialism in Eastern Europe, and nationalism in the Global South.²¹⁷ Neoliberalism makes increasing recourse to the law to displace social welfare systems through liberalization, deregulation, and privatization, and uses the discipline of expanded markets to remove barriers to accumulation that earlier democratic gains had achieved.²¹⁸ To secure unfettered rights to private property and profits, it expands and deepens the logic of the market, collapses the distinctions between culture and economy, undermines state sovereignty and national autonomy, and links local and global political economies to facilitate transnational

²¹³ See Palley, *supra* note 80, at 20–29; Anwar Sheikh, *The Economic Mythology of Neoliberalism*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 80, at 41–49.

²¹⁴ Harvey, *supra* note 204, at 22.

²¹⁵ See Simon Clarke, *The Neoliberal Theory of Society*, in NEOLIBERALISM: A CRITICAL READER, *supra* note 80 at 50–59; Susanne Mac Gregor, *The Welfare State and Neoliberalism*, in *id.* at 142–48.

²¹⁶ See generally HO-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2008); HO-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002); Matthew Sparke, *American Empire and Globalization: Postcolonial Speculations on Neocolonial Enframing*, 24:3 SINGAPORE J. TROPICAL GEOGRAPHY 373 (2003).

²¹⁷ See DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998).

²¹⁸ For articulation of the case for neoliberal global political economy and related accounts of the law, see, R. KEOHANE, *AFTER HEGEMONY* (1984); K. Abbot, et. al., *The Concept of Legalization*, 54:3 INT'L ORG. 401 (2000).

accumulation of capital.²¹⁹ Through new regimes of trade, finance, and property rights, sovereignty of states transfers to international institutions and dominant states.²²⁰ In the service of accumulation by dispossession, the iron fist of the state remains in concert with the hidden hand of the market.

²¹⁹ See Santos, *supra* note 202; A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); W. ROBINSON, A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD (2004); HISTORICAL MATERIALISM AND GLOBALIZATION (M. Rupert & H. Smith eds. 2002).

²²⁰ Carlos Aguir De Medeiros, I, 55 NEW LEFT REV. 109 (2009). See also B. S. Chimni, *International Institutions Today: An Imperial State in the Making*, 15 EUROPEAN J. INT'L L. 1 (2004). The exponential rise of extra-territorial jurisdiction in unilateral and multilateral forms has become an avenue to govern matters beyond international territorial boundaries by reaching deeply inside domestic jurisdiction of states and enforcing the neoliberal agenda upon reluctant states in the Global South. The United States, for example, increasingly uses certification mechanisms "to create laws for other states and to monitor its observance, while the United States itself remains unbound and unmonitored. N. Kirsch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 161 (M. Byers and G. Nolte eds. 2003). This combines with "substantivism" in US courts "a choice-of-law methodology whose goal is to select the better law in any given case." Buxbaum, *supra* note 203, at 932, 957. This results in "over-application of US law" in international disputes, and acts "as a lever of forcing convergence . . . outside the political process that generally structures the harmonization movement." *Id.* at 966, 972. See also BRAITHWAITE & DRAHOS, *supra* note 203, at 475–7 (showing how this has impacted the fields of banking, securities regulation, civil aviation, and cyber law). The multilateral form is exemplified by the WTO's compulsory jurisdiction over disputes that lie within its extensive regimes, which opens the door for unilateral prescriptions and measures related to trade and environmental policies of states in the global South. See, e.g., United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of DSU by Malaysia WT/DS58/AB/RW, Oct. 22, 2001: report of the Appellate Body. See also Chimni, *WTO and Environment*, *supra* note 203, at 133; Chimni, *India and the Ongoing Review of the WTO Dispute Settlement System*, *supra* note 203, at 264. Increasingly, courts of the Global South are deemed unsuitable for adjudicating claims against multinational corporations, thus creating "new national frontiers of responsibility for the conduct of global capital." Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 RECUEIL DES COURS 297, 312 (1999). See also H. Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 NETH. INT'L L. REV. 143 (2001); M. Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer*, 41 WASHBURN L. J. 399 (2002).

Indeed, the ubiquitous “low-intensity conflicts” across the Global South appear necessary to create a good investment climate for global capital.²²¹

In the neoliberal era “[t]here’s a lot of money in poverty, and a few Nobel Prizes too.”²²² Here philanthropic foundations of global capital lead the way, with elite universities of the Global North not far behind.²²³ The approach to poverty is framed by an insidious companion of neoliberal privatization—“NGO-ization of Everything.”²²⁴ Creating the illusion of a “Third Way,”²²⁵ ostensibly at a remove from the public and private sectors, corporate and foundation-endowed NGOs allow global capital to even “buy[] into resistance movements, literally as shareholders buy shares in companies, and then try to control them from within.”²²⁶ Partial to technocratic responses to problems, NGO-ization elides historical, structural, and political causes of poverty. The multiple manifestations of poverty are discrete problems hermetically sealed into their own silos, to be managed by supposedly apolitical technocrats. Fragmentation of solidarities between the subordinated within various manifestations of poverty is a direct result. All the while, ideology, discourses, and processes of NGO-ization facilitate abdication by and immunity to the state about matters related to poverty. This abdication and immunity does not, however, entail withering away of the state.

²²¹ See generally ARUNDHATI ROY, *CAPITALISM: A GHOST STORY* 13 (2014).

²²² *Id.* at 27.

²²³ For a detailed study of private foundations in setting the agenda for public policies, see JOAN ROELOFS, *FOUNDATIONS AND PUBLIC POLICY: THE MASK OF PLURALISM* (2003); GERALD COLBY, *THY WILL BE DONE: CONQUEST OF THE AMAZON, NELSON ROCKEFELLER AND THE EVANGELISM IN THE AGE OF OIL* (1996). For decisive involvement of university-based scholars in choreographing the turn to neoliberalism in the Global South and Eastern Europe, see JUAN GABRIEL VALDES, *PINOCHET’S ECONOMISTS: THE CHICAGO SCHOOL OF ECONOMICS IN CHILE* (1995); JAPHY WILSON, *JEFFREY SACHS: THE STRANGE CASE OF DR. SHOCK AND MR. AID* (2014).

²²⁴ Roy, *supra* note 220, at 33.

²²⁵ See Joan Roelofs, *The Third Sector as a Protective Layer for Capitalism*, 47 *Monthly Rev.* 16 (1995).

²²⁶ Roy, *supra* note 220, at 33.

Neoliberalism does not displace the state as much as it reformulates it and restructures its options.²²⁷ The neoliberal project is to turn the “nation-state” into a “market-state,”²²⁸ one with the primary agenda of facilitating global capital accumulation unburdened by any legal regulations aimed at assuring the welfare of citizens. Social formations in the Global South, situated in an asymmetrical relationship with global capitalism, are a particular target of this project. The neoliberal regimes, with their bedrock principles of private property rights and free trade, are a coercive mechanism to get states in the Global South to adopt neoliberal economic and social policy frames conducive to global capital.²²⁹ The enabling mechanism is “[t]he extension of the normative force of international standards by the device of conditionality.”²³⁰ These regimes advance particular understandings of development and poverty that “disregard the social context of provision, the lived experiences of the poor and dismiss

²²⁷ Many perceptive observers reject the “state shrinking and declining” argument as political posturing of neoliberals. In particular, they point to the expansion of the coercive apparatuses of the state and the shift of the state from a managerial mode befitting the Fordist era towards a neoliberal entrepreneurial mode. See, e.g., David Harvey, *From Managerialism to Entrepreneurialism: Transformation in Urban Governance in Late Capitalism*, 71 (B) GEOGRAFISKA ANNALER 3 (1989).

²²⁸ Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, in INTERNATIONAL LAW ON THE LEFT; RE-EXAMINING MARXIST LEGACIES 169, 170 (Susan Marks, ed. 2008).

²²⁹ These regimes include the WTO multilateral agreements including the Agreement on Trade Related Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), the Agreement establishing the Multilateral Investment Guarantee Agency (MIGA), and bilateral investment protection treaties (BITS). Together these regimes provide global capital ease of entry and investment, protection from national performance requirements, protection of expansive intellectual property rights, generous compensation in case of expropriation, insurance against non-economic risks, and mechanisms to avoid national laws and dispute resolution fora.

²³⁰ Vaughan Lowe, *The Politics of Law-making: Are the Methods and Character of Norm Creating Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 212 (M. Byers ed. 2000).

and/or reinforce the way in which deprivations are constituted.²³¹ The mandate is to privatize public assets, roll back social services, and allow unbridled mobility of capital.²³² Now “[s]trait-jacketed within the global logic of capital and market and the global regime of property rights,” states in the Global South “can no longer act as development states and engage in management of poverty on their own.”²³³ Instead, non-state actors representing interests of global capital play an active role in designing legal orders that circumscribe state sovereignty and autonomy.²³⁴ Mandates of privatization make education, health, infrastructure, utilities, housing, and a range of state enterprises available for private appropriation.²³⁵ By its insistence on the rollback of the state, privatization becomes “the cutting edge of accumulation by dispossession.”²³⁶

B. Globalization

The historical record of the modern global does not support the claim that “[t]he global economy is something that has developed only in very recent

²³¹ R. Higgott & H. Weber, *GATS in Context: Development. An Evolving Lex Marcatoria and the Doha Agenda*, 12:3 REV. INT’L POL. ECON. 435, 442 (2005).

²³² For a detailed account of how the interests of the Global South are jeopardized by concentration of finance capital and monetary regimes of the IMF, see JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENT* (2002).

²³³ SANYAL, *supra* note 82, at 77.

²³⁴ See generally GLOBAL LAW WITHOUT A STATE (G. Teubner ed. 1997). The exponential expansion of international commercial arbitration has created a space for private justice to serve global capital at the expense of the state. See BUXBAUM, *supra* note 203, at 938–39.

²³⁵ *Id.* at 148–49, 158–59. See also David A. McDonald, *Environmental Racism and Neoliberal Disorder in South Africa*, in THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 255 (Robert D. Bulland ed. 2005); Daniel R. Faber & Deborah McCarthy, *Neo-Liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice*, in JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 38 (Julian Agyeman, et. al eds. 2003).

²³⁶ HARVEY, THE NEW IMPERIALISM, *supra* note 70, at 157.

times.”²³⁷ If globalization means an economy in which each part of the world is linked by markets sharing close to real-time information, then globalization began not in the 1970s but in the nineteenth century with the “Victorian internet”²³⁸—a system of submarine telegraph cables and the pantelegraph.²³⁹ Long-distance trading and credit networks existed well before the European’s voyages of discovery.²⁴⁰ Colonial intersections of law and geography inscribed new terms of engagement for both these existing networks and new networks that were fashioned in the colonial era.

For example, for India, engagement with the “beyond” was not new. Intercontinental migrations, conflicts, and trade across the Indian Ocean and the Mediterranean and South China Sea zones predated Vasco de Gama’s landing in Calicut by centuries.²⁴¹ Colonialism and its aftermath did not change the engagement with the “beyond,” but rather the terms of this engagement. It reworked trade routes and geographies of power, turning

²³⁷ KENICHI OHMAE, *THE NEXT GLOBAL STAGE: CHALLENGES AND OPPORTUNITIES IN OUR BORDERLESS WORLD* 59 (2005). Ohmae dates the birth of the global economy rather precisely, 1985. *Id.* at 28.

²³⁸ *See generally* TOM STANDAGE, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY’S ON-LINE PIONEERS* (1998).

²³⁹ ANDREW HEROD, *GEOGRAPHIES OF GLOBALIZATION: A CRITICAL INTRODUCTION* 70 (2009); PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* 9–10 (1996).

²⁴⁰ *See, e.g.*, Felix A. Chami, *Roman Beads From the Rufiji Delta, Tanzania: First Incontrovertible Archaeological Link With the Periplus*, 40:2 *CURRENT ANTHROPOLOGY* 237 (1999); HARAPRASAD RAY, *TRADE AND DIPLOMACY IN INDIA-CHINA RELATIONS: A STUDY OF BENGAL DURING THE FIFTEENTH CENTURY* (1993); Wang Gungwu, *Merchants Without Empire: The Hokkien Sojourning Communities*, in *THE RISE OF MERCHANT EMPIRES: LONG-DISTANCE TRADE IN THE EARLY MODERN WORLD 1350-1750* 400–21 (J. D. Tracy ed. 1990); JOSEPH HARRIS, *THE AFRICAN PRESENCE IN ASIA: CONSEQUENCES OF THE EAST AFRICAN SLAVE TRADE* (1971); CLAUDE MARKOVITS, *THE GLOBAL WORLD OF INDIAN MERCHANTS, 1750–1947: TRADERS OF SIND FROM BUKHARA TO PANAMA* (2000).

²⁴¹ *See, e.g.*, SANJAY SUBRAHMANYAM, *EXPLORATIONS IN CONNECTED HISTORY: MUGHALS AND FRANKS* (2005); SANJAY SUBRAHMANYAM, *EXPLORATIONS IN CONNECTED HISTORIES: FROM THE TAGUS TO THE GANGES* (2005); HOLDEN FURBER ET. AL., *MARITIME INDIA* (Sanjay Subrahmanyam ed., 2004).

India into “the pivot of empire.”²⁴² People had traded and interacted, prompted by needs and desires dictated by their respective grounded contexts. Those situated “beyond” were alternatively deemed equal, lesser, strange, or perhaps even savage. But no one claimed the mandate to change the other; there was no burden to rescue, reform, and civilize. Insertion of the colony in the geopolitics and geoeconomy of capitalism transformed the terms of engagement in foundational ways. Henceforth, interactions with the “beyond” were mandated and orchestrated by needs and desires emanating from oceans away. Who will interact with whom, when, and how became the project of elaborate legal regimes designed and enforced by colonial powers. Now, any gains from the interactions were not to accrue to the colony but were to be siphoned off. Systems of production and attendant social relations were transformed. Global accumulation coordinated different modes of production to make extraction “efficient.”²⁴³ Commoditization of goods and labor was grafted onto non-capitalist modes and relations of production. What was to be produced, by whom, and under what regime of ownership were regulated in great detail. Law and power intermeshed unavoidably in this new scheme of things and provided the essential fuel for global accumulation by dispossession. Colonized Latin America was the first testing ground of this phenomenon.

The latest iteration of modernity’s suturing of law with global space is today’s master narrative: Globalization—a newly fashioned ensemble of norms, practices, and discourses to facilitate the geopolitics and geoeconomy of late capitalism.²⁴⁴ Mainstream discourse about globalization

²⁴² DURGA DAS, *INDIA: FROM CURZEN TO NEHRU AND AFTER* 44 (1969) (quoting Lord Curzon). *See also* THOMAS R. METCALF, *IMPERIAL CONNECTIONS: INDIA IN THE INDIAN OCEAN ARENA 1860–1920* (2007).

²⁴³ *See* WOLPE, *supra* note 75; AMIN, *ACCUMULATION*, *supra* note 75; WALLERSTEIN, *supra* note 69.

²⁴⁴ *See generally* SAMIR AMIN, *CAPITALISM IN THE AGE OF GLOBALIZATION: THE MANAGEMENT OF CONTEMPORARY SOCIETY* (2014).

represents the world as a seamless integrated whole,²⁴⁵ and globalization as inevitable.²⁴⁶ Globalization, like civilization, embodies modernity's claims about the direction and destination of history. The promise of progress and of overcoming space with time remains in place. However, global power relations remain embedded in the ensemble of globalization. Commitment to and participation in the global political economy is deemed the measure of a state's fitness for membership in the global community. The end of the Cold War is seen as capitalism's final victory over alternative models of collective life, thus signaling an "end of history."²⁴⁷ The purported universality of capitalism, however, yields to its historical particularity in the claim that "the story of western civilization is now the story of mankind, its influence so diffused that old oppositions and antitheses are now meaningless."²⁴⁸ The geo-legal space of globalization remains hierarchically organized and internally differentiated in that relations between particular spaces are shot through with power inequalities and unevenness. In this context "the global village . . . is the fantasy of the colonizer, not the colonized."²⁴⁹ All this points to the apt summation that globalization of the neoliberal era is a "barely reworked variant" of imperialism.²⁵⁰

We have to move away from conflation of structural tendency of capital towards homogenization with its actual historical realization. Rule of capital is not natural, unitary, or impelled by any unilinear logic. Rather, it adopts

²⁴⁵ See, e.g., KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (1990). For a critical reading of the discourse of globalization, see A. Leyshon, *True Stories? Global Dreams, Global Nightmares, and Writing Globalization*, in *GEOGRAPHIES OF ECONOMIES* 133–46 (R. Lee & J. Wills eds. 1997).

²⁴⁶ LOWELL BRYAN & DIANA FARRELL, *MARKET UNBOUND: UNLEASHING GLOBAL CAPITALISM* 160 (1996).

²⁴⁷ See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

²⁴⁸ JOHN ROBERTS, *THE TRIUMPH OF THE WEST* 431 (1985).

²⁴⁹ L. Spigel, *The Suburban Home Companion: Television and the Neighborhood Idea in Postwar America*, in *SEXUALITY & SPACE* 217 (B. Colomina ed. 1992).

²⁵⁰ Etienne Balibar, *Racism and Nationalism*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 25 (Etienne Balibar & Immanuel Wallerstein, eds. 1991).

contradictory historical forms and generates multiple space-times. It is this multiplicity and unevenness that has generated today's crises and conflicts, presenting new challenges to intersections of law and geography at a global scale.²⁵¹ Global financial markets, the cutting edge of late capitalism, face a meltdown of grounds secured by deregulation. Fossil-fuel-driven industrialization reaches the limits of accommodation that environment can offer. Victims of neoliberal restructuring of "national" economies seek alternative social compacts. Those subjected to globally differentiated sovereignties demand autonomy and self-determination. The post-colonial failures to reconcile indivisible sovereignty with demographic heterogeneity reach the breaking point. Refugees, migrant workers, "internally displaced persons," and trafficked persons swell the ranks of the "constitutionally unclaimed."²⁵²

Vigilance is in order in view of growing "cultural racism," wherein "biological hierarchy" may seem to be displaced by "new cultural definitions of 'race' which are just as intractable."²⁵³ At large "new rhetorics of exclusion" founded in a "cultural fundamentalism," that see the Global North "swamped]" by "people with a different culture."²⁵⁴ For example, in Europe, the canonical bastion of liberal cosmopolitanism, where ostensibly "the first truly post-modern international political form,"

²⁵¹ For detailed analysis of the causes of the Great Recession and the on-going financial meltdown, see PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010); RICHARD D. WOLFF, *CAPITALISM HITS THE FAN: THE GLOBAL ECONOMIC MELTDOWN AND WHAT TO DO ABOUT IT* (2010); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

²⁵² Siba N. Grovogui, *The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality*, in *THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS* 261 (Douglas Howland & Luise White, ed. 2008).

²⁵³ PAUL GILROY, *THERE AIN'T NO BLACK IN THE UNION JACK: THE CULTURAL POLITICS OF RACE AND NATION* 60–61 (1987).

²⁵⁴ Verena Stolcke, *Talking Culture: New Boundaries, New Rhetorics of Exclusion in Europe*, 36 *CURRENT ANTHROPOLOGY* 1, 3 (1995) (quoting Margaret Thatcher).

is emerging,²⁵⁵ “a new European order . . . is coming to mean a sharper boundary between ‘European’ and ‘non-European.’”²⁵⁶ Indeed, the Maastricht Treaty brackets “asylum,” “immigration,” and “nationals of third countries” in conjunction with “combatting unauthorized immigration, residence and work . . . terrorism, unlawful drug trafficking and other serious forms of international crime.”²⁵⁷ All this at a time when there are over 214 million international migrants in the world, of whom about half were migrant workers.²⁵⁸

Popular resistance to neoliberal globalization is confronted with shrinkage of space for political action. As neoclassical economic theory masquerades as general theory of the social, lords of the universe raise the specter of “excess of democracy.”²⁵⁹ This “excess” is remedied by ever-new designs to move from government to governance and from representative to responsible government.²⁶⁰ To ensure that this “excess” does not spill over, the new imperium deploys its trump card: an accelerating state of permanent exception and war, placing an ever-increasing numbers of bodies and spaces on the other side of universality—a moral and legal no man’s land.

Exceptions, lurking in the heart of storied universal norms of governance and conflict, are brought forth to save the global imperial order. Liberal constitutional protections shrink. Racist discourses, forged on the anvil of colonialism, are recycled in the service of the resurgent Empire. Identity-

²⁵⁵ J. G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 4 INT’L ORG. 139, 169 (1993).

²⁵⁶ Shore, *supra* note 101, at 793.

²⁵⁷ Treaty on European Union (Treaty on Maastricht), Art. K. 1, Feb. 7, 1992, OJC 191 of 29.7.1992.

²⁵⁸ Kristin Surak, *Guestworkers: A Taxonomy*, 84 NEW LEFT REV. 84, 85 (2013).

²⁵⁹ Wolfgang Streeck, *The Crisis of Democratic Capitalism*, 71 NEW LEFT REV. 5, 7 (2011).

²⁶⁰ Peter Mair, *Representative Versus Responsible Government*, Max Planck Institute for the Study of Societies (Cologne, Working paper 09/8, 2009), available at <http://www.mpi-fg.de/pu/workpap/wp09-8.pdf>.

bestowing binaries fashioned in the classical age of colonialism are deployed unabashedly. Benign tropes such as “the space of imperial sovereignty . . . is smooth,”²⁶¹ and “the world is flat,”²⁶² conveniently give way to “clash of civilizations,” with the “disconnectedness” between a “functioning core” and a “non-integrating gap” designated the “ultimate enemy.”²⁶³ We are now offered a “bifurcated world . . . inhabited by Hegel’s and Fukuyama’s Last Man . . . [and] Hobbes’s First Man.”²⁶⁴ Binary geographies of danger and safety are deployed that see “bloody boundaries” between a “functioning core” and a “non-integrating gap,” with the “disconnectedness” between the two designated as the “ultimate enemy.”²⁶⁵ An inverted map of the world is unfolded to offer prescriptions for “[g]eostrategic success,” namely, “prevent collusion and maintain security dependence among the vassals, . . . keep tributaries pliant and protected, and . . . keep the barbarians from coming together.”²⁶⁶ A “new paradigm” is enunciated for a war of “uncertain duration” against “the enemies of civilization,”²⁶⁷ one that “renders obsolete [and] . . . quaint” established rules of war.²⁶⁸ Belated acknowledgment that “[t]he hidden hand

²⁶¹ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 190 (2001).

²⁶² THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2006).

²⁶³ THOMAS P. M. BARNETT, *THE PENTAGON’S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* 124 (2004).

²⁶⁴ ROBERT D. KAPLAN, *THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR* 24 (2000).

²⁶⁵ BARNETT, *supra* note 262, at 124.

²⁶⁶ ZBIGNIEW BRZEZINSKI, *THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES* 32, 40, 215 (1997).

²⁶⁷ NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA Introduction, Section 5 (2002); Stephen P. Marks, *Branding the “War on Terrorism”: Is There a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 113 (2006).

²⁶⁸ Memorandum from Alberto Gonzales, White House Counsel, for President George W. Bush (Jan. 25, 2002), *available at* <http://www.scribd.com/doc/8947254/Gonzales-Torture-Memo> (last visited Mar. 3, 2010).

of the market will never work without a hidden fist,²⁶⁹ leads to the prescription—“give war a chance.”²⁷⁰ Of course, the war has to be in the name of liberty and freedom. After all, we stood warned some time ago that “[f]reedom requires and will require far greater living space than Tyranny.”²⁷¹ Faced with this brutal response to the crisis of Empire, the global subalterns are creating new geographies of resistance against all odds.²⁷²

VI. RESISTANCE RISING: FROM POST-COLONIAL TO UN-COLONIAL

The global financial meltdown of 2008 and the ensuing great recession opened the floodgates of protest that channeled pent-up frustrations into active resistance to draconian austerity measures and containment of democracy, global capital’s response to the great recession.²⁷³ From school teachers in Chicago to pensioners in Greece, from mortgage holders in Iceland to students in Egypt, and from mine workers in South Africa to

²⁶⁹ THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 373 (Farrar, Straus, Giroux, eds. 1999).

²⁷⁰ THOMAS L. FRIEDMAN, *LONGITUDES AND ATTITUDES: EXPLORING THE WORLD AFTER SEPTEMBER 11 91* (2002).

²⁷¹ *GEOGRAPHY AND EMPIRE* 271 (Anne Godlewska & Neil Smith, eds., 1994) (quoting Henry Luce, *The American Century*, LIFE, Feb. 17, 1941, at 61–65).

²⁷² See generally Andre Singer, *Rebellion in Brazil*, 85 NEW LEFT REV. 19 (2014); Tariq Ali, *Between Past and Future*, 80 NEW LEFT REV. 61 (2013); Asef Bayat, *Revolution in Bad Times*, 80 NEW LEFT REV. 47 (2013); Kees Van Der Pijl, *Arab Revolts and Nation-State Crisis*, 70 NEW LEFT REV. 27 (2011); *GEOGRAPHIES OF RESISTANCE* (Steve Pile & Michael Keith, eds. 1997); *ENTANGLEMENTS OF POWER: GEOGRAPHIES OF DOMINATION/RESISTANCE* (Joanne P. Sharp et. al., eds. 2000); *GLOBAL FLASHPOINTS: REACTIONS TO IMPERIALISM AND NEOLIBERALISM* (Leo Panitch & Colin Leys, eds. 2007); *GLOBALIZATION AND THE POLITICS OF RESISTANCE* (Barry K. Gills, ed. 2000); *NEW SOCIAL MOVEMENTS IN THE SOUTH: EMPOWERING THE PEOPLE* (Ponna Wignaraja, ed. 1993); JEREMY BRECHER, TIM COSTELLO & BRENDAN SMITH, *GLOBALIZATION FROM BELOW: THE POWER OF SOLIDARITY* (2000); *A MOVEMENT OF MOVEMENTS: IS ANOTHER WORLD REALLY POSSIBLE?* (Tom Mertes, ed. 2004).

²⁷³ See SAMIR AMIN, *THE IMPLOSION OF CONTEMPORARY CAPITALISM* (2013).

displaced laborers in China rose up in protest.²⁷⁴ Incessant protests spreading across the globe are the specter that haunts the global age of austerity. Who wins this round of historical struggles between the haves and the have-nots remains to be seen. The task of critical theory in general and outsider jurisprudence in particular is to conduct a clear-eyed analysis of the forces that would determine the prospects of popular movements for transformation and global justice.

In the neoliberal era, one had already witnessed ever-new forms of resistance emerge in response to ever-new forms of subordination. The rapid transformation of the urban furnishes an evocative example. Deindustrialization triggered by offshoring and flexible production often leaves in its wake “dead zones” that become “developers’ utopias” or “privatopias.”²⁷⁵ Accelerated commodification of urban space, with culture and aesthetics at a premium, disciplines the ineligible and dispossessed through a range of legal and architectural measures. These include “secure architecture,” “zero tolerance” policing, and “preventive crime control,” in the neoliberal “post-justice” city.²⁷⁶ In the midst of all this, urban groups do manage to contrive cultural, economic, and political “spaces of escape,” or “counter spaces.”²⁷⁷ Farmers markets, “alternative lifestyle” enclaves, and the “underground” economy are some examples of this phenomenon that

²⁷⁴ See W. J. T. MITCHELL, BERNARD E. HARCOURT & MICHAEL TAUSSIG, *OCCUPY: THREE INQUIRIES IN DISOBEDIENCE* (2013); NOAM CHOMSKY, *OCCUPY: REFLECTIONS ON CLASS WAR, REBELLION AND SOLIDARITY* (2013).

²⁷⁵ Gordon Macleod, Mike Raco & Kevin Ward, *Negotiating the Contemporary City: Introduction*, 40:9 *URB. STUD.* 1655, 1666 (2003) (internal citations omitted). See also Henry McGee, *Seattle’s Central District: 1990 -2006: Integration of Displacement?*, 39 *URB. LAW.* 167 (2007).

²⁷⁶ See D. Mitchell, *Postmodern Geographical Praxis? The Postmodern Impulse and the War Against Homeless People in the United States*, in *POSTMODERN GEOGRAPHY: THEORY AND PRAXIS* 57 (C. Minca, ed. 2001); D. Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-homeless Laws in the United States*, 29 *ANTIPODE* 303 (1997); J. Peck, *Mapping the Penal State*, 19 *HUM. GEOGRAPHY* 16 (2003).

²⁷⁷ MacLeod, et. al., *supra* note 274, at 1657.

engender “new identities and practices that disturb established histories.”²⁷⁸ The resistive mode of these counter spaces can and does take overt political forms as demonstrated by the anti-WTO protests in Seattle in 1999, and replicated around the world since.²⁷⁹

Theorizing resistance in the neoliberal age of the modern global is also confronted by new challenges of identifying repositories of resistive agency. Critiques of global capital, if they are to make any political headway, must have a social base. For most of the twentieth century, the industrial working class provided the mass base for this critique in the Global North. In the Global South, anti-colonial movements mobilized for national liberation and against dependent development joined suit. The neoliberal counterrevolution successfully thwarted these challenges but, in turn, created the field of possibility for the emergence of a reconstituted mass base of political resistance. Today, four distinct social forces rising from the margins of the global order furnish the possibility of a robust and successful challenge to global capital and its attendant regimes of exploitation and oppression. One, indigenous peoples, politically active above all in Andean America and India but present across the Global South, have developed international networks that add to the political weight in local contexts. Two, hundreds of millions of landless peasants, casual laborers of informal economies, and slum dwellers who constitute a major source of destabilization for global capital. Three, global dispersion of industrial production cycle and the explosive growth of contingent labor

²⁷⁸ J. Holston, *Spaces of Insurgent Citizenship*, in *CITIES AND CITIZENS* 167 (1999). See also SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* (2009); Regina Austin, “*An Honest Living*”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 *YALE L. J.* 2119 (1994); Regina Austin, “*A Nation of Thieves*”: *Securing Black People’s Right to Shop and to Sell in White America*, 1993 *UTAH L. REV.* 147 (1994).

²⁷⁹ See e.g., NAOMI KLEIN, *NO LOGO* (2000); *GLOBALIZATION AND THE POLITICS OF RESISTANCE* (Barry K. Gills, ed. 2001); DAVID FEATHERSTONE, *RESISTANCE, SPACE AND POLITICAL IDENTITIES: THE MAKING OF COUNTER-GLOBAL NETWORKS* (2008).

markets has put into question the existential collective identity and means of livelihood of the laboring classes that had found some security during the age of Keynesian compromise. While vulnerable to being inducted into campaigns of xenophobia and reaction, they also hold the promise of popular and progressive resistance. Four, the middle classes have exponentially grown in the age of neoliberal globalization, particularly in Asia and Latin America. Urged to be part of an entrepreneurial society, they now confront diminished opportunities in the age of austerity. During the early phase of unbridled neoliberalism, these middle classes often furnished the social base for dictatorships. Today, they are a volatile social force that puts its weight behind an array of social and political movements. As commodification of social relations and shrinking entrepreneurial possibilities combine with gathering storms of a global environmental crisis, these middle classes may increasingly find no choice but to align with the other three vulnerable social forces. In what different forms these four social groups come together will be determined by the political matrix of particular settings. The urgent task of critical theory is to articulate how these social forces can act in concert as a force for transformation and global justice.

The aim of critique and transformative praxis must be to move beyond the post-colonial to an un-colonial state. The de-colonial begins by rejecting the Occidental, Eurocentric, proprietary, and exemplary claim to the universal as an ontological completeness.²⁸⁰ Critique aimed at de-coloniality must disrupt the canonical “Western myths of origin, history, identity, and

²⁸⁰ See N. Maldonado-Torres, *Thinking through the De-colonial Turn: Post-continental Interventions in Theory, Philosophy, and Critique – An Introduction*, 1:2 TRANSMODERNITY 1 (2011); DAPISH CHAKRAVARTY: PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000).

temporality.”²⁸¹ Such critique must jettison and fashion ontological and epistemological departures that overturn “conceptual structures which become entrenched and which are used to exclude and undermine alternative ways of looking at the world.”²⁸² The challenge is to reimagine rights in modes freed of “a constricted referential universe,” because “for the historically disempowered, the conferring of rights is symbolic of all denied aspects of their humanity.”²⁸³

The first step towards meeting this challenge is to evaluate whether modern law, having served the apparatus of imperial subjugation, retains any potential as an instrument of resistance and liberation. Here, critical legal theorist Peter Fitzpatrick’s formulation of the dynamic existence of law in terms of determination and responsiveness provides a productive point of departure.²⁸⁴ In his reading, modern law is forever engaged in shoring up and breaching its own boundaries.²⁸⁵ On the one hand, modern law has a determined dimension in order to create territorial grounds, govern populations, and establish order and security. On the other hand, modern law has a responsive dimension that remains open to change in order to respond to the inherently dynamic nature of collective life.²⁸⁶ It is

²⁸¹ A.J. Kabir & D. Williams, *Introduction: A return to Wonders*, in *POSTCOLONIAL APPROACHES TO THE EUROPEAN MIDDLE AGES: TRANSLATING CULTURES 2* (A. J. Kabir & D. Williams, eds. 2005).

²⁸² Maria Aristodemou, *Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia*, 5 *EUROPEAN J. OF INT’L L.* 532, 551 (1994).

²⁸³ PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153, 159 (1991).

²⁸⁴ See generally FITZPATRICK, *MODERNISM*, *supra* note 35. For instructive engagements with Fitzpatrick’s theories of law, see *READING MODERN LAW: CRITICAL METHODOLOGIES AND SOVEREIGN FORMATIONS* (Ruth Buchanan, Steward Motha, & Sundhya Pahuja, eds. 2012).

²⁸⁵ In Fitzpatrick’s words: “For law to rule, it has to be able to do anything, if not everything. It cannot, then, simply secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change, otherwise law will eventually cease to rule the situation which has changed around it.” FITZPATRICK, *MODERNISM*, *supra* note 35, at 71.

²⁸⁶ Peter Fitzpatrick, “*Gods would be needed . . .*”: *American Empire and the Rule of (International) Law*, 16 *LEIDEN J. INT’L L.* 429, 444–45 (2003).

this inherent and productive dynamic that injects indeterminacy in the heart of the law and makes it possible to concurrently make visible determined injustices of the law while channeling responsiveness of the law to the service of justice and liberation.²⁸⁷ The “tie” between determination and responsiveness brings “existence to normative futurity” and surpasses any “contained condition,” making law “the most independent yet the most dependent of things.”²⁸⁸ In this frame one can see, for example, the propensity of international law to overflow its “ties to the pre-existing,” and to exhibit an “incipient ethic of equality.”

For outsider jurisprudence the challenge is to reimagine law as a facilitator of humanity and justice. Such law would not only be the law of right but also would be an unconditional law of utter responsiveness to the other, a responsibility. A productive departure may be to reconceive human rights as plurality—a plurality made up of “resistances and struggles” against the “dominant and hegemonic” position assumed by or through a monist, quasi-religious, and “universal” human rights.²⁸⁹ In this schema, human rights emerge as “a nonhegemonic language of resistance allied to a variety of causes and motivations[;] . . . as locally owned and interpreted principles for political action.”²⁹⁰

²⁸⁷ Law is located, then, in-between its positing as autonomous and determined and as perpetually responsive to alterities beyond determined existence.

[L]aw, if it is to rule effectively and secure the requisite certainty and predictability in the world beyond, must constantly relate to the ever-changing nature of society, the economy, and so forth. There is a constituent requirement for law to respond to the infinity of relation which can imping upon its determined position. And yet, whilst the law cannot simply ossify in the determinacy of its position, neither can it dissipate itself in a pure, unalloyed responsiveness to the other and to the changing world ‘outside’ it.

BEN GOLDER & PETER FITZPATRICK, *FOUCAULT’S LAW* 80 (2009).

²⁸⁸ Peter Fitzpatrick, *Access to Justice*, 23 WINDSOR Y.B. ACCESS JUST. 3, 9 (2005).

²⁸⁹ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* XV, 23, 26, 47 (2006).

²⁹⁰ S. HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* XIV, 178 (2013).

Thus, rights could serve as normative claims on the futurity of a being together in community. Such rights will have to be able to transcend any delimitation, always able to become responsively other than what they may presently be. A right generatively trajects beyond any conditioned or conditional determinacy. This uncontainability is the impelling element of a right's being, in the conventional designation, "general and universal,"—of its surpassing any determinacy. The human, the humanity of rights, thoroughly embeds this responsiveness of rights. Coming from within the secular human, the community of the human, we are not able to occupy some comprehension beyond it, to encompass and contain it—to decree what its "nature," including its human nature, may "universally," ever-assuredly be. In the spirit of the de-colonial, this perspective would open on to a human rights ever beyond ultimate affirmation, an ever-resistant human rights. Perhaps the de-colonial may also take us through such an opening and towards a realization of such human rights. The de-colonial project, thus, must espouse a "delinking," a setting apart from the universalizing pretension of an Occident.²⁹¹ This would involve a "delinking" of both being and thought in its finitude from the quasi-universality, the positivized norm, of an occidental *imperium*, and realizing that delinking in a responsive relation of plurality—a "pluriverse" rather than a universe.²⁹²

Latin America, the birthplace of the modern global, may well be the zone that spearheads a decisive turn from post-colonial to un-colonial. The imperial modern global may well be buried where it was born. We see this turn rehearsed in the neoliberal era. Yesterday, Latin America was the first

²⁹¹ W. D. Mignolo, *Delinking*, 21 CULTURAL STUD. 449, 453 (2007). See also SAMIR AMIN & MICHAEL WOLFERS, *DELINKING: TOWARDS A POLYCENTRIC WORLD* (1990).

²⁹² W. D. MIGNOLO, *THE DARKER SIDE OF WESTERN MODERNITY: GLOBAL FUTURES, DE-COLONIAL OPTIONS* 72 (2011).

testing ground of neoliberal counterrevolution, inaugurated by the Pinochet coup of September 11, 1973. Today, Latin America is where neoliberalism is robustly challenged and experiments of un-colonial society unfold. While the Zapatistas initiated the global stirrings against neoliberal hegemony, the “wretched of the earth” in Bolivia are showing the way towards just constitutional arrangements and productive regional, hemispheric, and global solidarity. Something closer to a “practical rationality” of the intercultural may be found in that combining of “interculturality and decolonization” manifested in recent constitutional innovations in South America, pre-eminently “the constitution of the Plurinational State of Bolivia.”²⁹³

Indeed, the heft of the new “Andean constitutionalism” is what has been called the “re-founding of the state.”²⁹⁴ This refounded state, taking Bolivia as exemplary, is envisaged as “a social unitary state of plurinational and communitarian law.”²⁹⁵ As such, it embeds constitutionally a plethora of rights, some similar to the distinctly liberal variety but extending also and abundantly to social and cultural rights, rights of groups such as the Indigenous, and rights of participation in the state system, and all matched to a considerable extent by correlative duties on the part of the state. Here one can see steps towards “effective institutionalization of the political

²⁹³ CESAR AGUSTO BALDI & SUMAK KAWSAY, INTERCULTURALITY AND DECOLONIZATION, *CRITICAL LEGAL THINKING: LAW & THE POLITICAL*, 1 (2013), available at <http://criticallegalthinking.com/2013/04/15/sumak-kawsay-interculturality-and-de-colonialization/>.

²⁹⁴ CESAR AGUSTO BALDI, NEW LATIN AMERICAN CONSTITUTIONALISM: CHALLENGING EUROCENTRISM AND DECOLONIZING HISTORY, *CRITICAL LEGAL THINKING: LAW & THE POLITICAL* 3 (2012), available at <http://criticallegalthinking.com/2012/02/06/new-latin-american-constitutionalism-challenging-eurocentrism-decolonizing-history/>.

²⁹⁵ Raul Prada Alcoreza, *Analysis of Bolivia's New Political Constitution of the State*, 1 *LINKS: CRÍTICA Y EMANCIPACIÓN* 35 (2008), available at <http://links.org.au/node/1167>.

project that has been germinating.”²⁹⁶ We see a process unfold in which “the demands of movements . . . progressively incorporate those of other movements into their own.”²⁹⁷ These productive departures are challenging the edict of the Westphalian imaginary that any people not corresponding to “Western patterns of political organization” are ineligible for recognition as legitimate political subjects and incapable to act internationally.²⁹⁸ Of course, hopeful as this Bolivian turn is, halting moves of a similar turn in South Africa issue a caution that any break from post-colonial to un-colonial will not be easy, simple, or linear.²⁹⁹

In the struggle of transition from post-colonial to un-colonial, the concept of “third space” offers a productive point of departure.³⁰⁰ Initially coined to mark zones of resistance by the colonial subalterns, the construct of “third space” pointed out that the instability and contradiction of colonial discourses furnish grounds for the emergence of hybridized subjectivities, triggering a process whereby “other ‘denied’ knowledges enter the dominant discourse and estrange the basis of its authority.”³⁰¹ At work here is an “enabling violation”³⁰² of “the colonized,” which animates subaltern agency to transform “conditions of impossibility into possibility.”³⁰³ Critical geographers, building on the concept of the “third space,” eschew either/or

²⁹⁶ E. DUSSEL, TWENTY THESES ON POLITICS 75, 78, 90 (G. Ciccariello-Maher, trans. 2008).

²⁹⁷ *Id.* at 72, 132.

²⁹⁸ GONG, *supra* note 59, at 88.

²⁹⁹ *See, e.g.*, DRUCILLA CORNELL, LAW AND REVOLUTION IN SOUTH AFRICA: UBUNTU, DIGNITY, AND THE STRUGGLE FOR CONSTITUTIONAL TRANSFORMATION (2014).

³⁰⁰ HOMI K. BHABHA, THE LOCATION OF CULTURE 37 (1994).

³⁰¹ Homi Bhabha, *Signs Taken for Wonders: Questions of Ambivalence and Authority Under a Tree Outside Delhi, May 1817*, 12 CRITICAL INQUIRY 156 (1985).

³⁰² GAYATRI CHAKRAVORTY SPIVAK, THE SPIVAK READER 219 (Donna Landry & Gerald MacLean, eds. 1996).

³⁰³ GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 201 (1988).

choices and posit possibilities of “both/and also . . . a space of extraordinary openness.”³⁰⁴

Others call for a “critical search for a third space that is complicitous neither with the deracinating imperatives of westernization nor with theories of a static, natural, and single-minded autochthony.”³⁰⁵ A historical instantiation of such a “third space” as a zone of resistance to global capitalism and imperial overreaching is the path from the First Afro-Asian Conference at Bandung in 1955 to the World Social Forum at Porto Alegre in 2005.³⁰⁶ The Porto Alegre project breaks out of the binaries of modernity, and sutures economic and political democracy with radical cultural and civilizational plurality. The project is encapsulated in the foundational premise of the World Social Forum: Other Worlds are Possible. It puts into question designs to constitutionalize neoliberal global capitalism through “interstate treaties designed to legally enforce upon future governments general adherence to the discipline of the capital market.”³⁰⁷ It is also a rejection of the repackaged discourses and strategies of “development” that are “uniquely efficient colonizers on behalf of central strategies of power.”³⁰⁸ It helps uncover development discourse as yet another language

³⁰⁴ EDWARD W. SOJA, *THIRDSPEACE: JOURNEYS TO LOS ANGELES AND OTHER REAL-AND-IMAGINED PLACES* 5 (1996).

³⁰⁵ R. Radhakrishnan, *Postcoloniality and the Boundaries of Identity*, 16 *CALLALOO* 750, 755 (1993).

³⁰⁶ See JAMIE MACKIE, *BANDUNG 1955: NON-ALIGNMENT AND AFRO-ASIAN SOLIDARITY* (2005); VIJAY PRASHAD, *THE DARKER NATIONS; A PEOPLE’S HISTORY OF THE THIRD WORLD* (2007); BOAVENTURA DE SOUSA SANTOS, *THE RISE OF THE GLOBAL LEFT: THE WORLD SOCIAL FORUM AND BEYOND* (2006).

³⁰⁷ Leo Panitch, *Rethinking the Role of the State*, in *GLOBALIZATION: CRITICAL REFLECTIONS* 96 (J. Mittelman, ed. 1996).

³⁰⁸ Marc DuBois, *The Governance of the Third World: A Foucauldian Perspective on Power Relations in Development*, 16 *ALTERNATIVES* 1, 19 (1991). See also *LIBERATION ECOLOGIES: ENVIRONMENT, DEVELOPMENT AND SOCIAL MOVEMENTS* (Richard Peet & Michael Watts, eds. 1996); Michael Watts, *Development I: Power, Knowledge, Discursive Practice*, 17 *PROGRESS HUM. GEOGRAPHY* 257 (1993).

of domination: deployment of power/knowledge that aims to bring the postcolonial world in ever-closer alignment with economic and cultural behavior conducive to accelerated accumulation of capital. It signals the imperative to imagine alternatives to development rather than modes of alternative development. Edward Said, while alert to global operations of subjugation, affirmed that “in human history there is always something beyond the reach of dominating systems, no matter how deeply they saturate society, and this is what makes change possible.”³⁰⁹ Even as Empire reasserts its right to dominate, global capitalism is engulfed by a crisis triggered by its overreach. At this juncture, more than ever before, critical theory and outsider jurisprudence must renew fidelity to the foundational premise: Other Worlds are Possible.

VII. CONCLUSION

The papers in this LatCrit symposium engage historical and contemporary intersections of global and local forces. They bring into sharp relief critical questions of subordination and transformation with which all social and political formations struggling for global justice must contend. Most, if not all, these questions issue from the genesis and subsequent instantiations of the modern global. The modern global was triggered by the “discovery” of the “New World,” and was first forged into an enduring cast on the anvil of colonization of the Americas. Recognizing the Latin roots of the modern global underscores the foundational braiding of colonialism with discursive and material structures of power and subordination spawned over the last 500 years. An urgent challenge for outsider jurisprudence is to bring into sharp relief how this foundation continues to animate the law both in its local and global iterations. Training on Latin roots of the global modern and centrality of the colonial question also helps explore histories

³⁰⁹ EDWARD W. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 246–47 (1983).

and futures of resistance and transformation—the possibilities of global justice. It underscores the historical task of moving beyond the colonial and post-colonial and to conceptualize and actualize the un-colonial. The challenge for outsider jurisprudence is to remain cognizant of this canvas of the global and this historical task as it charts points and modes of emancipatory interventions.

While Latin America is the space where incipient capitalism and international human rights were assembled, it is also the space of incessant resistance, anti-subordination, and experiments of designs of collective life aimed at self-determination, human dignity, and economic sustainability. From the Haitian revolution of early nineteenth century to Bolivia's move from post-colonial to un-colonial constitutional designs in the early twenty-first century, one can trace an unending effort to capture the responsive dimensions of modern law. Both successes and setbacks in this journey should be explored more deeply by outsider jurisprudence in order to sustain its claim that it is an instrument of anti-subordination struggle and transformation. Indispensable to such inquiries is an accounting of the global dimensions of all structures and systems of subordination. Similarly, any prescriptions of transformation must address the imperative that the scope of justice at any particular site unavoidably remains overdetermined by the scope of global justice.

LatCrit, given its genesis and global orientation, has a particular role to play in shouldering this challenge of outsider jurisprudence. Identification of social forces that can provide grounds for resistance; articulation of strategies of coalition building among social formations with shared interests; and demonstration of sustained braiding of theory, praxis, and community must be the primary agendas of LatCrit today. In this context, the thoughtful steps LatCrit has taken in recent years to restructure and

reposition bode well.³¹⁰ This symposium is another small but concrete contribution to the collective struggle for global justice.

³¹⁰ For more information on the LatCrit self-study and strategic planning process of 2008-11, see Marc-Tizoc González, Yanira Reyes-Gil, Belkys Torres & Charles R. Venator-Santiago, *Change and Continuity: An Introduction to the LatCrit Taskforce Recommendations*, 8 SEATTLE J. SOC. JUST. 303 (2009); Marc-Tizoc González, Yanira Reyes, Belkys Torres & Charles R. Venator-Santiago, *The LatCrit Task Force Recommendations: Findings and Recommendations of a Self-Study of the LatCrit Board, 2009*, 18 AM. U. J. GENDER SOC. POL'Y & L. 853 (2010); Steven Bender & Francisco Valdes, *At and Beyond Fifteen: Mapping LatCrit Theory, Community, and Praxis*, 14 HARV. LATINO L. REV. 397 (2011); Francisco Valdes, *Coming Up: New Foundations in LatCrit Theory, Community and Praxis*, 48 CAL. W. L. REV. 505 (2012).