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## Reckoning: A Dialogue about Racism, AntiRacists, and Business & Human Rights

Erika George,<sup>†</sup> Jena Martin,<sup>††</sup> & Tara Van Ho<sup>†††</sup>

*Abstract:* Video of George Floyd’s death sparked global demonstrations and prompted individuals, communities and institutions to grapple with their own roles in embedding and perpetuating racist structures. The *raison d’être* of Business and Human Rights (BHR) is to tackle structural corporate impediments to the universal realization of human rights. Yet, racism, one of the most obvious of such barriers, has been a blind spot for BHR. While the field has contended with gender inequality, there have only been tokenistic nods to intersectional harms caused by business activities. The failure to address racism seriously undermines both the promise of BHR generally and specifically the recognized need to redress intersectional harms experienced by women from racialized backgrounds. In this article, three established BHR scholars enter into a dialogue on racism in BHR’s theory and practice. The article is not aimed at providing definitive answers, but instead at asking the questions necessary for understanding how BHR embeds, or may combat, racism. By engaging in a dialogic inquiry, the authors are able to highlight, examine, and analyze different approaches to these issues. The result is both an opening salvo on the intersection of critical race theory and BHR and an identifiable research agenda for future scholarship in the area.

The article proceeds in six substantive parts. Part I explains our choice of a dialogic methodology while Part II situates the inquiry in literature on structures of race and racism, critical race theory in law, and BHR. The dialogue begins in Part III with an interrogation of the terms “racist” and “antiracist” before Part IV contemplates whether BHR is racist, antiracist, or a tool that can be used to pursue either agenda. Because BHR is built on, and embedded with, capitalist theory, we examine capitalism’s racist foundations and question whether BHR can extricate itself from that origin. We then engage with the opposite end of the spectrum; what we call “Black Lives Marketing,” in Part V. Businesses may brand and market themselves as antiracist without ever undertaking the internal structural reforms necessary to *be* antiracist. We consider the demands BHR places on businesses to both adopt and to use their leverage to affect real change. The dialogue concludes in Part VI with reflections on the personal and professional impact of confronting racism within our fields of expertise. We conclude the article by noting that the dialogic methodology transformed the nature of the article, bringing a depth to our discussion that would not have been achieved otherwise.

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### INTRODUCTION

Business and Human Rights (BHR) provides a framework to understand and remedy internationally recognized human rights

violations that businesses cause.<sup>1</sup> One might assume that BHR is uniquely aligned with an antiracist approach. After all, the first international human rights treaty adopted after the Second World War was the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>2</sup> and Articles 2 of both the International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>4</sup> promise the realization of rights on a non-discriminatory basis. One might argue that since human rights are supposed to be antiracist, fields advancing human rights should be too.<sup>5</sup> This article questions these assumptions. By showcasing a dialogue between three BHR scholars, this article examines BHR's approach to racism and explores the challenges and opportunities within BHR to ensure an antiracist praxis. Unfortunately, this is a unique and original contribution to the scholarship, as scholars have yet to scrutinize how BHR might confront or reinforce racism.

Feminist and gendered approaches to BHR have gained traction in recent years, encouraged in part by a report and guidance on applying a gender lens in BHR by the United Nations (U.N.) Working Group on

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The co-authors contributed in equal measure to this piece and are listed alphabetically. We appreciate the research assistance of Shawn Hogbin and Isabella Anderson and the comments and feedback of the Washington International Law Journal editorial team.

<sup>1</sup> See Human Rights Council Res. 17/4, U.N. Doc. A/HRC/17/31 (June 16, 2011); Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights*, 14 J. HUM. RTS. 237, 240 (2015); Karin Buhmann & Florian Wettstein, *Business and Human Rights: Not Just Another CSR Issue?*, in CORPORATE SOCIAL RESPONSIBILITY: STRATEGY, COMMUNICATION, GOVERNANCE 379 (Andreas Rasche et al. eds., Cambridge U. Press 2017). For more on when a business "causes" or "contributes to" a harm, see Tara Van Ho, *Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights*, HUM. RTS. Q. (forthcoming 2021).

<sup>2</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

<sup>3</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 990 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force on Jan. 3, 1976).

<sup>5</sup> *But see* Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019) (showing how international law has not defined nor prohibited racism).

Business and Human Rights.<sup>6</sup> Resulting efforts have mentioned the need for an intersectional approach without considering how BHR addresses or challenges racism.<sup>7</sup> The routine silence on racism within the field, and the challenges of combatting racism through BHR, is troubling. For the first time in its nine-year history, the 2020 U.N. Forum on Business and Human Rights (the Forum)<sup>8</sup>—the largest annual event within the field, organized by the U.N. Working Group on Business and Human Rights—hosted an explicit panel on racism and BHR.<sup>9</sup> The speakers included industry representatives who discussed how

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<sup>6</sup> See U.N. Working Grp. on Bus. and Human Rights, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, U.N. Doc. A/HRC/41/43 (May 23, 2019) [hereinafter *Gender Dimensions*]. See also, Kate Grosser, *Corporate Social Responsibility and Multi-Stakeholder Governance: Pluralism, Feminist Perspectives and Women's NGOs*, 137 J. BUS. ETHICS 65 (2016) (bringing insights from feminist literature to corporate social responsibility as a process of governance); Eunice Musiime, *Towards Decent Work for Women in Eastern Africa's Horticulture Sector*, 9 BUWA! J. AFR. WOMEN'S EXPERIENCES 68 (2018); Sandra Bhatasara & Tamuka Charles Chirimambowa, *The Gender and Labour Question in the Future of Work Discourses in Southern Africa*, 9 BUWA! J. AFR. WOMEN'S EXPERIENCES 23 (2018); JOANNA BOURKE MARTIGNONI & ELIZABETH UMLAS, GENDER RESPONSIVE DUE DILIGENCE FOR BUSINESS ACTORS: HUMAN RIGHTS BASED APPROACH (2018), <https://repository.graduateinstitute.ch/record/296673>; Penelope Simons & Melisa Handl, *Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence Against Women in the Context of Resource Extraction*, 31 CAN. J. WOMEN & L. 113 (2019); Emma Larking, *Challenging Gendered Economic and Social Inequalities: An Analysis of the Role of Trade and Financial Liberalisation in Deepening Inequalities, and of the Capacity of Economic and Social Rights to Redress Them*, in RESEARCH HANDBOOK ON FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW 306–22 (Susan Harris Rimmer & Kate Ogg eds., 2019); Stephanie Barrientos et al., *Gender and Governance of Global Value Chains: Promoting the Rights of Women Workers*, 158 INT'L LAB. REV. (2019); Beth Goldblatt & Shirin M. Rai, *Remediating Depletion Through Social Reproduction: A Critical Engagement with the United Nations' Business and Human Rights Framework*, 3 EUR. J. POL. & GENDER 185 (2020); Linnea Kristiansson & Nora Götzmann, *National Implementation Processes for the United Nations Guiding Principles on Business and Human Rights: Towards Gender-Responsive Approach*, 26 AUSTL. J. HUM. RTS. 93 (2020).

<sup>7</sup> See, e.g., *Gender Dimensions*, *supra* note 6; Simons & Handl, *supra* note 6; Barrientos et al., *supra* note 6; MARTIGNONI & UMLAS, *supra* note 6; Grosser, *supra* note 6; Bhatasara & Chirimambowa, *supra* note 6; Larking, *supra* note 6; Goldblatt & Rai, *supra* note 6; Kristiansson & Götzmann, *supra* note 6.

<sup>8</sup> The Forum routinely attracts about 3,000 attendees from businesses, non-governmental organizations (NGOs), indigenous communities, academia, and other stakeholders. For reports on the Forum, including the number of attendees in past years, see *Forum on Business and Human Rights*, U.N. OFF. OF HIGH COMM'R. ON HUM. RTS., <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx> (last visited Mar. 26, 2021).

<sup>9</sup> United Nations Forum on Business and Human Rights, *Confronting Racism and Xenophobia*, UNITED NATIONS (Nov. 17, 2020), <http://webtv.un.org/search/confronting-racism-and-xenophobia-forum-on-business-and-human-rights-2020/6210439177001/?term=&lan=english&cat=Meetings%2FEvents&page=2>.

businesses' should combat racism.<sup>10</sup> At the Forum's concluding plenary, a representative of the Global Alliance of National Human Rights Institutions called on the field to take a clearer account of racism.<sup>11</sup>

This article answers that call. Specifically, in our dialogue, we unpack how the field and its primary tools either address or reinforce racism. We focus on two particular issues: BHR as a tool for antiracist reform and racism within BHR as a field. In doing so, we examine the field's foundations, its application, and its potential for radical reform.

Had this conversation occurred before the execution of George Floyd,<sup>12</sup> perhaps the field would have been better prepared to guide businesses' responses. Instead, we have witnessed what Erika George and others have called a rise in Black Lives Marketing. At its heart, this concept involves a dichotomy. On the one hand, a company may willingly recognize systemic and structural racism and commit to equality and diversity initiatives. But, it will do so without admitting its own failure to address racism and without any foundational or significant shift in their operations or approaches.<sup>13</sup> In fact, few United States companies—if any—have tied their new commitments to diversity and inclusion explicitly to their responsibility for past human rights abuses.<sup>14</sup> A prime example is athletic retail manufacturer Nike's relationship with

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<sup>10</sup> *Id.*

<sup>11</sup> United Nations Forum on Business and Human Rights, *Closing: Toward a Vision for the Next Decade*, UNITED NATIONS (Nov. 18, 2020), <http://webtv.un.org/search/closing-toward-a-vision-for-the-next-decade-forum-on-business-and-human-rights-2020/6210716893001/?term=FORUM%20BBUSINESS&sort=date> (comments by Deniz Utlu, Chair of the Global Alliance of National Human Rights Institutions' business and human rights working group, starting at minute 1:10:40).

<sup>12</sup> Mr. Floyd appears to have died after officer Derek Chauvin knelt on his neck for a documented eight minutes and 46 seconds. We chose the word "execution" rather than "murdered" as Chauvin is still awaiting trial. *See, e.g.*, Dakin Andone & Omar Jimenez, *Judge Drops Third-Degree Murder Charge Against Former Officer Derek Chauvin in George Floyd's Death, but Second-Degree Murder Charge Remains*, CNN (Oct. 22, 2020), <https://www.cnn.com/2020/10/22/us/derek-chauvin-george-floyd-charge-dropped/index.html>. In the United States, executions can be either lawful or unlawful. *See, e.g.*, John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 35–38 (2018); Kelly Oliver, *Death as a Penalty and the Fantasy of Instant Death*, 27 L. CRITIQUE 137, 138–39 (2016). Executions always involve a perpetrator. In the case of George Floyd, we must patiently wait for the courts to determine whether his killing was lawful or unlawful.

<sup>13</sup> *See, e.g.*, Tiffany Hogan, *Let's Not Turn Black Lives Matter into Black Lives Marketing*, BLACK ENTERPRISE (June 29, 2020), <https://www.blackenterprise.com/lets-not-turn-black-lives-matter-into-black-lives-marketing/>; Becks Collins, *Black Lives Matter: Brands Who Are Doing It Right*, MARKETING SOCIETY, <https://www.marketingsoociety.com/blog-post/black-lives-matter-brands-who-are-doing-it-right>.

<sup>14</sup> *See, e.g.*, Hogan, *supra* note 13.

Colin Kaepernick, the former San Francisco 49ers quarterback. Kaepernick has not played in the National Football League (NFL) since 2016, following a season in which he controversially took a knee during the playing of the National Anthem to protest systemic racism and the repeated killing of Black men by police.<sup>15</sup> Nike manufactures the uniforms and apparel for all 32 NFL teams, with a 2011 contract granting Nike exclusive apparel rights.<sup>16</sup> Yet, we could find no evidence that when Kaepernick was under pressure—and when NFL owners seemingly locked Kaepernick out of employment—<sup>17</sup> the company used its leverage to ensure that the NFL did not unfairly discriminate against Kaepernick on the basis of his speech or identity.<sup>18</sup> Kaepernick was unemployed for almost two years before Nike took a serious stand.<sup>19</sup> It was only after his social prominence grew and his jersey outsold those of active players that Nike began using his image in its 30th anniversary “Just Do it!” commercials and promotions.<sup>20</sup> As part of our discussion, we consider what Nike could and should have done instead according to the most authoritative framework within BHR, the U.N. Guiding Principles on Business and Human Rights (UNGPs).<sup>21</sup>

The significance of this piece is threefold. First, by subjecting the field of BHR to a focused inquiry on its racist or antiracist potential, we bring BHR into dialogue with critical race studies. Second, by utilizing a dialogical methodology in this paper, we intentionally highlight (and by doing so, perhaps exaggerate) our differences so that we can explicitly bring our varied perspectives to bear on the racial reckoning that our field faces. This includes examining how capitalism

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<sup>15</sup> Madilyn Zeegers, *Fans Are Sick of the NFL Trying to Have It Both Ways with Colin Kaepernick*, SPORTSCASTING (Dec. 29, 2020), <https://www.sportscasting.com/fans-are-sick-of-the-nfl-trying-to-have-it-both-ways-with-colin-kaepernick/>; Tejas Kotecha, *Colin Kaepernick: How Taking a Knee Started After NFL Quarterback Met Nate Boyer*, SKY SPORTS (Dec. 30, 2020), <https://www.skysports.com/nfl/news/12118/12170048/colin-kaepernick-how-taking-a-knee-started-after-nfl-quarterback-met-nate-boyer>.

<sup>16</sup> See *New Deal Establishes Nike as League’s Official Uniform Provider*, NFL (Oct. 12, 2010), <https://www.nfl.com/news/new-deal-establishes-nike-as-league-s-official-uniform-provider-09000d5d81b4559b>.

A 2018 agreement extended this arrangement for another eight years. See Ahiza Garcia, *NFL and Nike Sign 8-Year Contract for Uniforms*, CNN (Mar. 27, 2018), <https://money.cnn.com/2018/03/27/news/companies/nike-nfl-gear-contract/index.html>.

<sup>17</sup> A lawsuit on this issue was settled in 2019. See Andrew Beaton, *NFL Paid Under \$10 Million to Settle Colin Kaepernick Grievance*, WALL ST. J. (Mar. 21, 2019), <https://www.wsj.com/articles/nfl-paid-under-10-million-to-settle-colin-kaepernick-grievance-11553192288>.

<sup>18</sup> Jelani Cobb, *Behind Nike’s Decision to Stand by Colin Kaepernick*, NEW YORKER (Sept. 4, 2018), <https://www.newyorker.com/news/daily-comment/behind-nikes-decision-to-stand-by-colin-kaepernick>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See H.R.C. Res. 17/4, *supra* note 1.

encourages racial exploitation and corrupts efforts at racial equity. Third, in doing so, we set a research agenda for BHR on issues of racism. Consequently, this article is not a definitive answer to the problems our field faces. Rather, it is an honest—sometimes confrontational—opening dialogue to a meaningful expansion of work within our field.

Our article proceeds in six parts. In Part I, we explain our methodological choice of dialogical interrogation and writing. In Part II, we situate our discussion in literature on the structures of race and racism, critical race theory in legal studies, and BHR. We begin our conversation in Part III by addressing how we understand race and racism before considering in Part IV whether BHR is racist, antiracist, or a tool that can be used to pursue either agenda. BHR generally and the UNGPs in particular are built around capitalist structures,<sup>22</sup> and the interrogation into BHR's antiracist potential leads us to contemplate capitalism's racist foundations. We question BHR's ability to extricate itself from capitalism's racist lineage, focusing on whether and how tools with racist foundations may be used to pursue antiracist efforts. We then turn to the opposite end of the spectrum: discussing how "Black Lives Marketing" can appear antiracist while effectively ignoring, and obscuring, calls for broader and more meaningful reforms. With Part V, we move from the theory of racism within BHR to consider the practical barriers and impact of addressing racism in BHR. Specifically, we examine a willingness of leaders and scholars to discuss intersectional harms within BHR while still failing to engage on the issue of racism. In Part VI, we discuss the emotional and professional impact of speaking out on racism within one's area of expertise. We conclude the article by reflecting on how the dialogue led to new insights, and challenged our individual and collective assumptions about BHR's role in addressing racism. The article is therefore substantively different than it would have been had any one of us produced this article on our own. We argue that dialogic methodology should be more deeply integrated into legal scholarship while outlining substantive areas of research on racism and BHR that are in need of development.

## I. DIALOGICAL INTERROGATIONS AS LEGAL METHODOLOGY

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<sup>22</sup> The UNGPs' author, former Special Representative to the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, has suggested this is a pragmatic choice. Despite finding that liberal capitalism poses a significant threat, Ruggie also recognized that neoliberal economics and its centering of capitalist approaches have taken hold so that "today the multinational enterprise is the standard mode of organizing economic activities across countries." John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 62, 64–65 (Surya Deva and David Birchall eds., Edward Elgar Pub. 2020).

Dialogic methodology uses discourse to facilitate in-depth examinations of contentious or uncertain issues.<sup>23</sup> It allows multiple authors to generate communal knowledge while providing a foundation for further inquiry.<sup>24</sup> There are numerous approaches to dialogic inquiry, but its common purpose is to better understand an object of inquiry rather than to find a definitive answer to it.<sup>25</sup> The dialogue allows participants to identify realities with humility alongside others such that no one voice dominates or erases another's experiences.<sup>26</sup> While the ontological and epistemological focus varies, a dialogue is intended to transcend "the exchange of ideas" so it "question[s] and reflect[s] on reality from multiple viewpoints, fostering knowledge that in turn can advance social transformation."<sup>27</sup> Common in the humanities and other social sciences,<sup>28</sup> and in legal pedagogy through the Socratic method,<sup>29</sup> dialogic methodology and writing has been used more sparingly in

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<sup>23</sup> Donaldo Macedo, *Introduction to the Anniversary Edition* of PAULO FREIRE, *PEDOGOGY OF THE OPPRESSED*, 30TH ANNIVERSARY EDITION 18 (Myra Bergman Ramos trans., Bloomsbury 2000). These can be real or imagined voices one creates for a dialogue with oneself. *See, e.g.*, Michèle Grossen & Anne Salazar Orvig, *Dialogism and Dialogicality in the Study of the Self*, 17 *CULTURE & PSYCHOL.* 491, 492 (2011).

<sup>24</sup> *See, e.g.*, Joe Norris & Richard D. Sawyer, *Towards a Dialogic Methodology*, in *DUOETHNOGRAPHY: DIALOGIC METHODS FOR SOCIAL, HEALTH AND EDUCATIONAL RESEARCH* 9, 10-11 (Joe Norris et al. eds., Routledge Taylor & Francis Group 2012).

<sup>25</sup> *See id.*; GINA HEATHCOTE, *FEMINIST DIALOGUES ON INTERNATIONAL LAW: SUCCESS, TENSIONS, FUTURES* 1-2 (Oxford Univ. Press 2019); Macedo, *supra* note 23.

<sup>26</sup> PAULO FREIRE, *PEDOGOGY OF THE OPPRESSED*, 30TH ANNIVERSARY EDITION 88-91 (Myra Bergman Ramos trans., Bloomsbury 2000).

<sup>27</sup> Lisette Farias et al., *Critical Dialogical Approach: A Methodological Direction for Occupation-Based Social Transformative Work*, 24 *SCANDINAVIAN J. OF OCCUPATIONAL THERAPY* 235, 238 (2019). *See also* Norris & Sawyer, *supra* note 25, at 10.

<sup>28</sup> *See, e.g.*, Grossen & Orvig, *supra* note 23; Sari Pietikäinen & Hannele Dufva, *Voices in Discourses: Dialogism, Critical Discourse Analysis, and Ethnic Identity*, 10 *J. SOCIOLINGUISTICS* 205 (2006); William K. Rawlins, *Writing About Friendship Matters: A Case Study in Dialectical and Dialogical Inquiry*, in *DIALECTICAL APPROACHES TO STUDYING PERSONAL RELATIONSHIPS* (Barbara M. Montgmoery & Leslie A. Baxter eds., Psychol. Press 2013) (1998).

<sup>29</sup> *See, e.g.*, Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue about Socratic Teaching*, 2 *NYU REV. L. & SOC. CHANGE* 249 (1997); KENNETH SEESKIN, *DIALOGUE AND DISCOVERY: A STUDY IN SOCRATIC METHOD* (Robert C. Neville ed., State Univ. of N.Y. Press 1987).



international legal scholarship.<sup>30</sup> This is a shame. As Andrew Clapham<sup>31</sup> and Paola Gaeta<sup>32</sup> recognized, a dialogic approach allows co-authors to “highlight . . . differences rather than papering over them.”<sup>33</sup> Acknowledging differences without reconciling them can facilitate a more honest set of inquiries, leading to a sustainable research agenda.<sup>34</sup> As such, dialogical methodology is beneficial for nuanced, underexplored topics, such as racism in BHR.

One reason legal scholars may be reluctant to engage in dialogic methodology is a fear that colleagues will not view dialogic writing as sufficiently rigorous. Dialogic writing is more colloquial, references are often embedded in thoughts rather than explicitly referenced in text, and when it is based on an actual conversation amongst those who know each other well—as ours is—the dialogue can include interruptions, interjections, and detours. This should not be confused with being less rigorous than doctrinal legal academic writing. It is simply different. Dismissing dialogic writing represents a misunderstanding of what occurs in a dialogue. Not only do contributors build on earlier literature to create new insights into complex issues,<sup>35</sup> but a dialogue allows its participants to push one another further than they might be comfortable moving on their own. Discussing the prevalence of racism within a field where one is a noted scholar or practitioner can invite “strategic ignorance,” a willingness to exploit, manufacture, magnify, or avoid acknowledging inconvenient evidence or truths.<sup>36</sup> One might consider downplaying one’s discomfort with the tools we utilize, or with lived experiences in the field, out of fear of how it will be heard and responded

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<sup>30</sup> But see Andrew Clapham & Paola Gaeta, *Torture by Private Actors and ‘Gold-Plating’ the Offence in National Law: An Exchange of Emails in Honour of William Schabas*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM SCHABAS 287 (Margaret M deGuzman & Diane Marie Amman eds., Oxford Univ. Press 2018); GINA HEATHCOTE, *supra* note 25; Hilary Charlesworth, Gina Heathcote, & Emily Jones, *Feminist Scholarship on International Law in the 1990s and Today: An Inter-Generational Conversation*, 27 FEMINIST LEGAL STUD. 79 (2019); Dianne Otto & Anna Grear, *International Law, Social Change and Resistance: A Conversation Between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)*, 26 FEMINIST LEGAL STUD. 351 (2018).

<sup>31</sup> Clapham is a Professor of International Law at the Graduate Institute of Geneva, and the author of a foundational text for BHR, *Human Rights Obligations of Non-State Actors* (OUP, 2006).

<sup>32</sup> Gaeta is a Professor of International Law at the Graduate Institute of Geneva, where she specializes on the laws of armed conflict, terrorism, and international criminal law.

<sup>33</sup> Clapham & Gaeta, *supra* note 30, at 287.

<sup>34</sup> *Id.* See also Norris & Sawyer, *supra* note 25, at 10–11.

<sup>35</sup> See FREIRE, *supra* note 26, at 88–91.

<sup>36</sup> For more on “strategic ignorance,” see LINSEY MCGOEY, *THE UNKNOWNERS: HOW STRATEGIC IGNORANCE RULES THE WORLD 3* (Zed Books Ltd. 2019).

to by more powerful actors. Requiring scholars with differing opinions to occupy the same physical space of an output can facilitate a greater willingness to challenge intentional and unintentional avoidance of uncomfortable truths.

This type of dialogue, on this type of topic, requires trust amongst the contributors.<sup>37</sup> Here, individual identities and relationships become relevant.

Erika George is an African American cis-gender woman. She identifies as Black. She was born on the South Side of Chicago after her parents migrated from Louisiana. She grew up in a two-parent family and in a middle-class neighborhood in what was a predominantly white affluent Chicago suburb—where she was all too frequently deemed the “diversity” or seen as an “outsider.” She spent most of her childhood summers in Louisiana with extended family. After graduating from the University of Chicago, she moved to Washington D.C., and took a gap year to work for the Center for Law and Social Policy, evaluating anti-poverty programs and welfare reform before attending Harvard Law School. Prior to becoming a legal academic at the University of Utah, she worked for Human Rights Watch. There, she conducted research, testified before international human rights treaty bodies and foreign governments, and briefed the international media about international human rights violations. She gained practical experience in private commercial practice as a litigation associate for the corporate law firms of Jenner & Block in Chicago and later Coudert Brothers LLP in New York City. She is the author of *Incorporating Rights* forthcoming from Oxford University Press. As a teacher she encourages her students to remain curious and open to ideas. She strives to create an environment that enables her students to explore various modes of judicial interpretation and different perspectives on policy in order to better understand the role of law in society.

Jena Martin is an African American cis-gender woman. Although she identifies, in racial terms as “Black,” this racial identity is colored by her bi-racial upbringing. Both her mom and her stepmom are white. Both women were her primary caregivers growing up. In contrast, her father, a Black man, was largely absent from family activities and rarely engaged her in discussions of race or racial identity. Although she is an American citizen, she also lived in Canada for several years (first, as a young girl and then in university) and as such has been exposed to other cultures and linguistic traditions from an early age. Throughout her formative years she lived in primarily white residential communities. After graduating from McGill University (a school that one professor

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<sup>37</sup> FREIRE, *supra* note 26, at 91.

purportedly stated was “steeped as an Anglo-Saxon institution”) she moved to Washington D.C. to attend Howard University School of Law—an Historically Black College or University. As an attorney, she has worked in positions that focus both on business and human rights. For instance, she was a senior attorney at the United States Securities and Exchange Commission’s Division of Enforcement and worked as a pro bono attorney for the RFK Center for Human Rights. Her first encounter with BHR resulted from an interaction with Erika George, when Professor George came to the University of Texas School of Law to speak about Yahoo’s issues with China.<sup>38</sup> Since that time, Professor Martin’s research has focused on the intersection between business and human rights particularly around issues of transparency and reporting (i.e., through using securities regulation as a framework or examining data privacy initiatives).

Tara Van Ho identifies as a white, cis-gender woman. She grew up in a racially, socio-economically, and religiously diverse suburb of Ohio. After completing her J.D., she began her career as a corporate lawyer until she realized it was not, to borrow a term from the Inter-American Court of Human Rights, her *proyecto de vida* (life project).<sup>39</sup> Following her LL.M. in International Human Rights Law at the University of Essex (U.K.), she has not returned to full-time residence in the United States. She has resided in the United Kingdom, Denmark, or Japan for most of her adult life, and briefly lived in Palestine while serving as a visiting fellow for the NGO Al-Haq. With over a decade of practical work in BHR, she has advised States, intergovernmental organizations, and NGOs on the human rights impacts of business laws and practices and international economic agreements. As a lecturer, she has worked to (imperfectly) decolonize her curriculum and occasionally teaches on racism and racial discrimination.

We have known each other for several years, having met or reunited annually at the Forum and at meetings of the Global Business and Human Rights Scholars Association and the TeachBHR Forum. We are friends and colleagues, with a history of engaging in difficult, thought-provoking and supportive conversations—including but not exclusively about race. Our relationships permitted for a more honest

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<sup>38</sup> See Xiaoning et al. v. Yahoo! Inc, et al., No. 4:2007cv02151 (N.D. Cal. 2007) (dismissed on Nov. 28, 2007). See also, Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST (Nov. 14, 2007), <https://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html> (accessed Mar. 26, 2021). George returns to this case in her upcoming book. ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY (OXFORD UNI. PRESS, 2021) (forthcoming).

<sup>39</sup> Van Ho voluntarily entered inactive status in 2018 after not practicing law in Ohio for over a decade.

and complicated dialogue on what could have been a difficult issue for us to wrestle with individually or with others whom we do not know well. This article is the result of that intentional dialogue, first developed via a Zoom-based conversation and then through emails and drafts of this article. In line with dialogic writing practices, we recreate the dialogue here, utilizing excerpts of emails and the Zoom conversation and moving between our voices rather than attempting to amalgamate them into one.

By bringing together colleagues who know and trust one another, we recognize that there is choice about whose voices are included here and that this choice has the potential for creating an “echo chamber,” with the opinions between us not being as diverse as what one may find in the broader academic community. Dialogues like this, however, do not operate in a vacuum and instead build on the literature and conversations that have come before us.<sup>40</sup> As becomes apparent below, we entered this dialogue not only with ourselves but with others, notably, sociologists, capitalist intellectuals, critical race theorists, and scholars of Third World Approaches to International Law (TWAAIL). The hope is that others challenge and replicate our process, so that our conversation continues not only between this piece’s co-authors, but amongst various groups of scholars who can enter into these inquiries with the level of trust and respect needed to seriously grapple with racism’s impact on our profession.

## II. SITUATING OUR DIALOGUE

Underpinning this dialogue are three sets of scholarly inquiries: those that interrogate the structures of race and racism; the related application of critical race theory in law; and, finally, literature in the interdisciplinary field of BHR. In this section, we briefly set out these main elements of our dialogue, starting with how we understand structures of race and racism before turning to each constituent field.

### A. Structures of Race and Racism

Once considered an inherent trait that determined one’s intelligence and character, scientists now recognize that race is not a biological construct but a social one.<sup>41</sup> Imperialist explorers categorized inhabitants of “new” territories and often declared possession over the people encountered as property.<sup>42</sup> Indeed, as Antony Anghie argues,

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<sup>40</sup> See FREIRE, *supra* note 26 at 88–91.

<sup>41</sup> See IBRAM X. KENDI, HOW TO BE AN ANTRACIST 21, 30, 59–60 (2019).

<sup>42</sup> See, e.g., ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 13 (James Crawford & John S. Bell eds., Cambridge Univ. Press 2005).

“colonialism was central to the constitution of international law” as European and non-European worlds collided in the enterprise of imperialism with race discrimination central to colonialism.<sup>43</sup> America’s Founding Fathers largely accepted, adopted, and reinforced the racist views reflected in later Supreme Court opinions concerning the plight of enslaved Black people as “altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”<sup>44</sup> Racialized designations largely developed in opposite to a category of “white,” which was legally and socially privileged.<sup>45</sup> “White” has never had a clear definition and the classification has evolved over time, allowing some communities of individuals to access privileges that were denied to their immediate predecessors.<sup>46</sup> For this reason, we prefer the terms “socialized white people” or “people socialized as white” in this article, but occasionally use the short-hand “white people.”

Research now debunks the notion of biological race and recognizes race as a social construct intended to create structures of inclusion and exclusion.<sup>47</sup> As such, notions and designations of race are contextual and cultural.<sup>48</sup> While race is a social construct, racism has become real.<sup>49</sup> The legal, political, and social implementation of racialized hierarchies was intentional and widespread over a prolonged period of time, allowing it to become entrenched in culture and

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<sup>43</sup> ANGHIE, *supra* note 42, at 3. Professor Antony Anghie is a renown international legal scholar based at the University of Utah and the National University of Singapore. He delivered the American Society of International Law’s 2011 Grotius Lecture. More information about Professor Anghie’s research is available at *Antony T Anghie*, U. UTAH, [https://faculty.utah.edu/u0027950-ANTONY\\_T\\_ANGHIE/research/index.html](https://faculty.utah.edu/u0027950-ANTONY_T_ANGHIE/research/index.html) (last visited Jan. 26, 2020).

<sup>44</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>45</sup> STEVE GARNER, *WHITENESS: AN INTRODUCTION* 4 (Routledge 2007).

<sup>46</sup> *See id.* at 1.

<sup>47</sup> *See* KENDI, *supra* note 41.

<sup>48</sup> *See* GARNER, *supra* note 45. As a comparison, the United States, United Kingdom, and Canada employ different racialized categories on their censuses. *Compare Race*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/note/US/RHI625219#:~:text=OMB%20requires%20that%20race%20data,report%20more%20than%20one%20race> (last visited Mar. 26, 2021), *with* Government of the U.K., *List of Ethnic Groups* <https://www.ethnicity-facts-figures.service.gov.uk/style-guide/ethnic-groups> (last visited Mar. 26, 2021), *with* U.K. Government, *Population of England and Wales*, <https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/national-and-regional-populations/population-of-england-and-wales/latest> (last visited Mar. 26, 2021).

<sup>49</sup> *See, e.g.,* Aurey Smedley and Brian D. Smedley, *Race as Biology is Fiction, Racism as a Social Problem is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (2005).

discourse.<sup>50</sup> Its ongoing impact is attributable in part to the fact that it was embedded into all structures and institutions within societies. As a result, racial hierarchies were integrated into the socialization of both white people and everyone else.<sup>51</sup> The simplicity and comfort of racism may also be a factor: if one can easily distinguish an individual's moral strength and economic capacity on the basis of their skin color, then there is no need to admit that our institutions and structures can impact individual realities, and no need to question the legitimacy of, or reform, those structures.

Legal and social changes have addressed explicit forms of racism—such as obvious or blatant discrimination—but critical race scholars have analyzed its more subtle forms.<sup>52</sup> This includes implicit and structural biases and microaggressions.<sup>53</sup> That means institutions are less responsive to the needs of racialized communities; social, cultural, educational, health, economic, and political institutions continue to

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<sup>50</sup> For an overview of racist ideology development and how it is embedded in the United States, see generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016).

<sup>51</sup> See *id.* at 23, 28–29 (detailing how the socialization process began in the 1400s with a defense and apology for Portugal's Prince Henry's decision to seek out and enslave Black captives and later how the writings of authors of African descent amplified the message of white supremacy through their writings); Sun Jiang (孙江), *Blumenbach in East Asia: The Dissemination of the "Five-Race Theory" in East Asia and a Textual Comparison*, 51 *ORIENS EXTREMUS* 107, 110–20 (2012) (detailing how constructs of race were disseminated throughout East Asia under the guise of science, ultimately including statements of white supremacy, even while debates raged as to whether East Asians were "white" or not).

<sup>52</sup> For recent works on more subtle forms of racism that utilize or engage with critical race theory, see, e.g., DANIEL G. SOLÓRZANO & LINDSAY PÉREZ HUBER, *RACIAL MICROAGGRESSIONS: USING CRITICAL RACE THEORY TO RESPOND TO EVERYDAY RACISM* (James A. Banks ed., Teachers College Press 2020); Anver Saloojee & Zubeida Saloojee, *Locating Racial Microaggressions within Critical Race Theory and an Inclusive Critical Discourse*, in *EXPLORING THE TOXICITY OF LATERAL VIOLENCE AND MICROAGGRESSIONS: POISON IN THE WATER COOLER* 249 (Christine L. Cho et al. eds., Palgrave Macmillan 2018); Shiv R. Desai & Andrea Abeita, *Institutional Microaggressions at a Hispanic Serving Institution: A Diné (Navajo) Woman Utilizing Tribal Critical Race Theory through Student Activism*, 50 *EQUITY & EXCELLENCE IN EDUC.* 275 (2017); Talitha Angelica Acaylar Trazo & Woohee Kim, "Where are you From?": Using Critical Race Theory to Analyze Graphic Novel Counter-Stories and the Racial Microaggressions Experienced by Two Angry Asian Girls, 3 *INTERSECTIONS* 112 (2019), <https://digitalrepository.unm.edu/intersections/vol3/iss2/6>.

<sup>53</sup> See, e.g., Saloojee & Saloojee, *supra* note 52; Acaylar Trazo & Woohee Kim, *supra* note 52.

replicate and amplify racist beliefs and practices.<sup>54</sup> As Ibram X. Kendi<sup>55</sup> explains, individuals can hold and act upon implicit racist beliefs even if they recognize that race is a meaningless construct or that racism is a problem.<sup>56</sup> In response to these realities, it is insufficient to be non-racist. Rather, one must be actively antiracist if they are to support progress.<sup>57</sup> Being antiracist means challenging and deconstructing structures that embed or protect racism by countering racist policies “that produce[] or sustain[] racial inequality between racial groups” through new structures and policies that combat such inequality.<sup>58</sup>

### *B. Critical Race Theory in Law*

Critical race theory is now diffused through a wide range of fields and has expanded to other countries, but it developed in the 1970s in United States’ legal scholarship and was born from a frustration with how advancements in civil rights were being dismantled by the legal system.<sup>59</sup> As Richard Delgado and Jean Stefancic have explained, “[u]nlike traditional civil rights discourse, which stresses incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of Constitutional Law.”<sup>60</sup> Built on a recognition that racial hierarchies serve the majority “white” population, and that racism is “ordinary” or “everyday,” critical race theory has considered how “race blind” or “race neutral” laws and prohibitions on discrimination can actually perpetuate, ignore, or excuse racism.<sup>61</sup> Such laws often address only the most blatant forms of discrimination.<sup>62</sup> Burdens of proof are often set at a level that can be impossible to prove absent a written declaration of intent to

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<sup>54</sup> See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 456 (2005); Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199 (2008); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 11 (5th ed. 2018).

<sup>55</sup> Ibram X. Kendi is the director and founder of Boston University’s Center for Antiracist Research and a New York Times best-selling author.

<sup>56</sup> KENDI, *supra* note 41, at 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 9.

<sup>59</sup> See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 2 (N.Y. Univ. Press 3d ed. 2017). An incomplete list of contemporary commentators on race in the United States’ legal academy include Angela Onwuachi-Willig, Camille Gear Rich, and Robin Lenhardt.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2–4.

<sup>62</sup> *Id.* at 4.

discriminate.<sup>63</sup> Legislators may design or adopt *prima facie* “race neutral” laws that in effect disproportionately harm one or more racialized groups,<sup>64</sup> or executives and the judiciary may implement “race neutral” laws in a discriminatory manner.<sup>65</sup> While there is a common goal to critical race theory, its scholarly inquiry has diffused as scholars from various racialized groups in the United States have focused on issues of particular concern for their racialized group.<sup>66</sup>

Given this diffusion of critical race theory, in the context of this article it is necessary to note only a few prominent themes and developments. First, Kimberlé Crenshaw set a foundation for understanding intersectionality and intersectional harms.<sup>67</sup> Intersectionality recognizes that there is no singular experience within a racialized group because racism does not operate in a vacuum disconnected from other forms of discrimination.<sup>68</sup> Instead, it interacts with misogyny, sexism, patriarchy, homophobia, biphobia, transphobia, classism, ableism, migratory discrimination, and other forms of exclusion to create differentiated harms across a group.<sup>69</sup>

Second, Derek Bell has argued that “interest convergence” explains various legal developments that appear antiracist but are actually in the common interest of both the majority and the racialized group.<sup>70</sup> These advancements can be important but they are not undertaken by the majority out of an interest in inclusivity and equality.<sup>71</sup> Instead, civil rights victories often (if not exclusively) result from the emergence of common shared interest amongst Black and white communities, and this should alter both our understanding of those

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<sup>63</sup> *Id.*

<sup>64</sup> See Girardeau Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1142 (2009–10) (discussing the concept of post-racialism within the context of the Roberts Court’s decision on disparate impact in *Ricci v. DeStefano*).

<sup>65</sup> *Id.* at 1143.

<sup>66</sup> DELGADO & STEFANCIC, *supra* note 59, at 2–5.

<sup>67</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL FORUM 139 (1989) [hereinafter Crenshaw, *Demarginalizing*]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping*].

<sup>68</sup> See generally Crenshaw, *Demarginalizing*, *supra* note 67; Crenshaw, *Mapping*, *supra* note 67. Crenshaw is a Professor at UCLA School of Law and Columbia Law School.

<sup>69</sup> See generally Crenshaw, *Mapping*, *supra* note 67. For more on intersectionality, see Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman* 102 IOWA L. REV. 2017, 2022 (2017).

<sup>70</sup> See Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>71</sup> *Id.*



victories and the framing of subsequent debates.<sup>72</sup> For instance, Bell links *Brown v. Board of Education*, one of the Supreme Court's most celebrated cases for promoting racial justice as it found that the Constitution required states to desegregate public schools, to the larger Cold War mandate of the McCarthy Era.<sup>73</sup> Ongoing racial segregation in public spaces had tainted the United States's image in the international arena and in post-colonial societies.<sup>74</sup> Instead of the rights and needs of racial minorities, the unanimous decision to desegregate school systems by an all-white, all-male United States Supreme Court can be understood as a means to promote the state's reputation abroad.<sup>75</sup> Bell also connected the Court's decision to an economic opportunity for white Americans in the South.<sup>76</sup> The South needed desegregation in order to realize its full economic potential or else it would remain a "rural, plantation society."<sup>77</sup> While some white people supported desegregation out of a commitment to racial equality, "as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform."<sup>78</sup> The benefits awaiting elite white people, Bell argues, explains the Supreme Court's willingness to advance desegregation, and the limitations of that interest's convergence explains why desegregation has largely been limited to formal, rather than practical, changes.<sup>79</sup>

Finally, critical race scholars have argued that racialized oppression gives individuals from Black, Indigenous, Asian, or Latinx backgrounds insight into structures that socialized white colleagues are unlikely to experience or see.<sup>80</sup> Critical race theory often utilizes

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<sup>72</sup> *Id.* For more on interest convergence, see Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007). For a critical assessment of the interest convergence theory, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. UNIV. L. REV. 149 (2011).

<sup>73</sup> See Bell, *supra* note 70, at 524–25; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

<sup>74</sup> Bell, *supra* note 70, at 524.

<sup>75</sup> See generally Dudziak, *supra* note 73 (documenting primary source material during World War II and afterward to show how concerns over foreign perception provided a pivotal perspective for the court's decision).

<sup>76</sup> Bell, *supra* note 70, at 525.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 525–26.

<sup>80</sup> For an overview of the debate over whether the "voice of color" exists, and its meaning or context, see Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2012–15 (1991); See also Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); DELGADO & STEFANCI, *supra* note 59, at 5; Derrick Bell, *Who's Afraid of Critical Race Theory?*, U. ILL. L. REV. 893, 907 (1995).

storytelling and conversational inquiries to examine the commonality and uniqueness of experiences.<sup>81</sup> This includes autobiographical or autoethnographical insights that are deemed significant for challenging “law’s master narratives.”<sup>82</sup>

### C. Business and Human Rights

Unlike critical race theory, it is difficult to pinpoint a specific origin for the field of BHR, as it draws from international anti-slavery campaigns, the trial of industrialists following the Second World War, and domestic labor, environmental, and indigenous rights movements.<sup>83</sup> Its modern incarnation began in the 1970s when both the United Nations’ Economic and Social Council and the International Labour Conference called for international attention and debate over the role of transnational corporations in development and labor rights.<sup>84</sup> Throughout the next decades, the international community struggled to define a clear narrative about corporate human rights responsibilities.<sup>85</sup> In the 1970s and 1980s, developing States and NGOs asked Western, corporate “home” States take greater responsibility for their corporate nationals,

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<sup>81</sup> See DELGADO & STEFANCIC, *supra* note 59, at ch. III.

<sup>82</sup> See *id.* at 5; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). See, e.g., Angela P. Harris, *From Color Line to Color Chart: Racism and Colorism in the New Century*, 10 BERKELEY J. AFRICAN-AMERICAN L. & POL’Y. 52, 52 (2008).

<sup>83</sup> See, e.g., NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY—BRIDGING THE ACCOUNTABILITY GAP 15-62 (Surya P. Subedi ed., Routledge 2016).

<sup>84</sup> See Note by the Secretary-General on Multinational Enterprises, U.N. Committee on Int’l. Trade Law, U.N. Doc. A/CN.9/83 (Mar. 16, 1973); U.N. Economic and Social Council Res. 1721 (LIII) (July 28, 1972), attached as Annex IV to Note by the Secretary-General, *id.*; “Resolution Concerning the Social Problems Raised by Multinational Undertakings,” Res. V, Int’l Labour Conference (LVI) (1971), attached as Annex II to the Note by the Secretary-General; Economic and Social Council, “The impact of transnational corporations on the development process and international relations,” Res. 1913 (LVII) (1974). See also Surya Deva, *From ‘Business or Human Rights’ to ‘Business and Human Rights’: What’s Next?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 1, 3 (Surya Deva and David Birchall eds., Edward Elgar Pub. 2020). But see Florian Wettstein, *The History of ‘Business and Human Rights’ and Its Relationship with Corporate Social Responsibility*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 22, 23-24 (Surya Deva and David Birchall eds., Edward Elgar Pub. 2020) (claiming that “the controversial engagement of corporations with the South African apartheid regime throughout the 1970s and 1980s is rarely seen as a starting point, or even as a part of, the core BHR discussion, even though it inspired some of the early and seminal contributions to the academic literature in the BHR field later on,” and suggesting that “[i]t is commonly agreed that the events unfolding in the mid-1990s around the execution of Nigerian playwright and activist Ken Saro-Wiwa mark something like the beginning of the BHR movement in a more narrow sense”).

<sup>85</sup> For an overview of the debates of the movement in this time, see Wettstein, *supra* note 84 at 23–26.

particularly in relation to corporate activities in then-apartheid South Africa and Namibia.<sup>86</sup> Concurrently, developing States in the 1970s called for a New International Economic Order that would have enshrined a right for States to nationalize natural resources being exploited by foreign corporations, and would have protected developing States' rights to access modern technology, implicitly limiting companies' ability to exploit or exclusively control certain technologies for capitalist gain.<sup>87</sup>

Early efforts also focused on business's direct responsibility. States tried to develop an international code of conduct for transnational corporations were unsuccessful, which was unsuccessful.<sup>88</sup> That failure was met with numerous proposals by corporations and their home States for "corporate social responsibility" initiatives focused more on asking corporations to consider their impacts, rather than on mandating them to do so.<sup>89</sup> Starting in the 1990s, activists relied almost exclusively on the United States Alien Tort Statute to hold multinational corporations accountable for their complicity in grave human rights abuses.<sup>90</sup> This was often unsuccessful, proving most useful in a small number of particularly egregious cases of corporate involvement in international

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<sup>86</sup> See, e.g., U.N. Economic and Social Council, *Activities of Transnational Corporations in Southern Africa and Their Collaboration with the Racist Minority Régimes in that Area*, Res. 1978/73 (Aug. 4, 1978); U.N. Economic and Social Council, *Activities of Transnational Corporations in Southern Africa and Their Collaboration with the Racist Minority Régimes in that Area*, Res. 1980/59 (1980); U.N. Economic and Social Council, *Activities of Transnational Corporations in South Africa and Namibia*, Res. 1987/56 (1987).

<sup>87</sup> See G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974). For an overview of the legal and political debates surrounding the New International Economic Order, see THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA (Jochen von Bernstorff & Philipp Dann eds., Oxford Univ. Press 2019). For contemporaneous discussions of the potential impacts of the technological demands of the New International Economic Order, see Morgan D. Thomas, *Economic Development, Technological Change, and the New International Economic Order*, 10 GEOFORUM 129 (1979); Kempe R. Hope, *Basic Needs and Technology Transfer Issues in the New International Economic Order*, 42 AM. J. ECON. & SOC. 393 (1983).

<sup>88</sup> For an overview, see generally Karl P. Sauvart, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experiences and Lessons Learned*, 16 J. WORLD INV. & TRADE 11 (2015).

<sup>89</sup> See, e.g., Ramasastry, *supra* note 1, at 239–40; Deva, *supra* note 84, at 4.

<sup>90</sup> For an overview on these issues, see Tara L. Van Ho, *'Band-Aids Don't Fix Bullet Holes': In Defence of a Traditional State-Centric Approach*, in THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CHALLENGES FOR A UN TREATY 111 (Jernej Letnar Černič & Nicolás Carrillo-Santarelli eds., Intersentia 2011).

crimes.<sup>91</sup> The Supreme Court has since limited the statute's availability for cases against foreign corporations for harms resulting overseas and thus its utility for BHR cases.<sup>92</sup>

After a subcommittee of the Commission on Human Rights proposed the U.N. Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights that would have assigned to transnational corporations the responsibility to respect, protect, and fulfil human rights within their "sphere of influence"—a proposal roundly rebuffed by the Commission. That Commission appointed John Ruggie to clarify international expectations on businesses for human rights.<sup>93</sup> Business and human rights has expanded exponentially since the development and rejection of the U.N. Draft Norms in the mid-2000s.<sup>94</sup> It is now a robust, interdisciplinary field of academic inquiry, and a well-developed practice area for attorneys, business majors, and human rights advocates.<sup>95</sup>

The main instruments for BHR—at least at the U.N. level—are the Protect, Respect, and Remedy Framework and the UNGPs aimed at

<sup>91</sup> See, e.g., Beth Stephens, *The Rise and Fall of the Alien Tort Statute*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 45, 53 (Surya Deva and David Birchall eds., Edward Elgar Pub. 2020); Tara L. C. Van Ho, *Corporate Accountability for Human Rights Violations: Using Transnational Civil and Criminal Litigation*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 53 (Sabine Michalowski ed., 2013). For example, in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), a plaintiff alleged that oil giant Unocal was responsible for human rights violations, such as forced labor and torture, carried out by the Burmese military during the construction of the Yadana gas pipeline. It is considered one of the more successful cases because it resulted in a settlement.

<sup>92</sup> *Jesner v. Arab Bank, PLC*, 584 U.S. 1386, 1436–37 (2018).

<sup>93</sup> For overviews of the Draft Norms and their rejection, see, e.g., David Weissbrodt, *Business and Human Rights*, 74 U. CIN. L. REV. 55 (2005) (authored by a member of the drafting sub-Commission, this piece outlines the Draft Norms and their controversy); Karin Buhmann, *Navigating from 'Train Wreck' to Being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 29 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013) (explaining why and how Ruggie moved away from the Draft Norms and secured widespread state support for the Three Pillar Framework).

<sup>94</sup> See generally Jena Martin, *The End of the Beginning?: A Comprehensive Look at the U.N.'s Business and Human Rights Agenda From a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012) (reviewing the the business and human rights field's history and the U.N.'s involvement).

<sup>95</sup> See, e.g., CHRISTINE BADER, *WHEN GIRL MEETS OIL: THE EVOLUTION OF A CORPORATE IDEALIST* (Bibliomotion 2014) (documenting Bader's tenure at both at the multinational corporation BP, and as a member of the U.N.'s team that developed the UN Guiding Principles).

the Framework's practical implementation.<sup>96</sup> The Framework posits that there are three pillars to corporate and State involvement vis-à-vis corporate activity in the larger societal arena.<sup>97</sup> Pillar One requires States to protect individuals against the harmful human rights incidents as a result of business-related activities.<sup>98</sup> Pillar Two states that businesses have the moral responsibility to respect human rights through its activities, conduct, and relationships.<sup>99</sup> Pillar Three holds that both corporations and States have an obligation to remedy any human rights harm that comes as a result of business interaction with individuals or communities.<sup>100</sup> The UNGPs were designed to operationalize the Three Pillar Framework in ways that both businesses and States could effectively implement and use.<sup>101</sup> The UNGPs contain 31 principles that fall within the same organizational structure as the Three Pillar Framework.<sup>102</sup> Since their unanimous approval by the UN Human Rights Council in 2011, they have become the standard for States and corporations in the BHR field.<sup>103</sup> However, there has also been criticism and resistance to its predominance in the field. For instance, scholars and advocates from civil society have argued that the lack of legal

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<sup>96</sup> John Ruggie (U.N. Special Representative of the Secretary-General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Three Pillar Framework*]; H.R.C. Res. 17/4, *supra* note 1.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Report of the Special-Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," U.N. Doc. A/HRC/17/31, para 9 (2011).

<sup>102</sup> H.R.C. Res. 17/4, *supra* note 1.

<sup>103</sup> See, e.g., Wettstein, *supra* note 84, at 30–31 (discussing how States have responded to the UNGPs). For a sample of businesses embracing the UNGPs, see *Human Rights Policy (2017)*, AVIVA, <https://www.aviva.com/content/dam/aviva-corporate/documents/socialpurpose/pdfs/policies-responses/20171025-Human-Rights-Policy-Final.pdf> (last visited Mar. 26, 2021); *Human Rights*, SHELL, <https://www.shell.com/sustainability/transparency/human-rights.html> (last visited Jan. 26, 2020); *Unilever's Human Rights Policy Statement*, UNILEVER, [https://www.unilever.com/Images/unilever-human-rights-policy-statement\\_tcm244-422954\\_en.pdf](https://www.unilever.com/Images/unilever-human-rights-policy-statement_tcm244-422954_en.pdf) (last visited Mar. 26, 2021). Our inclusion of any business or human rights policy in this footnote should not be seen as an endorsement or a belief that these policies are followed. Van Ho has previously criticized both Shell and Unilever for their business and human rights. See Sheldon Leader et al., ESSEX BUS. & HUM. RTS. PROJECT, *Corporate Liability in a New Setting: Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta* (2011), <https://www1.essex.ac.uk/ebhr/documents/niger-delta-report.pdf> (last visited Jan. 26, 2020); Maria Hengeveld, *Blood on the Tea Leaves: Kenyan Workers Demand Reparations from Unilever*, NATION (Mar. 26, 2021), <https://www.thenation.com/article/world/unilever-tea-violence-kenya/>.

responsibility for corporations under international law embodied in the two documents creates an insurmountable gap that cannot be rectified by tweaks to their structure.<sup>104</sup> This criticism has led to calls for a binding international treaty on BHR.<sup>105</sup> Others have argued that until the field moves away from its State-centric focus, it will never align with power dynamics caused by multi-national, multi-jurisdictional corporations operating in different countries (including countries with weak governance zones).<sup>106</sup>

The UNGPs have served as a strong foundation for much of the modern, practical work that has been undertaken in BHR. Unfortunately, that work remains limited. Several States have adopted National Action Plans on Business and Human Rights, but few of those contain new, concrete proposals to regulate corporate impacts on human rights.<sup>107</sup> A smaller number of States have adopted “reporting requirements” that obligate some or all businesses to explain the measures they are taking to address a limited number of human rights and/or human rights within

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<sup>104</sup> See Olivier DeSchutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. AND HUM. RTS. J. 4, 451 (2015). See generally HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 29 (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2013); Amnesty International, et al., *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights* (Jan. 2011), [https://www.fidh.org/IMG/pdf/Joint\\_CSOS\\_Statement\\_on\\_GPs.pdf](https://www.fidh.org/IMG/pdf/Joint_CSOS_Statement_on_GPs.pdf). While the critique was of the UNGPs’ draft form, the UNGPs are built on the Three Pillar Framework, which was then three years old. *Id.* When the final version of the UNGPs was released a few months later, most criticisms in this letter remain unabated. *Id.*; Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, HUMAN RIGHTS WATCH (2013), [https://www.hrw.org/sites/default/files/related\\_material/business.pdf](https://www.hrw.org/sites/default/files/related_material/business.pdf) (last accessed Mar. 26, 2021).

<sup>105</sup> For debates over the future of a treaty, see, e.g., THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CHALLENGES FOR A UN TREATY (Jernej Letnar Čemič & Nicolás Carrillo-Santarelli eds., Intersentia 2018); BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS (Surya Deva & David Bilchitz eds., Cambridge Univ. Press 2017). For an overview of potential avenues for the treaty, see Douglass Cassell and Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights*, 6 NOTRE DAME J. INT’L & COMP. L. 1, 9–13 (2016).

<sup>106</sup> Weak governance zones has been defined as “an investment environment in which governments are unable or unwilling to assume their responsibilities. These ‘government failures’ lead to broader failures in political, economic and civic institutions that, in turn, create the conditions for endemic violence, crime and corruption and that block economic and social development.” Organisation for Economic Co-operation and Development [OECD], *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, at 11 (2006), <https://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>; Larry Catá Backer, *The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Poly-Centric Asymmetric Global Orders*, 31 BYU J. PUB. L. 1, 16–17 (2016).

<sup>107</sup> See Jena Martin, Commentary, *Principle No 8*, in *Commentary on UN Guiding Principles* (forthcoming 2021) (Barnali Choudhury, ed).

a particular geographical area.<sup>108</sup> These generally have limited enforcement and do not provide a right to remediation for those harmed by the business's failings.<sup>109</sup> France is, to date, the only State to have adopted a mandatory human rights due diligence (duty of vigilance) law, which requires its largest companies to develop and implement a plan to identify impacts on human rights throughout their supply chains and corporate groups.<sup>110</sup> Companies that fail to develop or implement an appropriate plan can ultimately be fined for that failure.<sup>111</sup> NGOs have begun filing cases using the French law against companies with allegedly deficient plans.<sup>112</sup> The Netherlands has adopted a child labor due diligence law, framed more as a consumer protection law, which is

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<sup>108</sup> For critiques of the use of reporting mechanisms by States, see Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLO. J. TRANSNAT'L L. 530, 530–31, 566–78 (2018); Rachel Chambers and Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, CHI. J. INT'L L., 1, 35–41 (forthcoming 2021).

<sup>109</sup> See, e.g., “Wet zorgplicht kinderarbeid of 7 February 2017,” as adopted by the Senate on May 17, 2019. Unofficial English translation available at *Dutch Child Labor Due Diligence Act Approved by Senate—Implications for Global Companies*, ROPES & GRAY (June 5, 2019), <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>; Nicolas Bueno and Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L. Q. 789, 800–15 (2020). See also Anneloes Hoff, *Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence*, OXFORD HUM. RTS. HUB (June 10, 2019), <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/>.

<sup>110</sup> *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, [Law 2017-399 of Mar. 27, 2017 relating to the duty of vigilance of parent companies and order-giving companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (Mar. 28, 2017) 7–9, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>; see also Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317 (2017).

<sup>111</sup> *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, [Law 2017-399 of Mar. 27, 2017 relating to the duty of vigilance of parent companies and order-giving companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (Mar. 28, 2017) 7–9, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>.

<sup>112</sup> *Total Sued Under France's New Duty of Vigilance Law*, BUS. & HUM. RTS. RES. CTR. (Oct. 23, 2019), <https://www.business-humanrights.org/en/latest-news/total-sued-under-frances-new-duty-of-vigilance-law/> (stating that “six environmental groups in France and Uganda, led by Friends of the Earth, are taking the French multinational energy company Total to court for its failure to elaborate and implement its human rights and environmental vigilance plan in Uganda.”)

binding on companies that sell products in the Netherlands.<sup>113</sup> Relevant companies have to exercise due diligence by “investigating whether there is a reasonable suspicion that a product or service in its supply chain has been produced with child labor,” and if so, develop and implement a plan of action.<sup>114</sup> The law does not provide those harmed by the company’s activities with a distinct, private right of action but compliance will be overseen by a regulator.<sup>115</sup> Companies can be criminally fined and directors can be imprisoned for repeat offences.<sup>116</sup> The first fine, however, is limited to € 4,350.<sup>117</sup>

After a period of nearly four years in which the German government monitored voluntary efforts at human rights due diligence, it announced plans for a mandatory human rights due diligence law in February 2021.<sup>118</sup> The law would apply to companies with more than 1,000 employees to undertake and report on human rights due diligence.<sup>119</sup> Failure to comply could result in fines, sanctions, and exclusion from public-procurement contracts, but the leaked draft text contains no provision of civil liability for victims and no criminal liability in cases of serious or repeated violations of the law.<sup>120</sup>

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<sup>113</sup> Hoff, *supra* note 109; *Mandatory Human Rights Due Diligence Laws: the Netherlands Led the Way in Addressing Child Labour and Contemplates Broader Action*, ALLEN & OVERY (Sept. 2, 2020), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action>.

<sup>114</sup> Allen & Overy, *supra* note 113.

<sup>115</sup> *Id.*; Bueno & Bright, *supra* note 109, at 800–01.

<sup>116</sup> Bueno & Bright, *supra* note 109, at 800–01.

<sup>117</sup> Allen & Overy, *supra* note 113.

<sup>118</sup> The announcement was done in German on February 12, 2021. Phoenix, *Peter Altmaier, Gerd Müller und Hubertus Heil zum Lieferkettengesetz* [Peter Altmaier, Gerd Müller and Hubertus Heil on the supply chain law], YOUTUBE (Feb. 12, 2021), <https://www.youtube.com/watch?v=R92jdOz1Ym8&feature=youtu.be>. For English commentary, see *Germany: Government agrees on Mandatory Due Diligence Law; Parliament to Consider Next*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/latest-news/chancellor-merkel-supports-german-due-diligence-law-following-disappointing-nap-monitoring-results/#:~:text=Story-,Germany%3A%20Government%20agrees%20on%20mandatory%20due,law%3B%20Parliament%20to%20consider%20next&text=Under%20the%20NAP%2C%20the%20Government,human%20rights%20protections%20by%202020> (last visited Mar. 26, 2021); Simon Glover, *Germany Reaches Deal on Supply Chain Law*, *Ecotextile News* (Feb. 16, 2021), <https://www.ecotextile.com/2021021627397/labels-legislation-news/germany-reaches-deal-on-supply-chain-law.html>.

<sup>119</sup> *Germany: MPs Should Strengthen Proposed Supply Chain Law*, HUMAN RIGHTS WATCH (Feb. 23, 2021), <https://www.hrw.org/news/2021/02/23/germany-mps-should-strengthen-proposed-supply-chain-law>.

<sup>120</sup> Johanna Kusch and Claudia Saller, *Germany’s Proposed Supply-Chain Law – A Glass Half-Empty*, SOCIAL EUROPE (Feb. 26, 2021), <https://www.socialeurope.eu/germanys-proposed-supply-chain-law-a-glass-half-empty>.



Additionally, the European Union has committed itself to developing a mandatory human rights due diligence law.<sup>121</sup> As this article goes to print, the contours of that law remain unclear. The European Parliament adopted a resolution setting out its wishes for the law. This includes businesses complying with new human rights and environmental due diligence obligations as “a condition for access to the internal market.”<sup>122</sup> If adopted by the European Commission, this standard would require any company that wishes to sell its goods within the European Union to comply with the responsibility to respect human rights. The European Parliament also indicated a need for civil liability when businesses violate human rights and called on the European Commission and Member States to adopt “administrative fines comparable in magnitude to fines currently provided for in competition and data protection law” as a punishment when businesses breach the new due diligence standards.<sup>123</sup>

While these proposals offer some hope, States more frequently rely on existing domestic tort laws, or their equivalent, to provide transnational remedies for those harmed by business actors.<sup>124</sup> Such

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<sup>121</sup> Ionel Zamfir, *Towards a Mandatory EU System of Due Diligence for Supply Chains*, European Parliamentary Research Service, 5–6 (Oct. 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS\\_BRI\(2020\)659299\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf).

<sup>122</sup> European Parliament, Resolution of 10 Mar. 2021, Recommendation to the Commission to the Corporate Due Diligence and Accountability, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf) ¶ 10. The resolution is not legislation, but rather a recommendation to the European Commission as to what future legislation should include. *Id.*

<sup>123</sup> *Id.* ¶ 26, 28, 29; European Parliament, Annex to Resolution of 10 Mar. 2021, Recommendation to the Commission to the Corporate Due Diligence and Accountability, ¶ 50. A Private Members Bill introduced before the Dutch Parliament in March 2021, would impose “a duty of care to prevent negative impacts on human rights and the environment ... on all companies in all economic sectors – including the financial sector – that are registered in the Netherlands or sell products or services on the Dutch market.” See Joseph Wilde-Ramsing, Manon Wolfkamp and David Ollivier de Leth, *The Next Step for Corporate Accountability in the Netherlands: the New Bill for Responsible and Sustainable International Business Conduct*, NOVA BHRE BLOG (Mar. 18, 2021), <https://novabhre.novalaw.unl.pt/new-bill-for-responsible-sustainable-international-business-conduct-netherlands/>. National elections in the following days did not favour the parties that introduced the bill, which is why we did not give it much attention in this article. See Koen Damhuis, *Dutch Elections: Mark Rutte wins Another Term but Fragmented Results Mask Continuing Popularity of the Far Right*, THE CONVERSATION (Mar. 19, 2021), <https://theconversation.com/dutch-elections-mark-rutte-wins-another-term-but-fragmented-results-mask-continuing-popularity-of-the-far-right-156993>.

<sup>124</sup> See Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court*, U. PA. J. INT’L L. (forthcoming 2021); Tara L. C. Van Ho, *Corporate Accountability for Human Rights Violations: Using Transnational Civil and Criminal Litigation*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 53 (Sabine Michalowski ed., 2013).

cases have faced significant barriers, ranging from dismissals for *forum non conveniens* to difficulties in securing discovery that would allow clarity over a parent company's involvement in human rights violations.<sup>125</sup> As a result, transnational civil claims have produced only limited success in holding corporations accountable for their harms.<sup>126</sup> The Canadian Supreme Court recently determined that companies can be sued within Canada for violations of customary international law.<sup>127</sup> Claimants alleged that a Canadian mining company breached customary international law when its subsidiary used forced labor provided by the Eritrean government.<sup>128</sup> The case was settled shortly after the jurisdictional decision was rendered.<sup>129</sup> Additionally, a court in Thailand has certified a class action brought by Cambodian farmers and their families alleging one of the world's largest sugar companies forcefully displaced the farmers from their land.<sup>130</sup> That case is the first of its kind in Southeast Asia and is significant because it represents the first high-profile, transboundary claim brought by and in the Global South.<sup>131</sup>

Finally, the Supreme Court of the United Kingdom issued two decisions that can potentially render parent companies liable for harms caused by their subsidiaries. One of the ongoing barriers protecting companies is the separate corporate personality doctrine, or the "corporate veil," which creates a presumption that a subsidiary controls its own operations independently from the parent. This doctrine shields the parent company from liability for the acts of its subsidiary.<sup>132</sup> This has often led courts to determine that a parent company cannot be

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<sup>125</sup> See Daysheelyn Brillo, *The Global Pursuit for Justice for DBCP-Exposed Banana Farmers*, in *WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD* (Jena Martin et al. eds, Anthem Press 2020) (discussing *forum non conveniens* as a barrier to relief for business and human rights victims).

<sup>126</sup> *Id.*

<sup>127</sup> *Nevsun Resources Ltd v. Araya*, [2020] S.C.R. 5 (Can.).

<sup>128</sup> *Id.*

<sup>129</sup> See Yvette Brend, *Nevsun Resources Enters into a Settlement in a Lawsuit in Canada Alleging Torture & Slavery at Its Subsidiary's Eritrean Mine*, *BUS. & HUM. RTS. RES. CTR.* (Oct. 26, 2020), <https://www.business-humanrights.org/en/latest-news/nevsun-resources-enters-into-a-settlement-in-a-lawsuit-in-canada-alleging-torture-slavery-at-its-subsidiarys-eritrean-mine/>.

<sup>130</sup> *Thai Appeal Court Decision on Mitr Phol Paves the Way for Asia's First Transboundary Class Action on Human Rights Abuses*, *INCLUSIVE DEVELOPMENT INT'L* (July 30, 2020), <https://www.inclusivedevelopment.net/cambodia/thai-appeal-court-decision-on-mitr-phol-paves-the-way-for-asias-first-transboundary-class-action-on-human-rights-abuses/>.

<sup>131</sup> *Id.*

<sup>132</sup> For an overview of the corporate veil issue, and a proposal for reform, see generally Anil Yilmaz Vastardis and Rachel Chambers, *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?*, 67 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 389–423 (2018).

responsible for the harms caused by their subsidiaries.<sup>133</sup> In *Vedanta Resources v Lungowe* and *Okpabi v Royal Dutch Shell*, the Supreme Court of the United Kingdom called for a more nuanced approach to the issue.<sup>134</sup> In the former case, Lord Briggs indicated that a parent company may incur liability where it holds itself out as having assumed responsibility in areas such as human rights and environmental protections through public disclosures or policy statements.<sup>135</sup> This is true, according to Lord Briggs, even if the parent company never follows through on its public commitments in practice.<sup>136</sup> In the latter case, Lord Hamblen called for a clearer understanding of how parents and subsidiaries interact: a parent may assume, or a subsidiary may relinquish, control over a particular issue without a change in the de facto management of the operations as a whole.<sup>137</sup> This decision may represent a natural extension of the duty of care present in general English tort law,<sup>138</sup> and yet, it was transformative because it clarified that the internal characteristics of a corporate group, rather than their paper-based organization, determines the extent to which a company owes a duty of care and can be held liable for its failings. This reduces the corporate veil's power to act as an accountability barrier.

These four cases, limited as they are, offer new avenues for victims to pursue remediation and reparations. Utilized strategically, these precedents may lead businesses to proactively respect human rights in the future.

#### D. *The Limits of Our Discussion*

BHR has not yet engaged with critical race theory. Given our dialogical methodology, we employ critical race theory to set our foundational understandings of race and racism and launch into a discussion of racism within BHR. In doing so, we critically analyze BHR and identify areas

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<sup>133</sup> See generally *id.*

<sup>134</sup> *Vedanta Resources et al. v. Lungowe et al.* [2019] UKSC 20 ¶ 53; *Okpabi et al. v. Royal Dutch Shell et al.* [2021] UKSC 3. For an overview of *Vedanta*, see Tara Van Ho, *Vedanta Resources Plc and Another v. Lungowe and Others*, 114 AM. J. INT'L L. 110, 111 (2020). For early reflections and commentary on *Okpabi* by Van Ho and others, see Essex Law School, *On Emissaries and Control: Corporate Accountability in the Aftermath of the Shell Litigation*, YOUTUBE (Feb. 24, 2021), <https://www.youtube.com/watch?v=iq7YwPNMafA&t=5s>.

<sup>135</sup> *Vedanta* [2019] UKSC 20 ¶ 53.

<sup>136</sup> *Id.*

<sup>137</sup> *Okpabi* [2021] UKSC 3 ¶ 147. This decision was unanimous, with the exception of a justice who fell ill after the hearing and before the judgment was handed down.

<sup>138</sup> For an overview of the tort law approach to corporate duties of care and its application in the context of human rights claims, see generally Tara Van Ho and Carolijn Terwindt, *Assessing the Duty of Care for Social Auditors*, 27 EUROPEAN REVIEW OF PRIVATE LAW 379 (2019).

of concern that require and deserve further scholarship. Approaching the discussion in this way has some inherent limitations. Racism is contextually-specific, and the discussion we have is based on the United States's context, with brief references to other Western experiences. Bringing together the United States-centric discourse around race, racism, and critical race theory into a conversation with the universalist claims of BHR causes some tension. First, as noted above, race and racism are contextually defined,<sup>139</sup> and the understanding of racism and its application within the United States may not be applicable elsewhere. Just as critical race theory has diversified,<sup>140</sup> further consideration is needed regarding how BHR might be racist, embed racism, or be used for antiracist purposes within other societies. Second, the utilization of an American lens means that the racialized terms we employ are primarily those used in the United States. Just as racism is contextual, so are racial identifiers.

Third, while we engage with intersectionality, we remain largely focused on a discourse that emerges from the "Global North." Critical race theory examines horizontal inequalities within a state, while TWAIL focuses on racialized hierarchies created between States, with greater attention to disparities between the "Global North" or developed States and the "Third World."<sup>141</sup> As Eric Williams has proposed that racism was developed to protect Western economic interests,<sup>142</sup> Anghie has argued that international law developed to justify colonialist intentions.<sup>143</sup> While TWAIL and critical race theory can often lead to similar critiques about how the law is used to entrench, protect, and replicate inequalities, they are distinct in their remits. As such, one might be a beneficiary of the structures critiqued within TWAIL even while being a victim of the structures critiqued by critical race theory. These limitations are important to note but they do not alter the significance of

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<sup>139</sup> See GARNER, *supra* note 45.

<sup>140</sup> See DELGADO & STEFANCIC, *supra* note 59, at 2–5.

<sup>141</sup> See Makau W. Mutua, *What is TWAIL?*, 94 U. BUFF. SCH. L. 31, 31 (2000). For discussions of TWAIL's application to BHR, see, e.g., Aaron A. Dhir, *Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse*, 22 BUS. ETHICS Q. 99, 100, 107–10 (2012); Sara L. Seck, *Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations*, 3 TRADE L. & DEV. 164 (2011); Jalia Kangave, *A TWAIL Analysis of Foreign Investment and Development-Induced Displacement and Resettlement: Lessons from Uganda's Bujagali Hydroelectric Project*, 44 OTTAWA L. REV. 213 (2012). The term "Third World" is used with deference to TWAIL critics who have reclaimed the term with pride. See, e.g., James Thuo Gathii, *The Promise of International Law: A Third World View*, SSRN (June 25, 2020), at 17–25; Upendra Baxi, *What May the 'Third World' Expect from International Law*, 27 THIRD WORLD Q. 713 (2006).

<sup>142</sup> See ERIC WILLIAMS, *CAPITALISM AND SLAVERY* 4 (Univ. N.C. Press 1944).

<sup>143</sup> See ANGHIE, *supra* note 42, at 15.

bringing BHR into discussion with critical race theory. Indeed, we believe that there is a powerful opportunity to bring concepts of antiracism into the conversation with BHR, which can have a positive impact on one of the world's most critical contemporary challenges.

### III. UNDERSTANDING RACISM AND ANTIRACIST FOR THE PURPOSE OF OUR DISCUSSION

We began our conversation by invoking Ibram X. Kendi's approach to antiracism,<sup>144</sup> and use this to establish our understanding of the terms racism and antiracism. We consider whether there is a binary between racism and antiracism or whether a more nuanced approach is needed.

**Van Ho:** Angela Davis is often quoted as saying it's not enough to be not racist, but we need to be actively antiracist.<sup>145</sup> Ibram Kendi, in further explaining and developing the notion of antiracism, has said that there's no such thing really as race neutral.<sup>146</sup> Everything is either racist because it embeds the power structures that allow for racism to continue to exist and amplifies that racism or it is antiracist because it deconstructs these systems and allows for inclusion, rather than exclusion.<sup>147</sup> So, the first question I'd like to ask is: do we think BHR as a field or as a practice is either racist or antiracist? Now, Jena, I know you wanted to take issue with the question.

**Martin:** Yes, I would question it's premise. I think that those options are presented as a binary choice—that it's either racist or antiracist; either you're part of the solution or you're part of the problem—and I think that *anything* can be racist or antiracist, depending on the situation. But first, can we take a second because I'd be curious as to your views: how do you guys define racism versus antiracism?

**George:** [*holding book*] That's why I went and got Kendi's book,<sup>148</sup> to reference with respect to defining terms. So, we're in conversation with Angela Davis's literature and Ibram Kendi's recent writings.<sup>149</sup> He was influenced by her. One important point of his work is trying to detach "racism" as a term that is deployed to be pejorative

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<sup>144</sup> KENDI, *supra* note 41.

<sup>145</sup> See, e.g., Marlene F. Watson et al., *Black Lives Matter: We Are in the Same Storm but We Are Not in the Same Boat*, 58 FAMILY PROCESS 1362, 1362 (2020); Jude Mary Cénat, *How to Provide Anti-Racist Mental Health Care*, 7 LANCET PSYCHIATRY 929, 929 (2020).

<sup>146</sup> KENDI, *supra* note 41, at 9.

<sup>147</sup> *Id.* at 9–10.

<sup>148</sup> *Id.*

<sup>149</sup> See, e.g., ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* (First Vintage Books, 1983); ANGELA Y. DAVIS *READER* (Joy James ed., Blackwell Pub. 1998); KENDI, *supra* note 41.

and make it something descriptive.<sup>150</sup> I think that's an excellent and helpful move because it takes the shame out of being racist because it is not a permanent fixed state of being ... you can be racist in one moment and not racist or even antiracist in the next moment.<sup>151</sup> It's a choice at every potential point whether or not to be racist.<sup>152</sup> In order to be antiracist, you have to be willing to identify racism and that is something that I'm not sure I've seen the BHR community quite reckon with or acknowledge. I think, in contrast, being "not-racist" means we aren't into racism, we don't engage in racism, and so ... we're not looking for it. And so, if we don't see it, we don't address it. This is how racism remains a challenge. Kendi's call is for us to look at what conditions are and then ask why they are the way they are.<sup>153</sup> A racist is one who is supportive of a racist policy through their actions, inactions, or expressing their ideas – attaching or ascribing a condition to a person's race, whether attributing something positive or negative.<sup>154</sup> An antiracist is someone who supports antiracist policies through actions or expressing antiracist ideas.<sup>155</sup>

**Van Ho:** I agree with ensuring the terms "racist" and "antiracist" are treated as factual descriptions rather than epithets, but I actually thought Kendi was intentionally creating a binary.<sup>156</sup> He says that "there is no such thing as a not-racist idea, only racist ideas and antiracist ideas," so I assumed that meant there are also only racist or antiracist tools and actions.<sup>157</sup> He also indicates that the effort to claim race-neutrality is actually a means of defeating antiracism.<sup>158</sup> Like Dr. Martin Luther King, Jr., did before him,<sup>159</sup> and as Reni Eddo-Lodge has recognized in the context of Britain,<sup>160</sup> he also lays blame on the moderate more than the actively racist:

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<sup>150</sup> KENDI, *supra* 41, at 9 (explaining that the term "racist" is "not the equivalent of a slur").

<sup>151</sup> *Id.* at 4 ("racist and antiracist are not fixed identities. We can be a racist one minute and an antiracist the next").

<sup>152</sup> *Id.*

<sup>153</sup> George hosted Professor Ibram Kendi at the University of Utah as the inaugural guest for a speaker series on contemporary challenges and humanity that she launched as Director of the Tanner Humanities Center in February 2020. Her comments also reflect her conversation with Kendi. See KENDI, *supra* note 41, at 23.

<sup>154</sup> *Id.* at 13.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 9.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Martin Luther King, Jr., *Letter From Birmingham City Jail* (1963), reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, 289 JR.*, (HarperCollins Publishers 1986).

<sup>160</sup> RENI EDDO-LODGE, *WHY I'M NO LONGER TALKING TO WHITE PEOPLE ABOUT RACE* 35 (Bloomsbury Pub. 2017).

The most threatening racist movement is not the alt right's unlikely drive for a White ethno-state but the regular American's drive for a 'race-neutral' one. The construct of race neutrality feeds White nationalist victimhood by positing the notion that any policy protecting or advancing non-White Americans toward equity is 'reverse discrimination.'<sup>161</sup>

So, I understood Kendi as saying that race neutrality *is* a form of racism, and therefore we only have racism or antiracism. And, I agree with that binary.

Even if I didn't agree, I don't think I'm in a place to challenge him. I think to challenge him you need either a lived experience of watching the structures of racism and antiracism play out on your life as a racialized person, or you need the right disciplinary training and background. I think whiteness—meaning the socialized experience rather than a biological or inherited trait—can blind us to the structures we have adopted, benefitted from, replicate, or amplify.<sup>162</sup> As a white person, and within the societies I primarily inhabit, my identity and experience is treated as a neutral reality or is endowed with privileges.<sup>163</sup> So, I might see portions of the structure, but I don't live the whole of those structures in the way someone who is racialized does. My reality is not *the* reality that needs to be better understood, at the center of this discussion, or that is the more informed perspective.

Now, I think the right disciplinary training and background can give a white person a depth of understanding that entitles them to challenge Kendi, but I don't think law is the right disciplinary training for that. In law, we privilege hierarchies of sources, largely inhabit or challenge a positivist approach to legal constructs, and interrogate texts but not really communities or communal structures. While I like to inhabit interdisciplinary spaces, my primary and principle training is in law, and I don't think that gives someone without the lived experience of being racialized the insight and expertise needed to challenge Kendi's binary. So, I respect that the two of you have earned the right to challenge that, but I think for now I am bound to accept it and apply it just as I would apply a doctor's diagnostic criteria if I were working in medical law or scientists' understanding of certain constructs if I were in intellectual property law. I am focused on how to apply his expertise.

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<sup>161</sup> KENDI, *supra* note 41, at 9.

<sup>162</sup> For more on how socialized white people “frequently construct themselves as raceless individuals, unfettered by the kinds of collective indentifications that they view other people as having”, see GARNER, *supra* note 45, at 4.

<sup>163</sup> See RENI EDDO-LODGE, *supra* note 160, at 48; see GARNER, *supra* note 45, at 5, 35.

### *Communal Reflection*

Early in our conversation, it becomes clear that we agree on the foundational discussion more than we disagree. Our agreement on the meaning of the terms racist and antiracist—one that is based on whether something or someone reinforces racism or deconstructs it—and that these terms are descriptive rather than a judgment of one's character is significant. It allows us to move forward in the conversation to consider what these terms mean in the praxis of BHR. As such, these terms carry us and we carry them throughout the remainder of the conversation. We were not able, however, to reach an agreement on their practical implementation. Martin and George consider tools to be malleable, moving between racist and antiracist depending on how they are utilized. This contrasts with Van Ho's approach, in which certain structures are either racist or antiracist because of their construct. This debate is carried forward, particularly in the next section where we analyze BHR's antiracist potential.

#### IV. BUSINESS AND HUMAN RIGHTS AS A RACIST TOOL OR A TOOL TO FIGHT RACISM?

With some foundational agreement and some clear differences settled, we turn to the conversation's intended focus: how BHR embeds or combats racism. In this section, we initially focus on how BHR as a field interacts with racist and antiracist ideologies. We begin by substantively analyzing BHR as a racist or antiracist tool, including the racist foundations of capitalism and the framing of the UNGPs, before considering how BHR can be used to challenge racism. This leads us to also discuss how BHR might obscure racism, particularly through "Black Lives Marketing."

**Martin:** We should start by acknowledging the difficulty in identifying Black men who are in the BHR field. And I say Black men specifically because, to me, if we're focusing on the BLM movement and particularly its impact in the United States, there is a specific history there and I want to be able to hear from Black men who are engaging in this issue both professionally and personally. I know that there are Black men in this field, but hardly any scholars, and I wish we could have had that voice in this discussion.<sup>164</sup>

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<sup>164</sup> During the course of the conversation, George noted the work of Jay Butler who has written about corporations and international law. See, e.g., Jay Butler, *Corporations as Semi-States*, 57 COLUM. J. TRANSNAT'L L. 221 (2019); Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189 (2020); Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. INT'L J. L. & POL. (forthcoming 2021). Martin, however, was not referring to a specific individual but to the need to have more Black male voices within the conversation.



Also, at the outset, I think we need to note that we can take this issue from two different points. On the one hand, we're talking about BHR as a tool or a framework to redress racism. And, on the other hand, we're also discussing the failures of BHR as a *field*, as a *profession* to address its own racism. I think that we need to acknowledge it. I'm sure that one informs the other, but I think it's important that we don't conflate these two issues.

**George:** I think that's really an extraordinarily helpful distinction and I completely agree. I think that they are mutually reinforcing, either as a vicious cycle or as a virtuous cycle.<sup>165</sup>

#### A. Is BHR an Antiracist Tool?

After our general discussion, we return to the specific question of whether the BHR framework is, by its nature a tool to advance an antiracist agenda. Martin started off this part of the conversation by examining instances where tools within the BHR framework could be used to advance an antiracist agenda or provide barriers to antiracist relief.

**Van Ho:** So, we're returning to the question: is BHR racist or antiracist?

**Martin:** Again, I think that the same tool could either be racist or antiracist, depending on the situation. I'm trying to think of an example. Affirmative action has been both projected as an antiracist tool and as a racist tool, facilitating equality or imposing inequality by requiring preferential treatments that can make Black people seem less qualified.<sup>166</sup> Mandatory quotas on boards have also been promoted as an antiracist tool and a racist tool for the same reasons.<sup>167</sup> Or let's move to something closer to home: human rights due diligence (HRDD).<sup>168</sup> I

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<sup>165</sup> George thinks it important to understand how mutually reinforcing cycles operate, to that end she appreciates this passage from Kendi's book: "Racist ideas make people of color think less of themselves, which makes them more vulnerable to racist ideas. Racist ideas make White people think more of themselves, which further attracts them to racist ideas." KENDI, *supra* note 41, at 2.

<sup>166</sup> See Germinie H. Awad et al., *Attitudes Toward Affirmative Action: A Comparison of Color Blind Versus Modern Racist Attitudes*, 35 J. APPLIED SOC. PSYCH. 1384 (2005).

<sup>167</sup> Compare Alex Johnson, *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, Race, Racism in the Law*, 1992 ILL. L. REV. 1043 (1992) (promoting use of quotas to fight racism) with Anastasia Boden & Daniel Ortner, *Racial Quotas Have an Ugly Pedigree. California Shouldn't Try to Bring Them Back*, S.F. CHRON. (Sept. 16, 2020), <https://www.sfchronicle.com/opinion/openforum/article/Racial-quotas-have-an-ugly-pedigree-California-15569927.php> (conveying how quotas promote racism).

<sup>168</sup> H.R.C. Res. 17/4, *supra* note 1, at 16 (discussing human rights due diligence (HRDD) as a "process to identify, prevent, mitigate and account for how they address their

think that there is a way that HRDD can be used to push forward either a racist or an antiracist agenda, to the extent that it either illuminates or obfuscates the reality of racial injustice in corporate America.

I think that the fundamental distinction between whether something is racist or antiracist—is whether it pushes back against the power structure. This idea of reverse racism; I don't think that exists because I tend to think that if you're a part of the dominant power structure, you can't be subjected on a grand institutional scale to something that will oppress you because you're already privileged in that system.<sup>169</sup> But, on the micro level versus on the macro level, I think there are just different ways that you can construct the same tool and then use that tool accordingly. So, for me, the idea is that you're pushing back against these racist thoughts and actions using any tool at your disposal to do it. I think that you can definitely posit that something is racist versus antiracist, but I think in the end the thing is a tool.

**Van Ho:** So BHR isn't racist?

**Martin:** See, I'm going to say it depends! Because, particularly for BHR, it depends on the issue. I think that in a lot of ways, BHR permeates the same sort of power structure and dynamics that have caused the issues or problems that contribute to racism. For instance, the fact that for a really long time the human rights framework was almost exclusively housed and dominated (or at least the narrative was dominated) by Western countries as opposed to people in the Global

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impact on human rights.”) For a discussion on the evolution of due diligence from its traditional corporate underpinnings to the current HRDD incarnation, see Jena Martin, *Business and Human Rights, What's the Board Got to Do with It?*, 2013 ILL. L. REV. 959 (2013).

<sup>169</sup> Others agree that reverse racism doesn't exist. See, e.g., David Backer, *The Game Metaphor: How to Teach Racists that There Is No Such Thing as Reverse Racism*, HAMPTON THINK (June 22, 2016), <https://www.hamptonthink.org/read/the-game-metaphor-how-to-teach-racists-that-there-is-no-such-thing-as-racism?rq=backer%20game%20metaphor> (“Saying that there is reverse racism is like saying that the loss the one who always wins experiences that one time is the same thing as the loss that the one who always loses has experienced for ten years. They are very different losses, almost to the point where we cannot use the same word to describe them.”); Tad Suiter, *Reverse Racism: A Discursive History*, in RACE STILL MATTERS: THE REALITY OF AFRICAN AMERICAN LIVES AND THE MYTH OF POSTRACIAL SOCIETY 4 (Yuya Kiuchi, ed., SUNY Press 2016) (“In the years since the late seventies, the dialogic on race has fallen victim to a pernicious myth of ‘reverse racism’”); Phillip Lewis, *Here's Why Reverse Racism Doesn't Actually Exist in the US*, BUS. INSIDER (Apr. 15, 2016), <https://www.businessinsider.com/heres-why-reverse-racism-doesnt-actually-exist-in-the-us-2016-4> (quoting social work Professor Carlos Hoyt, who states, “[R]acism is prejudice plus power leveraged at an institutional level to maintain the privileges of the dominant social group.”); see also KENDI, *supra* note 41, at 12.

South,<sup>170</sup> is incredibly problematic. But I also think that the fact BHR is highlighting issues with regard to discrimination and corporate accountability and weak governance zones, I think that shows its potential for antiracism. So, I think it really depends on how you do it. If you're going to make me pick – I would say that, as a tool, BHR hasn't yet progressed to the point of being able to fully dismantle the underlying power structures or the underlying oppressive structures that have contributed to racism. But I actually don't know if it's the BHR framework's problem or fault. I tend to think that racism writ large, or at least racism here in the United States, is a root cause to a substantial amounts of our economic and social issues. To that end, I think that what we're seeing now in BHR is symptomatic of all of the issues that have happened historically—as outlined in the 1619 project.<sup>171</sup> So, to the extent that BHR has grown up in that system, I think it's going to be a reflection of that foundational issue; to the extent that affirmative action has grown up in that system, it's going to be a part of that; to the extent that any corporate activity that privileges corporations, which have a dismal number of Black people in positions of power,<sup>172</sup> lies within that structure, I think that all forms a part of the larger injustices that Black Americans face. But I also think (with respect to Audre Lorde), that the “master's tools” *can* dismantle the master's house.<sup>173</sup>

**George:** OK, so the pointed question is—is BHR racist, or not racist, or antiracist? Tara, you did not put in the “not-racist” piece, but it's not a complete binary. I think most of our colleagues in BHR—those who framed it, studied it, are working to advance it—would assert that they are “not racist.” And that is true and that is fine and that is not enough. Also, I think that's the thesis that Ibram Kendi's work is pressing towards.<sup>174</sup> So, to take up the tools, let's take one of the tools that Jena has described: one could imagine due diligence being racist or antiracist.

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<sup>170</sup> Rachel Murray, *International Human Rights: Neglect of Perspective from African Institutions*, 55 INT'L & COMPAR. L. Q. 193, 193 (2006) (stating that “international human rights law has focused primarily on European and Western sources and neglected those from other jurisdictions.”)

<sup>171</sup> *The 1619 Project*, N.Y. TIMES MAG. (last modified Sept. 4, 2019) <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (“[T]he 1619 Project is an ongoing initiative from the New York Times Magazine that began in August 2019, the 400<sup>th</sup> anniversary of the beginning of American slavery. It aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.”)

<sup>172</sup> See, e.g., Jeanne Sabadi, *After Years of Talking About Diversity, the Number of Black Leaders at U.S. Companies is Still Dismal*, CNN (June 2, 2020), <https://www.cnn.com/2020/06/02/success/diversity-and-black-leadership-in-corporate-america/index.html>.

<sup>173</sup> AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES*, 110–14 (Crossing Press 1984).

<sup>174</sup> See generally KENDI, *supra* note 41.

We can see something and attribute it to racist rationales—like these people are suffering because they are lazy or inept or unruly, or whatever manner of negative stereotype we're going to attach to a racialized group—or we would have a different account. An antiracist due diligence framework locates for us policies, practices, and procedures that are keeping people in conditions that exacerbate poverty, inaccessibility to opportunity and greater suffering. We must ask ourselves, are we asking these questions in antiracist ways—ways that allow us to see the extent to which racist policies, practices or patterns of behaviour are the cause of racial inequities? For example, what account do we offer to explain our observations when we are conducting human rights due diligence and we find racial inequities?

I think that BHR is comfortably “not racist,” and that's not the change that's going to get us to where we need to be. Particularly in the aftermath of recent global uprisings protesting police brutality, persistent problems with exclusion in powerful global companies (and even local, smaller and mid-range companies) on the basis of race, unequal access to capital for people of color across the world, and the difficulties members of disfavored minority groups face when trying to create business enterprises and engage in the economic marketplace equally—being “not racist” is simply not good enough if we are serious about a better and more effective BHR movement.<sup>175</sup>

**Van Ho:** Yeah, I think often people in our field believe because we are on the side of human rights, that makes us inherently good and antiracist. For me, some of the most frustrating encounters that I've had on race and sex comes from self-proclaimed antiracist, feminist human

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<sup>175</sup> See, e.g., Esther King, *Europe Seeks Own Response to Black Lives Matter*, POLITICO (June 10, 2020), <https://www.politico.eu/article/us-style-civil-rights-protests-come-to-europe-george-floyd-black-lives-matter/>; Alexandra Anton Mahfoud et al., *Black Lives Matter: A Panorama of the Movement Across Latin America and the Caribbean*, PANORAMAS (Nov. 15, 2020), <https://www.panoramas.pitt.edu/news-and-politics/black-lives-matter-panorama-movement-across-latin-america-and-caribbean/>; Andreas Illmer, *Black Lives Matter Pushes Japan to Confront Racism*, BBC (Aug. 27, 2020), <https://www.bbc.com/news/world-asia-53428863>; Frank Jordans, *Black Lives Matter Protests in Australia, Asia and Europe*, ASSOCIATED PRESS (June 6, 2020), <https://www.pbs.org/newshour/world/black-lives-matter-protests-in-australia-asia-and-europe/>; Saijel Kishan, *Economist Found \$16 Trillion When She Tallied Cost of Racial Bias*, BLOOMBERG BUSINESSWEEK (Oct. 20, 2020, 2:00 AM), <https://www.bloomberg.com/news/articles/2020-10-20/racism-and-inequity-have-cost-the-u-s-16-trillion-wall-street-economist-says>; Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES, (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html?smid=url-share>; Sam Dean & Johana Bhuiyan, *Why are Black and Latino People Still Kept Out of the Tech Industry?*, L.A. TIMES (June, 24, 2020, 5:00 AM), <https://www.latimes.com/business/technology/story/2020-06-24/tech-started-publicly-taking-lack-of-diversity-seriously-in-2014-why-has-so-little-changed-for-black-workers>.

rights scholars who are bad at both antiracism and anti-sexism. There is this attitude of, “I’m in human rights; obviously, I’m a good person” and with that comes “obviously I’m antiracist.” Their goodness seems to become their identity personally and professionally and they never consider whether their work *is* good, or whether they are actually contributing to antiracist, anti-sexist agendas.

**George:** [*holding up Kathy Obear’s ‘... But I’m Not a Racist! Tools for Well-Meaning Whites’*]<sup>176</sup> This is the best book that I’ve seen to date written by a white woman on dealing with white people who think they’re woke and liberal and “not racist” and the rest of it. She was a diversity trainer who then learned that she, too, was racist. She recounts the lessons she’s learned about being willing to learn and to change and the work that it takes to change.<sup>177</sup> This is a helpful tool to get people to acknowledge—without the guilt or shame that too often shuts them down—that it is possible to learn and to change. While it is understandable that the average white person in America may not recognize what is racist or when their actions or omissions serve to advance racism and injure others, it is not impossible to learn and to change.

**Van Ho:** One thing I think is interesting is that I actually think BHR *is* racist. It’s a bit hard for me to sit here and tell the two of you, “you know, I think it’s completely embedded with racism,” but I do think that. I think there’s a couple of reasons for that. The first is that it’s inherently capitalistic. Within international human rights law more generally there’s a belief—or at least a claim that I actually think is inaccurate—that all human rights can be respected, protected, and fulfilled regardless of the economic structure a state adopts.<sup>178</sup> Within BHR, however, there is no alternative economic structure; it has just accepted, replicated, and amplified the framework of capitalism.<sup>179</sup> And I think capitalism, by its nature, is racist.

### *Communal Reflection*

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<sup>176</sup> See generally KATHY OBEAR, ... BUT I’M NOT RACIST! TOOLS FOR WELL-MEANING WHITES (The Difference Press 2017).

<sup>177</sup> *Id.*

<sup>178</sup> See U.N. Comm. On Econ., Soc. And Cultural Rts., CESCR General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant), ¶ 8, U.N. Doc. E/1991/23 (Dec. 14, 1990).

<sup>179</sup> This is most evident in the UNGPs, which suggest that businesses are sometimes allowed to continue in relationships that harm human rights if the relationship is crucial to the business. See H.R.C. Res. 17/4, *supra* note 1, princ. 19; see generally GRIETJE BAARS, THE CORPORATION, LAW, AND CAPITALISM: A RADICAL PERSPECTIVE ON THE ROLE OF LAW IN THE GLOBAL POLITICAL ECONOMY (Brill Academic Pub. 2019) (providing broader criticisms of the capitalist approach).

The significance of our differences in foundational approaches becomes clearer now that we have moved into the substantive focus of our conversation, applying critical race theory and antiracist considerations to BHR. The simple question, “Is BHR racist or antiracist” elicited three distinct answers, each reflecting our earlier positions. For Martin, BHR is a tool and can therefore be used for racist or antiracist endeavours depending on who is wielding it. George similarly rejects a binary and asserts that BHR is “not-racist” but is also not yet antiracist. This, she observes, is not good enough. Embracing the binary, Van Ho asserts that BHR is inherently racist, rather than not-racist or antiracist, because it is built on a foundation of capitalism. Her assertion that capitalism is racist raises two questions that become the focus of the next part of our conversation: is capitalism racist; and if it is, can BHR still become antiracist?

As is seen in the next section, this set of questions raises both personal and professional concerns for us individually and collectively. Here, the benefit of a dialogic method becomes more acute, allowing for the amplification, rather than the minimization, of disagreements. The method allows for a deeper inquiry into BHR, its relationship to capitalism, and ultimately capitalism’s relationship to racism. We pick up the conversation in the next section with Van Ho’s ongoing reflection on the racist foundation of BHR.

### *B. Racism as a Foundation of Capitalism?*

**Van Ho:** Capitalism—particularly American capitalism—requires structures of exploitation specifically because the primary goal of a corporation is to serve the economic interests of its shareholders.<sup>180</sup> The shareholder primacy rule has become dominant in modern capitalism even where it is not a legal obligation.<sup>181</sup> Milton Friedman

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<sup>180</sup> Here, Van Ho is not addressing how the law *should* be interpreted, or how it has traditionally been interpreted, but rather its dominant interpretation today. See, e.g., Beate Sjäfjell & Mark B. Taylor, *A Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose*, 13 INT’L & COMPAR. CORP. L.J. 40, 45–49 (2019) (noting that this is a relatively recent interpretation of corporate purpose, but that “[a]s a result of the interaction of company law and the shareholder primacy norm, the general understanding of the corporate purpose has been radically narrowed.”)

<sup>181</sup> *Id.*; see also Tara Van Ho, *COVID-19 Symposium: A Time to Kill ‘Business as Usual’—Centring Human Rights in a Frustrated Economy (Part 1)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-1/>; Tara Van Ho, *COVID-19 Symposium: A Time to Kill ‘Business as Usual’—Centring Human Rights in a Frustrated Economy (Part 2)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-2/>; Beate Sjäfjell, *How Company Law Has Failed Human Rights—and What to Do About It*, 5 BUS. & HUM. RTS. J. 179 (2020).

argued that greed and the shareholder primacy rule facilitate good for the rest of society.<sup>182</sup> Under that approach to capitalism generally and company law<sup>183</sup> specifically, greed becomes both a means and an end for achieving social interests.<sup>184</sup> But, this “greed is good,” shareholder-first approach actually incentivizes business leaders to identify ways in which they can devalue the efforts and contributions of others—employees, suppliers, customers—in the way that is most value-increasing for shareholders.<sup>185</sup> If businesses are looking for ways to devalue the efforts of others, then they will take advantage of social constructs that allow them to devalue individuals. There is a reason why Black men with degrees still have the same, and often less, economic standing and opportunity than white men without a degree:<sup>186</sup> because these laws and our society encourage companies to exploit social biases in the pay they provide. Because, society and the law allows for this division and exploitation in order to further shareholder interest. Part of that allowance is classist,<sup>187</sup> but a significant part of that is also racist.

I recognize that scholars have called for a rethinking of the shareholder primacy approach,<sup>188</sup> and there are serious efforts outside the

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<sup>182</sup> Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 n.5 (2001) (asserting that the “standard model” of shareholder primacy “is, in effect, an assertion that social welfare is best served by encouraging corporate managers to pursue shareholder interests”).

<sup>183</sup> Throughout the conversation, Van Ho utilized the British term “company law” rather than the American variant “corporate law.”

<sup>184</sup> David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 260 (2009).

<sup>185</sup> With regard to labor, Beate Sjøfjell characterizes it more softly as an issue of labor commodification rather than an exploitation of others’ interests. See Sjøfjell, *supra* note 181. On the tension between consumer interests, on the one hand, and shareholder primacy and profit motivation theory of company law, see Yosifon, *supra* note 184, 258–85. For a discussion on the impact of profit-seeking on suppliers, see Rashmi Venkatesan, *The UN Framework on Business and Human Rights: A Workers’ Rights Critique*, 157 J. OF BUS. ETHICS 635, 639 (2019).

<sup>186</sup> See Anthony Carnevale et. al., *The Unequal Race for Good Jobs: How Whites Made Outsized Gains in Education and Good Jobs Compared to Blacks and Latinos*, GEO. UNIV. CTR ON EDUC. & WORKFORCE (2019), [https://1gyhoq479ufd3yna29x7ubjnwengine.netdna-ssl.com/wp-content/uploads/Full\\_Report-The\\_Unequal\\_Race\\_for\\_Good\\_Jobs.pdf](https://1gyhoq479ufd3yna29x7ubjnwengine.netdna-ssl.com/wp-content/uploads/Full_Report-The_Unequal_Race_for_Good_Jobs.pdf).

<sup>187</sup> For Marxist critiques of BHR and international economic law, see, e.g., NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW (Larissa van den Herik & Jean d’Aspremont eds., Cambridge Univ. Press 2020); BAARS, *supra* note 179.

<sup>188</sup> See, e.g., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008); Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*,

U.S. to move from shareholder to stakeholder capitalism.<sup>189</sup> But, shareholder primacy remains the dominant approach.<sup>190</sup> When the Business Roundtable attempted to redefine the purpose of a corporation to one that serves “all of our stakeholders” and “deliver[s] value to all of them,”<sup>191</sup> they were immediately rebuffed by the Council of Institutional Investors (CII).<sup>192</sup> CII rightly argued that “[a]ccountability to everyone means accountability to no one.”<sup>193</sup> The investors called instead for a “focus on long-term shareholder value,” which requires respecting other stakeholders while being accountable to investors.<sup>194</sup> I tend to agree with CII, albeit reluctantly. The Business Roundtable statement does not provide rules for accountability.<sup>195</sup> It is unclear who CEOs would report to.<sup>196</sup> So, their proposal is only for a diffusion of responsibility, not real reform.<sup>197</sup> And, I doubt American businesses will be both willing and

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161 U. PENN. L. REV. 2003 (2013); Virgile Chassagnon & Xavier Hollandts, *Who are the Owners of the Firm: Shareholders, Employees or No One?*, 10 J. OF INST. ECON. 47 (2014); Timo Busch, et al., *Value(s) for Whom? Creating Value(s) for Stakeholders*, 31 ORG. & ENV'T 210 (2018).

<sup>189</sup> Shareholder capitalism refers to a model that centres the interests of shareholders while ‘stakeholder’ capitalism expects businesses to take into account a broader range of interests and rights. For some efforts to introduce stakeholder capitalism and challenges with those efforts, see Companies Act 2006, c. 46, part 10, c. 2, § 172 (UK); Klaus Schwab, *Why we need the ‘Davos Manifesto’ for a Better Kind of Capitalism*, WORLD ECONOMIC FORUM (Dec. 1, 2019), <https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/>; Gregory Jackson, *Stakeholders Under Pressure: Corporate Governance and Labour Management in Germany and Japan*, 13 CORP. GOVERNANCE: INT’L REV. 419 (2005).

<sup>190</sup> See Sjäffjell & Taylor, *supra* note 180; Schwab, *supra* note 189.

<sup>191</sup> *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-February-2021-compressed.pdf>. See, e.g., Jeffrey S. Harrison, et al., *On the 2019 Business Roundtable “Statement of the Purpose of a Corporation”*, 7 J. MGMT. 1223 (2020). This proposal built on years of advocacy around stakeholder theory, although the actual demands and impact of stakeholder theorists are, at times, uncertain; Jeffrey Moriarty, *The Connection Between Stakeholder Theory and Stakeholder Democracy: An Excavation and Defense*, 53 BUS. & SOC. 820 (2012).

<sup>192</sup> See *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL INST. INV., (Aug. 19, 2019), [https://www.cii.org/aug19\\_brt\\_response](https://www.cii.org/aug19_brt_response); see also, Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N. Y. U. J.L. & BUS. 641 (2011).

<sup>193</sup> COUNCIL INST. INV., *supra* note 192.

<sup>194</sup> *Id.*; see also, Karen Firestone, *How Investors Have Reacted to the Business Roundtable Statement*, HARV. BUS. REV. (Nov. 20, 2019), <https://hbr.org/2019/11/how-investors-have-reacted-to-the-business-roundtable-statement>.

<sup>195</sup> See *Statement on the Purpose of a Corporation*, *supra* note 191.

<sup>196</sup> *Id.*

<sup>197</sup> See Jena Martin, *supra* note 168 (discussing diffusion of responsibility within the corporate context).



able to undertake the changes needed to ensure their commitment to stakeholder value is meaningful.<sup>198</sup>

So, I think starting from a capitalist perspective is itself racist, but that is what BHR does. As long as that is our foundation, BHR itself becomes racist. This is hard for me to admit because, first, I'm passionate about BHR as a field and the potential it has to challenge structural inequalities. Second, I am fundamentally a critical capitalist in line with Elizabeth Warren, Bernie Sanders, and Alexandria Ocasio-Cortez. I'm not actually a Marxist.<sup>199</sup> But, I still have to admit that our foundation is racist, and I do not know how you can rescue capitalism from that. I don't know how you build something antiracist out of something so deeply linked to and embedded with racism. We're seeking to remove the foundation from the house while keeping the house intact. I don't know that you can do that. Or rather, *how* you can do that.

**George:** So, Tara, I have a question for you. Could you have racism without capitalism and capitalism without racism? Can it be disaggregated?

**Van Ho:** I think you can absolutely have racism without capitalism. I don't know if you can have capitalism without racism. Part of the reason why I think it's hard for me to conceive of capitalism without racism is because we've never had it. Racism is largely traced to the start of mercantilism, which coincided with the colonizing of the Americas, Africa, and Asia in the 1400s.<sup>200</sup> Eric Williams, who would go on to be the first Prime Minister of Trinidad and Tobago, argued that it was not a coincidence that racism and capitalism emerged at the same time.<sup>201</sup> He builds on earlier commentary on the economic divisions between two types of colonies: those whose land was better situated for smaller-scale farming; and those whose "land and capital were both

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<sup>198</sup> See Tara Van Ho, *COVID-19 Symposium: A Time to Kill 'Business as Usual'—Centering Human Rights in a Frustrated Economy (Part 1)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-1/>; Tara Van Ho, *COVID-19 Symposium: A Time to Kill 'Business as Usual'—Centering Human Rights in a Frustrated Economy (Part 2)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-2/>; see also, Sjøfjell, *supra* note 181.

<sup>199</sup> While Ocasio-Cortez and Sanders have self-identified as socialists, the economic discourse in the United States has cast their policies as socialist even though they are actually within the spectrum of capitalist thinking. See, e.g., Mason B. Williams, *Socialism and the Liberal Imagination*, DISSENT (Aug. 8, 2018), [https://www.dissentmagazine.org/online\\_articles/new-deal-socialism-liberalism-progressive-reform](https://www.dissentmagazine.org/online_articles/new-deal-socialism-liberalism-progressive-reform). For critical Marxist studies, see TZOUVALA, *supra* note 187; BAARS, *supra* note 179, at 184.

<sup>200</sup> See generally ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (Mariner Books 1999) (tracing the historical roots of slavery and the slave trade).

<sup>201</sup> WILLIAMS, *supra* note 142.

useless unless labor could be commended.”<sup>202</sup> In this latter category are sugar and tobacco colonies, in both the Caribbean and the Southern United States.<sup>203</sup> Labor-intensive land required a significant number of workers undertaking repetitive activities in order to make the production viable and then to make it as profitable as possible.<sup>204</sup> Slavery was a means of achieving this, and when Indigenous communities did not provide the desired levels of production, European States, led by Spain, began to bring African slaves over.<sup>205</sup> Williams asserts that “[s]lavery was not born of racism: rather, racism was the consequence of slavery.”<sup>206</sup>

Williams’s analysis and conclusions have been echoed by a number of other scholars, as well,<sup>207</sup> and I think he’s right that capitalism drives racism. The prioritization of shareholder interest and the compensation of executives in stocks—which incentivizes them to raise share price at the expense of other interests<sup>208</sup>—really means that companies are looking for means of exploitation, and justifications for reducing compensation to average workers.<sup>209</sup> Fundamentally, that is going to call for identifying or creating and exploiting differences and hierarchies amongst workers.

**George:** What’s the difference, if any, between the economic and the cultural aspects of racism? It would seem they are mutually reinforcing. I hadn’t gotten to the point that you have gotten to in terms of interrogating the entire capitalist system in relationship to racism or as irredeemably racist. However, Ibram Kendi does discuss capitalism in his book.<sup>210</sup> So that’s why I was asking you, can these ever be

<sup>202</sup> *Id.* at 4.

<sup>203</sup> *Id.* at 4–7.

<sup>204</sup> *Id.* at 7–8.

<sup>205</sup> *Id.* at 9.

<sup>206</sup> *Id.* at 7–8.

<sup>207</sup> See KENDI, *supra* note 48, at 22–24 (explaining how the first European voyages to capture slaves were done for profit, which was replicated by Christopher Columbus within the Americas when he arrived); MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP*, 10 (The Belknap Press of Harv. Univ. Press 2017) (“[t]he institution of slavery was so at odds with the liberal notions of equality avoiced in America’ founding documents that a theory of racial hierarchy was used to explain away the dissonance”); Karen E. Bravo, *Black Interests in Slavery*, 53 VAL. U. L. REV. 605, 625 (2019).

<sup>208</sup> Van Ho has previously written about this practice and its harms. See Tara Van Ho, *COVID-19 Symposium: A Time to Kill ‘Business as Usual’—Centering Human Rights in a Frustrated Economy (Part 1)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-1/>.

<sup>209</sup> See LORDE, *supra* note 173.

<sup>210</sup> KENDI, *supra* note 50, at 42–43 (identifying “the self-interest of racist power” as the root problem of racism noting the accumulation of capital by slave traders as contributing to racist ideas to justify racist policies).

disaggregated, since this is the economic system that it seems we will have for the future, I guess, or until society collapses. But, in the meantime, can we use the tools that we have, whether it's securities law, whether it's human rights due diligence, or impact assessments in ways that are more inclusive, less racist and even potentially antiracist? How do we make the devices, and the tools we have more effective to ensure more workers' voices are heard? How do we use and create tools to reduce abuse of power? If there are going to be people building power and then using that power in a way that serves the interests of antiracism better than racism, then I am all for it.

But let's be honest. For some people, racism is an interest and the commitment to maintaining it can work horribly efficiently. For the last United States administration for instance—racism did a great deal of work.<sup>211</sup>

**Martin:** Building on Erika's question, I want to push you, Tara, in understanding your definition of racism. Because I'm hearing sort of different views of interrogating capitalism but also other forms of oppression that are not simply traditional racism. And there's certainly validity to that, but I think othering happens even in microcosms where racism isn't present, and it is distinct from racism.<sup>212</sup> I'm really trying to get an understanding of what you what you mean when you're discussing racism.

**Van Ho:** This is interesting to me. I had assumed we would all be in agreement that BHR is racist and the discussion would move in a different direction. I hadn't anticipated some of this.

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<sup>211</sup> See, e.g., David Choi, *Hate Crimes Increased 226% in Places Trump Held a Campaign Rally in 2016, Study Claims*, BUS. INSIDER (Mar. 23, 2019), <https://www.businessinsider.com/trump-campaign-rally-hate-crimes-study-maga-2019-3>; Jason Le Miere, *How Trump Won: White Working Class Voters Motivated by Fear of Immigrants, Not Economic Woes*, NEWSWEEK (May 9, 2017), <https://www.newsweek.com/trump-voters-immigration-working-class-605930>; see also, Brian F. Schaffner, et. Al, *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9 (2018).

<sup>212</sup> Othering has been described as "the simultaneous construction of the self or the in-group and the other or out-group in mutual and unequal opposition through identification of some desirable characteristic that the he self/in-group has and the other/out-group lacks and/or some undesirable characteristic that the other/out-group has and the self/in-group lacks. Othering thus sets up a superior self/in-group in contrast to an inferior other/out-group, but this superiority/inferiority is nearly always left implicit." Lajos Brons, *Othering, An Analysis*, 6 TRANSCIENCE 69, 70 (2015). Prof. Martin credits her introduction to the idea of othering and the concepts of non-racial and gender-based privilege to the work of her colleagues William Rhee (WVU law Professor) and Adrienne Williams (formerly of WVU, currently the founder and principal of Standpoint Consulting). For an example of their discussion of privilege and equity in higher education, see Adrienne Williams & William Rhee, *Learning to Examine Life: Why Diversity Writ Large is Essential in K-12 Education* (Sept. 24, 2011) (working paper, Chapman University Emerging Scholars Conference) (on file with author).

So, first, I would base my answer to the question of what constitutes racism as opposed to other forms of “othering” in the ICERD.<sup>213</sup> I recognize that Anna Spain Bradley has argued that racial discrimination is not synonymous with racism and we need a better framework for combatting racism than merely ICERD.<sup>214</sup> Hers is a significant argument and it’s one I’m still grappling with, so I know I’m taking the coward’s way out here by relying on ICERD. But, I don’t yet have another framework I prefer better that is also universalist in its intention.

In ICERD, racial discrimination is the exclusion or oppression of people on the basis of identifiable characteristics of race, color, decent, ethnicity, or nationality.<sup>215</sup> For me, that oppression manifests in a variety of different ways. There are political, legal or civil, social, economic and cultural manifestations of racism.<sup>216</sup> I think capitalism is and creates an economic manifestation of racism. Underpinning modern capitalist thought is an expectation that profitability is an inherent good that will produce efficiency in a manner that enhances society.<sup>217</sup> That’s often not the case, of course.<sup>218</sup> But, that goal of profitability is one that facilitates, is conducive to, and may even prompt racial discrimination because the devaluing of a person gives greater value to the corporation, and ultimately the shareholder.

In discussing this with my colleague Jessica Lawrence, she made the point that as a matter of first principles, capitalism does not *require* racism. One could imagine taking capitalism to a galaxy far, far away where the population is made up of clones. Employing capitalism

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<sup>213</sup> See ICERD, *supra* note 2.

<sup>214</sup> See Bradley, *supra* note 5.

<sup>215</sup> ICERD, *supra* note 2, at art. 1(1).

<sup>216</sup> See Bravo, *supra* note 207. This understanding aligns with and is informed by work on the types of horizontal inequalities—meaning the distribution of power between self-identified groups within a community—that tend to lead societies to fall into armed conflicts. Researchers have identified four main types of power—political, economic, social and cultural—and the more types of power that one side holds over the other, the more likely the state is to move into a situation of violence. See, e.g., HORIZONTAL INEQUALITIES AND CONFLICT: UNDERSTANDING GROUP VIOLENCE IN MULTIETHNIC SOCIETIES (Frances Stewart ed., Palgrave Macmillan 2016); Frances Stewart, *Horizontal Inequalities as a Cause of Conflict: A Review of CRISE Findings*, WORLD BANK GROUP (Aug. 20, 2010), <https://openknowledge.worldbank.org/handle/10986/9126>; HORIZONTAL INEQUALITIES AND POST-CONFLICT DEVELOPMENT (Arnim Langer et al. eds., Palgrave Macmillan 2012).

<sup>217</sup> See e.g., Amartya Sen, *Capitalism Beyond the Crisis*, 56 NEW YORK REVIEW OF BOOKS (Mar. 26, 2009), <http://www.nybooks.com/articles/22490>; Jennifer Cohen, *COVID-19 Capitalism: The Profit-Motive versus Public Health* 13 PUBLIC HEALTH ETHICS 176, 176 (2020).

<sup>218</sup> See Cohen, *supra* note 217, at 176–77 (identifying tensions between the profit-motivation of capitalism and interests in public health).

there will not produce *racism* but it would produce some other, equivalent means of differentiation. You might find exploitation on the basis of which factory someone is cloned in or when they were cloned. That intentional othering will emerge, however, because capitalism requires the exploitation of labor and the diminishing of the expense of labor. Right now, that exploitation and diminishing is achieved, at least on Earth, easily with racism and misogyny, and then furthered with their intersection.

This economic manifestation can then intersect with and reinforce inequalities in other areas of power. I think a lot of times these four types of power intersect in the U.S. Who has the most economic power? Oftentimes, it is the people who have been able to target in on culture, define that culture, and then influence our understanding of politics. This intersection of power, and its ability to reinforce itself, explains why the GOP is willing to degrade the notion of the Hollywood elite but will embrace 50 Cent and use Kanye West so long as they support Trump.<sup>219</sup> It is a manifestation of their attempt to capture cultural cache and use it for their political agenda.<sup>220</sup>

**Martin:** Another example is the co-op of hip hop culture throughout the '90s.<sup>221</sup> Hip hop was considered “the other” and “the bad”

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<sup>219</sup> 50 Cent and Kanye West are both Black men who made millions as musicians. West gained additional wealth and fame through endorsements, business ventures, investments, and his marriage to socialite Kim Kardashian—famous and wealthy in her own right for her family’s reality TV show *Keeping up with the Kardashians*. Compare Louis Baudoin-Laarman, *After 50 Cent Backs Trump, Republicans Share Rappers’ Doctored Image*, AFP (Oct. 21, 2020), <https://factcheck.afp.com/after-50-cent-backs-trump-republicans-share-rappers-doctored-image> (indicating an embrace of 50 Cent by Republicans after he expressed support for Trump) with Hunter Field, *Clarke Tucker Seen As Democrats’ Best Hope to Flip U.S. House Seat*, ARKANSAS DEMOCRAT GAZETTE (May 24, 2018), <https://www.arkansasonline.com/news/2018/may/24/tucker-seen-as-democrats-best-hope-to-f-1/> (noting that the National Republican Congressional Committee tried to degrade a Democratic candidate by tying him to “Hollywood elite”).

<sup>220</sup> See Ben Kamisar & Julia Ingram, *Republicans in at Least Four States Are Helping Kanye West Gain Ballot Access*, ABC NEWS (Aug. 4, 2020), <https://www.nbcnews.com/politics/2020-election/republicans-least-four-states-are-helping-kanye-west-gain-ballot-n1235881> (indicating that GOP operatives were supporting Kanye West’s campaign, likely in an effort to draw Black voters away from then-Democratic presidential candidate Joe Biden); Spencer Hornhaber, *Kanye West, Political Pawn*, ATLANTIC (Aug. 14, 2020), <https://www.theatlantic.com/culture/archive/2020/08/how-kanye-west-became-political-pawn/615256/> (noting that Trump’s son-in-law Jared Kushner met with West after he announced his run for President and other Republicans seemed to be using West’s candidacy as a spoiler for Joe Biden).

<sup>221</sup> Kembrew McLeod, *Authenticity Within Hip-Hop and Other Cultures Threatened With Assimilation*, 49 J. COMM. 134, 134–50 (1999).

until it was monetized, brought out of the underground and into the mainstream.<sup>222</sup>

**Van Ho:** Yes, what Nancy Leong calls “racial capitalism,” the commodifying of non-white racial identities and cultures so white people can derive capital from it.<sup>223</sup> In doing so, the commodified culture is changed by the white capitalists.<sup>224</sup>

**Martin:** I think it’s also important to recognize what David Richins has pointed out, which is that many consider the positioning of capitalism versus socialism to be a false dichotomy and what we really need is to move to an ownership economy.<sup>225</sup> What he has proposed is not new—and he notes that it’s not new—but I think that he might be onto something, with ensuring that employees have a stake in the actual ownership of the company. For instance, with the Chobani corporation, it’s universal that every employee has a stake in the company,<sup>226</sup> and they specifically employ refugees and immigrants.<sup>227</sup> Apparently, the CEO was saying that people often tell him that the people he’s hiring don’t know how to make yogurt, and his reaction is, “well, we can train them, right?”<sup>228</sup> There’s an evolution to the corporate purpose there.

So, I think there’s something to be said about your approach, and we should have a deep interrogation of the capitalist system. But the reality is, is that we’re not there yet.

### *Communal Reflections*

Van Ho’s exploration of the demands of capitalism reflect fundamental conflicts that BHR seeks to resolve.<sup>229</sup> Other scholars have also recognized that the shareholder primacy approach of modern capitalism sits in tensions with efforts to ensure corporations respect

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<sup>222</sup> *Id.* at 136 (“Within only a few years, hip-hop music was transformed from [] being an aspect of a small subculture identified with young, city-dwelling African Americans to a genre that has been absorbed into mainstream U.S. popular culture.”)

<sup>223</sup> See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

<sup>224</sup> *Id.*

<sup>225</sup> Ownership Economy, *Ep. 1: A New Way of Thinking (Beyond Capitalism and Socialism)*, YOUTUBE, (Feb. 13, 2015) <https://www.youtube.com/watch?v=4fTkPv5EzB0>.

<sup>226</sup> Yuki Noguchi, *Why Chobani Gave Employees a Financial Stake in the Company’s Future*, NPR (Apr. 28, 2016), <https://www.npr.org/sections/thesalt/2016/04/28/476021520/why-chobani-gave-employees-a-financial-stake-in-companys-future>.

<sup>227</sup> Christine Lagorio-Chafkin, *This Billion-Dollar Founder Says Hiring Refugees Isn’t a Political Act*, INC. (June 2018), <https://www.inc.com/magazine/201806/christine-lagorio/chobani-yogurt-hamdi-ulukaya-hiring-refugees.html>.

<sup>228</sup> Hamdi Ulukaya, *The Anti-CEO Playbook*, TED (Apr. 2019), [https://www.ted.com/talks/hamdi\\_ulukaya\\_the\\_anti\\_ceo\\_playbook?language=en](https://www.ted.com/talks/hamdi_ulukaya_the_anti_ceo_playbook?language=en).

<sup>229</sup> See Ramastasya, *supra* note 1, at 243; Sjäffjell, *supra* note 181, at 180–81.

human rights.<sup>230</sup> This is what makes the “stakeholder approach” she mentions so appealing: it presents a means by which to balance out capitalism’s inherent call for greed by requiring corporations to account for their impacts beyond the shareholder. But, does the capitalist focus on shareholder primacy render capitalism, and as a consequence BHR, irredeemably racist? Van Ho shies away from a definitive answer. If Van Ho is hesitant, George and Martin are resistant. They are unwilling to embrace the premise that capitalism is inherently racist and therefore cannot agree that BHR itself is racist. We return to contemplate why this difference of opinion exists in Section VI, below.

In grappling with the central question of capitalism’s relationship to racism, we are forced to return to and re-examine the concept of racism. The structural and systematic nature of racism means it impacts every (public) facet of society.<sup>231</sup> As such, Van Ho argued that capitalism is an economic manifestation of racism that exists because of, and intersects with, social, cultural and political manifestations of racism. Here, we experience again the significance of the dialogic method, which allows for an interrogation into underlying assumptions. It is not simply that tension exists between the three of us—more so in the transcription than in the actual conversation—but that this tension gives rise to a question that an individual author may have avoided or simply missed. Through the dialogue, we also built on one another, drawing together examples but also alternative frameworks for understanding the issues we present to one another. Martin’s resistance to the connections Van Ho makes between racism and capitalism are tempered by the former’s own reflections on the false dichotomy between capitalism and socialism. The notion of an ownership economy, like that of stakeholder capitalism, perhaps offers a better, less exploitative economic approach. Both systems, our discussion implies,

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<sup>230</sup> Peter Muchlinks, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation*, 22 BUS. ETHICS Q. 145, 157 (2012) (“Whether corporate actors can allow human rights concerns to trump profit maximisation concerns is only open to debate so long as corporate cultures and, as will be discussed below, corporate governance theories upon which so much corporate law is based, remain rooted in the prioritisation of enhancing shareholder value.”). See also Sjäfjell, *supra* note 181 (noting numerous tensions that arise from the shareholder primacy approach as well as potential solutions to be found within company law); Sjäfjell & Taylor, *supra* note 180 (articulating how the shareholder dominance of corporate purpose makes it difficult for businesses to fulfil the role the international community expects of them in terms of sustainable development); Beate Sjäfjell et al., *Shareholder Primacy: The Main Barrier to Sustainable Companies*, in COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 79 (Beate Sjäfjell & Benjamin J. Richardson eds., 2015).

<sup>231</sup> We recognize that private spheres may, but not always, offer a reprieve from the structures of racism.

may allow for a stronger antiracist framing than the current, dominant approach.

Unanswered in this section is whether BHR is inherently racist or derivatively racist, *i.e.*, racist simply because it derives from and embraces a capitalist framing. The nature of this dialogue means we never firmly answer the latter part of that question. Other scholars do not either.<sup>232</sup> This is an area that calls for greater research.

What we do offer, however, are greater reflections on whether BHR and the UNGPs are racist. In the next section, Van Ho begins the discussion by arguing that the UNGPs fail to adequately address the impact and ever-presence of racism, paying less heed to treaties like ICERD than she believes is needed. George, on the other hand, finds the UNGPs framing broad enough to cover racial discrimination and render the UNGPs “not-racist.” This is not good enough, but the situation is perhaps not as dire as Van Ho claims. Due to the flow of the conversation, we are choosing to also introduce the following section here. Building on the debate between Van Ho and George over the adequacy of the UNGPs’ framing, Martin calls us to reflect on whether the “master’s tools” can ever dismantle the “master’s house.”<sup>233</sup> We consider the benefits and costs of incremental change utilizing structures that were not designed to be antiracist. This takes us into a discussion on the complexity of assessing jurisprudential advancements of antiracist efforts. We contemplate whether aggressive radicalism or incremental change is more desirable and the considerations we make as BHR educators when advising our students on career choices. We then turn to the difficult question of whether the UNGPs and BHR should be treated synonymously, particularly when considering the field’s approach to racism.

### *C. The Framing in the U.N. Guiding Principles*

**Van Ho:** When we move from the capitalist foundation to BHR’s most authoritative statement, the UNGPs, we also have an issue with framing.<sup>234</sup> The UNGPs require businesses to take account of human rights but what it identifies as human rights is narrow: the International Bill of Human Rights and the eight ILO core conventions.<sup>235</sup> What’s missing are all the treaties that recognize that

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<sup>232</sup> See BAARS, *supra* note 179, at 365–78.

<sup>233</sup> LORDE, *supra* note 173.

<sup>234</sup> H.R.C. Res. 17/4, *supra* note 1.

<sup>235</sup> *Id.* princ. 12. The International Bill of Human Rights consists of the Universal Declaration of Human Rights, U.N. Gen. Assembly res. 217A (1948), the ICCPR, *supra* note 3, and the ICESCR, *supra* note 4. The eight International Labor Organization (ILO) core conventions are identified in the *Declaration of Fundamental Principles and Rights at Work*, 86th Sess., 37 I.L.M. 1233 (adopted June 18, 1998).



when the majority interprets and applies human rights they carry with them biases that mean that human rights continue to be denied to those outside the majority group. These treaties recognize that specific measures may be needed to protect human rights for people in situations of social vulnerability: ICERD;<sup>236</sup> the Convention on the Elimination of All Forms of Discrimination against Women;<sup>237</sup> the Convention on the Rights of the Child;<sup>238</sup> the International Convention on the Rights of All Migrant Workers and Members of their Families;<sup>239</sup> and the Convention on the Rights of Persons with Disability.<sup>240</sup> None of those are explicitly brought into the UNGPs.<sup>241</sup> Instead, what we have is a recognition that “[d]epending on circumstances, business enterprises may need to consider additional standards” including respect for “individuals belonging to specific groups or populations that require particular attention.”<sup>242</sup> Well, there’s not a circumstance in which a business *shouldn’t* be taking account of racial discrimination (or gender discrimination, as the Working Group has recognized).<sup>243</sup> When we take these treaties and commitments out of the centrality of our thinking on BHR, we undermine their relevance, and we miss the intersectionality that bringing these treaties together can address. That failure to really engage with those treaties, again, means the UNGPs fail to be antiracist. And by not being actively antiracist, I think they become racist.

**George:** I think I’m less bothered than you are by the failure to make explicit reference to the subsequent international human rights instruments further elaborating prohibitions against racism and sexism in the UNGPs. I read the International Bill of Rights, specifically Article 2 of the Universal Declaration, Article 2 of the ICCPR, and Article 2 of the ICESCR, all to state fundamentally that all unfair discrimination on the basis of race, color, sex, language, religion, political or other opinion,

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<sup>236</sup> ICERD, *supra* note 2.

<sup>237</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

<sup>238</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, (entered into force Sept. 2, 1990).

<sup>239</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3, (entered into force July 1, 2003).

<sup>240</sup> Convention on the Rights of Persons With Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, (entered into force May 3, 2008).

<sup>241</sup> See H.R.C Res 17/4, *supra* note 1, princ. 12.

<sup>242</sup> *Id.*

<sup>243</sup> *Gender Dimensions*, *supra* note 6, ¶¶ 22, 24.

nationality, ethnicity is prohibited.<sup>244</sup> Antidiscrimination is there and therefore it is in the UNGPs.<sup>245</sup>

Now, I think the interesting question then becomes—why is it that people aren't giving the proper read to what *is* already on its own a robust statement of a broad antidiscrimination principle in the International Bill of Human Rights that is further elaborated by the additional instruments?<sup>246</sup> Having them not explicitly referenced in the UNGPs makes no difference to me in a substantive way because I see it there, I read it there, and I think others who don't are simply wrong.

Would having explicit references to additional instruments make the importance of racial and gender equity more clear? The other instruments are important, and in some sectors more important than others because some economic sectors happen to be or have come to be racialized and feminized, like factory work.<sup>247</sup> Women who are members of racial minorities are doubly discriminated against or disadvantaged in dangerous work. We're seeing it with COVID-19 in really dangerous and sad ways. Essential workers are disproportionately ethnic minorities and a lot of women are at risk.<sup>248</sup> And I understand, women are going to be

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<sup>244</sup> International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 990 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>245</sup> H.R.C. Res. 17/4, *supra* note 1.

<sup>246</sup> The International Bill of Human Rights has been recognized as comprising the following treaties and declarations: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights, and its Two Optional Protocols. *See* U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Dec. 10, 1948), <https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf>.

<sup>247</sup> *See, e.g.,* Edna Bonacich et al., *The Racialization of Global Labor*, 52 AM. BEHAV. SCIENTIST 342, 350 (2008) (explaining that “groups of workers are located within a hierarchically organized, racialized labor system that differentially exploits workers based upon their racialized and gendered location” and arguing that certain groups (mainly white/European workers) are generally afforded more privileges than other groups (mainly non-white workers), who face “higher degrees of exploitation and inferior working conditions”); Terry L. Esper, *Let's Talk About Race and the Danger Faced by Black Delivery Drivers*, SUPPLY CHAIN Q. (June 1, 2020), <https://www.supplychainquarterly.com/articles/3505-lets-talk-about-race-and-the-danger-faced-by-black-delivery-drivers>.

<sup>248</sup> *See* Catherine Powell, *Color of Covid: The Racial Justice Paradox of Our New Stay-at-Home Economy*, CNN (Apr. 18, 2020), <https://www.cnn.com/2020/04/10/opinions/covid-19-people-of-color-labor-market-disparities-powell/index.html>; Mary T. Bassett et al., *Variation in Racial/Ethnic Disparities in COVID-19 Mortality by Age in the United States: A Cross-Sectional Study*, PLOS MEDICINE (Oct. 20, 2020), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1003402> (“In the United States, non-Hispanic Black (NHB), Hispanic, and non-

pushed back by this pandemic about a decade in the kinds of advances that we've made.<sup>249</sup> And I think that's "not racist."<sup>250</sup> This is not to say it is not a problem. It is. Being "not racist" is not sufficient to meet the challenge.

*D. Can We Use the "Master's Tools" to Dismantle the Master's House?*

**Martin:** This conversation brings us back to the Audre Lorde quote: "the master's tools can never be used to dismantle the masters house."<sup>251</sup> As I mentioned before, I don't actually agree with that because I have seen examples of incremental changes that have led to incredibly powerful, structural changes that have helped to partially dismantle racism. Think of Thurgood Marshall and his approach to taking the step-by-step, incremental changes that led to *Brown v. Board of Education*, which didn't occur in a vacuum.<sup>252</sup> It was a very effective strategy. Ruth Bader Ginsburg did the same thing when she wanted to unpack gender discrimination, even using male plaintiffs to show how it affects everyone.<sup>253</sup> I take solace from that. I really do.

That does not mean desegregation went off without a hitch. There are definitely arguments that can be made that, in many ways, desegregation hurt the Black community.<sup>254</sup> Before desegregation, socioeconomic class was less of a dividing point in communities of color: Black doctors lived with Black laborers who lived with Black

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Hispanic American Indian/Alaska Native (NHAIAN) populations experience excess COVID-19 mortality, compared to the non-Hispanic White (NHW) population.")

<sup>249</sup> See, e.g., Amanda Taub, *Pandemic Will 'Take Our Women 10 Years Back' in the Workplace*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/world/covid-women-childcare-equality.html>.

<sup>250</sup> See KENDI, *supra* note 41, at 181–92 (offering a definition of "gender racism" as "a powerful collection of racist policies that lead to inequity between race-genders and are substantiated by racist ideas about race genders" and discussing the concept of "intersectionality" as conceptualized by Kimberlé Crenshaw in 1991).

<sup>251</sup> LORDE, *supra* note 173. Audre Lorde was one of the leading voices of black feminist thought during the 1970s and 1980s.

<sup>252</sup> 347 U.S. 483 (1954); Leland Ware, *Thurgood Marshall, the Man With the Winning Strategy*, DELAWARE ONLINE (May 12, 2014), <https://www.delawareonline.com/story/opinion/contributors/2014/05/12/thurgood-marshall-man-winning-strategy/8918021/> (discussing how Marshall was the chief strategist for the NAACP from 1938 to 1961, during which "Marshall won a series of cases that set the stage for *Brown v. Board of Education*.")

<sup>253</sup> *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (featuring a male plaintiff who alleged discrimination for failing to receive benefits based on his status as a widowed father in order to take care of his child. Similarly situated widowed mothers were allowed to receive those same benefits. In a unanimous decision, the Supreme Court found that this constituted gender discrimination).

<sup>254</sup> Deirdre Oakley et al., *The Impact of Desegregation on Black Teachers in the Metropolis, 1970–2000*, 39 ETHN. RACIAL STUD. 1576, 1576–77 (2009).

teachers, all in the same neighbourhood.<sup>255</sup> When Black doctors had the ability to move out, they moved out, which then led to a double stratification because you were black and in lower socioeconomic classes.<sup>256</sup> So I'm not naively saying, "Oh, it was wonderful how desegregation happened!" but it *has* happened.

**Van Ho:** Well, I think we need to interrogate why Black doctors moved out, given the "redlining" of American cities, which excluded predominantly Black communities from access to mortgages and necessary investment, which led to embedded and cyclical poverty that is still having an impact today.<sup>257</sup>

**Martin:** Sure. But can we acknowledge that—at least from a jurisprudential point of view—desegregation happened. Again, I'm not naive enough to think that ending *de jure* segregation uniformly made the world a better place, but I do think it at least led to a shift in the conversation regarding how we talk about these things and examine these things. It also provided new opportunities for Black folks who didn't have them before. So, on balance, I think it was probably a positive development for the most part and I credit Thurgood Marshall for that. The fact that Thurgood Marshall sat on the United States Supreme Court within thirteen years of the *Brown* decision—that's a huge development. And he did not sit there as a token member of the Court.

**George:** He did so much, so much.

**Martin:** I don't know of any system, at least in the United States (because we are so good at assimilation and co-option) that has been

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<sup>255</sup> See Sheryll Cashin, *Middle Class Black Suburbs and the State of Integration: A Post Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 736 (2001) (discussing the rise of affluent Blacks from segregated neighborhoods in the wake of the Civil Rights Act and the Fair Housing Act); see, e.g., Claude S. Fischer et al., *Distinguishing the Geographic Levels and Social Dimensions of U.S. Metropolitan Segregation, 1960 -2000*, 41 DEMOGRAPHY, 37, 54 (2004) (stating "Class segregation, although much lower than segregation by race and ethnicity, increased between 1970 and 1990, largely because the well-to-do concentrated more in specific metropolitan areas and, even more, in specific places within metropolitan areas.")

<sup>256</sup> For a more nuanced discussion of the role of race and class in residential neighborhoods, see Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354 (2012).

<sup>257</sup> United States government agencies introduced redlining of communities during the Great Depression, determining that some communities were "high risk." Mortgage lenders used these maps and others to determine who and where to lend to. While technically outlawed in 1977 with the Community Reinvestment Act of 1977, studies indicate that redlining continues to affect housing opportunities and even health outcomes. See, e.g., Kevin A. Park & Roberto G. Quercia, *Who Lends Beyond the Red Line? The Community Reinvestment Act and the Legacy of Redlining*, 30 HOUS. POL'Y DEBATE 4, 19 (2019); Anthony Nardone et al., *Historic Redlining and Urban Health Today in U.S. Cities*, 13 ENV'T JUST. 109, 112–17 (2020); Mark Percy, "The Most Insidious Legacy"—Teaching About Redlining and the Impact of Racial Residential Segregation, 17 GEOGRAPHY TCHR. 44, 45–46 (2020).

dismantled exclusively by outsiders.<sup>258</sup> Even the movements that started on the outside, like the Civil Rights Movement, gained traction because of the people on the inside.<sup>259</sup> Sure, there were demonstrations, but there was also Lyndon B. Johnson twisting arms and saying, “you will sign on to this legislation.”<sup>260</sup>

**George:** And, of course, Nelson Mandela shares the Nobel Prize with de Klerk.<sup>261</sup>

I also never really understood, “you can’t dismantle the master’s house with the master’s tools.” That’s what built the house! I really genuinely do not get the saying. Nothing else would take it down, right?

**Van Ho:** True. I think there’s strength when we have people inside and outside the system working for the same goal. But, we need NGOs and academics who are putting outside pressure on businesses to adopt structural reform in their operations, and on States to adopt structural reform within their trade and investment regimes.<sup>262</sup>

**Martin:** But, we also need people inside the corporations who are capable of making good decisions at the helm. When I taught my BHR seminar this semester, I spent a lot of time working with my students through the complicated situation between corporations and their impact on society. For many of these students, this is the first time that they’ve been exposed to stories of communities who have suffered significant harms at the hand of corporations.<sup>263</sup> So many of them became disillusioned with businesses and were ready to find a whole new career. *I’m* the one saying, “no, let me be very clear: I actually *want* people like you to be in corporations because you’re the people who are conscious and will do good. I want you to interrogate the system.” Now, hopefully the system doesn’t completely change them, so they become all about the money. But, I want the people who are willing to interrogate

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<sup>258</sup> See, e.g., David Pettinicchio, *Institutional Activism: Reconsidering the Insider/Outsider Dichotomy*, 6 SOCIO. COMPASS 499, 499–507, (2012).

<sup>259</sup> Michael O’Donnell, *How LBJ Saved the Civil Rights Act*, ATLANTIC (Apr. 2014), <https://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/>.

<sup>260</sup> *Id.*

<sup>261</sup> See Darrell D. Irwin, *Awards for Suffering: The Nobel Peace Prize Recipients of South Africa*, 12 CONTEMP. JUST. REV. 157 (2009).

<sup>262</sup> See Tara Van Ho, *Extraterritorial Human Rights Obligations in the Context of Investment Law*, in THE ROUTLEDGE HANDBOOK ON EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS (Mark Gibney et al., eds., 2021) (on file with author).

<sup>263</sup> See generally WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD (Jena Martin et al. eds., Anthem Press 2020) (providing an overview of a corporation’s role in society as told from the perspective of the community).

and engage to be thinking about this from inside the corporation.<sup>264</sup> As you both know, I want to be on a corporate board because, like it or not, corporations are the ones that have power. So, I want to be on the inside during the conversation. Maybe, maybe I don't win the first fight, and maybe I don't even win the first five fights, but maybe my voice is enough to help move them in the right direction, and maybe slowly, there's a shift. I am totally fine with playing the long, incremental game because it's what made Marshall so powerful.

In many ways, Derrick Bell's work on interest convergence theory set the groundwork for my thoughts on this.<sup>265</sup> In many ways this idea of interest convergence echoes a similar debate that we had during the early development of the BHR field – do you remember the debates surrounding whether we should make a “business case for human rights?”<sup>266</sup> or whether we should just try and push human rights on corporations because it was the right thing to do? As it turns out, we just did both. Those with the right language made the business case for human rights.<sup>267</sup> Others took a different approach.<sup>268</sup> As a result, there has definitely been an uptick in human rights related principles becoming embedded in corporations.<sup>269</sup> And, because they are now more embedded, I truly believe it now gives corporate employees and executives the space to make human rights-based decisions without having to justify their actions every time they do so. But part of that had to happen because they were confronted with the alternative – stricter regulatory oversight. It does require people on both sides. One of the reasons why Martin (Luther King Jr.) was so palpable towards the end

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<sup>264</sup> See BADER, *supra* note 94.

<sup>265</sup> See generally Bell, *supra* note 80. Bell was one of the leading Black academic legal scholars until his death in 2011. He was the first Black tenured Professor at Harvard Law School and is one of the founding voices of critical race theory.

<sup>266</sup> Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REVIEWS 85 (2010).

<sup>267</sup> *Id.*

<sup>268</sup> See, e.g., Andrew Clapham, *Non State Actors in INTERNATIONAL HUMAN RIGHTS LAW* 3–4, (Daniel Moeckli et al. eds., Oxford Univ. Press 3rd ed. 2017) (“The most promising theoretical basis for human rights obligations for non-state actors is to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person’s inherent dignity. The implication is that these natural rights should be respected by everyone and every entity.”)

<sup>269</sup> See, e.g., Caroline Kaeb & David Scheffer, *Bullhorns for Humanity: The Rise of CEOs as Social Activists*, KNOWLEDGE @ WHARTON (June 6, 2019), <https://knowledge.wharton.upenn.edu/article/the-rising-social-activists-ceos-and-their-employees/> (discussing the rise of CEOs taking stands in human rights, often at the urging of their employees).

was because there was Malcolm (X).<sup>270</sup> So people had a choice: do you want the softer, gentler view of Martin or the other way?<sup>271</sup>

**Van Ho:** Whereas I'm happy to play the Malcolm side of things in BHR<sup>272</sup> and advocate for burning down structures like investment law and the corporate purpose because I find them so destructive.<sup>273</sup> I think the only way to salvage human rights is to destroy these sacred truths and protections of company law, which essentially function as barriers to progress in the BHR. And I kind of hate the “business case for human rights.” I don't care if it's in your interests to respect human rights; do it anyway. They're human rights: universal claims we are endowed with from our very birth.<sup>274</sup>

I always struggle as a teacher, Jena, whenever we talk about your approach to using the inside track. You're actively encouraging your students to go into corporations, whereas I often want to protect my students from becoming the token human rights person in a company. We do have alumni who have gone on to work for corporations—some of whom are still working for corporations—but, several of whom have told me that they were used and eaten up by the company and its competing demands. They were supposed to reform the entire system, but every time they brought a proposal forward, the management or the Board objected to the cost.<sup>275</sup> We've also seen this at the Forum, with

<sup>270</sup> Terry Gross, *Black Power Scholar Illustrates How MLK and Malcolm X Influenced Each Other*, NPR: FRESH AIR (Aug. 12, 2020), <https://www.npr.org/2020/08/12/901632573/black-power-scholar-illustrates-how-mlk-and-malcolm-x-influenced-each-other> (discussing the work of Black Power scholar Peniel Joseph. Joseph notes that, Malcolm X “injects a political radicalism on the national scene that absolutely makes Dr. King and his movement much more palatable to mainstream Americans.”)

<sup>271</sup> See KEHINDE ANDREWS, *BACK TO BLACK: RETELLING BLACK RADICALISM FOR THE 21ST CENTURY* xvi–xvii (Zed Books 2018).

<sup>272</sup> As Andrews explains, this is not the same thing as being violent. “Radicalism is confused with extremism because we incorrectly conflate what is radical with what is violent. This confusion is dangerous...” *Id.* at xix.

<sup>273</sup> I used this phrase with regard to investment law in a panel discussion at the 2018 U.N. Forum on Business and Human Rights titled, “Crowd-drafting: Designing a Human Rights-Compatible International Investment Agreement.” See also Tara Van Ho, *COVID-19 Symposium: A Time to Kill ‘Business as Usual’—Centring Human Rights in a Frustrated Economy (Part 1)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-1/>; Tara Van Ho, *COVID-19 Symposium: A Time to Kill ‘Business as Usual’—Centring Human Rights in a Frustrated Economy (Part 2)*, OPINIO JURIS (Apr. 2, 2020), <http://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-2/>

<sup>274</sup> Universal Declaration of Human Rights, *supra* note 246, art. 1.

<sup>275</sup> Reports indicate this is also a common experience for women and racial and ethnic minorities who are asked to lead on diversity initiatives within a company. Antiracist

large companies complaining about how difficult it is and how much it costs to comply with different reporting requirements in California versus the European Union.<sup>276</sup> And there might be some legitimacy to that concern for *some* businesses, but often the issue is not that it is unsustainable for the business, but that it is expensive and that requires a reallocation of resources.

I remember listening to a representative from Disney at the Forum a few years ago complaining about this. Disney, which spent a reported USD \$5.4 billion on dividends in 2018 and 2019 alone, and spent another \$47.9 billion in share buybacks from 2009 to 2018.<sup>277</sup> Disney, whose compensation package for then-CEO, now Executive Chairman, Bob Iger exceeded \$44 million in 2019 alone.<sup>278</sup> Disney is not suffering because they're expected to take stock of how their operations, products, and services impact on human rights. Now, I understand why their human rights representatives show up at the Forum and say this; they're probably being told the reporting costs too much. But, that does not mean it's true. That is more of an indication of serious failures by leaders higher up the chain to value human rights and to invest what is needed to respect human rights. So, I worry about sending students to these businesses if there's no guarantee the business is serious about BHR.

**Martin:** Absolutely, it places students of color in impossible situations because they must shoulder the double burden of dealing with racism in their own life (both professionally and personally) while at the same time having the increasingly heavy allostatic stress load of working

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leaders have reported that workers from racialized backgrounds have been asked to volunteer, or have been volunteered, for leadership roles on equality, diversity, and inclusion without adequate support for their work and without workplaces adequately understanding either the experiences these workers have had to date or the emotional labor that is required to lead on these initiatives. For reflections on this issue from antiracist leaders, see Sheryl Nance-Nash, *Corporate Diversity Initiatives Trap Workers of Colour*, BBC (Sept. 14, 2020), <https://www.bbc.com/worklife/article/20200826-how-corporate-diversity-initiatives-trap-workers-of-colour>.

<sup>276</sup> This is a reflection of Van Ho's memory of events at the 2017 Forum. See @TaraVanHo, TWITTER (Nov. 27, 2017, 7:37 AM), <https://twitter.com/TaraVanHo/status/935170841226235905>. What Van Ho remembers—and while not directly reported in the Tweets—is that the Disney representative had complained about the cost of complying with both the United Kingdom Modern Slavery Act 2015 c.30, and California Transparency in Supply Chains Act, 2010 Civil Code Section 1714.43.

<sup>277</sup> Anders Melin, *Warren Questions Disney Buybacks, CEO Pay Before 28,000 Layoffs*, BLOOMBERG (Oct. 14, 2020, 7:43 PM), <https://www.bloombergquint.com/onweb/warren-questions-disney-s-rich-buybacks-ceo-pay-before-layoffs>.

<sup>278</sup> Madeline Berg, *Bob Iger, Entertainment's Highest-Paid Executive, Forgoes Salary to Combat Disney's Coronavirus Hit*, FORBES (Mar. 30, 2020, 12:50 PM), <https://www.forbes.com/sites/maddieberg/2020/03/30/disneys-bog-iger-entertainments-highest-paid-executive-forgoes-salary-amid-coronavirus-pandemic/?sh=308a936b5ce1>.



through issues of injustice for a corporation that might not care.<sup>279</sup> On the other hand, many people of color who have been exposed to racial injustices will often take on this work anyway, often times at under paid organizations where they can barely eke out a living wage. Isn't it better than if they at least have the opportunity to make decisions that *may* have an impact while also helping to promote their social economic status in a way that they otherwise would not be able to do?

**Van Ho:** Of course, I agree that they should get paid and paid well for that work—particularly if they are doing it for a corporation but also if they are laboring for a non-profit—but my concern is that I pretty routinely see companies place good, human rights knowledgeable staff in untenable positions where they don't have the resources needed to do their job. There are numerous corporations that make public promises about their commitment to human rights—the kinds of companies that engage in “Black Lives Marketing”—and then they refuse to make the reforms necessary to match those commitments.<sup>280</sup> And I'm not sure I want to subject my students, particularly my students of color, to that. I don't want to send them to a position where they are required to endure that level of emotional labor—and emotional abuse. I obviously can't stop them, and for some of them it's the right move. But I do worry about them and feel obligated to have a realistic conversation with them.

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<sup>279</sup> For a discussion on the forces at work that contribute to attorneys of color leaving corporate law practices, see generally Richard Sander, *The Racial Paradox of the Corporate Law Firm*, 84 *Empirical Studies of the Legal Profession*, No. 5 (2006) <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4229&context=nlcr>. For insight into the pressures faced by academics of color, see generally PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. Gonzalez and Angela P. Harris, eds)(Univ. Press of Col. 2012) (describing the stress of women of color in academia).

<sup>280</sup> The disconnect between the promises businesses make in policy statements and their lack of implementation in practice has been highlighted in a number of recent cases, most notably two heard by the United Kingdom Supreme Court. In *Vedanta Resources, PLC and another v. Lungowe and others*, the parent company is alleged to have adopted policies indicating strong involvement in the environmental response of its subsidiaries, but took inadequate action to ensure the realization of those policies in Zambia, harming 1,826 Zambian citizens, mostly farmers, through the emission of toxic substances. *Vedanta Resources v. Lungowe et al.*, [2019] U.K.S.C. 20 (U.K.). In *Okpabi and others v. Royal Dutch Shell Plc and another*, the parent company is alleged to have adopted widespread public commitments to human rights and environmental protections throughout its corporate group that were not realized when its Nigerian subsidiary caused environmental pollution that harmed the rights of the Ogale Community and the Bille Kingdom. *Okpabi et al. v. Royal Dutch Shell* [2021] U.K.S.C. 3 (U.K.). This case upended previous approaches to BHR and parent company liability within the United Kingdom; finding for the first time that a parent company's public commitments, including through policy documents, can constitute an assumption of a duty of care to those who might foreseeably be damaged by a breach of those commitments. *Id.*

I don't think the UNGPs are well situated to challenge or change this reality, either, because they do not go far enough to require businesses to adopt serious, structural reforms.<sup>281</sup>

**Martin:** Now, Tara, I want to push you here because I keep hearing you come back to the UNGPs, even when we talk about the BHR framework generally, you keep bringing it back to the UNGPs. I think it's worth noting that within this field, other academics consider BHR to be much broader than the UNGPs.<sup>282</sup> Some would even argue that we have moved beyond the UNGPs,<sup>283</sup> so even where I agree with you that there are these limitations to the UNGPs, I don't think that means that there's a limitation to the field of BHR as a whole.

**Van Ho:** This is interesting to me for two reasons. First, I actually think we haven't done enough with the UNGPs. While I think they are fundamentally flawed, I also see more potential in them than I think a lot of legal scholars have acknowledged. When they were adopted, their non-binding nature and their employment of uncertain, and seemingly meaningless, language—the use of “human rights impacts” instead of violations; the attribution of responsibility for “causing” and “contributing” to those impacts without indicating what those terms are supposed to mean<sup>284</sup>—contributed to a perception amongst some that they were rather useless in practice, or, in Surya Deva's words, that they “treat[ed] human rights lightly.”<sup>285</sup> I think that explains the rush to develop a binding treaty; there was a clear

<sup>281</sup> The UNGPs create only a social responsibility for businesses to respect human rights, rather than a legal obligation to do so. See H.R.C. Res. 17/4, *supra* note 1. There is a movement to adopt a legally binding instrument that may change this reality, but that is still being negotiated. See U.N. Human Rights Council, Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014). See also U.N. Human Rights Council, Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/46/73 (Jan. 14, 2021) (the most recent report on the work of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights); *OEIGWG Chairmanship Second Revised Draft*, OHCHR (June 8, 2020), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf).

<sup>282</sup> Surya Deva et al., *Business and Human Rights Scholarship: Past Trends and Future Directions*, 4 BUS. & HUM. RTS. J. 201, 202 (July 2019) (stating “we believe that BHR scholars in the future should move beyond the UNGPs and pay greater attention to a wider range of research strands.”)

<sup>283</sup> *Id.*

<sup>284</sup> See H.R.C. Res. 17/4, *supra* note 1.

<sup>285</sup> Surya Deva, *Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESSES: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT?, 78 (Surya Deva & David Bilchitz eds., 2013).

recognition that States and businesses could render the UNGPs meaningless by utilizing these gaps and uncertainties in the UNGPs.<sup>286</sup> Now, we're ten years on and we are only starting to grapple with key terms in the UNGPs, like "impacts," which David Birchall argues is intended to capture a broader set of actions than those that would trigger a "violation" under general IHRL.<sup>287</sup> And, I have the first significant examination of the terms "cause" and "contribute to" coming out this year.<sup>288</sup> I think by concretizing these terms, academics can play an important role in moving BHR forward as a field.

Second, and more directly to your question: yes, I use the UNGPs as the standard for assessing and discussing where we are as a field because if we're going to talk about whether the master's tools can dismantle the master's house, we need to recognize that this is the only real tool the masters have given us. States and businesses have embraced the UNGPs, and have pledged to realize their implementation.<sup>289</sup> They keep fighting mandatory due diligence, watering it down or limiting it to only a few businesses, as the French duty of vigilance law does in capturing only France's largest employers.<sup>290</sup> We have some, but not many, successful transnational tort claims, which face significant hurdles everywhere they are brought.<sup>291</sup> We have a few reporting requirements, but those generally do not have a significant enforcement mechanism, or rights for victims to pursue reparations and remediation under the relevant statute.<sup>292</sup> We have the *potential* for a binding treaty, but European States have been quite resistant to that proposal.<sup>293</sup> And, we have the UNGPs. If we want to see businesses held to account for their

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<sup>286</sup> In a seminal piece on the need for a new binding treaty, Olivier De Schutter noted four particular gaps in the UNGPs that States should consider addressing in the treaty. Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41 (2015).

<sup>287</sup> David Birchall, *Any Act, Any Harm, to Anyone: The Transformative Potential of 'Human Rights Impacts' Under the UN Guiding Principles on Business and Human Rights*, 1 U. OXFORD HUM. RTS. HUB J. 120, 122–24; 126–32 (2019).

<sup>288</sup> Van Ho, *supra* note 1.

<sup>289</sup> See, e.g., Wettstein, *supra* note 84, at 30–31 (discussing how States have responded to the UNGPs); *Human Rights Policy (2017)*, *supra* note 103; *Human Rights, supra* note 103; *Unilever's Human Rights Policy Statement*, *supra* note 103.

<sup>290</sup> See *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, [Law 2017-399 of Mar. 27, 2017 relating to the duty of vigilance of parent companies and order-giving companies], *supra* note 110; see also Cossart et al., *supra* note 110.

<sup>291</sup> See Chambers, *supra* note 124; Van Ho, *supra* note 124, at 53; Brillo, *supra* note 125.

<sup>292</sup> See Martin, *supra* note 108, at 530–31; 566–78; Chambers & Vastardis, *supra* note 132, at 35–41; see also Bueno & Bright, *supra* note 109, at 800–15; Hoff, *supra* note 109.

<sup>293</sup> See Zamfir, *supra* note 121, at 5–6.

impacts on human rights, we need to focus on making the UNGPs actionable, enforceable, and meaningful.

I realize it is ironic that I am defending the utility of the UNGPs when I have said that they are, fundamentally, racist. But—if you can forgive me for beating this analogy to death—the masters have given us a single hammer, and we can simultaneously recognize how inadequate a tool it is while still using it to bash as many windows as we can, passing it around to pound away at the load-bearing walls until they break.

### *Communal Reflections*

We began these two sections by considering the framing of the UNGPs specifically. Central to the debate between George and Van Ho was whether the UNGPs should have explicitly referenced ICERD or whether their reliance on the ICCPR and ICESCR is sufficient for ensuing an antiracist approach. Consistent with their earlier approaches, Van Ho asserts that without an explicit antiracist approach, the UNGPs are necessarily racist while George concludes that the problem lies not in the UNGPs, but in their implementation by those unwilling to focus on racism as part of their BHR work. This renders the field “not-racist,” which is not good enough.

Martin challenged us to consider how incremental change can progress antiracist efforts in BHR. She broadened the discussion to reference examples from the United States to consider how a judicial system not intended to protect racial minorities was used to dismantle formal segregation. This dismantling, however, required collaboration between “insiders” and “outsiders” within the system. As George points out, this is not unique to the U.S. judiciary. Other structures of oppression have similarly crumbled because of simultaneous internal and external pressures. This raises a question for us as educators: if we accept that change requires allies on the inside to support opponents on the outside, should we encourage our students to join corporate practice? For Martin, the answer is yes. Van Ho is more hesitant because she often sees businesses that claim a commitment to human rights in policy, but fail to operationalize that commitment in practice. The benefit of a dialogic method is apparent again as Martin calls on Van Ho to consider whether her approach threatens to exacerbate racial economic inequalities and places an undue burden on members of racialized communities.

This exchange also led Martin to question Van Ho on her seeming treatment of the UNGPs and BHR as synonymous, a controversial position in the field. Van Ho concedes she is doing this because the UNGPs are the only global tool available for BHR. Her position on the UNGPs is also revealed to be more complex than earlier

discussions suggested. While the UNGPs are racist structurally, they have also been underutilized as a tool of radical reform. While she has held this latter belief for a while, it is through this dialogic inquiry that the discord of her beliefs becomes apparent. In an solo-authored article, Van Ho could have skimmed past this tension. She is unwilling to concede her belief that the UNGPs are racist and yet she implicitly recognizes they offer some antiracist potential. This suggests that perhaps she was wrong to insist that the racist foundation of capitalism makes both it and BHR irredeemably racist, although she is not yet ready to adopt Martin and George's approach, either.

In the next section, we return to the problem of businesses that seem committed to human rights on paper but fail human rights in practice. George opens this section by considering how companies have responded to the Black Lives matter movements. The discussion evolves to identify our expectations for businesses when they are linked to racism, either directly or through their business relationships. Contrasting the responses of the United States's companies to the United Kingdom's ones, Van Ho notes that the latter have explicitly recognized the connection between their current efforts and reforms and their historical participation in justice and racism. The United States's companies have not. This leads Martin to question the appropriateness of reparations as a solution for the problems identified by the Black Lives Matter movements.

#### *E. "Black Lives Marketing"*

**George:** With "Black Lives Marketing" developing as the Black Lives Matter movement moved mainstream, we see companies that want to do just enough not to be labelled racist—which shows the power in calling a thing "racist" when it is and saying what is "racism" when it is—but again this is not enough to move to where we need to be which would be to be actively antiracist, which is beyond affirmative action and beyond disclosures of board diversity. Antiracism would require an entire reordering and upheaval of our usual ways of denying that there is a problem with policies and practices instead of a person's race or gender.

Since the uprisings, the business response to the Black Lives Matter movement has been: "Oh, and we're on your side." But it's more like, "Look at all the Black people in our commercials—like Colin Kaepernick"—without addressing the structural issues they've faced or been complicit in. It is performative at best and profiteering off of the pain of affected communities at worst. Though I imagine those involved in crafting statements responding to racism would self-describe as "not racist." After the first wave of BLM protests, Colin Kaepernick was

completely and utterly shunned for taking a knee on the field during the United States' national anthem to protest police violence.<sup>294</sup> Then, Nike took a stand for the brand and had him in their Super Bowl Commercial.<sup>295</sup>

**Martin:** That's my point! More and more corporations are taking a specific stand - they're not staying out of it, they're getting involved in all sorts of conversations; conversations about politics, social justice, and racism. And again, I think that none of us are naive enough to think that they're just doing the right thing. But I also think that there has been some ... good is too strong a word, but there has been some benefit there. Could there perhaps be an argument that at there has been some benefit to those stories being represented by these corporations in the mainstream media? I'm very much of two minds at this. We're all really good at assimilation. The United States is fantastic at assimilation. And so suddenly it was cool to actually back Colin Kaepernick and so now it's not even a thing - whether Black players in the NFL stand or don't. At least, they don't get fired anymore. And like it or not, because corporations are so powerful, part of their power lies in shifting the conversation...

**Van Ho:** I want to push back a little bit on this. First, I don't think that the corporation's power is universal. I think what Nike does doesn't make it cool for my parents' generation.

**Martin:** Yes, but they're not targeting your parents' generation.

**Van Ho:** True. But, the thing about the Nike example for me is that they have *so much power* in their relationships with both the general public and the NFL. They are the go-to brand for so many consumers;<sup>296</sup> they enjoy an almost unparalleled cultural cachet, and as you mentioned they have normalized Kaepernick and the protest. They also have an exclusive contract with the NFL, providing the NFL with all their team

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<sup>294</sup> See, e.g., Kevin Draper & Ken Bolsen, *Colin Kaepernick and NFL Settle Collusion Case*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/sport/s/nfl-colin-kaepernick.html> (reporting on Colin Kaepernick's settlement of claims against the N.F.L. for allegedly colluding to keep him off a team).

<sup>295</sup> See Kevin Draper & Julie Creswell, *Colin Kaepernick 'Dream Crazy' Ad Wins Nike an Emmy*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/sport/s/football/colin-kaepernick-nike-emmy.html>.

<sup>296</sup> See Pamela N. Danziger, *Nike Outranks Adidas, Under Armour and Lululemon Where it Counts: Consumer Perception*, FORBES (May 23, 2019), <http://www.forbes.com/sites/pamdanziger/2019/05/23/nike-outranks-adidas-under-armour-and-lululemon-where-it-counts-most-consumer-perception/> (discussing a survey examining consumers' intent to purchase a brand and their perceptions of various brands on the basis of their fashion and innovation); see also Marsin Lavaei et. al., *Investigate the Relationship between Personality Characteristics and Consumer Behavior. Case Study: Nike Brand*, 6(12) INT'L J. SPORTS STUD. 722 (2016) (examining how perceptions of Nike has led to brand loyalty amongst student athletes).

uniforms.<sup>297</sup> So, where were they in that discussion? Because it's nice to throw Colin Kaepernick up on some posters *after* he's been fired but they had the potential to raise awareness with their customers, helping to amplify his message by explaining it in their commercials and in their stores while plastering his face everywhere so that his presence and protest became normalized rather than demonized by people like Trump. They also had the opportunity to put pressure on the NFL and say, "retain him or there will be consequences." What the consequences could be would depend on where they felt that they could exercise pressure, but they should be explicit and intentional about pressure.

**George:** So this becomes a call, or at least I believe it should become a call for leverage, for leadership. In other words, use your leverage?

**Van Ho:** Exactly. And that is what the Guiding Principles talks about; they say that even if you are not causing or contributing to the underlying harm you are expected to use your leverage to effect change if you're directly linked to the harm through your business relationships.<sup>298</sup> Now possibly Nike was doing that, behind the scenes, but I doubt that this was happening. I suspect that if Nike was really using its leverage, we would have seen a different outcome for Colin Kaepernick.

I do think it's important to contrast the approach of companies in the United States to that of, at least some, companies based in the United Kingdom. In response to Black Lives Matter protests in the United Kingdom, the Bank of England promised to remove the "names and images of former governors and directors involved in the slave trade ... from display" and to "work with its staff, particularly Black and other ethnic minorities, to find ways to be more inclusive."<sup>299</sup> Lloyd's of London, the world's largest commercial insurance company, apologized for its role in providing insurance for slavers and in doing so treating enslaved Africans as general cargo.<sup>300</sup> It promised to recruit more minority ethnic employees, "and provide financial support to charities that promote diversity and inclusion."<sup>301</sup> And Greene King, a brewery

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<sup>297</sup> See *New Deal Establishes Nike as League's Official Uniform Provider*, *supra* note 16; Garcia, *supra* note 16.

<sup>298</sup> H.R.C. Res. 17/4, *supra* note 1, princ. 19.

<sup>299</sup> Linda Givertash, *Critics Question Reparation Offers from British Corporations with Slave Trade Ties*, NBC NEWS (June 19, 2020), <https://www.nbcnews.com/news/abc/blk/critics-question-reparation-offers-british-corporations-slave-trade-ties-n1231515>.

<sup>300</sup> Guy Faulconbridge & Kate Holton, *Lloyd's of London Apologizes for Its 'Shameful' Role in Atlantic Slave Trade*, REUTERS (June 17, 2020), <https://reut.rs/37Kk9T9>.

<sup>301</sup> Mark Landler, *Britain Grapples with its Racist Past, from the Town Square to the Boardroom*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/world/europe/uk-slavery-trade-lloyds-greene-king.html>.

whose founder Benjamin Greene had owned at least 231 slaves, also apologized and promised money to charities and a greater efforts to promote diversity and inclusion in its operations.<sup>302</sup> The English companies aren't doing *enough* in my opinion—they're still overly relying on diversity measures rather than the full range of reparations available and appropriate for their impacts as a matter of international law<sup>303</sup>—but they now recognize that their measures are a form of reparations, and that's significant in my opinion.

**Martin:** Is there a presumption by all of us that the Black Lives Matter movement deserves reparations? In other words, are we equating the solution to the problem that BLM brought to the fore to be reparations? Or is reparations just one of the solutions to the issues that were raised by BLM?

**George:** I think it's fair to do both: to seek repair for past and continuing intergenerational injury as we see the ongoing impacts of exclusion (economic or otherwise) and to seek to end racist state sanctioned violence against Black people through reimagining our understanding of human security and reforming policing.<sup>304</sup> I think of reparations in terms of restorative justice—not just a pay-out, payback, or a payoff.<sup>305</sup> I don't think we stop at the George Floyd Racial Justice Act effort,<sup>306</sup> which among other things aims to hold police accountable, to change the culture of policing, and to end racial profiling. Unfortunately there will persistently be racism in policing because

<sup>302</sup> *Id.* Kevin Rawlinson, *Lloyd's of London and Greene King to Make Slave Trade Reparations*, GUARDIAN (June 17, 2020), <https://www.theguardian.com/world/2020/jun/18/lloyds-of-london-and-greene-king-to-make-slave-trade-reparations>. When the trans-Atlantic trade was abolished, Greene was compensated approximately GBP £500,000 (USD \$680,500) today. *Id.* Those enslaved by Greene, of course, received no reparations, but—until the government's debt was paid in 2015—their taxes, and those of their descendants, helped pay the slavers for their losses. See Kris Manjappa, *When Will Britain Face up to its Crimes against Humanity?*, GUARDIAN Mar. 29, 2018) <https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity>.

<sup>303</sup> Givetash, *supra* note 299; Faulconbridge and Holton, *supra* note 300; Landler, *supra* note 301; Rawlinson, *supra* note 302.

<sup>304</sup> See Dreisen Heath, *Defunding the Police is a Reparations Issue*, NATION (Oct. 2, 2020), <https://www.thenation.com/article/activism/defund-police-reparations/>.

<sup>305</sup> See Ayesha Bell Hardaway, *The Case for International Reparations for Slavery Is Moral and Lawful, Even If Hard to Prove*, N.Y. TIMES (Oct. 8, 2015), <https://www.nytimes.com/roomfordebate/2015/10/08/are-transatlantic-slave-trade-reparations-due/the-case-for-international-reparations-for-slavery-is-moral-and-lawful-even-if-hard-to-prove>; Michael Gee, *It's Time for U.S. Business Leaders to Talk About Reparations*, HARV. BUS. REV. (July 24, 2020), <https://hbr.org/2020/07/its-time-for-u-s-business-leaders-to-talk-about-reparations>; Nkechi Taifa, *Reparations – Has the Time Finally Come?*, ACLU (May 26, 2020), <https://www.aclu.org/news/racial-justice/reparations-has-the-time-finally-come/>.

<sup>306</sup> George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).



policing has been about protecting a social and economic system in the United States that dehumanized Black people and relied on slavery to amass wealth and that continues to rely on racist policies and practices.<sup>307</sup> Can we imagine antiracist approaches to policing and security?

**Martin:** Erika, one of my friends, dré cummings, writes about that. In some of his articles he talks about how policing is a way of perpetuating the system of racism.<sup>308</sup> For me, personally, I don't think that reparations is *the* solution or even a partial solution. I think it's both over inclusive and under inclusive ... I mean everything ties back to racism! So much of our cultural, political, economic, and social ties all interweaves through the structural edicts of racism. And so all of the current "solutions,"—including reparations—to me is just another way of just treating the symptoms. Let me very clear, I have no clue as to how to treat the root cause. I have absolutely no clue how to do that. But I think it starts with an aggressive interrogation of what the heck racism is and how it continues to affect us on a structural level. As Karen Bravo has said, our whole commercial system is based upon the foundations of chattel slavery.<sup>309</sup>

### *Communal Reflections*

As has repeatedly been recognized in this broader discussion, it is not enough to consider in a vacuum how the UNGPs address racism.

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<sup>307</sup> See generally W. MARVIN DULANEY, *BLACK POLICE IN AMERICA* 1–7 (1996) (detailing various ways racism influenced policing in United States history); In the Southern United States, the need to protect the institution of slavery led to the use of "slave patrols," which evolved into the policing institutions of the South. For a detailed account, see Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 *AM. J. OF POLICE* 51, 54–66 (1998); Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 *SOCIAL RACE* 156, 159 (2001). Dulaney asserted that "the slavery patrol was the first distinctly American police system, and it set the pattern of policing that Americans of African descent would experience throughout their history in America." DULANEY, *supra* at 2. In a recent article, Robert A. Brown explains that policing developed differently in the Northern United States than it did in the Frontier and Southern United States. See Robert A. Brown, *Policing in American History*, 16 *DU BOIS REV.: SOCIAL SCIENCE RESEARCH ON RACE* 189, 190 (2019). The North modeled its law enforcement after the London Metropolitan Police force, whereas the South's law enforcement developed from slave patrols, but the Western states operated without clear or "well-structured or formal law enforcement entities [which] gave way to extralegal enforcement of laws and norms" *Id.* Each embedded racism, but in different ways, and Brown argues that "over time policing in America became a blend of these traditions and practices." *Id.*

<sup>308</sup> André Douglas Pond Cummings, *Reform Policing*, 10 *DREXEL L. REV.* 572 at 578–79. André Douglas Pond Cummings, *The Anti-Black Culture of Policing in the United States—Part I: History*, *OXFORD HUM. RIGHTS HUB* (June 27, 2020), <http://ohrh.law.ox.ac.uk/the-anti-black-culture-of-policing-in-the-united-states-part-i-history/>.

<sup>309</sup> Bravo, *supra* note 207, at 609–10, 614, 623, 625.

We must also consider what companies, States, and others actors do with the UNGPs in practice. In this section, we considered how businesses have responded to the Black Lives Matter movement, and to calls for greater inclusivity. We note that businesses have a responsibility under the UNGPs to use their leverage to affect change when they are directly linked to racist conduct through their business relationships. They also have an obligation to provide reparations when they cause or contribute to a harm.<sup>310</sup> But, are reparations the right approach for the calls of Black Lives Matter? Martin suggests not. The deeply embedded structure of racism for her means that reparations are an inadequate tool for redressing racism. George draws on a broad understanding of reparations to find that both economic and legislative responses should form part of the response to the structural issues articulated by the movement.

With this section, we conclude the first line of our inquiry on BHR as an antiracist tool. As promised at the outset of this article, we did not come to conclusions about the questions we asked. Instead, we focused on asking questions and offering individual answers. In the next section, we turn to the difficulties of addressing intersectional harms within BHR.

#### V. THE WILLINGNESS, AND DIFFICULTY, OF ADDRESSING INTERSECTIONAL HARMS WITHIN BHR

In this section, we begin to move away from the foundation and theory of BHR into its practice. We narrow our focus to the gap we each perceive in how BHR approaches intersectional harms, drawing on Crenshaw's body of work. As becomes apparent, we find more common ground when discussing this narrower issue than in the broader issue of racism in BHR. While reports on gender and BHR often give a passing nod to intersectional harms, without a concrete understanding of and response to racism one cannot address intersectional harms appropriately. Through the dialogue, we recognize the importance of representation on corporate boards, and anywhere else that decision-making occurs, to ensure a greater understanding of intersectionality. But, progress in that area has been slow to come. We also consider how domestic issues with racism within the "champions" of BHR—States like France, the United Kingdom, Denmark, and the Netherlands—may influence the willingness of the field to address intersectionality. We find the United States may be well placed to lead on some of these issues, but ultimately the perniciousness of racism globally means that States are unlikely to focus on racism generally nor on racism in BHR specifically.

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<sup>310</sup> H.R.C. Res. 17/4, *supra* note 1, princ. 22. *See also* Van Ho, *supra* note 1.

Since States continue to be the primary actors of international law,<sup>311</sup> they set the agenda for BHR and this means that the field as a whole has lost focus on the racial aspects of intersectional harms.

**Martin:** One of the criticisms that has been levied against the events that have taken place in the BLM movement this year is that, although it is explicitly trying to dismantle one system of oppression (racism) it does so from a privileging point of view with regards to *gender*. Case in point, it was George Floyd's death that sparked the outrage and protests across the country, not the death of Breonna Taylor. Also, statistically speaking (and I think this is right)<sup>312</sup> it's the death of Black men that tends to garner more media attention than Black women.

As a corollary to this, one of the sustained criticisms of the feminist movement over the years is that it has privileged race (and class) within the framework of gender oppression.<sup>313</sup> So the initial push in the 1970s for women to be able to move beyond their "traditional" roles as stay-at-home housewives ignored the fact that most Black women and women from lower social-economic backgrounds had been working outside of the home for years.<sup>314</sup>

Both of these issues represent a failure of intersectionality across race, gender, and class lines. My question is: does the BHR framework represent this same failure? If so, how do we address this?

**George:** So can I simplify that to be a question about: does business and human rights ignore intersectionality?

**Martin:** Sure, I mean I like my lead up but, fine...

**George:** It just seems that one of the reasons why we want things like the proposed NASDAQ board diversity disclosure requirements (which I'm super stoked about) is because it will plainly reveal who is not present in corporate leadership.<sup>315</sup> If we (Black women or women of color) aren't part of the decision-making process, if we

<sup>311</sup> See MALCOLM N. SHAW, *INTERNATIONAL LAW* 156–57 (Cambridge Univ. Press 8th ed. 2017).

<sup>312</sup> See Meredith Clark, *Coverage of Black Female Victims of Police Brutality Falls Short*, USA TODAY, (Apr. 22, 2016), <https://www.usatoday.com/story/opinion/policing/spotlight/2016/04/22/police-violence-women-media/83044372/>.

<sup>313</sup> See generally Angela Y. Davis, *supra* note 149. At least, this criticism stretches back to Sojourner Truth's famous "Ain't I a Woman" speech. Sojourner Truth, *Address at 1851 Women's Convention in Akron, Ohio: Ain't I a Woman* (May 29, 1851).

<sup>314</sup> See Crenshaw, *Demarginalizing*, *supra* note 67.

<sup>315</sup> E.g., *Nasdaq to Advance Diversity through New Proposed Listing Requirements*, NASDAQ (Dec. 1, 2020), <https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01>; Alexander Osipovich & Akane Otani, *Nasdaq Seeks Board-Diversity Rule that Most Listed Firms Don't Meet*, WALL ST. J. (Dec. 1, 2020), <https://www.wsj.com/articles/nasdaq-proposes-board-diversity-rule-for-listed-companies-11606829244>.

aren't in the boardroom, then we're not a part of informing or influencing the decision-making of corporate leaders. We're often not thought of in our absence, and so it's not surprising that the society is going to default to the sexism and racism that is already inherent in it.

**Martin:** Kimberlé Crenshaw first spoke about intersectionality thirty years ago.<sup>316</sup>

**George:** More recently she founded the "Say Her Name" campaign.<sup>317</sup>

**Martin:** So, do you think that intersectionality is something that BHR deals with or not? Specifically, do we think that this is a failure in the BHR field? Do we really engage with the dual issues of both sexism and racism?

**George:** No. I do not think that BHR deals with intersectionality or understands adverse human rights impacts through the lens of intersectionality in any meaningful way. It does not seem to me that the dominant framework for understanding and approaching business and human rights problems was created to capture the dilemma of the double discriminations of racism and sexism. Could the framework be made to fit? I do think it could but this would mean doing diligence to detect how policies and practices combine to create double discrimination against Black women. It is difficult to solve what is not seen and intersectionality has not been seen as a significant issue measured by the amount of time devoted to discussing it in BHR conference presentations or BHR publications. It will require a candor and courage that perhaps could be incentivized if business interests were to converge with our interests in creating a more fair just and equitable world—one in which Black women are acknowledged and appreciated, invited into policy circles, appointed to boards, and cited in academic circles.

**Martin:** So then again, I'm going to ask you what it means that we're really good in the BHR field for talking about gender issues (most of the official literature I've seen that has come out of the Working Group makes sure to include a gender dimension for the issues that they

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<sup>316</sup> E.g. Crenshaw, *Demarginalizing*, *supra* note 67; Crenshaw, *Mapping*, *supra* note 67.

<sup>317</sup> In many ways, the initiative is a practical extension of her theoretical work on intersectionality. In 2015, Crenshaw's African American Policy Forum created the hashtag and movement #SayHerName to highlight the erasure of Black women as victims of police violence. See Kimberlé Crenshaw, *The Urgency of Intersectionality*, TED (Nov. 14, 2016), [https://www.ted.com/talks/kimberle\\_crenshaw\\_the\\_urgency\\_of\\_intersectionality?language=en](https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality?language=en); see also, Aamma Mohdin, *Kimberlé Crenshaw: The Woman Who Revolutionised Feminism—and Landed at the Heart of the Culture Wars*, THE GUARDIAN (Nov. 12, 2020), <https://www.theguardian.com/society/2020/nov/12/kimberle-crenshaw-the-woman-who-revolutionised-feminism-and-landed-at-the-heart-of-the-culture-wars>.

are discussing),<sup>318</sup> but I've heard much less that truly interrogates the role of race within the framework of BHR. Even *after* all the unrest of this past summer.

**Van Ho:** I think one of the problems we have within BHR is that, until recently, a lot of States were able to pretend that they had already fought successfully against racism while they were more willing to admit that gender inequality remained an issue. There has long been an unwillingness within European States to grapple with the racism that was intrinsic to their colonial rules and that continues to manifest in their societies.<sup>319</sup> If you are convinced that your legislation has done all the work your society needs to do, then it is easy to dismiss the ongoing pervasiveness of racism and the need to take any form of additional corrective action to address it.

Unfortunately, I've seen this approach in almost every European state I have been in. This includes the seeming leaders of the BHR movement. The United Kingdom was the first country to adopt a National Action Plan on Business and Human Rights, and has developed some of the most important precedence around BHR.<sup>320</sup> Between 2007 and 2018, the United Kingdom government wrongfully detained, deported, and denied rights to hundreds of lawful residents in what is now known as the "Windrush scandal."<sup>321</sup> These residents were originally from Caribbean States, almost all were Black, and they had been granted a right to remain because they came to the United Kingdom to help rebuild the country between the 1940s and the 1970s.<sup>322</sup> The government didn't provide them with adequate documentation, then it forgot about their rights, ignored them when they tried to assert those rights, and deported them to countries they hadn't lived in for decades.<sup>323</sup>

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<sup>318</sup> See United Nations Human Rights Office of the High Commissioner, *Gender Lens to the UNGPs*, <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx> (last visited Mar. 6, 2021).

<sup>319</sup> See generally Sara Salem & Vanessa Thompson, *Old Racism, New Masks: On the Continuing Discontinuities of Racism and the Erasure of Race in European Contexts* 3 NINETEEN SIXTY NINE 1 (2016); see also Moshe Semyonov et al., *The Rise of Anti-foreigner Sentiment in European Societies, 1988-2000*, 71 AM. SOCIO. REV. 426 (2006).

<sup>320</sup> Office of the High Commissioner for Human Rights, *National Action Plans on Business and Human Rights*, <https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx> (last visited Mar. 26, 2021); *Vedanta*, *supra* note 134; *Okpabi*, *supra* note 134.

<sup>321</sup> The government commissioned an independent review, which made some conclusions about the cause of the scandal and recommendations for reforms to prevent this from occurring again. See Wendy Williams, *Windrush Lessons Learned Review* (Mar. 19, 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876336/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_LoResFinal.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf).

<sup>322</sup> *Id.* at 24–25; 29–33; 112.

<sup>323</sup> *Id.* at 7.

An independent review found at least some elements of institutional racism in the government's conduct.<sup>324</sup> We now have Prince Harry's and Meghan Markle's interview with Oprah Winfrey too, where they state that members of the Royal Family were concerned about their son's skin color.<sup>325</sup> For years before their interview, I watched as she was subjected to viscous, racialized coverage in the media. The Sussexes' accusations were disturbing but it wasn't really surprising to anyone who has paid attention to racism in the United Kingdom. Yet, the response has consistently been to blame those who identify racism as an issue within British society.<sup>326</sup> The government has announced that it is "unequivocally against" the teaching of critical race theory in a year in

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<sup>324</sup> *Id.*

<sup>325</sup> *Oprah Interviews Meghan and Harry*, (ABC television broadcast Mar. 7, 2021) (showing Meghan stating that members of the Royal Family expressed "concerns and conversations about how dark [her son's] skin might be when he was born.") The interview and the allegations were met with varying degrees of concern. For instance, Britain's Society of Editors originally dismissed the claims, saying that "the U.K. media is not bigoted." William Booth, *Meghan and Harry called the British tabloids racist. A lot of U.K. Journalists Agree*, WASH. POST (Mar. 10, 2021) [https://www.washingtonpost.com/world/meghan-tabloids-harry-racist-/2021/03/10/a8777384-818d-11eb-be22-32d331d87530\\_story.html](https://www.washingtonpost.com/world/meghan-tabloids-harry-racist-/2021/03/10/a8777384-818d-11eb-be22-32d331d87530_story.html) (the head of the Society later resigned over the backlash). See also Jennifer Hassan, *'What Have They Done?' Britain's media reacts in horror to Meghan and Harry Interview*, WASH. POST (Mar. 9, 2021) <https://www.washingtonpost.com/world/2021/03/09/britain-reacts-meghan-harry/>. On the other hand, Queen Elizabeth issued a statement saying that Meghan's comments were saddening. William Booth, *Queen Elizabeth II 'Saddened' by Harry and Meghan's Descriptions of Rejection, Racism; Family will Address it Privately, Palace Say* WASH. POST (Mar. 9, 2021) [https://www.washingtonpost.com/world/meghan-queen-statement-demands/2021/03/09/36ecb5d0-80cf-11eb-be22-32d331d87530\\_story.html](https://www.washingtonpost.com/world/meghan-queen-statement-demands/2021/03/09/36ecb5d0-80cf-11eb-be22-32d331d87530_story.html).

<sup>326</sup> See Kevin Rawlinson, *'Abolish Whiteness' Academic Calls for Cambridge Support*, THE GUARDIAN (June 25, 2020), <https://www.theguardian.com/education/2020/jun/25/abolish-whiteness-academic-calls-for-cambridge-support>; Rebecca Speare-Cole, *Piers Morgan Hist out as Professor for Comparing Winston Churchill to Adolf Hitler on GMB*, EVENING STANDARD (June 10, 2020), <https://www.standard.co.uk/news/uk/piers-morgan-churchill-row-good-morning-britain-kehiinde-andrews-a4464781.html>. Piers Morgan had bashed Meghan, Duchess of Sussex, for years before he quit a prominent morning news show in the wake of the Sussex's Oprah interview. While Morgan has been criticized for being racist, it appears his choice to leave the morning program was not in response to accusations of racism. Instead, it was over concerns about the harm his criticisms of the Duchess could have on mental health advocacy and awareness in the United Kingdom. See Amol Rajan, *Why Piers Morgan Left Good Morning Britain*, BBC (Mar. 9 2021), <https://www.bbc.co.uk/news/entertainment-arts-56341511>; Naman Ramachandran, *Piers Morgan Storms Off 'Good Morning Britain' after 'diabolical' Meghan Markle Comments*, VARIETY (Mar. 9, 2021), <https://variety.com/2021/tv/news/piers-morgan-meghan-markle-itv-carolyn-mccall-1234925361/>. See also Jon Allsop, *Racism, the Culture Wars, and the Self-Cancellation of Piers Morgan*, COLUM. JOURNALISM REV. (Mar. 10, 2021), [https://www.cjr.org/the\\_media\\_today/meghan\\_oprah\\_piers\\_morgan.php](https://www.cjr.org/the_media_today/meghan_oprah_piers_morgan.php).

which the United Kingdom recorded over 76,000 hate crimes directed against people on the basis of their race.<sup>327</sup>

The Netherlands was the second country to adopt a National Action Plan.<sup>328</sup> There remains an ongoing “debate” within the Netherlands as to whether a blackface caricature used as a sidekick for Santa Claus around Christmas is racist.<sup>329</sup> The majority of white Dutch citizens remain convinced he is a perfectly acceptable, non-racist image.<sup>330</sup> He is quite literally a black-faced fool, but somehow they’re convinced he’s not racist.

Denmark was the third state to release a National Action Plan.<sup>331</sup> Denmark has adopted a series of laws that it calls “ghetto initiatives,” using that loaded term “ghetto.”<sup>332</sup> In 2018, the latest initiative defined a “ghetto” in contrast to a “vulnerable housing area.”<sup>333</sup> The latter term is based around economic indicators but the term “ghetto” is applied to vulnerable housing areas only if more than 50 percent of its residents “are immigrants and descendants from non-Western countries.”<sup>334</sup> “Descendants from non-Western countries,” clearly meaning non-white, right? Descendants of, not citizens of. So my poverty would have no impact on the designation of my neighbourhood, but if you were poor and living in Denmark, your neighborhood could be designated a ghetto. That is deeply problematic, but there are a number of human rights advocates who—at least in the conversations white people have with each other when they assume no one will object—have defended the law and its approach.

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<sup>327</sup> 682 Parl Deb HC (6th ser.) (2020) Cols. 921-1014 (UK) (The Equalities Minister inaccurately described critical race theory as “an ideology that sees my blackness as victimhood and their whiteness as oppression.”); House of Commons Library, *Hate Crime Statistics, 2020*, HC, 8537, 7.

<sup>328</sup> Office of the High Commissioner for Human Rights, *supra* note 320.

<sup>329</sup> See Charlotte McDonald-Gibson, *The Fight over ‘Black Pete’ Brings a Reckoning on Racial Equality in the Netherlands*, TIME (Nov. 14, 2020), <https://time.com/5910949/black-pete-netherlands-zwarte-piet/>; Yvon van der Pijl and Karina Goulordava, *Back Pete, ‘Smug Ignorance,’ and the Value of the Postcolonial Netherlands*, 88 NEW W. INDIAN GUIDE 262 (2014); Jeroen Rodenberg & Pieter Wagenaar, *Essentializing ‘Black Pete’: Competing Narratives Surrounding the Sinterklaas Tradition in the Netherlands*, 22 INT’L J. OF HERITAGE STUD. 716 (2016); Yannick Coenders & Sébastien Chauvin, *Race and the Pitfalls of Emotional Democracy: Primary Schools and the Critique of Black Pete in the Netherlands*, 49 ANTIPODE (2017).

<sup>330</sup> See, e.g., Charlotte McDonald-Gibson, *supra* note 329; van der Pijl & Goulordava, *supra* note 329; Rodenberg & Wagenaar, *supra* note 329; Coenders & Chauvin, *supra* note 329, at 1244–62.

<sup>331</sup> *Id.*

<sup>332</sup> See generally Anika Seemann, *The Danish “ghetto initiatives” and the Changing Nature of Social Citizenship, 2004-2018*, CRITICAL SOC. POL’Y (Dec. 2020).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

These are supposed to be our leaders and our allies in BHR! And then there's France. It has given us our only serious human rights due diligence legislation to date,<sup>335</sup> but racism is such a pernicious issue there.

**Martin:** I know! I teach my International Human Rights Law students about France's attitude towards non-discrimination using one of the cases that was presented to the Committee on the Elimination of Racial Discrimination (CERD)—*Diop v. France*.<sup>336</sup> The case presented the issue of a Senegalese lawyer trying to get admitted to the French bar. He was denied admittance. France took the position that, he wasn't prevented from practicing because he was Senegalese but because he wasn't French. Similarly, France has attached a reservation to Article 27 of the ICCPR stating that they don't discriminate against minorities because in France – there are no minorities, everyone is equal!<sup>337</sup>

**Van Ho:** Exactly!

**Martin:** That creates tensions within the society because what it means to be French is really what it means to be a white person who is French. It's not French to wear the hijab in schools or the niqab in public.<sup>338</sup> It's not French to wear a burkini, the bathing suit that some Muslim women wear because it covers their hair and their legs in ways other bathing suits don't.<sup>339</sup> And now, it's not French to film police

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<sup>335</sup> See *Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, [Law 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and order-giving companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (Mar. 28, 2017), at 7–9, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>; see also Sandra Cossart et al., *supra* note 110.

<sup>336</sup> Comm. 2/1989, U.N. Doc. CERD/C/38D/2/1989 (1990).

<sup>337</sup> Declarations and Reservations of France to the International Covenant on Civil and Political Rights, ¶ 8, deposited with the Secretary General 4 November 1980; see also France, Fifth Periodic Report to the Human Rights Committee, U.N. Doc. CCPR/C/FRA/5 (2013) ¶¶ 23–33.

<sup>338</sup> For critiques of France's ban on the hijab and niqab, see generally Fatima Khemilat, *Excluding Veiled Women from French Public Space: the Emergence of a 'Respectable' Segregation*, J. OF GENDER STUD., <https://doi.org/10.1080/09589236.2020.1863198>; Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 UNIVERSITY OF BALT. <https://doi.org/10.1080/09589236.2020.1863198>; Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 U. BALT. L. REV. 201 (2017).

<sup>339</sup> The burkini ban was introduced by resorts, rather than the government, but was then embraced by cities along the French coast. It briefly resulted in authorities arresting women for wearing the burkini on beaches before the Council of State ruled that the bans breached fundamental freedoms. See *French Resorts Lift Burkini Bans After Court Ruling*, BBC (Sept. 1, 2016), <https://www.bbc.co.uk/news/world-europe-37243442>. For analysis of the tensions at play in the ban, see generally Giulia Evolvi, *The Veil and its Materiality*:



brutality and violence against minorities. I don't know if you know this, but the French are pursuing a new Global Security Bill, which will make it a crime to show the faces of police officers on duty "with the aim of damaging their physical or psychological integrity."<sup>340</sup> What might not be obvious from that language is that it will likely make it a crime to share images of officers involved in police violence.<sup>341</sup> So, they're adopting a law that would mean it's not French to stand up to police brutality or racialized violence. *That's* how they're going to combat racial tensions?

**Van Ho:** And I hate to say this, but it's kind of unsurprising. France just seems completely lost when it comes to understanding or addressing racism. It does not allow for measuring race or ethnicity in hiring, but it appears French of African, Middle Eastern, and Asian decent are disproportionately un- and under-employed, and disproportionately suffer criminal abuse.<sup>342</sup> A 2019 metanalysis of national studies into racism concluded France had the highest rates of discrimination amongst nine States—higher than the United States!<sup>343</sup> (The other States examined were Belgium, Canada, France, Germany, Great Britain, Netherlands, Norway, and Sweden).<sup>344</sup> The French government seems to understand that racism is an issue but appears in two minds on what to do about it. They investigated employment discrimination against North Africans and came to their own conclusion that it's a pernicious issue.<sup>345</sup> But, that didn't lead to a recognition of the importance of disaggregated data that could point to serious and sustainable policy reforms.

Instead, the current government—supported by a surprising number of French academics—seems to be laying the blame at the feet

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*Muslim Narratives about the Burkini Ban*, 34 J. CONTEMP. RELIGION 369 (2019); Dimitri Almeida, *Marianne at the Beach: The French Burkini and the Shifting Meanings of Republican Secularism*, 39 J. OF INTERCULTURAL STUD. 20 (2017).

<sup>340</sup> Emma Beswick, *Why is France's New National Security Bill Controversial?*, EURONEWS (Nov. 28, 2020), <https://www.euronews.com/2020/11/28/why-is-france-s-new-national-security-bill-controversial>.

<sup>341</sup> *Id.*

<sup>342</sup> See generally Sarya Baladi, *Reasons Behind High Unemployment Rates of Maghrebians in France*, 3 COLLOQUIUM 5, 16 (2019).

<sup>343</sup> Lincoln Quillian, et al., *Do Some Countries Discriminate More than Others? Evidence from 97 Field Experiments of Racial Discrimination in Hiring*, 6 SOCIO. SCI. 467, 468–70; 480–82 (2019).

<sup>344</sup> *Id.*

<sup>345</sup> See Sandrine Amiel, *French Corporations Accused of Racial Discrimination Against North-African Job Applicants*, EURONEWS (Feb. 7, 2020), <https://www.euronews.com/2020/02/07/french-corporations-accused-of-racial-discrimination-against-north-african-job-applicants>.

of critical race theory.<sup>346</sup> They have argued that critical race theory is an American import that poses a threat to unity, *égalité* and *fraternité* in France, meaning critical race theory is the cause of racial tensions instead of, well, racism.<sup>347</sup> When your entire premise around race, racism, and diversity is “we don’t have it,” then you’re never going to be able to really address it. Discussing it, acknowledging it, and combatting racism becomes a form of dissidence instead of a patriotic duty, which is what I would have thought that commitment to *égalité et fraternité* should mean. It’s perverse. Given this reality, given where they are in understanding and combatting racism domestically, France is not and may never be a natural ally for antiracist activities or praxis within BHR. They can give us the duty of vigilance law, but that doesn’t mean they will ensure an antiracist approach to BHR is on the agenda for the treaty, the UN Working Group, or efforts at the European Union.

When we look at the States that are leading us in BHR—the United Kingdom, the Netherlands, France, Denmark—we find States that are struggling to even develop a consciousness about race and racism.<sup>348</sup> If States do not understand or combat racism, then they are

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<sup>346</sup> See Norimitsu Onishi, *Will American Ideas Tear France Apart? Some of Its Leaders Think So*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/world/europe/france-threat-american-universities.html>; Andreas Bikfalvi et al., *Open Letter: A Response from the ‘100’ French Scholars*, OPEN DEMOCRACY (Nov. 25, 2020), <https://www.opendemocracy.net/en/can-europe-make-it/open-letter-response-100-french-scholars/>; Alan Lentin et al., *Open Letter: the Threat of Academic Authoritarianism—International Solidarity with Antiracist Academics in France*, OPEN DEMOCRACY (Nov. 5, 2020), <https://www.opendemocracy.net/en/can-europe-make-it/open-letter-the-threat-of-academic-authoritarianism-international-solidarity-with-antiracist-academics-in-france/>.

<sup>347</sup> See Onishi, *supra* note 346; Bikfalvi et al., *supra* note 346; Alan Lentin et al., *supra* note 346.

<sup>348</sup> While European States are the BHR agenda’s primary supporters at the international level, they are not the only ones who struggle with racism. Anti-Semitism, a form of racism, is a problem globally. See, e.g., Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Rep. on Elimination of All Forms of Religious Intolerance*, U.N. Doc. A/74/358 ¶ 4 (Sept. 20, 2019). In Japan, there are serious issues with colorism and anti-Black racism—which received some attention following the global spread of Black Lives Matter—and against Koreans, and Indigenous communities, including the Ainu and Ryukyu. See, e.g., Ryusei Takahashi, *Black Lives Matter Spreads to Tokyo as 3,500 People March to Protest Racism*, JAPAN TIMES (June 14, 2020), <https://www.japantimes.co.jp/news/2020/06/14/national/black-lives-matter-spreads-tokyo-2000-people-march-protest-racism/>. Colorism is also a serious problem in India. See, e.g., Neha Mishra, *India and Colorism: The Finer Nuances*, 14 WASH. UNIV. GLOB. STUD. L. REV. 725, 732–33 (2015). In Latin American States, there are significant issues of colorism and anti-indigenous racism too. See, e.g., Tanya Katerí Hernández, *Colorism and the Law in Latin America—Global Perspectives on Colorism Conference Remarks*, 14 WASH. UNIV. GLOB. STUD. L. REV. 683, 688–90 (2015); Angela R. Dixon, *Colorism and Classism Confounded: Perceptions of Discrimination in Latin America*, 79 SOC. SCI. RSCH. 32, 44–45 (2019); Christopher Courtheyn, *De-indigenized but Not Defeated: Race and*

incapable of leading on intersectionality. You cannot address intersectionality without understanding its component parts: racism; sexism; homophobia and transphobia; classism; religious bigotry; ableism; ageism; nationalism; and other forms of discriminatory conduct. It requires more than just noting that women from racialized backgrounds will experience additional harms. That approach of a mild acknowledgment actually just centers whiteness and the white experience—or the majoritarian experience in non-white States—as some sort of universal reality from which other races and realities deviate. That is just not accurate nor is it helpful for understanding and addressing intersectional harms. Unfortunately, that's all we really see in their literature and state practice on BHR and gender: a nod to intersectionality without a commitment to *also* tackle racism.<sup>349</sup>

In some senses, I think the United States is actually well-suited to be a leader on bringing antiracist approaches into BHR because we have a vocabulary that allows for the acknowledgment and redressing of racism even if we fail to implement that in practice. Relying on the United States to be a leader is a rather depressing idea. We've made so little progress on BHR, racism, or sexism, so you can understand the depth of my despair as I look to the United States to lead here.

**Martin:** I think there's a certain ironic dissonance in terms of what happens within the United States vis-a-vis human rights and what is happening in the BHR field with regard to racism. For instance, in the United States we seem to have no problem discussing racism and issues of social injustice. Newspapers, social media, and literature are replete with discussions, and analyses of racism, social injustice, and discrimination.<sup>350</sup> And yet, rarely, do these discussions here take place

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*Resistance in Colombia's Peace Community and Campesino University*, 42 *ETHNIC & RACIAL STUD.* 2641, 2642–43 (2019).

<sup>349</sup> See *Gender Dimensions*, *supra* note 6; Grosser, *supra* note 6; Musiime, *supra* note 6; Bhatasara & Chirimambowa, *supra* note 6; MARTIGNONI & UMLAS, *supra* note 6; Simons & Handl, *supra* note 6; Larking, *supra* note 6; Barrientos et al., *supra* note 6; Goldblatt & Rai, *supra* note 6; Kristiansson & Götzmann, *supra* note 6.

<sup>350</sup> For instance, the New York Times has a whole section devoted to issues of Race & Ethnicity. *Race and Ethnicity*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/race-and-ethnicity> (last visited Mar. 7, 2021). See also, Christina Larson, *Black Scientists Call Out Racism*, ABC NEWS (Sept. 13, 2020), <https://abcnews.go.com/Technology/wireStory/black-scientists-highlight-racism-lab-field-72981585>; Eric Deggans, “Not Racist” is Not Enough: Putting in the Work to be Anti-Racist, NPR (Aug. 25, 2020), <https://www.npr.org/2020/08/24/905515398/not-racist-is-not-enough-putting-in-the-work-to-be-anti-racist>; *What Systemic Racism Means and the Way it Harms Communities*, NPR (July 1, 2020), <https://www.npr.org/2020/07/01/885878564/what-systemic-racism-means-and-the-way-it-harms-communities>; Elly Belle, *How White People Can Hold Each Other Accountable to Stop Institutional Racism*, TEEN VOGUE (Aug. 2, 2019), <https://www.teenvogue.com/story/white-people-can-hold-each-other-accountable-to-stop>

within the context of a human rights lens.<sup>351</sup> In fact, it is rare that Americans interrogate issues of social injustice or engage with human rights in general – instead tending to view human rights violations as something that happen somewhere else. In contrast, the BHR framework is quite obviously fluent in the language of human rights, it’s a part of everything we do. And yet, we seem remarkably shy about using that human rights lens to examine the issues of racism – either within our own field or by using that framework to engage with issues of racial injustice. It’s just something that struck me during our conversation.

### *Communal Reflections*

As we recognized at the outset of this article, BHR has proven willing and capable of addressing gendered harms.<sup>352</sup> Efforts to consider these harms often give a nod to intersectionality but never provide a strong foundation for understanding how racism manifests in BHR. This is a problem. Intersectional harms cannot be understood or addressed without understanding and addressing racism. Yet, the state champions of BHR are not natural allies for antiracist efforts. In this section, we reflected on the challenges of addressing intersectionality, and having it taken seriously within the field of BHR. In the next, we consider the emotional labor of antiracist work in the area of BHR.

## VI. THE IMPACT AND EMOTIONAL LABOR OF SPEAKING OUT ON RACISM

In this section, we remain focused on the problems of addressing racism within BHR but we move away from external resistance to development while considering our own internal struggles to muster the energy to fight certain battles within the field. Here, the racial backgrounds of the three authors becomes a central point as George contemplates why Van Ho, who identifies as white, is more willing to label capitalism as racist while Martin and George, who identify as Black, are not. The answer likely lies in the emotional labor it takes to combat racism. The authors reveal that the emotional burden of being racialized coupled with fighting racism has led Martin and

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institutional-racism; Erica West, *Racism and the Need for Reproductive Justice Can't be Unlinked*, TEEN VOGUE (Sept. 18, 2020), <https://www.teenvogue.com/story/racism-and-the-need-for-reproductive-justice> (recognizing reproductive rights as human rights, but not discussing racism through a human rights lens).

<sup>351</sup> See, e.g., Deggans, *supra* note 350 (using conventional language and anecdotes, rather than a human rights framework); Larson *supra* note 350; NPR *supra* note 350.

<sup>352</sup> See *Gender Dimensions*, *supra* note 6; Grosser, *supra* note 6; Musiime, *supra* note 6; Bhatasara & Chirimambowa, *supra* note 6; MARTIGNONI & UMLAS, *supra* note 6; Simons & Handl, *supra* note 6; Larking, *supra* note 6; Barrientos et al., *supra* note 6; Goldblatt & Rai, *supra* note 6; Kristiansson & Götzmann, *supra* note 6.

George to focus on pragmatic approaches while Van Ho finds her privileges allow her to entertain thoughts and adopt positions that she might resist or not invest in if she were from a racialized background. But there are dangers to white scholars dominating discussions of racism, and we briefly outline our concerns. We conclude the discussion portion of this article on a note of hope: the demands for change are coming more loudly than before from a generation that is assuming its position as leaders.

**George:** I think it's interesting that Tara is the one calling for a greater deconstruction of capitalism, and labeling capitalism racist, and not us. There is a pragmatism of knowing what is and isn't useful to label as a racist system, and I'm actually kind of interrogating why I'm resistant to calling capitalism and BHR racist.

**Van Ho:** Am I allowed to answer?

**George:** Yes. I think if anything, you doing this gives us more permission to do this.

**Van Ho:** I think there's a lot of freedom (and even praise to be earned) as a white person when critiquing racism. Back in 1984, Richard Delgado documented how Black, Hispanic, and Native American legal scholars working on civil rights in the U.S. were less cited than white scholars working in the same area.<sup>353</sup> This was quantitatively true in terms of who courts cited and who the "prominent scholars" in the field cited.<sup>354</sup> I can speak openly about racism and while I might receive hate mail or death threats from the general population,<sup>355</sup> I will not be

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<sup>353</sup> Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 UNIV. PA. L. REV. 561, 565 (1984).

<sup>354</sup> *Id.* at 561–62.

<sup>355</sup> While writing this article, Van Ho was subjected to a flurry of death threats and threats of sexual violence that used white supremacist language to accuse her of betraying the white race. She has previously written about her experience with threats and harassment due to her work on human rights. See Tara Van Ho, *Reflections on Twitter and Women Human Rights Defenders*, ATLAS (June 21, 2020), <https://www.atlaswomen.org/insight/2020/6/2/1/reflections-on-twitter-and-women-human-rights-defenders>. Van Ho's experience is unsurprising. Human rights defenders, and particularly women human rights defenders, are often subjected to threats of violence, including sexual and gender-based violence and death threats. Michel Frost (Special Rapporteur on the Situation of Human Rights Defenders), *Rep. on the Situation of Women Human Rights Defenders*, U.N. Doc. A/HRC/40/60 ¶ 45 (Jan. 10, 2019). In a single two-month period in 2020, the UN Special Rapporteur on Human Rights Defenders, Mary Lawlor, raised concerns to States about threats against 189 human rights defenders, including 59 women. Mary Lawlor (Special Rapporteur on the Situation of Human Rights Defenders), *Rep. on the Situation of Human Rights Defenders*, U.N. Doc. A/75/165 ¶ 12, 16 (July 16, 2020). In her report, Lawlor notes that human rights defenders with online presences have important opportunities but are also "more and more exposed to abuse and threats, including with regard to their families,

professionally diminished for that being *an* area of passion. Equally, I am never portrayed or dismissed as the proverbial Angry Black Woman—<sup>356</sup> despite the fact I sometimes get more demonstrably angry and I always curse more than the two of you combined. And, any biases I have in favor of my own privileges are ignored because with white as the neutral reality,<sup>357</sup> and with the majority of those evaluating bias and academic rigour being white,<sup>358</sup> the *perception* is that I am or can be objective about race in a way racialized individuals cannot be.<sup>359</sup> The intersection of my privileges means that I can undertake the same analysis as countless Black people have done before me,<sup>360</sup> boldly claim that capitalism is inherently racist, and I (probably) will not face the backlash that Black academics would and do.

**Martin:** I also think that there is a level of—and again I don't want to speak for you, Erika—but there's just a level of resignation and fatigue that comes from having it as a lived experience. This is sort of a

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smears and intimidation, ridicule, stigmatization and defamation.” *Id.* at ¶ 34. Lawlor is in the first year of her mandate. While her predecessor, Michel Forst, recognized that women and those who work on racism suffer from intersectional harms, he did not release disaggregated data to indicate whether and how racism manifests in attacks against human rights defenders. *See, e.g.*, Michel Frost (Special Rapporteur on the Situation of Human Rights Defenders), *Rep. on the Situation of Human Rights Defenders*, U.N. Doc. A/HRC/28/63 (Mar. 4, 2015). Clearer information on how racism affects human rights defenders is needed in the future, and human rights scholarship would benefit from a thematic report on this issue going forward.

<sup>356</sup> The “Angry Black Woman” is a well-known trope used to deride, control, and criticize Black women, especially in situations where anger is justified. Trina Jones & Kimberly Jade Norwood have noted that the trope allows aggressors to blame women who choose to challenge bias and discrimination for being too sensitive and angry. *See* Jones & Norwood, *supra* note 69.

<sup>357</sup> *See* RENIEDDO-LODGE, *supra* note 160, at 48; GARNER, *supra* note 45, at 5, 35.

<sup>358</sup> In the United Kingdom, assessments of academic outputs are done through the Research Excellence Framework, in which works are evaluated by other academics who are respected leaders in their field. *About the REF, RESEARCH EXCELLENT FRAMEWORK 2021*, <https://www.ref.ac.uk/about/> (last visited Mar. 7, 2021). According to official statistics, as of December 2019, 89 percent of United Kingdom professors are white, seven percent are Asian, and only one percent, or 155 individuals, are Black. *See Higher Education Staff Statistics: UK 2019/20*, HIGHER EDUCATION STATISTIC AGENCY (Jan. 19, 2021), <https://www.hesa.ac.uk/news/19-01-2021/he-staff-statistical-bulletin-released>.

<sup>359</sup> In 1974, federal District Judge A. Leon Higginbotham brilliantly addressed this claim of race neutrality by white people. *See Pennsylvania v. Local Union*, 542, 388 F. Supp. 155, 165–66 (E.D. Pa. 1974) (dismissing a motion for Judge Higginbotham’s recusal when the defendant argued that as a Black judge and civil rights leader, he could not be impartial to white defendants in a race discrimination lawsuit).

<sup>360</sup> These privileges also include having a permanent academic contract—the United Kingdom equivalent of tenure—at a University and in a department that prides itself on its human rights research, and working alongside colleagues who are doing similar work. For more on how the intersection of these privileges operate in academia, *see, e.g.*, Carole L. Lund, *The Nature of White Privilege in the Teaching and Training of Adults*, 125 NEW DIRECTIONS FOR ADULT & CONTINUING EDUCATION 15, 21 (2010).

personal anecdote, but I think it's relevant: I grew up in a little bit of a weird situation because I was biracial, but people didn't necessarily know that I was biracial, and so I was treated from a racist lens without knowing or understanding where it came from. I didn't truly develop a racial consciousness until I was in college, and then I immediately went to Howard, like literally within a year. So, here I was in an environment where we were having conversations about racism, all the time. But suddenly, I wasn't experiencing race *all the time*. Well, Howard is the most recruited law school in the country, at least when I last checked, which was over ten years ago. If you think about it, it is an incredibly logical choice right because employers want the Black students to help with diversity, but the key is that they are all gunning for the same small number of people because they want the elite from Howard. And my first year, I was interviewed a lot and suddenly I remember I was exhausted and couldn't figure out *why* I was exhausted. But, when I was sitting in this Black partner's office, it hit me that I had just forgotten what it was like having to prove myself on a constant basis because I had this break for nine months where it wasn't an issue, and I was known for who I was as a person. But with these interviews, I was asked to explain why I am worth it, explain why I should overcome my presumption of incompetence.<sup>361</sup> And I was *tired*, and I remember that feeling of just *being tired*. So, I think for me, I tend to assume that so much of this stuff is embedded with racism that it gives me hope when there are any kind of tools that could be used for good. For me, it's a matter of "now we can *do something* with this, and right this wrong." So, at least for me, I think that that might be part of where I'm coming from. But again, I don't want to speak for Erika.

**George:** I think that exhaustion is an issue and so pragmatism is important—this is all very real and can take a harmful toll.<sup>362</sup> I mean,

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<sup>361</sup> Cf. PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutierrez et al. eds., Univ. Press Colo. 2012).

<sup>362</sup> George would like to note that the "racial battle fatigue" phenomenon suffered by Black people and other people of color who are steadily subjected to racist or "I am not racist but..." comments or conduct is very real and can have far-reaching consequences for the members of disfavored or disadvantaged minority groups. See, e.g., Michel Martin, *Racism is Literally Bad for Your Health*, NPR (Oct. 28, 2017), <https://www.npr.org/2017/10/28/560444290/racism-is-literally-bad-for-your-health>; see also, Meagan Call-Cummings & Sylvia Martinez, 'It Wasn't Racism; it was more Misunderstanding,' *White Teachers/Latino/a Students and Racial Battle Fatigue*, 20 RACE ETHNICITY & EDUC. 561, 564–65 (2016); William Smith et al., *Between Hope and Racial Battle Fatigue: African American Men and Race-Related Stress*, 2 J. OF BLACK MASCULINITY 35, 49–51 (2011); William Smith, *Black Faculty Coping with Racial Battle Fatigue: The Campus Racial Climate in a Post-Civil Rights Era*, in A LONG WAY TO GO: CONVERSATIONS ABOUT RACE BY AFRICAN AMERICAN FACULTY AND GRADUATE STUDENTS (Darrell Cleveland, ed., Peter Lang Pub. 2004).

we're just seeing Google unceremoniously fire the person who co-founded Black in AI and paint her as a crazy, angry Black woman, when she is actually trying to do research that is substantively critical of them.<sup>363</sup> This relates to the Black Lives Marketing issue: how much commitment is behind the commentary, because I don't believe very much of it is there. I have to reserve and conserve my energy for these kinds of conversations because we've had them before, and sometimes they are used to deflect actually doing something. It's like this piece by Pamela Newkirk who examines why diversity in the university and other environments hasn't been working, and she basically concludes it's because we don't really want it to.<sup>364</sup>

**Van Ho:** Yeah. We want it to work so long as it doesn't inconvenience us, or better yet as long as it *is* convenient for us. And by "us," I mean white people like me. That comes out strongly in Delgado's research on the dominance of white scholars in Civil Rights literature and in Nancy Leong's insights into Racial Capitalism.<sup>365</sup>

One thing we haven't discussed yet is the danger that arises when white people usurp the stories of non-white victims in BHR and retell their stories from their own perspectives, depriving racialized individuals of their own autonomy and centering their whiteness in a story that is actually not about white people or whiteness.<sup>366</sup> What is included and excluded is determined by what is important to the white observer or to white people generally.<sup>367</sup> Delgado discussed this in his work; how white people representing the voices, needs, and demands of non-white people can miss some important insights and nuance.<sup>368</sup> We can think we are helping when we are really promoting an approach that is embedded in, and implicitly protects, our own privileges.<sup>369</sup> With BHR scholarship dominated by white scholars writing on the experiences of racialized communities, there's a real danger that important insights, nuance, and stories are being missed. That we are merely focused on what we find interesting rather than what needs to be discussed.

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<sup>363</sup> See Cade Metz & Daisuke Wakabayashi, *Google Researcher Says She Was Fired Over Paper Highlighting Bias in A.I.*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/technology/google-researcher-timmit-gebru.html?smid=tw-nytimesbusiness&smtyp=cur>; see also Lyne P. Tchapmi (@lynetcha), TWITTER (Dec. 4, 2020), <https://twitter.com/lynetcha/status/1334901898604736512?s=20>.

<sup>364</sup> PAMELA NEWKIRK, *DIVERSITY INC.: THE FAILED PROMISE OF A BILLION DOLLAR BUSINESS* (Bold Type Books 2019).

<sup>365</sup> See Leong, *supra* note 223.

<sup>366</sup> See EDDO-LODGE, *supra* note 160, at 62; Delgado, *supra* note 353, at 367.

<sup>367</sup> Delgado, *supra* note 353, at 367.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 368.



I think about this a lot as someone who likes to center BHR discussions on actual cases, but who is also wary of exploiting the experiences of others for my own benefit. I'm white and I'm often telling, relying on, or addressing the stories of racialized individuals and communities.<sup>370</sup> I worry a lot about whether I am doing them justice. Or am I simply projecting my own values onto the story? Am I serving them or using them?

Here, Jena, I think you deserve a lot of praise. You really focused on bringing the voices of those affected by business impacts to the forefront of BHR scholarship. So, while I get a co-editor credit on our book with Karen Bravo, you are the one who had that vision and made sure that this was discussed. The book and your vision helps counter the impact of racialized gatekeeping by letting people speak for themselves rather than being spoken for through the words of someone else so that white people have less opportunity to co-opt the discussion.<sup>371</sup>

**Martin:** Although, really my mom deserves the lion share of the credit for that project.<sup>372</sup>

**George:** Interestingly, on the matter of different voices, I'm on my law school's diversity committee. What has changed in recent years is that we now have students who are actually asking questions about diversity across the board. One student asked the committee: "why are all of my case books written by old white men." And what I've noticed with my Constitutional Law casebook over the years is how Justice Thurgood Marshall's contributions, which often come in concurrences and dissents, are being edited out of subsequent editions of the book. So, I'll be making reference to something I've read in his writings in a class

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<sup>370</sup> See Tara Van Ho, *Defining the Relationships: "Cause, Contribute, and Directly Linked to" in the UN Guiding Principles on Business and Human Rights*, 43 HUMAN RIGHTS QUARTERLY (forthcoming 2021) (analyzing the Uyghur community's experience in China to consider whether multinational corporations owe the Uyghurs reparations for forced labor); Tara L. Van Ho, *Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives*, 5 INTERNATIONAL HUMAN RIGHTS LAW REVIEW 60 (2016) (utilizing the experience of afrocaribbean communities in Colombia to help explain how investment law could impact transitional justice initiatives); Essex Business and Human Rights Project, *CORPORATE LIABILITY IN A NEW SETTING: SHELL AND THE CHANGING LEGAL LANDSCAPE FOR THE MULTINATIONAL OIL INDUSTRY IN THE NIGER DELTA* (2011), <http://repository.essex.ac.uk/21477/1/niger-delta-report.pdf> (last accessed Feb. 28, 2021); CHIARA MACCHI ET AL., *INVESTOR OBLIGATIONS IN OCCUPIED TERRITORIES: A REPORT ON THE NORWEGIAN GOVERNMENT PENSION FUND—GLOBAL* (2019).

<sup>371</sup> Jena Martin, Karen Bravo, and Tara Van Ho (eds.), *WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD*, *supra* note 263.

<sup>372</sup> *Id.* at 1–2 (discussing a conversation between Jena and her mom that culminated in the edited volume).

discussion and then discover it's no longer in the case book for my students to reference. So there's a clear question about who is making choices about content—what is in and what is out—and that's where institutional Equity and Diversity efforts must come into communication with questions as to whether we are racist, “not racist,” or antiracist when making decisions. If we're race neutral or colorblind, then those kinds of choices go undetected and maybe even unacknowledged. I think some significant research is needed on how this gatekeeping affects scholarship within BHR.

### *Communal Reflections*

The actor Jesse Williams once said that “[t]he burden of the brutalized is not to comfort the bystander.”<sup>373</sup> Too often, however, society places greater demands on the brutalized than the bystander, and sometimes even greater than what it demands of the oppressor. Being an antiracist, reflecting on antiracism, and working to address racism in our field results in differentiated demands between those who experience racism as a part of their daily life and one who engages with it voluntarily. George and Martin experience different realities when working on these issues than Van Ho does, and the emotional labor required of the different authors to engage on these issues may explain some of the differences in their approaches throughout this dialogue. George wants to focus on pragmatic wins and Martin on reserving her energy for significant battles while Van Ho, privileged in numerous ways, is willing to push for radical reform that she recognizes is unlikely to be realized in the near future. These are obviously not universal responses; not all Black scholars will focus on pragmatic wins or reserving their labor, nor will all white scholars seek radical reform. But, these concluding moments suggest that the differences that felt significant throughout the dialogue may reflect not only intellectual differences but experiential realities. The emotional labor required of racialized scholars in the area of antiracism is unfair generally, and specifically in a field that is predicated on respect for human rights. The field is obligated to undertake significant work in the area of antiracism and to follow through on the agenda embedded in this article. It is not solely that our scholars from racialized background deserve this, but also that the field cannot realize its promise—to itself or to the victims it seeks to protect—without this work.

### CONCLUSION

With this article, we sought to engage in a dialogue examining how BHR embeds or challenges racism. We did not intend to offer definitive conclusions. Rather, we sought to ask the type of questions that can lead to long-term and systemic inquiries that have the potential of changing our understanding of racism and BHR. Our approach provided three significant benefits. First, we brought two areas of exploration into our conversation: critical race studies and BHR. Given

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<sup>373</sup> Megan Lasher, *Read the Full Transcript of Jesse Williams' Powerful Speech on Race at the BET Awards*, TIME (June 27, 2016), <https://time.com/4383516/jesse-williams-bet-speech-transcript/>. This quote has been an inspiration for the authors and was the inspiration for one of Martin's earlier works. See generally Jena Martin, *Easing "[T]he Burden of the Brutalized": Applying Bystander Intervention Training to Corporate Conduct*, 68 CATH. U.L. REV. 1 (2019).

their overlapping ends, ensuring these perspectives inform each other is crucial. Second, we attempted to engage with the field through moderate inquiries rather than bold and divergent queries. This allowed us to critique the foundations of BHR without being overwhelmed by the diversity of developments. Finally, we utilized the dialogic methodology to ensure that a single voice did not dominate the discussion, and that we did not ignore points of contention or shy from critiquing a field in which we have vested interests. The result was better than we expected. Rather than shying away from areas of concern, we found new opportunities and insights, driven by one another's focus and perspectives. Had any one of us produced this article individually, it would have resulted in a substantively different output. George and Martin may not have questioned whether the capitalist foundations of BHR made it a racist endeavour, but equally Van Ho may have only focused on this issue and missed the importance of addressing the emotional impact of raising racist arguments within our field. By bringing our views together, the paper offers a stronger overview of the issues that need greater scholarly attention in the future.

Considering a broad range of substantive issues, this article started with a simple question: is BHR racist or antiracist? Because BHR is inter-disciplinary, multi-disciplinary, and addresses law in various societies and contexts, our legal considerations merged with social and economic ones. We contemplated the racist origins of capitalism, and the role it played in framing the UNGPs. This led to a critical discussion of corporate (company) law and the shareholder primacy rule. We examined how a tool with racist origins (the master's tools) can be used in antiracist manners while seemingly antiracist initiatives ("Black Lives Marketing") might be used to mask ongoing racism. In doing so, we considered how law and jurisprudence can be used to affect social change. We also discussed the difficulty of addressing intersectionality within BHR, and the professional and emotional impact of speaking out on racism within the field. Throughout, we pointed to the tensions and intersections of international and domestic law. This is a significant accomplishment not simply because it has not been done before, but because our inquiry sets the foundation for greater critical reflection within a field that is expected to advance antiracist positions but has failed to do so in any strategic or structured way. As a result, this article not only critiques current approaches but charts a path for the theoretical and practical development of BHR.

While we did not offer definitive answers, the result of our inquiry is a clear research agenda on racism and BHR. We recognized the need for similar conversations amongst different researchers, both within the United States and importantly outside of it. If BHR is to

remain an international endeavour, it needs greater consideration as to how it embeds or challenges racism within its structures. To do so, it needs to draw from a range of experiences and racialized realities. Additionally, how the historical relationship between capitalism and racism affects modern efforts to utilize BHR for antiracist purposes has not been given significant consideration in previous research. In this article we set out preliminary considerations that deserve and require further scholarship. We noted that a better foundation for understanding intersectional harm is needed in BHR. The research on feminist or gendered approaches to BHR has been accompanied by a recognition that such an approach needs to recognize and respond to intersectional harms seriously. Yet, without clarity over how racialized harms embed within BHR, intersectional inquiries will continue to rest on a shaky foundation. Greater research is needed to identify how racialized harms manifest, and the potential of BHR to be used as a tool for antiracist endeavours. Finally, we identified the need for quantitative research into how racialized gatekeeping might affect citations within the academic field of BHR. We recognize that our conversation has scarcely scratched the surface of a complex, challenging, and constant problem. It is our hope that colleagues in the BHR community will incorporate issues of race and use antiracist approaches to identify and avoid racism in our academic research and policy advising.



**MINA KESHWAR KAMAL**, by Tom Block  
Oil on canvas, 40 x 30, 2006

At 20 years of age, Mina Keshwar Kamal began her work to empower the women of Afghanistan. In 1977 she founded the Revolutionary Association of the Women of Afghanistan (RAWA) to provide education, shelter, and healthcare to Afghani refugees of the Soviet occupation. In 1981, she launched the feminist magazine *Payam-e-Zan* ("Woman's Message"). Attaining international recognition for her work, she made several trips to Western Europe to testify about the plight of women in Afghanistan and surrounding refugee camps. She was murdered in Quetta, Pakistan in 1987. This painting is one of a series that are part of Tom Block's Human Rights Painting Project, in conjunction with Amnesty International. In this series, Block highlights the struggle for human rights the world over - and the important work that Amnesty International does in working toward this goal. In his work, Tom Block interpreted different aspects of the struggle for human rights, emphasizing the stories that bring it to life.