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Challenging Rights-Based Redress: White Supremacy, Heteropatriarchy, Settler Colonialism and the Promise of the Universal

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by

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ABSTRACT OF THE DISSERTATION

Challenging Rights-Based Redress:
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This dissertation engages how the framework of 'universal rights' is a modern concept inherently tied to colonialism. I show how rights-based redress is in fact a limited means for contemporary movements seeking to challenge structures of colonial state violence because the ongoing structures of white supremacy, heteropatriarchy, and capitalism remain intact within colonial-modernity. Using a methodological genealogy centered in Critical Ethnic Studies, legal history, and critical rights discourses, I engage this dynamic through the work of 16th century Spanish jurist Francisco de Vitoria as he configured a set of universal rights to justify Spanish colonialism. I trace this work to its 20th century re-uptake in the rise of International law as it bolstered the development of universal human rights regime by maintaining the colonial relationship of Mandate colonialism into neocolonialism through the United Nations. I argue that the formation of what we think of as modern and universal rights developed *because of* and *through* the

colonial relation of modernity to produce and maintain power imbalances through hierarchies of race, class, gender, sexuality, among other disciplining vectors. In locating the relationality of rights as emergent and related to colonial power, and not as separate from it or even emancipatory from it, I contend we can understand both the promise and the 'paradox' of rights as in fact essential to the maintenance of the current global socio-political order.

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INTRODUCTION:
The Ontology of Modern Rights

> I promised to show you a map you say but this is a mural
> then yes let it be these are but small distinctions
> where do we see it from is the question
>
> – Adrienne Rich,
> *An Atlas of the Difficult World*[1]

Introduction: What's Wrong with Rights?

In contemporary US society, the idea of rights we hold is about justice, about 'righting wrongs,' about accessing resources, institutions, and freedoms that have been denied. Often times, issues that invoke the demand for rights-based inclusion focus on the misapplication of rights as the problem. This can look like fighting to create better ways of making things more 'equal' through a focus on the problem as originating with institutions that deny access to unalienable rights, or in today's terms as universal or human rights. The essential idea behind the call to access rights is that if we have more rights, we can achieve more equality, and therefore can remedy the injustice caused by the denial of access. Rights, following legal theorist Kimberlé Crenshaw, can be understood as a form of self-defense in the face of systemic and structural inequities that offer a remedy to the racialized, gendered,

[1] Adrienne Rich, "An Atlas of the Difficult World," in *An Atlas of the Difficult World: Poems 1988-1991* (New York: W. W. Norton & Company, 1991), 6.

classed, homophobic, and other forms of differentiated treatment and harm.[2] There are a lot of important studies on this kind of defensive work to gain and employ rights as urgent strategies for survival and moving people out of the harmful reaches of particularized state violence in institutions such as prisons, immigration detention, and administrative law, for example.[3] This dissertation, however, approaches the project of inclusion within rights-based redress as symptomatic of a larger structural problem. This project ventures to see the map, so to speak, from a new perspective – how rights are not a remedy to the hierarchies and violences of colonial-modernity but are in fact endemic to the systems producing those inequalities and unfreedoms, and in turn, actually function to maintain them. Given this, how do we make sense of the relationship between colonialism, rights, and systems of power?

The founding notions of the United States and 'enlightened' modernity – of equality, freedom, democracy – are deeply structural dynamics that were founded at the expense of keeping millions of people unequal, unfree, and unable to access

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[2] Kimberlé Crenshaw, "Race, Reform, and Retrenchment," in *Critical Race Theory: The Key Writings that Formed the Movement*, eds. Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (New York: The New Press, 1995), 117.

[3] See, for example, Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law* (New York: South End Press, 2011); Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011); and Eric A. Stanley and Nat Smith, eds., *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, 2nd ed. (Oakland, CA: AK Press, 2015).

governing power or authority. If this dynamic is the foundation of the structure, then will the idea of equality actually bring about change to these structures or institutions? If equality is *necessarily* conjoined to inequality, as is freedom to unfreedom, then there will always exist some who have less at the expense of creating more for others. As Part 1 will address, race, class, gender, and sexuality are intersecting social relations that determine access to power through systems of white supremacy, heteropatriarchy, and capitalism. If the basis of the inequity of these structures and institutions are systemic power relations, will asking for more 'equal' rights fundamentally alter those same institutions?

To further investigate this question, I am interested in considering how the development of modern rights discourses might in fact be endemic to their limitation. This is a challenging prospect. We are constantly conditioned by ideas of rights in our daily lives, in the histories we are taught, in the discourses of dreams of freedom we are told. We often invoke the idea of rights to things in our everyday lives – I have the right to think this, or be this, or access this. Rights are not just a constitutional concern, but perhaps more so operate as a commonsense idea that people assert amongst themselves as they negotiate everyday interactions. Rights operate at the colloquial mindset as much as they operate within the larger legal structures that determine access to state-based protections.

Political Theorist Duncan Ivison argues that rights represent the social conditions of a society – that they do not make sense without the lager socio-political context they operate within. Rights are not pre-determined entities, but

rather are reflective of a set of ideas about how interactions between citizens, non-citizens, and governing bodies should operate. Rights are a social practice that reinforce various kinds of social relations, so as to *establish* ways of acting between people:[4]

> To mark some interest or claim in terms of a right is not merely to *describe* a particular jural relation, but also to *perform* it: to help bring it into being, to make a normative claim on its behalf. Thus, rights need to be analyzed in terms not only of their logical structure, but also their normative and historical structures.[5]

Rights, then, are entities that are particular to their socio-political and historical contexts. Ivison argues that rights are fundamentally dynamic.[6] They change in relation to the context they operate within. Rights are not isolated entities that carry separate meanings divorced from that which gives them meaning, but rather are housed within a structure of beliefs that need to be justified.[7] Rights represent both the justification and the potential promise for upholding those beliefs.

But, as Part 1 examines, invoking rights as a means of seeking protection from individuated and state harm has not actually changed the material conditions of systemic power relations. Settler colonialism is still ongoing, despite universal

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[4] Emphasis mine. Duncan Ivison, *Rights* (Ithaca: McGill-Queens University Press, 2008), 10.

[5] Ivison, *Rights,* 10.

[6] Ivison, *Rights,* 12.

[7] Ibid.

rights and international forums that include Native peoples, as evidenced by the United Nations ratification of the Declaration on the Rights of Indigenous Peoples (UN DRIP) in 2007.[8] Violence and discrimination against queer and transgender people has by many accounts actually increased since the right to gay marriage passed in 2015.[9] Racialized violence, especially at the hands of the state, has not diminished, despite racism being illegal in the US for over half a century. Although gains have been made over the last sixty years towards widening the realm of who can access the protection of civil and human rights, the individuated and systemic forces of racism, transphobia, homophobia, Indigenous erasure, anti-Blackness, wealth disparities, colonialism, and discrimination of people with disabilities or who are Muslims or immigrants, has not fundamentally changed.

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[8] For discussion of this point, see, for example, Lorie M. Graham and Siegfried Wiessner, "Indigenous Sovereignty, Culture, and International Human Rights Law," *The South Atlantic Quarterly* 110, no. 2 (Spring 2011): 403–27, doi: 10.1215/00382876–1162516. For a critique of this line of argument, see, for example, Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i,* rev. ed. (Honolulu: University of Hawai'i Press, 1999); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999); Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson: University of Arizona Press, 2013).

[9] See, for example, Courtney Vinopal, "LGBTQ activists on what progress looks like 5 years after same-sex marriage ruling," *PBS,* June 29, 2020. https://www.pbs.org/newshour/nation/lgbtq-activists-on-what-progress-looks-like-5-years-after-same-sex-marriage-ruling

We operate within deeply systemic socio-political relations determined by intersecting relationships of race, class, gender, and sexuality. Rights are a product of these relations, a condition of the larger socio-political framework they operate within. That framework has at is core the reformulations of ongoing systemic power relations of white supremacy, heteropatriarchy, and capitalism. But these systems are not the only way of being, and also have not been the only way of imagining socio-political relations. They, like everything else that western power uses to justify expansion as a linearly developed 'progress narrative,' were constructed over time to support the authority of those seeking a certain type of power.

This project engages how these systemic power relations came into formation. This inquiry is not about framing power relations as determined by certain individuals that are 'bad actors,' or institutions as 'taking control.' It is about understanding which *worldsense* – a term African Gender Studies Scholar Oyèrónké Oyewùmí uses to describe non-Western cultures' world framing that privilege many senses other than the visual – is positioned as dominant, and about how that worldsense both determines and legitimizes who holds power.[10] As a pillar of American education, we are taught a commonsense narrative about who gets to

[10] Oyewùmí uses the term "worldsense," as opposed to "worldview," to describe non-Western cultures' world framing of many senses other than the visual, or a combination of senses, as opposed to Eurocentric privileging of the visual. Oyèrónké Oyewùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis: University of Minnesota Press, 1997), 2–3.

own, control, govern, and create laws. The narrative of the founding of United States, for instance, frames its birth as a break from British tyranny and the desire to create freedom for all. The Bill of Rights represents the commonsense values that the founding fathers of America used to distinguish their power from that of Britain – the right to the pursuit of health, happiness, and freedom (though formerly property). This narrative reflects the commonsense ideas we are taught from a very young age about the United States – that freedom and equality are guaranteed for all, and that rights are the tool of defense and assertion to access those ideals. But this narrative was constructed through a violent corollary – the freedom and equality for white, property owning men to govern and maintain rights, built on the unfreedom and unequality of enslaved people, people of color, Black people, Native people, gender nonconforming people, disenfranchised people, people without wealth, people who are criminalized, people with disabilities, people in indentured servitude, and others.

The power relations that determined who would be free and who would be unfree were not originary to the moment of 1776. Native genocide and dispossession, racial chattel slavery, and capitalist production were already institutionalized and foundational to the newly formed American state. These systems and institutions were the result of the previous two hundred years, built out of European colonial expansion and occupation since 1492. Our commonsense notion is that these historical moments are separate, discrete events, not only in time and space, but in the ideological differences between 1776 'Enlightenment' and

1492 'Discovery.' Enlightenment assumes what the term implies – that Europeans (and the birth of America) signifies a state of arrival, of enlightened thinking and being about notions of governance, understandings of the individual, and the rights of citizens. Enlightenment frames the revolution of the United States, as well as in France, as a cumulative moment where the ideals of true humanity were finally actualized and that we as a society are constantly working to perfect them. This construction positions Enlightenment as originary – as 'modernity,' arising in distinction from the dark middle ages where Europeans were running around like chickens with their heads cut off. This reading disconnects and elides the systems of power that were in fact *already at work* as the conditions of possibility that allowed for the United States to emerge as a settler colonial state in a break from systemic British colonialism, built on the expansionist project of Spanish and Portuguese colonial ventures, among other competing European powers.

The moment of 1492 'discovery' was not happenstance, where a group of self-enterprising people innocently chanced upon vast sums of wealth, power, and land by accident. The moment of 1492 was borne of a calculated trajectory. It concerned the desire to expand the limits of growth – both economically and politically – of Christian-European socio-political power. The rise of systemic Spanish colonialism in the aftermath of 1492 was legally determined to be a juridically justified project. This dissertation explores the role of rights in legally legitimizing the rise of colonialism, not as an event, but rather as a massive shift in global socio-political relations that were productive of colonial-modernity. Through

this inquiry, I develop the groundwork to assess how the modern constructions of rights are imbedded within colonial formations and reformations. In particular, this work engages the question of the role of rights in justifying the colonial project by examining how the systemic power relations of white supremacy, heteropatriarchy, and capitalism were foundational to that justification, and how they move into contemporary manifestations within human rights and International law.

I. History as a Weapon, this Position is a Threat – a Methodology

Relationality

In thinking through the relationships between systemic power relations and the law, this project centers a methodology of *relationality*. Alexander Weheliye, in *Habeas Viscus*, draws on Edouard Glissant's conception of relation as interconnectedness that is constantly in motion. For Weheliye, "relationality provides a productive model for critical inquiry and political action within the context of Black and Critical Ethnic Studies, because it reveals the global and systemic dimension of racialized, sexualized, and gendered subjugation, while not losing sight of the many ways political violence has given rise to ongoing practices of freedom within various traditions of the oppressed."[11] Moving beyond a method of

[11] Alexander Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press, 2014), 13.

comparison, which Weheliye argues can work to reaffirm hierarchies constituted by western Man, relationality serves to bring many vectors of violent trajectories into focus at the same time.[12] For my purposes, this serves to underscore what is operating between and underneath colonial trajectories as interrelated logics that play out in different circumstances and affect different peoples in different ways.

I use the term *colonial–modernity* as a marker to define the confluence of historical events that are called colonialism and modernity, both of which are generally defined as overlapping but not co-developing. Colonial-modernity, a term employed by the field of Decolonial Studies, offers the direct relationality of modernity *as* colonialism, of colonialism *as* modernity, such that we cannot understand one without the other.[13] Following Settler Colonial Studies scholar Patrick Wolfe, colonialism is not an event, but rather a deeply embedded structure that governs our socio-political frameworks, ideologies, and relations into the contemporary moment.[14] My argument is that modern rights emerge in relation to

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[12] Weheliye argues that we cannot bring into focus replays of the genocide of Indigenous peoples, the transatlantic slave trade, and Asian American indentured servitude through "a grammar of comparison, since this will merely reaffirm Man's existent hierarchies rather than design novel assemblages of relation," Weheliye, *Habeas Viscus,* 13.

[13] For a full treatment on the term colonial-modernity, see, for example, Saurabh Dube, "Introduction: Colonialism, Modernity, Colonial Modernity," *Nepantla: Views from the South* 3, no. 2 (2002). See also Maria Lugones, "Heterosexualism and the Colonial/Modern Gender System," *Hypatia* 22, no. 1 (Winter 2007): 192.

[14] Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (London: Cassell, 1999), 2

the shift into colonial–modernity, one that moves to encompass certain frameworks and ideologies of 15th century Europe into a global structure that violently expanded into the dominant global order.

Framing colonial logics through relationality allows for a reading of how, for example, enslavement impacted both Native and African communities in the Americas differently, according to logics of Native erasure and anti-Blackness, but that are both imperative to the foundation of white supremacy and the expansion of the US settler colonial state. Relationality is a framework through which to engage how both the law and rights are structured as 'universal' through logics of colonialism that produce the foundational systemic power relations of white supremacy, capitalism, and heteropatriarchy. Framing these dynamics as separate and not interconnected leads to limitations in understanding how rights are built off these power relations, and further how each power relation is dependent on the other to move in new ways towards colonial futurity. Modern rights, in turn, derive from a system of inclusion and exclusion built on the logic of comparison. Weheliye argues that comparisons lead to hierarchization and foreclosure.[15] Such comparisons then function to force minoritized groups to gain state/hegemonic recognition through competition for protections such as rights, where only a certain number of exceptions to access the spheres of full 'humanity' are granted:

> Comparativity frequently serves as a shibboleth that allows minoritized groups to gain recognition (and privileges, rights, etc.) from hegemonic

[15] Weheliye, *Habeas Viscus*, 13-14

> powers (through the law, for instance) who, as a general rule, only grant a certain number of exceptions access to the spheres of full humanity, sentience, citizenship, and so on. This, in turn, feeds into a discourse of putative scarcity in which already subjugated groups compete for limited resources, leading to a strengthening of the very mechanisms that deem certain groups more disposable or non-quite-human than others.[16]

Under colonial-modernity, rights are inherently tied to notions of who and what constitutes a 'full' humanity. But gaining access to humanity via rights protections for minoritized groups does not dismantle the projects of hierarchization fundamental to colonial-modernity. The relationality of humanity is at once social, political, and juridical. Or rather, those things are always already one in the same.

Concentric Genealogies

Relationality as a framework positions how the genealogies of white supremacy, heteropatriarchy, capitalism, and rights are overlapping genealogies, intricately connected and bound through colonial-modernity. For theorist of power Michel Foucault, genealogies are understood as an "insurrection of knowledges," specifically subjugated knowledges. A genealogical methodology works to center subjugated knowledges through non-linearity.[17] Power is what is at stake in the

[16] Weheliye, *Habeas Viscus*, 13-14.

[17] Michel Foucault, *Society Must Be Defended: Lectures at the College de France 1975-1976*, eds. Mauro Bertani, Arnold I. Davidson, Francois Ewald, and Alessandro Fontana, trans. David Macey (New York: Picador,) 9.

practice of genealogy.[18] In classical juridical relations, power is regarded more so as "a right which can be possessed," as the aspect underneath the act that forms the right.[19] However, power, beyond only being repressive, is also productive, generative of new forms of social relations. Power functions in part through the law, but also through larger social relationalities that determine access to resources and wealth as conditioned via hierarchies of worthiness in colonial-modernity.

My methodological approach, understood as concentric genealogies,[20] connects the seemingly different genealogies of white supremacy, heteropatriarchy, capitalism, colonialism, and rights to demonstrate the interconnected nature of these systems of power as they cohere in the juridical realm. By white supremacy I mean the systemic power relationship emergent in early colonialism that produced the hierarchization of people based on the constructed notion of race, where whiteness confers differential access to resources over people of color. Inherent in the construction of the dynamic of white supremacy through US settler colonialism is the logic of whiteness as superior, as determined in part through the logics of anti-Blackness and Native erasure, which in the US are the cornerstone bases of the pyramid of racial hierarchy that in turn are used to then distinguish the

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[18] Foucault, *Society Must Be Defended*, 12-13.

[19] Foucault, *Society Must Be Defended,* 13.

[20] Thank you to Jasmine Syedullah for generating this concept in shared conversation.

positionalities of other groups of racialized people above these core logics. By heteropatriarchy I mean the systemic power relations that produce the identity categories and distinct notions of gender and sexuality governed by the norms of heterosexuality and patriarchy. Under this framework, gender is conditioned into a binary where men are positioned over women, and cis and straight people are positioned above gender non-conforming, agender, gender variant, Two-Spirit, and any other kind of transgendered relationality. Under heteropatriarchy, all social structures are in turn based off this dynamic, including compulsory heterosexuality, monogamy, marriage, and the primacy of the nuclear family unit. By capitalism I mean the structure of hierarchy that determines an overaccumulation of wealth for some based on the disaccumulation of wealth of others, as determined through racial and gender hierarchy logics of white supremacy and heteropatriarchy. I argue, following Cedric Robinson and Sylvia Federici, that this socio-political ideology emerged as a safety valve for the late medieval crisis in feudalism to undergird colonial competition for resources, land, and extraction.[21]

Genealogies are long lines of historical patterns that show us how the past is in fact maintained into the present. Genealogical methodology is long standing in traditions of resistance employed by peoples subordinated under colonialism,

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[21] Cedric Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: University of North Carolina Press 2000); Silvia Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation*, 2nd ed. (Brooklyn: Autonomedia, 2014).

through oral histories, spiritual practices, stories, lineages, and documentation, among other practices to maintain and pass on such knowledges. The fields of Native Studies, Black Studies, Critical Queer and Trans Studies, and Critical Ethnic Studies, of which this dissertation is centered in, alongside the resistance movements from which these fields emerged and are in conversation with, even if at times contested, are all in and of themselves concentric genealogies. Critical Black feminist studies argues that the formation of an already racialized Human determines citizenry as it is embedded within the universal notion of humanity premised on white supremacy.[22] Native feminist theory articulates how the positioning of the gender binary as both natural and universal functions as a core means of establishing and maintaining settler colonial power relations.[23] The work of critical trans scholarship opens a new lens into the legal limitations of rights-based redress for queer and trans communities by demonstrating how the law functions to normalize gendered relations through institutionalizing a strictly

[22] See, for example, Sylvia Wynter, "Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument," *CR: The New Centennial Review* 3, no. 3, (Fall 2003).

[23] See, for example, Maile Arvin, Eve Tuck, and Angie Morrill, "Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy," *Feminist Formations* 25, no. 1 (Spring 2013): 8–34; see also Scott Morgensen, "Theorising Gender, Sexuality, and Settler Colonialism—An Introduction," *Settler Colonial Studies* 2, no. 2 (2012).

maintained binary relationship.[24] Critical legal studies scholarship demonstrates that although rights-based inclusion since 1948 has incorporated many marginalized communities, violence at the hands of the state for those communities continues to expand.[25] My project extends these conversations to offer an interdisciplinary and genealogical optic for expanding understandings of the limitations of contemporary rights-based within the political urgency of our contemporary moment.

In this sense I relate these fields with critical rights discourses so as to better understand how the law maps, confers, and moves power through systemic relationships. Critical rights discourses do not comprise a field so much as a response to the query of the limitations of rights in accounting for the power imbalances inherent in rights discourses. In 'Suffering Rights as Paradoxes,' Wendy Brown lays out an analysis of rights as paradoxes – that which we need to remedy injustice but that do not fully account for those harms: "the paradox, then, is that rights entail some specification of our suffering, injury, or inequality that lock us into the identity defined by our subordination, while rights that eschew this

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[24] See, for example, Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law* (New York: South End Press, 2011); and Eric A. Stanley and Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, 2nd ed. (Oakland: AK Press, 2015).

[25] See, for example, Chandan Reddy, *Freedom with Violence: Race, Sexuality, and the US State* (Duke University Press: 2011; and Randall Williams, *The Divided World* (Minnesota: University of Minnesota Press, 2010).

specificity not only sustain the invisibility of our subordination, but potentially even enhance it."[26] The law serves as the binding force to bring these systemic power relations material meaning by determining access to institutions, resources, land, bodies, governance, and wealth. But the law is a product of these larger systemic power relations as much as it is a mediator of access to governing power, one in which the systems of formal law are never actually enforced and where state violence often operates outside those laws. Rights, too, function within the law as a mediation borne of those very systemic powers. Rights only have meaning within their socio-political realm; they, like the law, are not a natural, given fact, despite what political theory and commonsense constructions of the law discipline us into believing. This is why it is imperative to position the genealogy of rights within the larger systemic power relations of colonial-modernity and to situate that genealogy within the trajectory of western development, long before Enlightenment and the emergence of the 'rights of man.'

To do this, I read the work of 16th century Spanish jurist Francisco de Vitoria as a genealogical archive.[27] Vitoria's work is useful for many reasons, though the paramount reason for the purposes of this project is that his work offers its own genealogical pathway from the seeding colonial doctrine of universal rights rooted

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[26] Wendy Brown, "Suffering Rights as Paradoxes," *Constellations* 7, no. 2 (2000), 232.

[27] Francisco de Vitoria, "On the American Indians," in *Vitoria: Political Writings*, eds. Anthony Pagden and Jeremy Lawrance, (1991; repr., New York: Cambridge University Press, 2010).

in the work of medieval jurists, founded in the Roman juridical precept of the universal rights of the *law of nations*, to its outgrowth in the formation of universal human rights doctrine and the 20th century rise of International law. Utilizing Vitoria to situate the expansion of western conquest and colonial outgrowth that continues into our contemporary moment is necessary for understanding the ontological nature of modern rights as inherently exclusionary, not a tool of justice but rather one that continues to bind our variously situated subjecthoods to the frontiers of colonial futurity and all it entails. Colonial futurity, I argue, functions to maintain a vested interest in shifting institutions and power relations into new forms so as to maintain the logics of colonialism, and thus colonialism itself, towards a continued vision of futurity. The Coda addresses more explicitly the manifestations and practices of resistance to the realm of colonial futurity.

Throughout the course of this work, I show how the shift in modern rights discourses from 16th century universal rights to 1948 universal human rights are commensurate with shifts in colonial iterations of Spanish colonialism, US settler colonialism, and neocolonialism. I argue that the shifting ontological relationality of modern rights in fact works to secure colonial relations and propel forward a logic of colonial futurity. This is because rights work to secure the systemic power relations of colonial-modernity rather than dismantle them. I contend that this is in part because the underlying logics of those systemic power relations – as civility, crisis, and carcerality – remain constant so as to drive the formation of new

institutions and socio-political relationships through the expansion of colonial-modernity.

II. The Logics of Colonial-Modernity

This dissertation focuses on the movement of colonialism out of European Christian ideologies and Greco-Roman histories to understand the shifting nature of rights and the impact of the rise of colonial-modernity on the ontological formation of modern rights. I argue that the rise of modern rights did not occur during the Enlightenment period, as most legal historians, political scientists, philosophers, and other disciplines position as commonsense. Instead, I place the shift into modern rights emerging *because of and through* the colonial dynamic, as commensurate with the rise of colonial-modernity in the late 15th century. Like all shifts, however, the trajectories are often in place long before the totality of a new dynamic emerges as such. Given this, I look back into medieval conceptions of rights, which centered legal discussions of barbarians and conquest in the overlapping genealogies of Christian and Roman expansion out of the fall of the western Roman Empire and into the rise of European states, so as to trace the convergence of ideological and legal formations central to the rise of colonial-modernity. Following both Cedric Robinson and Sylvia Federici's ground-breaking work on these topics, I understand the pre-logics of colonialism as rooted in the already forming systems of capitalism, patriarchy, and racial logics of the medieval era. I extend their analysis into

conversation with the legal legitimations for heteropatriarchal conquest against so-called barbarians and pagans. This dynamic, I argue, in turn fomented a colonizing fervor for land, space, and resource domination emergent primarily through the conquest competition dynamic of what would become the Spanish and Portuguese crowns from the 13th century onwards. Part 2 explores in depth how these dynamics functioned to funnel European socio-political ideologies that created and controlled the convergence of scarcity, hierarchy, order, and Christian supremacy (and one specific kind of Christianity – Catholicism) into the systematic and structural ordering of colonial-modernity.

The underlying logics of the intersecting systemic power relations of colonial-modernity are largely based on the western practice of the pathologization of difference, where difference in all forms, especially upon encountering new socio-political frameworks, is considered to be inferior, and therefore, to be disciplined in some manner. This is a framework deeply embedded in the genealogy of western societies, where the justifications for conquest are predicated on a hierarchization of difference central to the expansion of empire. Robert Williams Jr, for example, demonstrates in his book *Savage Anxieties* that the concept of the savage as barbarian can be located in the heart of Greek culture, dating back to the 8th century BCE as evidenced in the works of Homer.[28]

[28] Robert Williams Jr., *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012).

Williams frames the civilized/savage binary, or as I frame the civil/uncivil binary, in Greco society as the grounds for the Indigenous/civil binary that expands throughout the western colonial project into our contemporary moment. I argue that the logic of civility became more and more refined as western society moved throughout time and space through enforcing compliance to the gender binary and heterosexual relationships. Patriarchy, as Mary Condren shows, emerges in part through the shift into Judeo-Christian frameworks which positioned the power and role of men over women, and I would also add that this binary relation was placed in turn over other forms of gender conceptions.[29] These dynamics of Christian expansion solidified the gender binary which was then used to enforced strict gender norms as deeply rooted power relationships within the trajectory of into the rise of Greco-Roman and European Christian societies of the west. Following Glissant, I use the conception of the west to understand it as a project, as opposed to a specific place, with its own attendant ideological constructions of socio-political relations that spread from western Europe into a globalized project under colonial-modernity.[30] By the time Christianity emerged in the Roman Empire, a cornerstone development in western history, power was largely consolidated into the hands of

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[29] See Mary Condren, "Chapter 1 Eve and the Serpent: The Foundation Myth of Patriarchy," in *The Serpent and the Goddess: Women, Religion, and Power in Celtic Ireland* (New York: HarperCollins Publishers, 1989).

[30] Edouard Glissant, Caribbean Discourse: Selected Essays (1989, repr.; Charlottesville, VA: University Press of Virginia, 1999), 2.

men with wealth. This power was in part conditioned on the compulsory heterosexual expectation of men, despite the previously normalized acceptance of homosexual relations, to also be married to a woman and support a nuclear family structure.[31] Understanding the dynamic of heteropatriarchy as foundational to western society and deeply embedded in the logic of civility demonstrates how civility underpins the formative dynamics of difference as articulated primarily through social relationality, coded as gender and sexuality, dependent on determining any social relationality that stands outside of the (dominant) western framework of straight, gender binary compliant, monogamous and nuclear family-centered and led by men as different and therefore, bad.

But difference need not be considered bad. As Black feminist poet Audre Lorde states, it is imperative that we accept and acknowledge our differences and understand them as in fact strengths.[32] Difference is important to the functioning of collective environments, and when differences are seen as strengths, where people have different needs, abilities, and desires, everyone can be accounted for and support each other by sharing and viewing such differences as necessary and important. When, however, difference is positioned as bad and thus placed below in

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[31] There is of course a long and fascinating line of research into queer and gender non-normative existence during this time that I hope to pursue in another project in order to more fully account for the experiences and resistance of people that is often left undocumented and underprioritized.

[32] Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," in *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 1984), 110–14.

a superior/inferior hierarchy, power imbalances accumulate to determine the superior as always above the inferior. The very notion of some peoples as civil and in relation to many other peoples deemed 'uncivil' is a founding logic of conquest that is maintained into our present order of colonial-modernity. There are countless examples of other social structures, including ones present today, that resist these colonial logics, such as movements for Third World Liberation, disability justice, and intersectional organizing, that understand difference as important, necessary, and positive, which allow for different types of social and political relationality that are not determined by the logic of civility.

The logic of civility is a longstanding foundation of western society and western conquest. The relationship between a civil society and an uncivil society, under Greco-Roman relations, is where early rights-based notions developed. Rights in the Roman world, for example, were used to account for access and compensation between Romans as well as Romans and non-Romans as a matter of contractual relations. Rights functioned to determine what protections and assertions were possible for those deemed 'civil' by Roman governance. Under the conception of *ius gentium*, or the law of nations, the rights to travel, for instance, were constituted as universal for those who were considered civil and from different 'nations.' Vitoria applied this same conception of universal rights for legitimating Spanish conquest. However, Vitoria actually expanded the Roman conception of universal rights to include trade into the trifecta of the universal rights – to trade, travel and preach.

Chapter 4 analyzes this legal justification, where in the emergent fashion of liberalism, Vitoria constructs a new 'universal' jurisdiction encompassing both Native peoples and the Spanish in the New World (and by extension Europeans) by determining that Native peoples constitute nations enough to join them under the universal rights of the law of nations. However, Vitoria finds that Native peoples are in fact uncivil based on their 'barbarian' status, as determined primarily through a list of offenses including but not limited to queer sexual relations and gender nonconformity, which in turn situated the status of Native nations as in need of Christianizing Spanish governance. Thus Vitoria, in fashioning a new legal determination for the conquest of peoples that had yet to be considered in the canon of European law, protects the Spanish claim to resources and land in the New World (against the interests of the Portuguese and other crowns), while also fomenting the logic of civility within colonial legal systems as a foundational pattern that will continue to justify land expansion and genocide within all colonial iterations.

This dissertation argues that two other key logics undergird the transition into colonial power relations, in addition to civility, as the logics of crisis and the carceral. Each logic undergirds corresponding identity categories, which we understand today as race, class, gender, and sexuality. Racial logics are imbedded in the civil/uncivil dynamic. But they are also at the same time embedded in the logics of both crisis and the carceral moving from medieval Europe. Racial logics, as Cedric Robinson details, were a crucial factor fueling the drive for conquest and the

overaccumulation of wealth and resources, both internally and external to Europe as forming *prior* to 1492.[33]

These racializing logics developed from the binary distinction of European as civilized and the Indigenous as uncivil that then in turn demarcate the colonial relationship of, following Sylvia Wynter and Weheliye, a superior Human/almost human or non-human as already racialized.[34] In Chapter 5, I show that the racialized construction of the Human as civil and the non-human/almost human as uncivil dichotomy is co-constituted by the simultaneously gendered and sexually differentiated power dynamic of heteropatriarchy. Working with Black feminist theories of the human to read the colonial shift Vitoria's work registers, I show how racial and gender disciplining and Christian religious entitlement were driven into a particular relationship to determine both a white supremacist and heteropatriarchal system mediated through capitalism driven by the combining logics of civility, crisis and the carceral.

Though I argue that the logics of crisis, civility, and the carceral are central to colonial-modernity, each is also already present within the dynamics of medieval

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[33] In *Black Marxism*, for example, Robinson deconstructs how racial logics emerges amongst the early transitions from feudalism to capitalism coded via national difference taking form as race. See Robinson, *Black Marxism.* On the concept of overaccumulation, see Walter Rodney, *How Europe Underdeveloped Africa,* (Baltimore: Black Classic Press, 2011).

[34] Wynter, "Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, It's Overrepresentation – An Argument." *CR: The New Centennial Review* 3, no. 3, (Fall 2003); Weheliye, *Habeas Viscus*, 8.

Europe, which then coalesced in new and particular ways in the rise of colonial expansion – both in predicating its rise as well as positioning its new globalizing power. Crisis is evident through the fall of the Roman western empire and can be seen, for example, in the 9th century rise of European Catholic kingdoms and subsequent expansions. Robinson and Federci show how crisis is endemic to medieval Europe: early shifts into the monetization of labor in the 11th century; the repeated rise and fall of various markets in responses to Plague outbreaks in the 11th-14th centuries; the reduction of the commons into privatization of land and space; the rise of the power of the Catholic Church and its relationship to land, money, and power; and the practice of the production of scarcity to control market prices, to name a few, all reflect various instances of political, social, and economic crisis that were driving socio-political relations in Europe.[35] The crisis over (or rather, desire for) land, slave labor, and extractive resources was already apparent, for example, in the early colonial outcroppings and slave plantations in both the occupations of North African island of Madeira by the Portuguese as well as the British colonization of Ireland, in the 15th and 16th centuries, respectively.[36] The history of medieval conquest practices in Italy, and particularly the province of Genoa, allowed for the development of warfare ships, trade markets, and the early venture capitalist projects of the banking houses across Europe which brokered and

[35] See Federici, *Caliban and the Witch*; Robinson, *Black Marxism.*

[36] See Robinson, *Black Marxism.*

funded New World exploration campaigns.[37] Heteropatriarchal logics further entrenched the gender binary and limited the power of women and gender nonconforming people that Silvia Federici argues emerges alongside the monetization of labor in the 11th century.[38] Additionally, as Federici shows, the decriminalization of crimes such as rape allowed for a funneling the potential for backlash of lower-class responses to political and economic crises by directing those responses away from rebellions and towards individuated acts of violence and harm against lower class women and sex workers to go virtually unpunished.[39]

Crisis, alongside civility, merged to determine a competition over land and resources within Europe prior to colonial-modernity. Both of these logics were managed by the Church, where institutional power (though one that waxed and waned over time) mediated conflicts and administered benefits to European crowns. The fervor of conquest was led in part via the language of Christian expansion, as evidenced by the 11th and 12th century Christian crusades to Palestine and the middle east. Roman Catholic Christianity was positioned as the civil religion, which led to an internal purging of dissenting forms of Christianity that either did not adhere to, or outright questioned, Catholic doctrines and power.

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[37] See, for example, Steven A. Epstein, *Genoa and the Genoese 958-1528* (Chapel Hill: University of North Carolina Press, 1996).

[38] See Federici, *Caliban and the Witch*.

[39] See Federici, *Caliban and the Witch*.

Christian ideology determined that there was one God and that all other religions must accept this as truth. The Church and state officials spent much of the late medieval ages pursuing the conversion or expulsion of Jews, Muslims, pagans, and other non-Catholic Christian practices within its borders.

The underlying logic of conquest is also carceral. For Foucault, the carceral logic is bound in its relationship between the logic of surveillance and institutions that take on carceral forms.[40] I extend this idea to include a larger historical genealogy as related to the specific way that land and bodies were positioned under colonialism through the logic of carcerality. Foucault does not consider the impact of colonialism as a fundamental source of power relations. Like most of the western canon, colonialism is considered instead as an event, a side outgrowth of European development. The carceral logic works beyond institutions and methods of surveillance to the very core relationalities that western society maintains as natural and assumptive – namely the relationships of bodies and land.

Framing land as property – something that came to be possessable under European ideology – is a form a carcerality. In the colonial structure, the logic of carcerality positioned the production of certain bodies, coded as uncivil, through the institutions of slavery, *encomiendas*, forced labor, and genocide. The control over those bodies – and their relationship to land – play out in dynamics of who is forced off which lands, who is confined to what land, and how certain bodies deemed less

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[40] Michel Foucault, *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan (New York: Vintage Books, 1995.

Human are surveilled, policed, and imprisoned within the *enconomienda*/plantations/missions of Spanish colonialism. I argue that the logic of the carceral is foundational to the hierarchies of colonial-modernity and is a different type of carcerality than medieval forms because it works to construct social dynamics of *populations* based on groupings of people coded, via civility and crisis, into carceral relations. The colonial space itself is a carceral space, in the form of control over who can go where and when based on a civility status. These methods of carcerality are necessary to the expansion of colonial trajectories in order to secure the livelihood and legitimacy of the colonizing body, in the form of statehood and constructions of sovereignty and citizenry, for example, which are all embedded through the carceral logic of freedom for some that is predicated on the unfreedom of others.

These logics of course continue into our present moment of neocolonial and settler colonial power relations. The Coda further explores this dynamic in recent discourses such as trans inclusion in the military, detailing how contemporary discourses of inclusion replicate heteropatriarchal multicultural white supremacy and propel the logics of crisis, civility, and carcerality of colonial-modernity into colonial futurity. For example, Toby Beauchamp, in *Going Stealth,* documents the politics of surveillance in the contemporary United States over trans populations that particularly exposes how gender non-conforming people are targeted as

threatening and suspicious under neoliberalism.[41] For people who cannot or do not want to align with upper class whiteness, they are positioned as threats and surveilled, which in turn limits access for medical, economic, and social needs. The carceral, via surveillance and politics of deservedness, is undergirded by the logic of civility and what is deemed to be the appropriate objects that should in turn be surveilled. Gender non-normativity functions as a crisis that must be contained under colonial-modernity, through the relationality of whiteness, gender dimorphism, and class to produce a set of norms and expectations that encompass all peoples, albeit to varying degrees. In turn, responses to this dynamic are funneled into inclusion discourses where securing rights becomes the ultimate goal.

III. The Ontology of Rights

Wendy Brown argues that "rights almost always serve as a mitigation – but not a resolution – of subordinating powers."[42] The point of this project is get at the *why*. Why are rights limited? Why do movements keep working towards them only to find that state violence does not end with the achievement of rights? If modern rights are borne out of the context of colonial-modernity and its attendant logics, then what does that mean for the ability of rights to remedy systemic power

[41] Toby Beauchamp, *Going Stealth: Transgender Politics and U.S. Surveillance Practices* (Durham: Duke University Press, 2019).

[42] Brown, "Suffering Rights as Paradoxes," 23.

relations? Colonialism thrives as a system because it secures its own futurity, namely that the logics underlying colonialism move consistently despite time period or version of colonialism. Crisis, civility, and the carceral bind and drive the expansion of the west. The notion of the future is one that is a space of possibility, both for the continuation of colonial-modernity as well as its downfall. The focus on rights functions to entrench colonial futurity because they act as a safety valve for which to co-opt dissent into a normalized pathway of citizenship, one predicated on whiteness, class ascendancy, and cis heteronormativity. Certain groups of people are then brought in at certain times, but as a pre-condition for stabilizing dissent and maintaining the status quo power dynamics, the most marginalized are always left out from that so-called inclusion. Understood in this way, rights then are not a broken tool, or a not yet fully realized concept limited by application. They work exactly as they are meant to, in support of a narrow group of people solidifying and maintaining relations of extraction and control built on a systemic relationality founded in the confluences of white supremacy, capitalism, and heteropatriarchy under colonial-modernity.

Part 1, *Contemporary Critiques of Rights: What Rights Cannot Account For,* engages critiques concerning how mainstream movements for racial, queer, and trans inclusion have brought legislative protections, yet systemic white supremacy, heteropatriarchy, and settler colonialism persist. Chapter 1: "Rights, Racism, and White Supremacy," looks at the relationship between rights, racism, and white supremacy to show how state violence against racialized communities continues

despite gains in rights-based redress. Chapter 2, "Rights, Inclusion, and Heteropatriarchy," shows how rights are limited to support the needs of queer and trans people based on conceptions of inclusion and heteropatriarchy. Chapter 3, "Rights, Settler Colonialism, and the Universal," engages the dynamics of settler colonialism and the universal to show how rights do not materially alter those foundational structural relations. Certainly, rights can be subversive in the fight to resist systemic oppression and can provide important material gains such as being released from prison, receiving state benefits, or defending oneself against harm and violence. However, the very fact that the ability to apply those rights are not equally upheld demonstrates that the issue is not in the application or ability to exercise rights or that they are not fully recognized and protected. It is not just about better enforcement of access to rights, but rather that rights are a part of the problem because of their ontological construction.

Part 2, *On the Ontological Construction of Modern Universal Rights: Civility, Crisis, and Carcerality in the Making of Colonial-Modernity,* details some of these deeper historical shifts in power relations to show how modern rights emerge both because of and through the rise of colonialism. Prior to colonial expansion, rights functioned in more of a contractual duty sense. For example, there were rights that existed from person to person as well as crown to subject. When Vitoria applied the Roman framework of universal rights to the question of by what rights the Spanish were in the New World, he shifted the relationship of rights to essentially include the right to occupation and conquest in an unprovoked situation. Furthermore, the

determination of whose rights matter more always favors the European. Chapter 4, "Vitoria's Universal Rights," walks through Vitoria's legal legitimations and their fundamental undergirding in the logic of civility to show, following Antony Anghie, that Vitoria is inventing a new ideological construction of the meaning of rights so as to justify Spanish colonization.[43] Chapter 5, "Civil is as Civil Does," engages how the large scale population determination of what constitutes the Human/non-human categories is based on civility. I argue that the application of rights then becomes attached to those who conform to Human-ness, as an already racialized, already gendered construction determining whose bodies constitute the power to access rights-based protections. For the first time in the western construction of rights, they become at the population level determined through socio-political demarcations constructed through logics of civility, crisis, and carcerality.

Chapter 6, "Capitalism and the Scarcity of Modern Rights," addresses the ontology of modern rights through the lens of scarcity and capitalism. To that end I show how rights, in their very construction as a tool of juridical power and thus social and political power, only make sense in their limited functional approach. Even if everyone had rights (as Vitoria outlines the Native nations and European nations have), some people's entitlement to exercise those rights are stronger. And given the commonsense Christian-European values undergirding colonial-

[43] Antony Anghie, "Chapter 1: Francisco de Vitoria and the Colonial Origins of International Law," in *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 13-31.

modernity, those rights will always favor those who conform most closely with whiteness, cis-heteronormativity, and class ascendancy.

Part 3, *The Universal Human Rights Regime: The Influence of Vitoria in the Rise of Neocolonialism,* traces the rise of universal human rights through the early 20th century uptake of Vitoria's work by American International lawyer and scholar James Brown Scott. Chapter 7, "Vitoria's Resurgence," details how Scott, through his role with the Carnegie Institute's Division of International Law, is the figure largely responsible for situating Vitoria as the 'father' of international law. Scott's work in proliferating Vitoria is important for understanding how a return to colonizing discourse was used to invigorate International law as a legitimate 'science' for negotiating socio-political global dynamics, especially for US imperialism. Vitoria's work, alongside other European political figures writing in his wake, were packaged as 'classics' of International law and become the subsequent focus of many conferences, peace organizations, and burgeoning law school curriculum in the early 20th century.

In order to better understand the emergence of universal human rights, I argue we must understand the shifting dynamics of franchise colonialism into International law and the rise of international governing bodies that preceded 1948. Chapter 8, "International Law and the Turn to Neocolonialism," engages how International law, positioned through Scott and other interwar lawyers in the likeness of Vitoria's universal rights, arises out of the shift of Mandate colonialism into the 1948 formation of the United Nations and the rise of neocolonialism. The

Mandate System is an important lineage of 20th century International law because it functions as a precursor to the United Nations, where the civilizing discourse from empire-based 'old' colonialism was rearticulated into one of 'protectorate' status for mandate colonial peoples. This happens through the shift from a focus on race-based difference to an economic based focus, where the rise of free trade ideology and the positioning of International law as a scientific means of applying an economic civilizing therapy are used to 'graduate' former colonial states as newly formed sovereign states into the playing field of western powers.

Chapter 9, "From the Mandate System to Universal Human Rights," situates how 20th century International law, in the re-uptake of Vitoria's work, is structured during this time to subvert its relationship to colonialism. This chapter addresses the end of World War II and the emergence of new global institutions, where I argue that neocolonialism emerges through a re-articulation of the colonial logics of crisis, civility, and the carceral as institutionalized in the universal human right. I engage the historical articulation of the human right as a discursive regime that eschews references to differences to instead produce a dehistoricized, depoliticized, and individualized notion of a blanket universal right. This chapter engages how the discussions to include protections for minorities (racial, ethnic, religious, and other distinctions) were actively dismissed by western powers, including the US, to instead articulate a category that would bring all peoples together as universal 'humans.' This, I argue, occurs especially through the role of US non-governmental organizations (NGOs) that secured the inclusion of a human rights discourse into the

1945 UN Charter, where before only a framework of individuated rights was considered. I show how, through imperialist goals to secure American hegemony in the post-World War II world order, this dynamic solidified a conceptual 'universal human' as a platform to rearticulate the civilizing discourse of the Mandate System into the development and modernization theories under the institutional disciplining of the United Nation's Bretton Woods Institutes - the World Bank and IMF – to usher in neocolonialism.

Chapter 10, "Genocide in the Age of Universal Human Rights," engages how in the era of universal human rights, this discourse functions as a technology of surveillance to recondition genocidal logics as institutional through new forms under neocolonialism. I argue that the move to claim the protection of a universal 'human' flattens the violences undergirding colonial-modernity to normalize both new and old forms of settler colonial genocide. In this manner, I show that the form of political subjecthood of modern rights is not one that is false or not yet fully realized, but instead positions the role of rights in securing new forms of colonial violences as endemic to western governance within colonial-modernity. Ultimately this chapter exposes how human rights articulate what in the contemporary moment is akin to the discourse of 'all lives matter.' It encompasses both the colonizer and the colonized on the same terms, in the same sphere, so as to actually disavow the violence between them and instead create and mystify a universal forum where all are rhetorically included, but that actually functions to ensure that

the logics, structures, and institutional dynamics of colonial-modernity remain intact.

IV. Closing

Vitoria's work offers an archive through which to trace the developmental trajectory of modern rights through colonial expansion. His 16th century work spans its nearly 500 year-long gap to remain relevant in today's world. Vitoria was tasked by his King Charles V with determining by what right the Spanish were justified in being in the New World. He did this as a measure of Spanish power, to show that the Spanish were justly there and that no other crown could claim them as unjust and thus take over their operations. In this way, he is somewhat akin to Harold Koh or John Yoo, the lawyers responsible for justifying drone strikes and the torture memos in the Obama and Bush administrations, respectively. It is in the vein of 'protecting the interests of the state's power' that Vitoria comes to signify the origins of International law and is venerated as protecting Native rights. However, I argue that rather than creating a ground of equal participation in exercising universal rights, Vitoria's work cemented the dynamic of European colonial conquest via a shift in the ontological construction of rights – altering the very nature of a 'right' to be linked with civility.

In the trajectory of modern universal rights, the moment of Vitoria is framed as originary of the universality that is supposed to 'save' those who have been

outcasted, to incorporate them into the protective fold of the institutions of the modern state. But when we understand the state and its institutions to be the source of both structural and interpersonal harm most impacting the very people seeking such protection, where do rights leave us? By reframing the contemporary narrative of rights-based inclusion through engaging Vitoria's work in its socio-political historical context, as well as its re-uptake in the rise of the neoliberal reconfiguration of 'universal human rights,' this dissertation project shows how the ontological formation of universal rights creates the mechanisms that keep us locked in the cycle of desiring the promise of rights – of freedom and of protection – that is in fact central to the structural and interpersonal violence inherent to the project of colonial-modernity.

Vitoria's work represents the shift out of the Christian-centered conception of Europe into the Christian as universal – as human. Thus if universal rights are claimed to be universal, yet in fact only Europeans (and men with wealth at that) can exercise them, what does this mean for the notion of the universal right, both in its historical formation evident in Vitoria's work, and in our present moment? If the ontological construction of the modern right is one that is already built through hierarchical categorizations of humanness predicated on skin color as racialization, social relationality as gender and sexuality, and bodily worth as classed labor, where does this leave us?

Through the rise of categorical groupings of out of the civil/uncivil binary, all peoples are disciplined into heteropatriarchy, yet the relationality of white

supremacy ensures that the positionalities of the hierarchies are maintained *over* the naturalized gender and sexual hierarchies. In practice, however, people were always transgressing these institutionally imposed and legally enforced boundaries under colonialism. To be coded as aberrant was not only about discipline but also about resisting colonial impositions of heteropatriarchy and white supremacy. As contemporary poet and queer performance artist Alok Vaid-Menon articulates, white supremacy is conditioned on the demarcation of a gender binary. White supremacy positions frameworks outside of cis-gender binary conformity and compulsory heterosexuality as deviant, subject to discipline, and a 'failure' to uphold the heteropatriarchal and white supremacist norms of the colonial universal. However, Vaid-Menon argues that in reframing queer, trans, non-binary, genderqueer, and gender nonconforming positionalities as political, as on the frontlines of resistance, we can instead hold such non-normativity as valued:

> I think we need to flip the script from failure to success: being a brown faggot/femme/tranny is wonderful, because I'm failing to uphold white supremacy. […] Femininity is not a weakness, it's something incredible strong and powerful. It's precisely the things which we understand as failure, and precisely the things which we are terrified of, that might have the potential to actually liberate us.[44]

It is in this vein that this work calls into question the deeply imbedded relationships of heteropatriarchy and white supremacy into our contemporary moment. My

[44] Bobuq Sayed, "Q&A with Alok Vaid-Menon of Darkmatter," *Archer Magazine*, Dec 7, 2016, accessed March 5, 2017, http://archermagazine.com.au/2016/12/qa-alok-vaid-menon-darkmatter/.

intention is that by engaging the historical coherence of these systems of power, not only will we question the attachment and investment in securing rights-based entitlements as a recourse from state violence, but also that in writing from the positionality of a queer, non-binary trans person who is a white settler, we may use these institutional resources of academia to gather the historical patterns and shifts so as to map them onto one another, to contribute to the histories of resistance that have allowed us to survive in the face of brutal systemic violence.

This project, in its present state, cannot adequately attend to the experiences, histories, knowledges, labor, and love of people cast over and to the edges of the 'universal.' Those stories are not mine to tell. But I hope this work can be of use in studying how these systemic power relations have grown, so that we may continue to work toward their end. As the conditions of violence that so brutally target people living at the intersections of white supremacy, heteropatriarchy, and capitalism within colonial-modernity continue to reconfigure and attach themselves to target gender nonconformity, queerness, people of color, low income people, people with disabilities, people who are immigrants, people who are positioned as non-normative to the Christian White Supremacist Universal, let us challenge the historical narrative that frames the only option of freedom as through claims of equality to be upheld by the same institutions that create the very conditions of violence in the first place. Let us take a risk in reframing what we have been conditioned to naturalize – that which we are sold as a golden ticket to freedom and

protection – may in fact be an integral aspect of what keeps systemic violence moving in its insidious forms.

Wendy Brown closes 'Suffering Rights as Paradoxes' by questioning how the paradoxical elements of the struggle for rights in an emancipatory context could potentially articulate a field of justice beyond "that which we cannot not want."[45] I am not sure I have any sort of definitive answer, beyond the necessity to articulate the structure of these conditions and in doing so simultaneously imagine their undoing – that in naming them we may see them so as to resist them so as to disappear them so as to build and resurface something in their place.

The Coda, *Reclaiming Our Vision: Moving Beyond Rights-Based Redress,* moves to imagine from a location outside these structures because we have seen them for the structures that they are, have grappled with them in the midst of the engulfment, and in the grappling, in the resistance, the conditions too have changed. If not in total, then in brief, in the glimmer and the building from *that* space, from what it means not to have to give up parts of ourselves or others to be let in to a 'universal,' to be designated a right. And in those moments, those engagements, those possibilities, we are already living something more. We imagine there to be a point of arrival, a point at which the nightmare we are in has ceased.[46] But we must

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[45] Brown, "Suffering Rights as Paradoxes," 240.

[46] The concept of the nightmare is derived from a speech by Angela Davis in 1972: "And a thunderous, resounding, united force that we have no intentions of stopping this fight, until we have eradicated every single remnant of racism in this country, until we, until we have ended the war in Vietnam and the neocolonialism in Africa,

wake ourselves into another dream, weave from the work of the margins, of the freedom lovers, the gender warriors, the colonial resisters, the queer fighters, the prison uprisers, the healers, the visionaries, the poets and the artists, and in particular the stepping back of those with privileges to hear and listen and be led elsewhere. To see our lives as the potential for already living the work, the hard, heartbreaking, challenging, transformational work of building something more. And in doing so, in affirming our own selves as autonomous, as interdependent, as reliable and strong and flexible, as worthy of the power that we already hold – we are changed.

Let this be a risk then, and an offering. It is in these pages I have attempted to center both, while excavating, though the tools of academia, how these structures have come to be. It is not ultimately a project for academia, however. It is for us, in the hopes that it may contribute something towards dreaming this nightmare to its end.

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we are not going to stop fighting until every political prisoner is free and until all the monstrous dungeons of this county are a mere memory of a nightmare." Angela Davis, *Black Power Mixtape* footage, 1972).

PART 1

Contemporary Critiques of Rights: What Rights Cannot Account For

Introduction: Commonsense Notions of Rights

Our contemporary notions of individuated rights are understood as an outgrowth of the 'universal' rhetorics of democracy, equality, and freedom. Liberal narratives largely trace the coherence of individuated rights to two key historical moments – that of the 18th century French and American Revolutions culminating in the Bill of Rights as espoused in the United States Constitution, and the more recent 1948 United Nations Declaration of Human Rights.[1] It is common knowledge that the declaration of such rights at their 18th century espousal was constructed specifically for white, property owning men.[2] It is also common knowledge that although many groups of people were left outside of rights entitlements, over time they gained access to these same set of rights once reserved for a small portion of

[1] See, for example, Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Los Angeles: University of California Press, 2004); Randall Williams, *The Divided World: Human Rights and Its Violence* (Minneapolis: University of Minnesota Press, 2010), xv.

[2] Étienne Balibar, *Politics and the Other Scene* (Brooklyn: Verso, 2011), 167: "We all know that, although the American and French Revolutions declared that all men (meaning: human beings) were 'free and equal by birthright,' the resulting social and political orders were permeated with a number of restrictions, discriminations, and authoritarian aspects."

people in power.[3] And, the narrative goes, that despite the abhorrent and genocidal histories of the joint projects of colonialism and racial chattel slavery that founded the country, the perseverance of struggle has, over time, expanded the universal hegemony of the United States to secure citizenship and its attendant rights for aggrieved groups through projects of rights-based inclusion.

The narrative of the United Nations Declaration of Human Rights is a slightly different one, though related to the same set of notions that underlie the possessive individuated rights of the Enlightenment era. The global climate of the UN formation was one of deep strife. Emerging after the warfare of World War II, western countries sought to form an international community through affirming a set of regulations to ensure that the atrocities of World War II would not emerge again.[4] The period after these wars was one focused on securing peace and democracy so as to avoid the dynamics of warfare between the 'great' global powers. The United Nations emerged out of the period of interwar years, founded on the documents of Woodrow Wilson's 14 points, the experiences of the League of Nations, and the work of many international lawyers and politicians seeking a new global order of power.[5] Much of the concern for a global project of international

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[3] Isahy, *The History of Human Rights*, 8.

[4] Isahy, *The History of Human Rights*, 179.

[5] See, for example, Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Cambridge: Kluwer Law International, 1998).

governance was based on the 'failures' of the League of Nations that left many western politicians concerned about the ability for a federation of international states to work cohesively in managing global conflict.[6] The coming together of the 51-member body of nation-states under the United Nations was heralded as a paramount achievement, representative of an expansion in power relations from that of European states to include the United States, among non-western countries as well.[7] As the decade shifted into the rise of the Cold War dynamics, the United Nations began its work as the arbiter of international justice and peace through its charter. The principal proclamation of the United Nations, that of the 1948 Universal Declaration of Human Rights, was a global proliferation asserting a set of 21 rights that all people across the world maintain as individual entitlements. These rights, ranging from equal protection under the law to the right to social and economic security, espoused a set of relationships between individuals and their states of citizenship as universal.[8] This universalized dynamic would have a particular impact on the relationality of people as a global citizenry. Through the expansion of 'human rights,' all people, regardless of citizenry, would be promised the same set of universal rights as individuated entitlements. Human rights scholar

[6] Ibid.

[7] Ibid.

[8] Isahy, *The History of Human Rights*, 18.

Hedley Bull argues that it was not until after 1945 that "the attempt was made to transform a universal society of states into one of peoples."[9]

These two historical moments are considered foundational to modern society and the project of a globalized democratic order. As the primary instances of foundational modern rights development, they are inherently tied to the narrative of universality, which proclaims that entry into the protected sphere of the universal body politic is achieved through rights recognition. The contemporary formations of rights-based struggle are deeply informed by historical instances of hard-won inclusion into the universal body politic. The struggle for rights over the span of Enlightenment to the formation of the United Nations produces a specific narrative about the promises that rights bring – namely that of formal recognition and equality. But the reality of gaining such access often remains a promise that is never fully actualized, not for lack or desire of those seeking a rights entitlement, but because the system of the universal which dolls out those rights is only ever offering them as a promise. This promise is a manifestation of the ability to exercise recourse, a recourse that often doesn't actually translate into the fundamental change in material conditions that aggrieved groups are seeking. As Critical Race Scholar Kimberlé Crenshaw states, rights discourses operate as a challenge to what Crenshaw terms the 'oppositional dynamic,' where "in the context of white

[9] Hedley Bull, "The Emergence of a Universal International Society," in *The Expansion of International Society*, eds. Hedley Bull and Adam Watson (New York: Oxford University Press, 1984), 126.

supremacy, engaging in rights discourse should be seen as an act of self-defense."[10] Although the ability to exercise rights is an important gain, and is especially important in the context of exercising the rights of people most impacted by the state apparatuses that limit physical and political freedom, rights-based redress at is base functions only to provide *access* to the forums of power for which to exercise claims of unequal or disparate treatment that a right supposedly guarantees against.

Narratives of formal equality and incorporation through rights-based redress appeal because unequal treatment, exclusion, and systemic and interpersonal violence are ongoing problems. And the fact that the people most impacted by those practices are groups considered 'minorities,' or groups that do not or cannot conform to the 'majority' identity of those in power, means that the narrative of exclusion from a democratic society based in promises of equality will be remedied by providing the right to inclusion into a sphere of universal protection – a forum where equality and objectivity are promised once entry into the sphere is achieved. This dynamic of the minority/majority is in fact a liberal narrative that functions to fictionalize the systems and incentives designed to benefit white rule and extreme wealth into a narrative of 'democratic majority rule' which ultimately elides the

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[10] Kimberlé Crenshaw, "Race, Reform, and Retrenchment," in *Critical Race Theory: The Key Writings that Formed the Movement*, eds. Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (New York: The New Press, 1995), 117. Crenshaw continues: "This was particularly true once the movement had mobilized people to challenge the system of oppression, because the state could not assume a position of neutrality regarding Black people; either the coercive mechanism of the state had to be used to support white supremacy, or it had to be used to dismantle it. We know now, with hindsight, that it did both."

relational conditionality of structural power relations. The universal body politic in theory represents a space where all are provided equality through rights. In practice, however, the universal and its shielded access still remain representative of the majority interests of those with access to governing power.

The notion of a universal set of values mediated through rights is not a recent concept tied to the proliferation of the United Nations, but rather is rooted within the conditions at work producing the rise of 'modernity,' as shall be further addressed in Part 2. However, the conceptualization of the 'universal' of the United Nations is one that determines modes of relationality specific to the contemporary neoliberal era. Universality is bounded by legal, social, and political apparatuses that regulate incorporation into a sphere of promised protection and entitlement. The notion of universality works to situate the problems that aggrieved groups are addressing as a problem of non-application of a right to those groups that other groups possess, in furtherance of practicing a more open and shared universal: "universality is effective as a means of integration – it demonstrates its own universality, so to speak – because it leads the dominated groups to struggle against discrimination or inequality in the very name of the superior values of the community: the legal and ethical values of the state itself (notably: justice)."[11] Balibar demonstrates here that the focus on entry into a protected universal is inherently about strengthening the role of the universal itself, through enforcing the

[11] Balibar, *Politics and the Other Scene,* 161.

notion of the state and its legal values as a space that can expand and accommodate groups whose access had been delimited through racial, gender, sexual, and other vectors of differentiated statuses.

Several historic milestones reached in the last two decades alone are representative of this contemporary narrative of inclusion into the 'universal' through rights-based struggle. The US election of the first Black president, the US federal recognition of the right to gay marriage, and the ratification of the UN Declaration on the Rights of Indigenous People are all examples that speak to the long-standing dynamics of marginalized groups as they work against exclusionary practices within domestic and international arenas to gain access and recognition. All three are also examples of political gains within the contexts of rights-based struggle emergent within the United Nations-era that proliferated into distinct movements for political recognition. The Civil Rights movement demanded access to political participation and the exercise of equal rights that set the stage for Barack Obama to be elected in president in 2008 as the first Black president, to which liberal and conservatives alike declared the United States as 'post-racial.'[12] The gay rights movement secured to the right to federal recognition of same-sex marriage with the 2015 US Supreme Court decision *Obergefell v Hodges*, to which mainstream

[12] Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2012), 26, 30.

gay rights agenda claims the achievement of 'full equality.'[13] The Indigenous Rights caucus of the United Nations produced a ratified document of the specific Rights of Indigenous Peoples (UN DRIP) across the globe in 2007, to which many have pointed as a sign of recognition and reconciliation between Native and settler societies.[14] All three instances reflect the struggles of movements over many decades of work to achieve political recognition in the form of rights.

These three movements demonstrate the gain of rights as a particular form of political inclusion into a protected class of people who are then able to assert rights against the state for protection. However, as the experience of social movements seeking to combat exclusion and harm have demonstrated, achieving the political recognition of the state in the form of a right in effect offers only the ability to assert a claim of entitlement in a court of law to exercise the entitlements of that right. Although it can be said that the Civil Rights movement brought about formal 'legal equality' and the achievement of the first Black president, racism has not ended, and the proliferation of state harm through policing, prisons, and

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[13] *Obergefell v Hodges*, 576 U.S. 644 (2015). For discussion of 'full equality,' see, for example, Ariane de Vogue and Jeremy Diamond, "Supreme Court Rules in Favor of same-sex marriage Nationwide," *CNN*, June 27 2015, accessed October 20, 2015 http://www.cnn.com/2015/06/26/politics/supreme-court-same-sex-marriage-ruling/.

[14] For discussion of this point, see, for example, Lorie M. Graham and Siegfried Wiessner, "Indigenous Sovereignty, Culture, and International Human Rights Law," *The South Atlantic Quarterly* 110, no. 2 (Spring 2011) doi: 10.1215/00382876-1162516.

increasing economic disparity is disproportionately highest within communities that are low-income and of color.[15] Although gay people now have the right to marry, queer, transgender, and gender non-conforming people are continually displaced from housing, jobs, and families of origin while also experiencing both state and interpersonal violence at astonishingly high rates.[16] Although the UN DRIP demonstrates the formal recognition of Indigenous people's rights in the International forum, Indigenous communities are repeatedly fighting against the banning of spiritual and cultural practices, land occupation, resource extraction, and the continual threat of the very existence of their communities within colonial, settler colonial, and neocolonial structures.[17]

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[15] See, for example, Angela Y. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press 2003); Eve Goldberg and Linda Evans, *The Prison-Industrial Complex and the Global Economy* (PM Press 2009); Ruth Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Los Angeles: University of California Press, 2007); and Christian Parenti, *Lockdown America: Police and Prisons in the Age of Crisis* (New York: Verso, 2008).

[16] See, for example, Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law* (Brooklyn: South End Press, 2011); Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011); and Eric A. Stanley and Nat Smith, eds., *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, 2nd ed. (Oakland: AK Press, 2015).

[17] See, for example, Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i,* rev. ed. (Honolulu: University of Hawai'i Press, 1999); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999); Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson: University of Arizona Press, 2013).

An apparent discrepancy emerges between that of the promise of rights – as a *guarantee* of inclusion and equality, and the actuality of what rights offer – an entitlement to the *ability* to exercise a claim of an equal right. Rights operate not to guarantee but to provide access, the implementation of which can be argued to have done very little to materially alter the systems that continually produce and reproduce harm and exclusion, especially at the hands of the state. Given such discrepancies, why is it that the exercise of hard-won rights does not necessarily correlate to a change in the conditions of harm, violence, and exclusion? Why is it that the achievement of formal legal protection and inclusion into the sphere of the universal does not alleviate the systems of colonialism, racism, sexism, ableism, resource maldistribution, xenophobia, transphobia, and 'othering' of people and communities? What about the promise of rights within the notion of a protected universal is not working to fulfill the material needs of communities seeking to change the conditionality of their livelihoods?

This Part will engage these questions by addressing the contemporary context of rights-based struggle through examining the historical and political development of universal rights in the United Nations era within the systemic power relations of colonial-modernity. The first chapter addresses the critical legal scholarship within the field of Critical Race Theory to engage with the limitations of post-Civil Rights-based redress for eliminating racism and systemic white supremacy in the United States. The second chapter addresses the engagement of critical queer and trans scholarship regarding the limitations of civil rights

incorporation and protected class status for queer and trans people to alleviate systemic heteropatriarchy. The third chapter addresses anti-colonial scholarship and critiques of domestic and International law's promise to incorporate Native peoples into a global universal as a means of alleviating conditions of unequal treatment under colonialism. Through these instances this Part argues that the contemporary rights-based redress cannot fundamentally alter the proliferation of state violence and ongoing structural harm of these systemic power relations through rights incorporation.

Chapter 1
Rights, Racism, and White Supremacy

In 1951 The Civil Rights Congress sent a 240-page report to the United Nations entitled *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of the United States Government Against the Negro People*. Edited by William Patterson of the Civil Rights Congress, authored by prominent Black activists and organizers such as W.E.D. Dubois, and connected to the 1895 work of anti-lynching activist Ida B. Wells-Barnett, the report documents the genocidal practices of police killings, lynching, and murder of Black people alongside economic, social, and legal discrimination in the United States.[18] The report painstakingly documents the dates, names, locations, family members, and contexts of deaths, when known, of hundreds of Black people who were killed in the course of less than a decade.[19] Written in the wake of the UN Declaration of Human Rights, the petition was sent to the UN to review the charge of genocide against the United

[18] William Patterson, ed., *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of The United States Government Against the Negro People* (New York: International Publishers, 1970); Williams, *The Divided World,* xiv; Ida B. Wells-Barnett, "A Red Record," in *On Lynchings* (Mineola, New York: Dover Publications, 2014).

[19] Alongside these known deaths, the report simultaneously indicates that the evidence is incomplete due to the fact that many deaths are not recorded and never known except to those who have lost someone. Patterson, ed., *We Charge Genocide*, 9-10; 58.

States under the Geneva Convention on the Prevention and Punishment of the Crime of Genocide, which passed three years prior.[20]

The opening of the petition situates the lynchings, police killings, murders, economic violence, and segregation as the everyday horror of genocide that is disguised through its familiar and ordinary conditionality of American life:

> The genocide of which we complain is as much a fact as gravity. The whole world knows of it. The proof is in every day's newspapers, in every one's sight and hearing in these United States. In one form or another it has been practiced for more than three hundred years although never with such sinister implications for the welfare and peace of the world as at present. Its very familiarity disguises its horror. It is a crime so embedded in law, so explained away by specious rationale, so hidden by talk of liberty, that even the conscience of the tender minded is sometimes dulled. Yet the conscience of mankind cannot be beguiled from its duty by the pious phrases and the deadly legal euphemisms within which its perpetrators seek to transform their guilt into high moral purpose.[21]

The 'everyday familiarity' of the targeting of Black people for violence and death articulates the systemic violence as in line with the same terms of genocide the UN claims to protect against. Writing in the face of a new era of 'universal' protection of all human rights, the report is a significant response that challenges the normalized construct of whose rights are actually protected in the universal, calling into question which forms of violence are seen as legitimate and which nation-states will

[20] Patterson, ed., *We Charge Genocide,* xi.

[21] Patterson, ed., *We Charge Genocide*, 4.

not be held accountable for genocidal state violence.[22] Critical Ethnic Studies scholar Dylan Rodríguez argues that *We Charge Genocide* formulates the state practices of the United States as explicitly genocidal: "in addition to constituting the first rigorous internationally circulated historical contextualization of the US racist state as a genocidal racist state, *We Charge Genocide* constructs a useful anatomy of white supremacist nation building that explicates the intimate, symbiotic link between 'democracy' and anti-Black genocide."[23] Genocide, as a formalized legal term of criminal culpability under Article 2 of the Geneva Convention, formulated the terms of what would constitute the act of genocide through a primary requirement of the state in question's demonstrated *intent* to commit genocide:

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part 1; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.[24]

The construction of this term as evidentiary and intent-based is a limited framework that does not always account for systemic violence, in that it must be

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[22] For a discussion on determinations of legitimate versus illegitimate violence and the forum of International Human Rights, see Williams, *The Divided World.*

[23] Dylan Rodríguez, *Suspended Apocalypse*: *White Supremacy, Genocide, and the Filipino Condition* (Minneapolis: University of Minnesota Press, 2010), 117.

[24] Article 2, United Nations Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res 260 (1948).

explicitly articulated that a certain 'group' was the focus of genocidal practices. A focus on individuated wrong-doing within a requirement for evidenced-based intent reifies the victim/perpetrator model so as to elide any consideration of systemic violence that is not explicitly legislated on racial, ethnic, or religious difference as outlined in the Geneva Convention. In turn, this process functions by appearing neutral and objective while simultaneously determining which states possess the ability to condition 'legitimate violence' through practices that regulate and oppress groups of people under the legitimacy of the state.[25]

In the United States, groups like the Civil Rights Congress argued for the UN to review the anti-Black genocide of the United States as a systemic and foundational practice of every-day life. Charges of genocide have also been taken up through Native and Indigenous critique linking the ongoing practice of US settler colonialism as genocidal under the terms of the convention.[26] The legal construction of the Geneva Convention against genocide utilized the promise of the protection of International law to create a forum for aggrieved groups to seek redress. This forum, however, secured the conditions of the 'universal' as one that privileged the interests of western powers controlling the access, framework, and legitimacy of the universal as a space to discipline non-western powers and would

[25] Williams, *The Divided World,* 17-18.

[26] See, for example, Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (San Francisco: City Lights Books, 1997).

not call attention to western state violence as illegitimate. Calls for accountability for the white supremacist and genocidal conditions of the United States of *We Charge Genocide* would not be reviewed, as this Petition never entered the floor of the UN.[27] In just three years since the 1948 establishment of the United Nations and the promise of 'universal' protection of human rights, the International regulatory body proved unable to either account for or even demonstrate concern for the genocidal conditionality of the United States.

The framing of US state violence as a foundational aspect of nation-building exposes the deeply embedded white supremacist logics that function through the upkeep of a 'protected' realm dependent on logics of anti-Blackness and Indigenous erasure. The system of state violence enacted through white supremacy is maintained not only through the state-sanctioned forms of violence such as prisons and policing, conquest and reservations, and military imperialism, but also through the regulatory apparatuses and social hierarchies that seek to contain, divide, and determine certain groups of people as 'threats' to national order and security and thus outside of an intent-based standard for enacting violence. The work of *We Charge Genocide* explicitly demonstrates how the emergence of the newly formed liberal instantiations of 'universal rights' in the age of the United Nations functions to delineate which states would not be held accountable for systemic violence and violations of those rights.

[27] Williams, *The Divided World,* xiv.

Through *We Charge Genocide*, the Civil Rights Congress, alongside organizing work of many other organizations throughout the 1940s and 1950s, contributed to the formation of the Civil Rights movement that worked to combat the legalized state practices of lynching, murder, police killings, Jim Crow laws, Black Codes, segregation, and voting restrictions across the United States.[28] Out of this context, the urgency of continued racialized violence in the United States produced a rise of community organizing that actively worked to combat the legal and extralegal practices of white supremacy. Alongside the Civil Rights movement emerged various community organizations articulating the work within their communities to combat social and political violence as the conditions of white supremacy. The community-based and coalitional organizing of the Black Panthers, Young Lords, American Indian Movement, Yellow Power, and many other groups emerged from an explicitly radicalized political critique against the oppressive racialized violence of the United States. The shifting of decades from the 1950s into the 1960s and 1970s saw an increase in technologies of policing, imprisonment, and state violence in communities of color as well as the continued conditions of economic

[28] For example, organizations such as the Regional Council of Negro Leadership see David T. Beito and Linda Royster Beito, *Black Maverick: T.R.M. Howard's Fight for Civil Rights and Economic Power* (Urbana: University of Illinois Press, 2009),72-89; For Fellowship of Reconciliation (FOR) and Congress of Racial Equality (CORE) see August Meier & Elliott Rudwick *CORE: A Study in the Civil Rights Movement* (Chicago: University of Illinois Press 1975); and for the NAACP, see Richard M. Dalfiume, "The 'Forgotten Years' of the Negro Revolution," *The Journal of American History* 55, no. 1 (1968): 90-106.

maldistribution and disenfranchisement.[29] The platforms of both the Black Panthers and the Young Lords, for example, centered imperatives for the redistribution of wealth; the curtailing of policing and prisons; access to healthcare, safe living conditions, employment, and education; oppositions to capitalism, US imperialism, and militarism; and the exercise of self-defense and liberatory struggle in the US and internationally.[30] The militant and community-centered organizing of these social movements was a direct response to the set of practices and long-term systemic conditions of state violence, racism, and economic disparities ongoing in the United States. The actions and critiques levied by community-based organizing through this period demonstrated that the conditions preceding the civil rights era would continue to extend their reach despite the integration of rights-based redress through legislation such as the 1964 Civil Rights Act.

The conditions of white supremacy directly proceeding the organizing of the 1960s are important for understanding the context in which legal ratification of rights-based redress could not ultimately work to rid systemic harm, but rather would see its reformulation in the rise of standardized neoliberal policies and

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[29] See Parenti, *Lockdown America.*

[30] See Black Panther Ten Point Platform, in Marshall Edward Conway, *The Greatest Threat: The Black Panther Party and COINTELPRO* (Baltimore: iAMWE Publications, 2009); See Young Lords Thirteen Point Program in Darrel Enck-Wanzer, ed. *The Young Lords: A Reader* (New York: New York University Press, 2010). On International organizing such as the Anti-Imperial work with the Black Panther Party see, for example, "Laura Whitehorn Interview" in *The Greatest Threat*, 191-206.

reforms.[31] Cultural Studies Scholar George Lipsitz documents how the post-World War II years saw a drastic restructuring of state social welfare practices through the dismantling of programs providing state and federal aid to communities with a maldistribution of resources, alongside an increase of resource redistribution towards white communities. Lipsitz frames this trajectory as 'the possessive investment in whiteness,' a term that exemplifies the consolidation of policies and social practices that continued to garner wealth and protection toward white communities. Lipsitz argues that this in turn functioned to maintain power predominately reserved for white interests: "the possessive investment in whiteness always affects individual and collective life chances and opportunities. Even in cases where minority groups secure political and economic power through collective mobilization, the terms and conditions of their collectivity and the logic of group solidarity are always influenced and intensified by the absolute value of whiteness in U.S. politics, economics, and culture."[32]

Many of the social welfare programs initiated through the New Deal legislation under Franklin Delano Roosevelt were designed to counterbalance the

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[31] On the rise of neoliberalism see David Harvey, *A Brief History of Neoliberalism* (New York: Oxford Press, 2007).

[32] George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit From Identity Politics* (Philadelphia: Temple University Press, 2006), 22. Lipsitz also adds: "the possessive investment in whiteness is not a simple matter of black and white; all racialized minority groups have suffered from it, albeit to different degrees and in different ways," 2.

devastating effects of the Great Depression that saw the results of unregulated market exchange and the production of resource scarcity preceding World War I.[33] With the stimulation of the war economy under the military Keyensian social policies providing social safety nets, housing for low-income people, and war industry job proliferation, the period spanning World War I and II saw the influx of vast numbers of people of color into urban environments seeking jobs.[34] White communities living in the cities began to respond to the building of public housing and the influx of non-white communities through the abandonment of urban spaces and the rise of suburbanization and its restrictive covenants following World War II through 'white flight.'[35] Fueled by the promises of the GI Bill for home ownership and college degrees, returning soldiers took advantage of these policies and moved out of urban settings and into suburban settler colonial expansion projects. This, however, was a practice that benefited only the white community, who were able to take advantage of the GI programs to buy homes and live in the racially restricted

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[33] Thomas J. Sugrue, "Crabgrass-Roots Politics: Race, Rights, and the Reaction against Liberalism in the Urban North, 1940-1964," in Jack E Davis, ed., *The Civil Rights Movement* (Malden, Massachusetts: Blackwell Publishers, 2001), 65-66.

[34] Ibid.; Ruth Wilson Gilmore, "Globalization and US Prison Growth: From Military Keynesianism to post-Keynesian Militarism," *Race and Class* 2/3:40 (1998-1999), 186.

[35] Industry rose through economies profiting in the war, producing an increase in jobs – namely the assembly and production of airplanes and automobiles, weapons manufacturing, and the engineering and technology hubs that arose in places like Los Angeles and Detroit. See Lipsitz, *The Possessive Investment in Whiteness* 5, 26; Sugrue, "Crabgrass-Roots Politics," 68-69.

and self-segregated communities, and in turn take out loans on their homes secured through special government programs for new home owners, which proliferated asset accumulation for their families and upward social mobility such as sending their children to college.[36] This possessive investment in whiteness consolidated the capital of the burgeoning white middle class in the form of assets and property accumulation that could be passed on to future generations of white families.

As white families were creating the foundations for the large-scale middle class overdevelopment of asset accumulation and investment through restricted suburban communities living the 'American Dream,' urban spaces were left with the severe underdevelopment and little legal ability to produce capital.[37] The flight of capital from urban cities left many communities devoid of business and income generating wealth because of the segregation practices and policies such as denial of loans for people of color. This dynamic saw a surge in the population of low-income people who for these reasons increasingly were forced to turn the state in the form of welfare and housing support while living in communities more likely to be impacted by conditions of police violence and environmental racism.[38] The practice of white flight into suburban areas coincided with the 1952 Urban Indian Relocation program through the Bureau of Indian Affairs that relocated Native people into

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[36] Lipsitz, *The Possessive Investment in Whiteness* 6-7.

[37] On the concept of underdevelopment and overdevelopment, see Walter Rodney, *How Europe Underdeveloped Africa,* (Baltimore: Black Classic Press, 2011).

[38] Lipsitz, *The Possessive Investment in Whiteness*, 9-10.

urban centers, distancing them from communities and homeland, and further incentivizing the spread of white suburban settlement. This severe underdevelopment of resources for communities of color in urban settings across the country contributed to the conditions of social resistance and uprising that many social movements of the 60s and 70s were responding to. The logics of crisis, civility, and carcerality under white supremacy saw the targeting of low-income communities so as to further divide movements working to dismantle the devastation of neoliberal capitalism through continued logics of white supremacy that produced the expansion of a new, primarily middle-class value of ascendency to white life.[39]

The state responded to the rise of social movement organizing against the constructed conditions of poverty through a proliferation of criminal and administrative webs encapsulating those articulated as 'less deserving.' In the book *Regulating the Poor*, Frances Fox Piven and Richard A. Cloward document state responses to state-produced conditions of poverty as a cycle whereby relief arrangements are initiated or expanded following civil disorder and then are diminished or altogether cut once political stability has been restored as a function used to quiet social uprisings.[40] As the 'tough on crime' order of the 1960s emerged

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[39] See Jodi Melamed, *Represent and Destroy: Rationalizing Violence in the New Racial Capitalism* (Minneapolis: University of Minnesota, 2011).

[40] Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare*, 2nd ed., (New York: Vintage Books, 1993), xv.

to respond to social movements organizing against the state violence of white supremacy, it coincided with a drastic rise in welfare expansion that Piven and Cloward argue was used primarily to "mute protests and riots."[41] Such expansion was short lived, as it was quickly followed by neoliberal reforms of welfare dismantlement policies in the 1970s. Those reforms enacted 'work disciplining' policies through increasing labor regulations, worsening economic conditions, wage stagnation, and the movement of jobs outside the US through deindustrialization designed in part to weaken union power.[42]

Through the rise of neoliberalism, non-profits would emerge to replace the state-sponsored social services as the 'shadow state' voluntary sector for direct social services work.[43] Not only would the rise of the Non-Profit Industrial Complex (NPIC) come to disrupt community-based organizing, but the state sanctioned response to the dismantling of the social services net would also produce an institutionalization of community-based organizing into the NPIC that would increasingly replicate private industry through requirements attached to funding, 'legitimate' workers with college degrees, pay scale hierarchies, and the model of

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[41] Piven and Cloward, *Regulating the Poor,* 184 – 190, 343. See also Ruth Wilson Gilmore, "In the Shadow of the Shadow State," in INCITE! Women of Color Against Violence, eds., *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex* (Cambridge: South End Press, 2007), 42-46.

[42] Piven and Cloward, *Regulating the Poor*, 344-350.

[43] Gilmore, "In the Shadow of the Shadow State," 45.

large national organizations parachuting into communities as a narrative of 'saviors.'[44] These practices of neoliberalism increased government programmatic abandonment and the incentivization of neoliberalism's possessive individualism through a narrative of deservedness for social services as reserved for people 'working hard' to pull themselves out of the conditions of poverty, rather than focusing on the systems producing ongoing harm and disparity.[45]

During this period into the 1980s, the web of administrative law expanded to encapsulate more low-income people into the reaches of discipline and regulation through making it increasingly difficult to apply for and obtain access to low-income housing, health care, cash assistance, foodstamps, and other 'benefits' mandated by federal law.[46] Reagan's policies would see the restructuring of increased federal incentivization for foster care and the state's ability to take away children for living in conditions of poverty, alongside an increased ability for the state to terminate parental rights rather than reinvesting in low-income communities' needs for child care, jobs, housing, and health care that had been defunded or removed over time.[47]

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[44] Spade, *Normal Life,* 174; For a critique of the Non-Profit Industrial Complex, see generally INCITE!, *The Revolution Will Not Be Funded.*

[45] Harvey, *A Brief History of Neoliberalism,* 157; Lipsitz, *Possessive Investment in Whiteness,* 20.

[46] Fox and Piven, *Regulating the Poor*, 359-361.

[47] Dorothy Roberts, "Feminism, Race, and Adoption Policy," in INCITE! Women of Color Against Violence, eds., *Color of Violence: The INICTE! Anthology*, 46.

The expansion of the administrative state and its legal regulations continued to worsen in the decades that followed until the complete dismantling of welfare under Clinton in the 1990s.[48] By the 1980s, the drastic expansion of prisons alongside the rise of non-profitization would force the decline of the large-scale radical social movements of the 1960s through the assassination, exile, and imprisonment of their members, many of who are still serving long-term prison sentences.[49] These groups were targeted by the government through policies like the FBI's counter intelligence program, COINTELPRO, to disrupt community engagement through covert and explicit actions so as to thwart organizing against the systemic conditions of white supremacy and capitalism both in the United States and internationally.[50] Through centering the issues of housing, medical care, prisons, police violence, and education, these community-based social movements demonstrated and articulated the lasting issues of systemic disparity and violence not resolved upon the achievement of 'equal rights' under the law, framing them instead as products of the long-term conditions of white supremacy.

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[48] Lipsitz, *The Possessive Investment in Whiteness*, 15.

[49] See Conway, *The Greatest Threat.* See also Dylan Rodríguez, *Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis: University of Minnesota Press, 2006).

[50] Ibid; see also Ward Churchill and Jim Vander Wall, *The COINTELPRO Papers: Documents from the FBI's Secret Wars Against Dissent in the United States* 2nd ed. (Cambridge: South End Press, 2002).

Addressing a "deep dissatisfaction with traditional civil rights discourse," Critical Race Theory centers how racial justice in the 1960s and 1970s was embraced in mainstream American discourse through terms that did not argue for radical or fundamental changes to US society.[51] Instead, Critical Race Theory scholarship argues that the exercise of racial power was formulated through a discourse that framed racially motivated disparity and harm as a rare phenomenon, rather than systemic and institutional. This, legal scholars Kimberlé Crenshaw, Neil Gotanda, Gary Puller, and Kendall Thomas argue, worked to "legitimize the basic myths about American meritocracy:"

> The image of a 'traditional civil rights discourse' refers to the constellation of ideas about racial power and social transformation that were constructed partly by, and partly as a defense against, the mass mobilization of social energy and popular imagination in the civil rights movements of the late fifties and sixties.[52]

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[51] Critical Race Theory scholarship responds to these limitations of civil rights-based redress for altering the continuation of systemic racism by way of incorporating more people into the universal body politic. Critical Race Theory scholarship emerged out of Critical Legal Studies as a project articulating the systemic influence of racial ordering within a white supremacist society that continues despite legal inclusion and 'formal equality' of the post-civil rights movement. As a field this scholarship centers the importance of the dynamics between race and the law through confronting what scholar Cornel West terms "the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation)." Cornel West, "Foreword," in *Critical Race Theory: The Key Writings That Formed the Movement*, xi.

[52] West, "Foreword," xiv.

Acknowledging the important social gains earned through the civil rights reform, Critical Race Theory scholars are invested in critiquing the ways that the American legal order worked to produce the *deradicalization* of racial liberation movements.[53] Crenshaw, Gotanda, Puller, and Thomas argue there are two common interests that can be distilled amongst Critical Race Theory scholars:

> [T]he first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and in particular, to examine the relationship between that social structure and professed ideals such as 'the rule of law' and 'equal protection.' The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it.[54]

This field of work demonstrates that race is not external to the functioning of law, but in fact integral to the law's very functioning. Because of the intertwining logics of race and white supremacy, the legal remedies emerging in the wake of civil rights redress worked instead to reproduce racial ordering through new instantiations of white supremacist neoliberal practices and policies.

White supremacy is not only the dynamic of interpersonal racism and hate groups, but rather is representative of a system that structures access to power, privileges, and benefits on the basis of proximity to whiteness. Critical legal scholar Frances Lee Ansley defines white supremacy as "a political, economic, and cultural

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[53] West, "Foreword," xv.

[54] Crenshaw et al, "Introduction," in *Critical Race Theory: The Key Writings That Formed the Movement*, xiii.

system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings."[55] The relationship between race and white supremacy works to privilege whiteness within the racial hierarchy that white supremacy enacts so as to order and regulate people into racialized populations. The dynamic of white supremacy in turn produces notions of racial categorization and hierarchies that are then normalized as biological and thus natural. Critical Race and Ethnic Studies scholars have combated the idea that race is an innate feature, understanding race instead as a social construction within a manifestation of the larger power relation of white supremacy that have real materials effects and consequences in people's lives, as documented throughout the expansionist building project of the United States.[56]

The racial logic of white supremacy works to construct whiteness as the basis of power within a society structured on racial subordination. Critical Race

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[55] Frances L. Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship,* 74 Cornell Law Review 933, 1024 n 129 (1989), as quoted in Cheryl I. Harris, *Whiteness as Property*, 8 Harvard Law Review 106, 1714 n. 10 (1993).

[56] See, for example, Michael Omi and Howard Winant, *Racial Formation in the United States,* 2nd ed. (New York: Routledge, 1994); Audrey Smedley, *Race in North America: Origin and Evolution of a World View* (Boulder: Westview Press, 2011); Alexander Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press 2014), Delgado and Stefancic, *Critical Race Theory: An Introduction*, 8.

Theory scholar Cheryl Harris explains how race was constructed through the law as an 'objective fact:' "by making race determinant and the product of rationality and science, dominant and subordinate positions within the racial hierarchy were disguised as the product of natural law and biology rather than as naked preferences. Whiteness as racialized privilege was then legitimated by science and was embraced in legal doctrine as 'objective fact.'"[57] This 'objective fact' of whiteness as racial privilege enforces the over accumulation of wealth and entitlement to property and resources as a naturalized outcome of white identity. Furthermore, Harris argues that whiteness as property developed out of the deep historical roots of systematic white supremacy, the conditions of which produced notions of group identity predicated on a subordinated racial 'other.'[58] The systemic conditions of white supremacy continue to reproduce power relations that privilege whiteness through access and accumulation of resources based on colonial conquest and enslavement legitimated as property entitlements over land and racialized bodies. Thus, whiteness came to define the legal status of a person and their attendant freedom through both property and rights, a status that Harris argues has been heavily guarded:[59]

> Whiteness is not simply and solely a legally recognized property interest. It is simultaneously an aspect of self-identity and of person-hood, and its relation

[57] Cheryl I. Harris, *Whiteness as Property*, 8 Harvard Law Review 106, 1738 (1993).

[58] Harris, *Whiteness as Property*, 1785.

[59] Harris, *Whiteness as Property*, 1726.

> to the law of property is complex. Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public, and legal realms. According whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest. The law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what legal entitlements arise from that status). Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.[60]

Even despite the legal overturn of segregation policies in landmark US Supreme Court cases such as *Brown v. Board of Education*, Harris argues that whiteness is continually perceived as materially significant – measured by the fact that although not all white people 'will win,' it means simply that 'they will not lose.'[61]

The commonsense discourse of the liberal articulation of civil rights incorporation enables the notion that the state has expanded the protection of the privileges of whiteness into a multicultural universal, thus enacting the promise of equal rights for all people. Providing the *access* to equality under the law, however, is the actualized result of the 'promise,' where enforcing policies of equality through the judiciary are scrutinized under legal standards that require a demonstration that state actor possessed the requisite *intent* to deny equal access.[62] By placing the

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[60] Harris, *Whiteness as Property*, 1725.

[61] Harris, *Whiteness as Property*, 1758.

[62] Crenshaw et al, "Introduction," in *Critical Race Theory.*

focus on the intent of the state, policies and practices that impact disproportionate numbers of people of color are no longer legally legitimated through policies such as *de jure* segregation. Instead, such policies are rearticulated and justified when framed as implemented against individuals deemed as 'non-deserving,' threats, or simply as low-income communities. Intent based concerns are framed as a protection from the various conscriptions of threats to the 'security' of the state and the economy through an ever-expanding juridical system of administrative and criminal regulation and containment that frames such threats as individuated and not part of the new and differently articulated logics of continued systemic white supremacy.[63]

Rodríguez conceptualizes the contemporary dynamic of racial inclusion into the sphere of the white supremacist universal as 'multicultural white supremacy,' a term that denotes the practices of inclusion whereby "'people of color' are increasingly, selectively, and hierarchically incorporated/empowered by the structures of institutional dominance – government, police, universities, corporations, etc. – that have historically formed the circuits of U.S. apartheid and racist state violence."[64] Such incorporation actively works to strengthen the systems of harm and institutional violence that continue to most greatly impact low-

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[63] See Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007); Melamed, *Represent and Destroy*.

[64] Rodríguez, *Suspended Apocalypse*, 196.

income communities of color both domestically and abroad. Rodríguez argues that such inclusion does not in effect alter the systematic conditions of white supremacy as a structure that centers white life as the dominant mode of social ascendancy.[65] Multicultural white supremacy emphasizes individuated causes for systemic issues that do not focus on the structural inequities of racial hierarchy and capitalism, but rather produces a narrative framed around those individuals that are hardworking and deserving enough to achieve class ascendency as an outgrowth of their ability to perform according to the standards of white middle-class values.

The articulations of neoliberal possessive individualism work alongside these practices to reformulate systemic power relations as individualized and products of personal pitfalls caused by not working hard enough to 'pull oneself up by the bootstraps.' This narrative works without having to address the underlying conditions responsible for disparities in resources between white people and people of color through the related systems of white supremacy, capitalism, and colonialism. As Critical Race Theorists have demonstrated, this narrative frames the

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[65] Rodríguez, *Suspended Apocalypse*, 49. Rodríguez continues: "hegemonic problematics of contemporary multiculturalist white supremacy, which provide delimited spaces of empowerment and social prestige for the racial subalterns of 'classical' American apartheid, while reproducing the institutionality of white life, white bodies, and white subjectivities as the socially ascendant modality of the (allegedly postapartheid) U.S. social formation. Put otherwise, the sanctity and quality of white life, figurative and physical integrity of the white body, and the social and moral ascendancy of the (usually transparent) white subject animate the multiculturalist 'turn' in U.S. civil society and form the condition of historical possibility for contemporary Filipino Americanism."

possibility of equal competition as the central concern for inclusion into the universal: "rather than engaging in a broad-scale inquiry into why jobs, wealth, education, and power are distributed as they are, mainstream civil rights discourse suggests that once the irrational biases of race-based consciousness are eradicated, everyone will be treated fairly, as equal competitors in a regime of equal opportunity."[66] The neoliberal narrative constructs a story whereby all people are competing on equal ground for a limited set of resources that all people have the ability to achieve, despite their race. This, however, is a gross misrepresentation if we reframe the history of disenfranchisement from one that centers individual downfalls to that of the systems of power that continually act to regulate and consolidate resources, wealth, and power into the hands of a small percentage of people under colonial-modernity. Such a framework maintains that the universal is a sphere of objective equality and is the ultimate act of achievement and space for recognition where individuals work hard to compete for resources and benefits on a level playing field. This narrative works to uphold individuated achievement while simultaneously erasing the ongoing historical conditions at work in producing such disparities.

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[66] Crenshaw et al, "Introduction," in *Critical Race Theory,* xv-xvi. The authors continue to elaborate on the effects of legal change to institutions "with the same people administering explicit policies of segregation and racial domination keeping their jobs as decision makers in employment offices of companies, admissions offices of schools, lending office of banks, and so on."

The documented downfalls of rights-based inclusion through fields such as Critical Race Theory demonstrates that rights, while creating the rhetoric of formal inclusion in the universal, have in fact done very little to alter the material conditions of poverty for low income communities of color, or curb racialized police violence, or abolish racist state practices of imprisonment, reservations, and military imperialism, all of which have exponentially increased in tactics and technology since the ratification of the United Nations Declaration of Human Rights over the last 60 years. Rights incorporation has instead worked to strengthen a system predicated on 'safety' and 'scarcity' that constantly seeks out new threats that must be locked away, deported, or limited in their access to state benefits as draining a limited pool of sequestered resources.[67] These instantiations of state violence are foundational to the project of the United States, working to discipline internal threats while simultaneously justifying the targeting of external threats through military imperialism. The idea that justice will prevail within the objective framework of 'the law' is a cohesive factor in this cycle, despite the fact that in a society founded on white supremacy, the universal projection of the law is based on a continual preservation of resources and entitlements towards the top portion of the racial capitalist hierarchy as a function of the possessive investment in multicultural white supremacy.

[67] See Jasbir Puar, *Terrorist Assemblages*; Melamed, *Represent and Destroy*.

We must ask ourselves then how it is possible that in the age of a Black president that the United States imprisons more people than any other nation in the world, most of whom are people of color within a majority white population. We must ask ourselves what the advancement of rights has done to alleviate the systemic conditions of racism, state violence, and resource maldistribution. We must ask ourselves how it is possible in the age of 'equal rights' that the conditions documented within the Civil Rights Congress' 1951 petition *We Charge Genocide* manifest time and time again, not only as demonstrated in the demands of social movement organizing of the 1960-70s, but also within the more recent 2014 emergence of the Black Lives Matter movement as a response to the continuation of the same trajectory of state violence at work within white supremacy.

As a national network and movement that emerged not unlike the uprisings in response to police violence in Los Angeles after the police beating of Rodney King in 1991 or the Watts Rebellion in 1965, alongside countless other demonstrations against racial violence in communities of color, Black Lives Matter is a response to the recurrent instantiation of the targeted killings of Black bodies by the white supremacist state. In *Why We Won't Wait* Cultural Studies scholar and critic Robin Kelley responds to the 'rule of law' rhetoric that claims the judicial system will work its 'objective' hand to remedy the structures of state violence. Kelly argues against the constant call for communities to 'wait patiently' for the state to uncover the reasoning that would justify actions of the police officer who killed 18 year old Michael Brown, a Black unarmed youth gunned down in Ferguson, Missouri in 2014,

prompting the emergence of the Black Lives Matter movement. Kelley's piece is reminiscent of *We Charge Genocide's* lists of names, dates, and locations of the numerous Black bodies killed in the decade preceding its 1951 publication. Kelly records the known names of Black people killed by police in the 3 month period of time it took for the grand jury to release their finding of non-indictment against police officer Darren Wilson for Brown's death. The Black Lives Matter network and movement erupted across the nation as a response to the repeated conditions of police violence, centering the work of community organizers from localities such as Ferguson to New York to Baltimore to Los Angeles:

> The young organizers in Ferguson from Hands Up United, Lost Voices, Organization for Black Struggle, Don't Shoot Coalition, Millennial Activists United, and the like, understand they are at war. Tef Poe, Tory Russell, Montague Simmons, Cheyenne Green, Ashley Yates, and many other young Black activists in the St. Louis area have not been waiting around for an indictment. Nor are they waiting for the much vaunted Federal probe, for they have no illusions about a federal government that provides military hardware to local police, builds prisons, kills tens of thousands by manned and unmanned planes without due process, and arms Israel in its illegal wars and occupation. They have been organizing. So have the young Chicago activists who founded We Charge Genocide and the Black Youth Project, and the Los Angeles-based youth who make up the Community Rights Campaign, and the hundreds of organizations across the country challenging everyday state violence and occupation. They remind us, not only that Black lives matter—that should be self-evident—but that resistance matters. It matters because we are still grappling with the consequences of settler colonialism, racial capitalism, and patriarchy. It mattered in post-Katrina New Orleans, a key battleground in neoliberalism's unrelenting war on working people, where Black organizers lead multiracial coalitions to resist the privatization of schools, hospitals, public transit, public housing, and dismantling public sector unions. The young people of Ferguson continue to struggle with ferocity, not just to get justice for Mike Brown or to end police misconduct

> but to dismantle racism once and for all, to bring down the Empire, to ultimately end war.[68]

Resistance to the continued racialized warfare indicates that not only are the conditions of racial state violence ongoing throughout the United States, but they are also a product of the long-term racialized warfare of systemic white supremacy. As demonstrated by the organizing and reorganizing movements of the last 60 years, such work demands the analysis that the universal works to co-opt movements into institutional inclusion and multicultural diversity that cannot account for the dismantlement of state violence. Such work demands centering the understanding that as Sora Han states, the United States is not at war, the United States *is* war.[69] The rise of militarization of US state police forces since the 1970s continues to have devastating effects for low-income communities policed though racial state violence.[70] The organizing in Ferguson and across the nation highlights the militarized repression of communities in protest of police killings as explicitly connected to the United States' imperial militarism. For example, the US continues to support the legitimacy of the Israeli state not only through its funding of Israel's

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[68] Robin Kelley, "Why We Won't Wait," *Counterpunch Magazine*, November 25, 2014, accessed October 19, 2015 http://www.counterpunch.org/2014/11/25/why-we-wont-wait/.

[69] Sora Han, "Bonds of Representation: Vision, Race and Law in Post-Civil Rights America" (PhD diss., University of California, Santa Cruz, 2006).

[70] Parenti, *Lockdown America*.

brutal regime of genocidal warfare against Palestinians, but also in the use of the Israeli trained US police that invaded Baltimore in response to community protesting of the police killing of Freddie Gray in April of 2015.[71]

These contemporary manifestations of resistance demonstrate the root of the limitations of rights-based redress and the universal's promise of protection through the 'rule of law': that rights are not able to account for the shifting logics of racial ordering and state violence embedded within white supremacy, even its contemporary neoliberal manifestation of 'multicultural inclusion.' The ongoing structural conditions mediating the contemporary production of racialized state violence that kills, expels, and imprisons Black, Brown, and Native bodies at rates exponentially higher than white bodies demonstrates that despite gains in access to a universal sphere of 'protected' status through rights, these conditions have not been alleviated. In strategically confronting the manifestations of white supremacy, this work demonstrates the continued need to interrogate the shifting formations of racial logics as they manifest in new technologies and under different policies to

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[71] See Kelly, *Why We Won't Wait*; Rania Khalek, "Israeli-trained Police invade Baltimore in Crackdown on Black Lives Matter," *The Electronic Intifada,* May 7, 2015, Accessed July 12 2015, https://electronicintifada.net/blogs/rania-khalek/israeli-trained-police-invade-baltimore-crackdown-black-lives-matter. 25 year old Freddie Gray had received a settlement in a police brutality case against him when his spinal cord was severed while in police custody in April of 2015. See Eliott C. McLaughlin, Steve Almasy and Holly Yan, "Report: Freddie Gray Sustained Injury in Back of Police Van," *CNN*, May 1, 2015, accessed October 24, 2015 http://www.cnn.com/2015/04/30/us/baltimore-freddie-gray-death-investigation/.

harm, regulate, and contain certain bodies deemed as 'threats' to the universal order, which discourses concerning rights and respecting the 'objective rule of law' have proved unable to remedy. A historical framework that details the patterns of relationality between these conditions leads us to question what about rights continues to produce limitations for alleviating state harm. How might conscription into projects of rights-based inclusion work not as a remedy for state violence, but rather as a constitutive element of white supremacy that re-constitutes the logics of racial ordering? Given this, how might we continue to work in struggle and resistance to dismantle the systems of power that continually reproduce harm, violence, and inequity through possibilities other than rights-based recourse?

Chapter 2
Rights, Inclusion, and Heteropatriarchy

The work of the social organizing emerging out of the 1960s and 1970s produced the imperative framework of intersectional feminist and queer of color analysis. Groups organizing in the 1970s such as the Combahee River Collective, Salsa Soul Sisters, and Street Transvestite Action Revolutionaries (STAR) organized against the conditions of violence of the state to co-opt movements and pit individuated identity oppressions against one another. The pamphlet of the Salsa Souls Sisters details their explicit organizing imperative as an organization of people identifying as Black, Native American, Asian, and friends "attempting to bridge the cultural, racial, and class chasm that separates women of color."[72] The Combahee River Collective's statement argued for an analysis of gender oppression that must understand the intersectionality of women of color's oppression as different than white women's singular analysis of gender as the primary vector of oppression.[73] The work of STAR, founded by transwomen of color organizers Marsha P. Johnson

[72] Third World Gay Women, Inc., "Salsa Soul Sisters Pamphlet," *Greenwich Village History*, accessed December 8, 2015, http://gvh.aphdigital.org/items/show/1159.

[73] See Combahee River Collective, "A Black Feminist Statement," in *Capitalist Patriarchy and the Case for Socialist Feminism*, ed. Zillah R. Eisenstein, (New York: Monthly Review Press, 1978).

and Sylvia Rivera in New York City in 1970, focused on street survival for queer and trans youth of color in the midst of violent state and social targeting.[74]

The analysis of these groups frames the racial hierarchies of white supremacy and the practices of scarcity resource maldistribution of capitalism as continually regulated through the intersectional vectors of gender and sexuality. Critical Race Theorist Kimberlé Crenshaw details the necessity of intersectional analysis, arguing that organizing that is solely single issue-based fails because it does not account for the intersectionality inherent within the replication of systems of power: "The failure of feminism to interrogate race means that the resistance strategies of feminism will often replicate and reinforce the subordination of people of color, and the failure to antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women."[75] A framework accounting for the relationality of state violence demonstrates how different identity groups are related to systems of power and experience different relationships to those systems of power, so that analysis of these systems must in turn be addressed through their relationality.

Patrice Cullors, a community organizer prominent within the Black Lives Matter network, articulates the necessary focus not only on the more publicized

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[74] See, for example, the zine *Street Transvestite Action Revolutionaries (STAR): Survival, Revolt and Queer Antagonist Struggle* (Untorelli Press).

[75] Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," in *Critical Race Theory*, 360.

instances of the death of Black men such as Mike Brown, Trayvon Martin, and Freddie Gray, but that the Black Lives Matter movement centers the importance of responding to violence for all Black people. Through making explicit the intersectional connections of state violence, Black Lives Matter "affirms the lives of Black queer and trans folks, disabled folks, Black-undocumented folks, folks with records, women and all Black lives along the gender spectrum. It centers those that have been marginalized within Black liberation movements. It is a tactic to (re)build the Black liberation movement."[76] Cullors as well as others in the Black Lives Matter movement center the targeting of transgender, gender non-conforming, and queer Black people whose deaths are either largely ignored or pathologized as deserving: "when we say all Black lives matter, we mean Black trans folks, we mean Black queer folks. There's a significant amount of queerness and transness happening on the front line, and we are it. We are the ones we've been waiting for."[77] The intersectional movement work of Black Lives Matter formulates a praxis whereby the notion of a single aspect of one's identity is not the organizing logic that drives movement work, but rather seeks to center those most impacted by the intersectional violence of the state and systemic harm.

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[76] *Black Lives Matter,* "About Black Lives Matter," accessed October 10, 2015, http://blacklivesmatter.com/about/.

[77] Reggie Myers, "New MSNBC documentary: LGBT #BlackLivesMatter," *VADA,* February 25, 2015, http://vadamagazine.com/25/02/2015/news/new-msnbc-documentary-highlights-queer-involvement-blacklivesmatter.

The disposability of trans and queer bodies, and particularly that of transwoman of color, is a manifestation of the normalizing logics of the universal that seeks to dispel the threat of 'nonconformity' that queer and transgender people represent. Transgender, gender nonconforming, and genderqueer people are less likely to be employed, have higher rates of suicide, have increased contact with prisons and policing, and experience increased levels of harm at the hands of state intervention and systems of 'protection'.[78] Despite the implementation of hate crime legislation such as the Matthew Shepard and James Byrd Hate Crimes Prevention Act in 2010 as the federally mandated legislation outlawing gendered, sexual, and racially motivated violence, the likelihood of harm experienced by trans and queer people has not diminished, but has in fact intensified, as Critical Trans Legal scholar Dean Spade articulates:

> Much of the thinking behind the need for hate crime and anti-discrimination legislation, including by advocates who recognize how limited these interventions are as avenues for increasing the life chances of trans people is about the significance of having our experiences of discrimination and violence named in law. The belief that being named in this way has a benefit for the well-being of trans people has to be reexamined with an understanding that the alleged benefits of such naming provides even greater opportunity for harmful systems to claim fairness and equality while continuing to kill us. Hate crime and anti-discrimination laws declare that punishment systems and economic arrangements are now nontransphobic, yet these laws not only fail to eradicate transphobia but also strengthen the systems that perpetuate it.[79]

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[78] See Spade, *Normal Life;* Alok Vaid-Menon, "Greater transgender visibility hasn't helped nonbinary people - like me," *The Guardian,* October 13, 2015, http://www.theguardian.com/commentisfree/2015/oct/13/greater-transgender-visibility-hasnt-helped-nonbinary-people-like-me.

[79] Spade, *Normal Life*, 90-91.

Hate crimes legislation is founded on a punishment model for securing the protection of queer and trans people but does not actually diminish the likelihood of harm towards queer and trans people. Through implementing such legislation, the very systems of state violence are expanded to further proliferate the harms of policing, prisons, and judiciary 'protections' in the name of protecting people who experience the harm via the classification of such harm as 'hate crimes,' without any shifting of the actual logics of civility, crisis, and carcerality underlying the structures of white supremacy, heteropatriarchy, and capitalism at the root of state violence.

These dynamics are acutely manifested in the recent experience of CeCe McDonald, a Black transwoman imprisoned in 2013 for protecting herself against a violent transphobic attack, which resulted in the death of the attacker and McDonald's fight to overturn her subsequent prison sentence.[80] Despite the fact that McDonald survived the attack qualified as a 'hate crime,' she was considered to have used excessive force in protecting herself against her white neo-Nazi affiliated assailant. Unlike the treatment of countless police officers like Darren Wilson who are rarely indicted in claims of excessive force, especially against people of color, regardless of their gender, or in the self-protection claim of armed civilian George Zimmerman who killed 16 year old Trayvon Martin in 2011 in Florida, McDonald's

[80] McDonald was released in 2011. See Tre'vell Anderson, "LAFF: Why Laverne Cox is lending her voice to the 'Free Cece' documentary," *Los Angeles Times*, June 3, 2016, https://www.latimes.com/entertainment/movies/la-et-mn-laff-free-cece-documentary-20160525-snap-story.html.

exercise of the right of self-defense against the hate crime was not only more intensely scrutinized in the Minnesota state criminal court proceeding, but resulted in her imprisonment, despite the fact that policies such as hate crime legislation claim to provide enhanced protection for the racial, sexual, and gender motivated violence.[81]

McDonald's imprisonment exemplifies the reservation of the right to self-protection as generally unquestioned for cisgendered men and agents of the state, whereas it is then routinely denied in cases of interpersonal violence concerning women and transwomen, especially those who are low-income and of color. This is also evidenced by the 2012 sentencing of Florida resident Marissa Alexander, a Black mother who fired a warning shot outside her home in fear of harm from her estranged ex-husband. Though the shot was fired in the air and no one was harmed, Alexander was subsequently imprisoned.[82] Marissa Alexander's case was prosecuted through the same set of state laws that George Zimmerman would be acquitted under for the lethal gunning down of Trayvon Martin in the act of 'stand your ground' self-protection. Both Marissa Alexander and CeCe McDonald's experiences and the community support rallied for their subsequent releases exemplify the highly enhanced nature of constructing certain bodies deemed as

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[81] "George Zimmerman not guilty of Trayvon Martin murder," *BBC,* July 14, 2013, https://www.bbc.com/news/world-us-canada-23304198.

[82] Alexander was released in 2017. *Free Marissa Now,* "About," accessed May 19, 2020, https://www.freemarissanow.org/about-marissa-alexander.html.

'threats' to a white, middle class, heteronormative order so as to contain them through logics of punishment and imprisonment.

Organizers within the anti-violence movement articulate the systemic nature of a rule of law touted as objective but that in reality operates through highly subjective terms based on intersections of race, class, and gender.[83] Despite the ability to exercise a right to self-defense, the systemic conditions of white supremacy, capitalism, and heteropatriarchy often operate to delimit the justification of exercising that right for low-income women and transgender, gender non-conforming, and queer people of color, where state violence and targeting play out most acutely. In these instances, rights operate to offer a promise of protection that is in fact constituted by only providing access to a forum that determines whether or not the exercise of that right was in fact legitimate.

This dynamic is apparent in the nature of how legislation like the Shepard-Byrd Hate Crime Act works to frame violence as individuated and interpersonal while strengthening and legitimizing the criminal justice system as a space to alleviate harm.[84] In the book *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law,* Spade argues that hate crimes legislation works to grow the system of policing and carceral logics through enhanced sentencing to

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[83] See, for example, the work of *Survived and Punished: End the Criminalization of Survival,* website, accessed May 19, 2020, https://survivedandpunished.org/.

[84] Spade, *Normal Life*, 87.

already overcrowded prisons.[85] Punishment enhancing laws in turn strengthen the individuated framework of victim/perpetrator, which does not account for ongoing systemic transphobic and homophobic social relations. Because of this focus on punishment, Spade argues that hate crimes legislation does not act as a deterrent of bias-motivated violence, but rather reinforces the carceral logic through expanding punishment-enhancing laws.[86] Neoliberal responses to ending violence and systemic harm through the likes of hate crimes legislation primarily operate by increasing police and prisons.[87] This, in turn, furthers the notion of addressing harm as solely individuated and funneled through the victim/perpetrator model, creating enhanced punishments for individuals that elides the systems of power continually enacting violence and harm through the criminal and administrative state.

The move to further expand the carceral logics of policing and prisons is exemplified in the recent proliferation of building 'safe' prison spaces for trans bodied people. This is evidenced, for example, by the addition of a 'trans wing' to the LGBT holding cells in Los Angeles County Jail, as well as the recent protests

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[85] Spade, *Normal Life*, 82.

[86] Spade, *Normal Life* 82-90. Spade questions that "in a context of mass imprisonment and rapid prison growth targeting traditionally marginalized groups, what does it mean to use criminal punishment-enhancing laws to purportedly address violence against these groups?" Spade, *Normal Life,* 88.

[87] See, for example, Chandan Reddy, *Freedom With Violence: Race, Sexuality, and the US State* (Durham: Duke University Press, 2011).

against this kind of expansion in Los Angeles and in other cities such as Seattle.[88] Spaces built for the 'protection' of queer and trans people such as LGBT specific prison wings very often end up being continued sites of violence and harm through harassment, mistreatment, and physical and sexual assault by prison guards and police officers.[89] In the carceral domain of the state, violence is perpetuated onto those who are already most impacted by the intersections of racism, classism, homophobia, and transphobia.[90] These oppressive dynamics play out not only in apparatuses of policing and prisons, but also within the ever expanding realm of administrative law and its regulations over immigration detention, access to low income state benefits, and child protective services. These systems produce an extended web that regulates primarily low-income people of color, further implicating those who are queer or trans in the web of state regulation through the routine denials of services such as access to hormones and other trans specific heath care needs, lack of services for people living with HIV, gender segregated facilities, and severe discrimination, harassment, violence, and death.[91]

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[88] See, for example, Ren-yo Hwang, "Accounting for Carceral Reformations: Gay and Transgender Jailing in Los Angeles as Justice Impossible," *Critical Ethnic Studies* 2, no. 2 (Fall 2016): 82-103.

[89] See Stanley and Smith, *Captive Genders*. For documentation of policing harassment and experiences see also Nadia Guidotto, "Looking Back: The Bathhouse Raids in Toronto, 1981," in Stanley and Smith, eds., *Captive Genders,* 69-80.

[90] Stanley and Smith, *Captive Genders*.

[91] Spade, *Normal Life*.

Critical queer scholarship and movement work argues that protected class status as provided through measures such as hate crime legislation has done nothing to impact the rates of both interpersonal and state violence as well as the structural and economic forces that produce systematic conditions of poverty and engagement with criminalized economies that many trans people survive in because of transphobic and discriminatory housing and hiring practices.[92] Community organizations such as *Streetwise and Safe* in New York City organize with trans and queer youth of color membership who are impacted by structures of state violence. In a report co-authored in part by the New York City-based Urban Institute and the former organization Streetwise and Safe, they explore the intersections between the state apparatuses of criminal justice and child welfare systems for queer and trans youth of color displaced from their homes and surviving in street based economies.[93] The report details the increased levels of harm and violence that youth experience through the systems of state 'protection' that in fact work to further punish, imprison, and surveil youth through the criminalization of activities related to conditions of poverty and displacement:

> Many youth reported frequent arrest for a variety of "quality-of-life" and misdemeanor crimes other than prostitution offenses, creating further instability and perpetuating the need to engage in survival sex. Youth

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[92] Spade, *Normal Life*, 83; Mogul et al., *Queer (In)Justice.*

[93] Meredith Dank, Lilly Yu, Jennifer Yahner, Mitchyll Mora, and Brendan Conner, *Locked In: Interactions with the Criminal Justice and Child Welfare System for LGBTQ Youth, YMSM, and YWSW Who Engage in Survival Sex* (Urban Institute: September 2015).

> described being locked in a constant vicious cycle of involvement in the criminal justice system with far-reaching collateral consequences ranging from instability in the home and school to inability to pay fines and surcharges, active warrants, incarceration, and consequences for future employment.[94]

The report reflects state-administered housing spaces for youth such as foster care and group homes as structures that reproduce the restrictive and regulatory carceral logics of the state that in turn further enact violence and harm in the lives of queer youth, documenting a consistent lack in state-provided support for the youth or even the ability to actually address their needs.[95] Legal scholar Brendan Conner articulates the regulative history criminalizing youth in New York City as originating in laws criminalizing vagrancy and homelessness.[96] Conner details how these policies then grew into a trajectory where the intent of protected class status for trafficked youth within recent legislation such as New York City's Safe Harbor Act work to further encapsulate youth into imprisonment, not protect them.[97] Outside of New York City, Wesley Ware documents the impact of spaces like juvenile court for trans and gender non-conforming youth where so called 'rehabilitative'

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[94] Dank et al., *Locked In,* 90.

[95] Dank et al., *Locked In,* 81-86.

[96] Brendan M. Conner, "In Loco Aequitatis: The Dangers of 'Safe Harbor' Laws for Youth in the Sex Trades," *Stanford Journal of Civil Rights and Civil Liberties* 12, no. 43 (2016): 43-120.

[97] Ibid.

measures manifest the intensely regulatory dynamics of gender conformity and heteronormativity: "guised under the 'best interest of the child,' the goal often becomes to 'protect' the child – or perhaps society – from gender-variant or non-heterosexual behavior."[98] Queer and trans youth, Ware details, are overwhelmingly overrepresented in almost all of the conditions that lead to increased interactions with juvenile criminal system, including homelessness, difficulty in school, substance use, and mental health issues.[99] The web of neoliberal administrative regulation continues at an unprecedented growth rate, calling into its reaches the lives of people most impacted by the intersections of gender, race, sexuality, class, age, disability, and immigration status. Despite the implementation of recent appeals to include and 'protect' queer and trans people through systems of administrative protection, violence continues to proliferate through systemic expansion of administrative and criminal legal systems that work to constantly regulate people who are deemed non-normative under the guise of 'protection.'

The United States positions itself as inclusive through narratives of exceptionalism that claim freedom for protected classes of people. Critiquing the merging of the narratives of freedom and sexuality, Chandan Reddy articulates the

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[98] Wesley Ware, "Rounding up the Homosexuals: The Impact of Juvenile Court on Queer and Trans/Gender-Non-Conforming Youth," in Stanley and Smith, eds., *Captive Genders*, 100.

[99] Ware, "Rounding up the Homosexuals," 102, citing K. Majd, J. Marksamer, and C. Reyes, "Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts," The Equity Project, 2009.

connection between the extension of rights through the context of warfare defense as exemplified with the passage of the Shepard-Byrd Hate Crimes Act as included via a measure on the 2010 Defense bill. Reddy argues that the complicity of achieving protection explicitly attached to warfare situates the advancement of LGBTQ protection via rights achievement as "necessarily and inextricably connected to the context of a republic at war," which in turn serves to internalize the ways that the state itself is a primary cause of the very violence the Shepard-Byrd Act claims to protect from.[100] The 2010 National Defense Authorization Act, which includes the Shepard-Byrd Act, was framed by LGBT organization as the first major piece of civil rights legislation for LBGT people under Obama, which in turn functions as a direct correlation to the extension of policing apparatuses of the United States.[101] The relationality of US imperialism alongside the 'protected' statuses of gay and trans people and measures against racial motivated bias is only made possible through explicit support of the nation-state as a continued project of violence.[102]

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[100] Reddy, *Freedom With Violence,* 7-8.

[101] Reddy, *Freedom With Violence,* 4-5.

[102] Reddy continues: "seeing the passage of law against anti-LGBTQ hate crimes as an amendment of both US racial globalism (the National Defense Authorization Act) and US racial capitalism (the 1969 Civil Rights Act) suggests the critical importance of sexuality in our contemporary moment as that which frames, redivides, or seeks to offer synthetic 'meaning,' simultaneously conserving and revising the relations and histories of force of both US globalism and racial capitalism." Reddy, *Freedom With Violence,* 17.

The calls for inclusion into a universal project of nation-state building is especially apparent within the recent legislation to repeal 'Don't Ask Don't Tell' to allow gay people to openly serve as armed forces and the granting of trans people the right to participate in the military.[103] Critiquing the inclusionist logic at work in offering gay and trans people the right to participation in the military-imperial project of the United States, former army officer Chelsea Manning, imprisoned for participating in wikileaks release of US military documents, articulates the violence of the state in both its structural and repressionist forms as systems "that are arranged in such a manner that the most vulnerable populations in society are the ones that are the most negatively affected."[104] Manning, writing from her cell in federal prison, had been routinely denied access to hormone and other trans-specific needs since her 2013 imprisonment, articulating the space of the military as one that exercises violence both externally in the world and also internally, where it continues to regulate against people it has claimed to include. The call for incorporation through the platform of ratified state violence is also evident in recent critiques of pinkwashing as the practice of eliding violent conditions producing a narrative of 'safety' for LGBT communities, as exemplified in the state of Israel's

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[103] See, for example, Ryan Conrad, ed., *Against Equality: Queer Revolution not Mere Inclusion* (Oakland: AK Press 2014).

[104] Chelsea E. Manning, "On the Intersection of the Military and Prison Industrial Complex," in Stanley and Smith, *Captive Genders,* 185-189.

push for gay tourism in Israel as a safe place.[105] The explicit dynamic that calls queer and trans people into the universal project of western-nation state governance through the violent apparatuses of military and defense allocation exposes the problematic of who state-based protection through rights are in fact working to protect, and what forms of violence continue to remain unexamined and legitimate.

The tradeoff of incorporation into state protection through the expansion of state military and policing apparatuses is not one that emerged with the rise of gay liberation organizing in the 1950s, but rather is one that became increasingly co-opted through the rise of neoliberal policies and non-profit funding for the project of liberal multiculturalism that seeks to take up 'diversity' through normalized constructions of sociability. The mainstream LGBT movement privileges the ascendancy to white middle class values by centering campaigns that uphold normalized conceptions of proper citizenship. Campaigns to increase military access, gain the right to marriage, and participate in market speculation and accumulation of wealth ultimately remain complicit with the project of the United States to expand the norms and values of a heteropatriarchal and multicultural white supremacist universal.

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[105] See, for example Jasbir Puar and Maya Mikdashi, "Pinkwatching and Pinkwashing: Interpretation and its Discontents," *Jadaliyya* (2012); Dean Spade and Craig Willse, "Sex, Gender, and War in an Age of Multicultural Imperialism," *QED: A Journal in GLBTQ Worldmaking* (2014): 5-29.

Queer Studies Scholar Christina Hanhardt argues that the act of framing individuated violence as the primary 'risk' for gay people became the defining feature of gay visibility, forming the key terms of mainstream LBGT nonprofit policies since the 1970s. Hanhardt articulates how the formulation of 'safety' for LGBT communities centers on the assessment of risk, detailing how this framing shapes the conditions of possibility for normative gay community and belonging through gentrifying practices couched in the creation of 'safe' gay neighborhoods.[106] Narratives of 'safe' gay neighborhoods function through both the explicit and implicit privileging of whiteness and class ascendancy by centering protection over geographical space that encompasses safety not just for certain bodies but the investment in property as well. These narratives are undergirded by the goal of seeking protection for primarily white gay communities *through* the state, whereas politicized queer and trans of color organizing focus on the need for protection *from* the state.

Che Gossett, Tourmaline Gossett, and AJ Lewis detail how the formation of gay liberatory movements were co-opted from critiques that centered state violence to that of neoliberal agendas of possessive individualism and state protection of 'safe' spaces.[107] They detail the emergence of mainstream gay liberation movement

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[106] Christina B. Hanhardt*, Safe Space: Gay Neighborhood History and The Politics of Violence* (Durham: Duke University Press, 2013).

[107] Che Gossett, Tourmaline (Reina) Gossett, and AJ Lewis, "Reclaiming Our Lineage: Organized Queer, Gender-Nonconforming, and Transgender Resistance to Police Violence," *The Scholar & Feminist Online* 10, no. 1-2 (Fall 2011/Spring 2012),

in the wake of uprisings against the police repression in the 1960s in places like Stonewall in New York City and Compton Cafeteria in San Francisco as exemplary in the shift of the narrative critiquing state violence towards seeking protection through the state. They detail how even politically moderate groups like the Mattachine Society that formed in the 1950s organized against police harassment:

> That the social and political connections between LGBT communities and policing are so infrequently considered central to LGBT politics is all the more striking when one considers that, in one form or another, strains of LGBT political work have always addressed police violence. There is, in significant respects, nothing new about making police violence central to a queer agenda—indeed it is perhaps only relatively recently that police violence has been seen as anything other than one of the most flagrantly apparent manifestations of LGBT oppression. Before the Stonewall and Compton Cafeteria riots, in fact, even politically moderate groups such as the Mattachine Society, which was founded in 1950 in Los Angeles and later expanded with chapters in the East Coast, were heavily active around issues of police harassment. Printing "What to Do in Case of Arrest" cards and attempting to build collaborative relationships with police forces in order to promote more sensitive police conduct towards gay individuals, Mattachine organized around gay men's vulnerability towards police violence.[108]

Centering violence at the hands of the state is central to organizing for queer and trans issues. The authors continue by citing the impact of the state targeting of revolutionary social movement organizing alongside neoliberal policies in the 1970s and 1980s as impacting the shift into a 'single-issue' approach to political organizing.

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http://sfonline.barnard.edu/a-new-queer-agenda/reclaiming-our-lineage-organized-queer-gender-nonconforming-and-transgender-resistance-to-police-violence/.

[108] Ibid.

In turn, the single-issue neoliberal reform agenda worked to sever more politicized approaches for combating state repression into the mainstream channels seeking inclusion through the protectionary interests of the 'gay rights' agenda. Critical frameworks detail the importance of re-centering organizing against state violence as an issue that has always been central to queer organizing. Calls for inclusion by the mainstream LGBT movement for rights-based protection such as marriage, military inclusion, and hate crimes have been critiqued by critical queer and trans scholars and activists because they argue such calls do not work to alter ongoing systemic conditions of white supremacy, capitalism, the military, and violence of the state. Craig Willse and Dean Spade argue in *Marriage Will Never Set Us Free* that gay marriage prioritizes those with the most access to the privileges of white supremacy, middle upper-class stability, gender normativity, and relationships that most conform to heterosexual dyadic formations. They critique the notion that gay marriage should be the organizing force through which to address inequalities such as health care and immigration status, arguing that prioritizing those with the most access to resources will not alleviate ongoing systemic harm:

> We should prioritize those vulnerable to the most severe manifestations of homophobia and transphobia. That would mean putting resources toward real solutions to these problems – the struggles against immigration enforcement and for health care access to all – and bringing particular insight about homophobia and transphobia to these struggles. Legalizing same-sex marriage puts a stamp of "equality" on systems that remain brutally harmful, because a few more-privileged people will get something from the change. A real approach to changing these systems includes asking why marital status is tied to immigration and health care access, how queer and trans people are

> impacted by immigration imprisonment and deportation, and how homophobia and transphobia create negative health outcomes and block health care access.[109]

The articulation of the right to gay marriage as a solution for altering immigration status works at the expense of focusing on the system of immigration deportation and detention as intensely carceral spaces that impact all immigrants, including queer and trans people.[110] Further, queer and trans people with disabilities articulate how the passage of the right to gay marriage has worked to now threaten access to state disability services if people qualifying for disability were in fact to get married through the forced re-calculation of shared income levels and the rigid cut offs for accessing state disability services.[111] Thus, narratives of state incorporation through access to 'rights' positions only certain issues such as marriage and military participation as 'gay issues,' eliding the larger systems at work in harming queer and

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[109] Dean Spade and Craig Willse, "Marriage Will Never Set Us Free," *Organizing Upgrade*, September 6, 2013, https://archive.organizingupgrade.com/index.php/modules-menu/beyond-capitalism/item/1002-marriage-will-never-set-us-free.

[110] See Yasmin Nair, "How to Make Prisons Disappear: Queer Immigrants, the Shackles of Love, and the Invisibility of the Prison Industrial Complex," in Stanley and Smith, eds., *Captive Genders*.

[111] See, for example, Jeanette Spalding, "Queer and Disabled: Here's How Marriage Made My Life Harder, Not Easier," *Everyday Feminism,* October 8, 2015, https://everydayfeminism.com/2015/10/marriage-equality-queer-disabled/.

trans people's lives such as immigration detention, regulatory youth services, imprisonment, and access to state benefits and services.[112]

Critical Trans scholar and activist Eric A. Stanley articulates critiques against entering the normalized space of the state as "an attempt to think about the historical and political ideologies that continually naturalize the abusive force of the police with such power as to make them ordinary."[113] In turn, rights-based inclusion functions as a form of naturalization into the universal body politic through normalizing the project of white supremacist and heteropatriarchal violence of the United States as ordinary and deserving for individuals who do not conform or who represent 'threats.' In the piece *Building an Abolitionist Trans and Queer Movement*, Morgan Bassichis, Alexander Lee, and Dean Spade articulate a reformulation of mainstream LGBT politics seeking inclusion through rights-based and punishment-enhancing legal practices towards a politics that centers liberation as a collective process that must address the deeply interconnected systems of power in the face of increasing neoliberal focus on possessive individualism:

> As the story of Stonewall teaches us, our movements didn't start out in the courtroom; they started out in the streets! Informing both the strategies of our movements as well as our everyday decisions about how we live our lives and form our relationships, these radical politics offer queer communities and movements a way out of the murderous politics that are masked as invitations to "inclusion" and "equality" within fundamentally exclusive, unequal systems. Sometimes these spaces for transformation are easier to spot than others – but you can find them everywhere, from church

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[112] Nair, "How to Make Prisons Disappear," *Captive Genders,* 150-151.

[113] Eric A. Stanley, "Introduction: Fugitive Flesh: Gender Self-determination, Queer Abolition and Trans Resistance," in Stanley and Smith, eds., *Captive Genders,* 8.

> halls to lecture halls, from the lessons of our grandmothers to the lessons we learn surviving the world, from post-revolutionary Cuba to post-Katrina New Orleans.[114]

An analysis of why 'inclusion' and 'equality' into a universal predicated on unequal distributions of wealth through racial capitalism and state violence founded on settler colonialism shows that such inclusion will not deter the harm facing queer and trans people, but rather re-condition the continued expansion of the systemic violence of the 'universal.' The promise of protected class status and inclusion through legal and policy measures have been enacted despite very little change in the material conditions most impacting queer and trans people. Such policies were the manifestation of the mainstream LGBT rights movement to incorporate into the universal through asserting desires to participate as 'normal' citizens through demonstration of the shared values of the straight, white, capitalist citizenry as 'just like you.'[115] By centering campaigns that claim to be 'just like you,' the mainstream LGBT movement ignores systemic conditions of violence and harm at the root of

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[114] Morgan Bassichis, Alexander Lee, Dean Spade, "Building an Abolitionist Trans and Queer Movement with Everything We've Got," in Stanley and Smith, eds., *Captive Genders*, 34.

[115] See Spade, *Normal Life,* 86-87: [T]he inclusion focus of anti-discrimination law and hate crime law campaigns relies on a strategy of simile, essentially arguing 'we are just like you; we do not deserve this different treatment because of this one characteristic.' To make that argument, advocates cling to the imagined norms of the US social body and choose poster people who are symbolic of US standards of normalcy, whose lives are easily framed by sound bites that resound in shared notions of injustice."

disparities in income, housing, health, education, and livelihoods in a trade off to achieve the rights for individuated inclusion and success.

Seeking state inclusion for queer and trans people through rights is inherently limited because it is founded on the reinforcement of a normalized conception of a gender binary that reflects heterosexual expectations now transformed into a tolerable and homonormative 'just like you' rhetoric of ascendancy to multicultural white supremacist capitalist life. These logics function through a deeply embedded systemic power relation of heteropatriarchy that seeks to regulate conceptions of gender and sexuality towards universalized expectations of male-female gender roles and the heteronormative nuclear family. The state functions as a regulatory apparatus that uses the notion of inclusion to discipline non-normative people through regulatory instantiations that reinforce not only the singularity of the gender binary, but to discipline all other frameworks for how we conceive of the very notions of gender, sexuality, and social relationships. In this structure, gender, sexuality, race, and class, for instance, are narrativized as identities seen as separate aspects of one's life, which then forecloses articulations of intersectionality and relationality. Legal frameworks then affirm claims for protection based on deservedness to enter the universal work through privileging these disaggregated identities. That those identities are in fact a production of the larger systemic power relations of heteropatriarchy, white supremacy, and capitalism remain in the background. The focus on alleviating identity-based issues through rights-based redress functions to distract from the long-term conditions

and power relations continually at work in reproducing institutions, laws, and practices of state harm disciplining people towards ascendancy to whiteness, wealth, and heteronormativity.

Heteropatriarchy

Heteropatriarchy is an analytic often used by community members and organizers, critical queer and trans scholars, and Native and feminist of color theorists to describe the naturalized construction of social relations based on these norms. Critical Legal Studies Scholar Angela P. Harris theorizes heteropatriarchy as a system that affects people of all genders and sexualities:

> 'Heteropatriarchy' is a system of subordination that burdens not only women and sexual minorities but also the straight-identified men that it purports to privilege. Understanding this connection, I argue, makes it possible to see how gender violence produces not analogous or even "intersecting" forms of oppression, but an interconnected web that stretches across civil society and the state. This web creates a common interest among women, sexual minorities, racialized minorities, and straight-identified men in eliminating gender violence, as well as potentially making allies of feminist, queer, and race scholars and restorative justice advocates.[116]

Harris' framing of heteropatriarchy is useful for delineating how the relationality of systems of power like white supremacy and capitalism function to affect many groups of people who are marked as deviant within the universal as an approach

[116] Angela P. Harris, "Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation," *Washington University Journal of Law and Policy* 37 (2011): 17-18.

critical legal studies can use to further unpack the limitations of legal measures and reform for diminishing structures of state violence. Heteropatriarchy situates the regulatory policing and shaming of all peoples into harmful constructions of gender expectations. Patriarchy, a logic that affirms the power of men over others, is harmful to all people, including men, and imposes unrealistic notions of what masculinity is, dictating how men are supposed to behave and relate in ways that are often not reflective of the array of behaviors and experiences that heteronormative masculinity regulates. Patriarchy is also a logic that women can police onto other women in harmful ways to regulate distinctions between expected conformity to the gender binary and power relationships. Heteropatriarchy, then, is an analytic that frames the enforcement of norms that regulate people towards gender binary conformity and roles to uphold heterosexuality as the primary form of acceptable social relationality.

Heteropatriarchy as an analytic is particularly useful for framing how gender and sexuality are constructed. Through relational systems of power, heteropatriarchy works in conjunction with structures of white supremacy and colonialism to position trans and queer people as 'non-conforming' threats. Projects that seek inclusion into the heteropatriarchal universal are incentivized based on proximities to normal and acceptable constructions of gender as it reaffirms the gender binary. Trans, genderqueer, and gender non-conforming people who then do not fit within the heteropatriarchal expectations of the gender binary are further displaced through systems of power that read non-normative

bodies as aberrant or impossible. Trans activist and poet Alok Vaid-Menon argues that greater transgender visibility and acceptance has not worked to alleviate harm for non-binary people:

> The rest of us – whose identities are more fluid, more difficult for strangers to comprehend and relate to – may not be visible in media but are more noticeable on the streets. As it stands, according to a nationwide survey by the National Center for Transgender Equality, nonbinary people, especially those of us who are people of color, are more likely than binary trans people to attempt suicide, be harassed by the police, live in abject poverty and be sexually and physically assaulted. What has become evident is that so many of us who do not pass as male or female are still regarded as disposable by both cis and trans communities. Too often, efforts to gain acceptance and rights for trans men and trans women has meant ignoring those of us who are not as easily categorized.[117]

Acknowledging that although gains have worked to produce changes that see more acceptance of trans people, this often operates through a focus on trans people who are read 'on one side of the gender binary,' which Vaid-Menon argues is not the fault of trans people who occupy those spaces, but rather functions because both the media and society construct notions of acceptable gender deviance as still based on assimilation into binary categorization. Instead, they argue, we should work to redefine notions of masculinity and femininity outside of the regulative and normative conceptions of the gender binary. Heteropatriarchy compels people towards conforming to conceptions of gender framed as biological and understood primarily through scientific facts about distinct and separate 'male' and 'female' categorizations that correlate to expected behaviors, presentations, and social roles.

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[117] Vaid-Menon, "Greater Transgender Visibility."

When we understand the ways that heteropatriarchy works to construct trans, genderqueer, and many other formations of gender nonconformity as problematic, we can instead work to focus less on inclusion into spaces that reaffirm those power relations and instead on other formations of social relationality that not only work to dismantle those systems, but that center ways of being people are already practicing. What might be at stake in passing over the very aspects of our lives that formulate different relationality outside of incorporation into the intensive regulation and violence of the state?

Given that systemic social relations are rooted in heteropatriarchy, rights-based redress is limited because it cannot work to undue heteropatriarchy as the system of power that continually produces identity constructions of sexuality and gender. Our very notions of what gender *is* are conditioned through a regulation towards a rigid male-female binary that is enforced through the state-based practices of gender marking on IDs and birth certificates, in schools, in placement in prisons and gender segregated facilities, through access to benefits, healthcare, and a myriad of other mechanisms of demarcation. An analytic centering the power relation of heteropatriarchy understands that it is not better access to rights or 'proper' placements in institutions like prisons that should be the aim of queer and trans resistance work, but rather a focus on dismantling the systems of power that produce notions of deviance as threats to a white supremacist and heteropatriarchal social order.

Chapter 3
Rights, Settler Colonialism, and the Universal

Critical feminist and anticolonial scholarship positions heteropatriarchy as the primary logic at work naturalizing social order in colonial-modernity.[118] Considering this, it is imperative to center the relationality of the social relationship of heteropatriarchy within white supremacy and capitalism as deeply integrated structures that cannot be alleviated through rights-based protection into the 'universal.' This is primarily because the power relations of white supremacy, heteropatriarchy, and capitalism are continually cohered through the ongoing structure of settler colonialism.

Settler colonialism is a specific framing of the type of long-term colonial occupation ongoing in countries such as the United States, Canada, Mexico, Australia, and many others. As an analytic, theories of settler colonialism work to distinguish the commonsense narratives of colonialism as an 'event' with discrete beginning and end points. The fields of Native Studies and Settler Colonial Studies offer a framework to understand colonialism beyond historicized periodization. For example, Patrick Wolfe argues that settler colonialism is an ongoing a structure

[118] See, for example, Maile Arvin, Eve Tuck, and Angie Morrill, "Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy," *Feminist Formations* 25, no. 1 (Spring 2013), 13.

comprised of legal, social, and historical logics.[119] Maori scholar Linda Tuhiwai Smith states that under settler colonialism, settlers arrived as permanent migrants, which has specific implications that differ from other types of colonial structures: "for indigenous peoples in these places this means a different kind of experience with colonialism and different possibilities for decolonization."[120] Native Studies Scholars Maile Arvin, Eve Tuck, and Angie Morrill define settler colonialism as "a process whereby newcomers/colonizer/settlers come to a place, claim it as their own, and do whatever it takes to disappear the indigenous people that are there."[121] It is a practice that centers on both exploitation of the land and bodies alongside importation of forced labor to work the land and produce the wealth founding the settler state. In this framework, both the specificity of the logic of Native erasure to take over the land alongside the logic of enslavement of plantation slavery and mission slavery to work the land function as foundational logics of US setter colonialism.

Heteropatriarchy functions in particular to secure settler colonialism through the logics of conquest and colonization that disciplines difference into rigid structures. Gender Studies Scholar Maria Lugones argues that in order to

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[119] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

[120] L. Smith, *Decolonizing Methodologies,* 74.

[121] Arvin et al., "Decolonizing Feminism," 12.

understand the current gender system, we must understand it as inherent to 'the coloniality of power:'[122]

> The reason to historicize gender formation is that without this history, we keep on centering our analysis on patriarchy; that is, on a binary, hierarchical, oppressive gender formation that rests on male supremacy without any clear understanding of the mechanisms by which heterosexuality, capitalism, and racial classification are impossible to understand apart from one another. The heterosexualist patriarchy has been an ahistorical framework of analysis. To understand the relation of the birth of the colonial/modern gender system to the birth of global colonial capitalism – with the centrality of the coloniality of power to that system of global power – is to understand our present organization of life anew.[123]

Lugones emphasizes the importance of not naturalizing gender within critiques of colonialism so as to see the imposition of the gender binary not just as normative but as tied to the violent domination at work in differentiating notions of freedom through colonialism.[124] Native Studies scholar Scott Morgensen argues that people not conforming to the gender binary gender were explicitly targeted within structures of colonial conquest as the precursor to establishing colonial rule:

> In the Americas, the targeting of persons who today might be called Two-Spirit for violent elimination instantiated colonial heteropatriarchy and a sex/gender binary as a *precursor* to establishing a new economic and legal system, while acting to educate the indigenous peoples who remained in the structural relations they and colonists would now enter.[125]

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[122] Maria Lugones, "Heterosexualism and the Colonial/Modern Gender System," *Hypatia* 22, no. 1 (Winter 2007), 186-187.

[123] Lugones, "Heterosexualism," 186-187.

[124] Lugones, "Heterosexualism," 187-188.

[125] Scott Morgensen, "Theorising Gender, Sexuality, and Settler Colonialism – An Introduction" *Settler Colonial Studies* 2, no. 2 (2012), 14.

The complicit power relations of white supremacy's racial ordering and heteropatriarchy's gender binary work to dispel the varied frameworks and understandings of gender and sexuality in non-western societies as divergent from western norms, and thus in need of disciplining. Settler colonialism functions through this dynamic to produce a universally regulated social order that seeks to enforce certain types of social relations as primary and natural – namely that of the male-female gender binary that privileges patriarchy and heterosexual relations to uphold a nuclear family. The regulation of colonial structures through the logic of heteropatriarchy attempted to foreclose the many types of possibilities for social relationships that existed not just in the 'New World,' but also across the globe.

Native Studies scholars demonstrate how the heteropatriarchal logic of conquest and colonialism functioned in a myriad of violent and disciplinary ways. Morgensen argues that heteropatriarchy in colonialism articulated relationships to land and bodies for Native peoples as outside compliance with western norms: "heteropatriarchal colonialism has sexualized indigenous lands and peoples as violable, subjugated indigenous kin ties as perverse, attacked familial ties and traditional gender roles, and all to transform indigenous peoples for assimilation within or excision from the political and economic structures of white settler societies."[126] In the piece *Extermination of the Joyas,* Native Studies Scholar Deborah

[126] Morgensen, "Theorising Gender," 4.

Miranda demonstrates that the Spanish colonial-military punishment during the 1500s for Native peoples who presented outside the gender-binary was a specifically targeted violent death through attack of dogs.[127] Sexual violence in particular is a tool used across colonial structures as not only an aspect of the formation of colonial structures, but an ongoing part of the project of settler colonialism.[128] European colonizers and the subsequent US and Canadian governments enforced heteropatriarchal logics of male dominance and patriarchy through only engaging with male tribal leadership.[129] Native tribes were forced into reservations as an attempt to enforce conformity to white society through disruption of kinship networks and forced blood quantum regulations for tribal

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[127] Deborah Miranda, "Extermination of the *Joyas*," *GLQ* 16, no. 1-2 (2010): 257-258. Miranda cites a 1513 case of Spanish conquistador Vasco Nunez de Balboa, who recounted "coming upon about 40 indigenous men, all dressed as women, engaged in what he called 'preposterous Venus.' He commanded his men to give the men as a 'prey to his dogges,' and the men were torn apart alive." Miranda continues, stating that "by the time the Spaniards had expanded their territory to California, the use of dogs as weapons to kill or eat Indians, particularly *joyas*, was well established."

[128] See, for example, Dian Million, *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson: University of Arizona Press, 2013) for examination of this in Canada.

[129] For example, see Million, *Therapeutic Nations*, 41. Million articulates how the Indian Act codified Indian as man – through introducing patriarchy and hierarchy into Indigenous social leadership via colonially sanctioned male chiefs, Indian agents, and priests. See also Mark Rifkin, *When did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (New York: Oxford University Press, 2010).

recognition alongside the propertied parceling off of reservation lands.[130] In the period beginning in the late 1800s, children were kidnapped from tribes and sent into Christian boarding schools in both the US and Canada, forced to conform to western standards of education, language, religion, and dress, including cutting of boys' hair and wearing clothes designated for gender binary specific roles, and enduring systematic sexual assault and violence.[131]

Morgensen details that anti-colonial feminists and queer accounts demonstrate that the methods of heteropatriarchy within colonialism are "inventive, not foreordained," meaning that social relations are always constructed and therefore not determinative as the only way of being: "liberation will follow [from] disturbing all that colonization taught, so that distinctive ways of life might be recalled or imagined."[132] In addressing the contemporary work of Two Spirit Indigenous peoples, Native Studies Scholar Qwo-Li Driskill articulates the necessary interface of queer studies with that of Native studies to address specifically how

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[130] See, for example, Vine Deloria Jr., *Custer Died for Your Sins: An Indian Manifesto* (1969, repr., Norman: University of Oklahoma Press, 1988).

[131] See, for example, Million, *Therapeutic Nations,* 41; Morgensen "Theorising Gender;" Rifkin, *When did Indians Become Straight?*

[132] Morgensen, "Theorising Gender," 5. Morgensen continues, "such accounts position 'gender' and 'sexuality' alongside 'race' and 'nation' as analytical categories that are freed from any universal referent, in that they designate power-laden arenas of contested knowledge and embodied practice that call for critical and creative engagement."

gender and sexual identities of Indigenous people are intimately connected to land, community, and history:[133]

> No understanding of sexual and gender constructions on colonized and occupied land can take place without an understanding of the ways colonial projects continually police sexual and gender lines. Two-Spirit critiques, then, are necessary to an understanding of homophobia, misogyny, and transphobia in the Americas, just as an analysis of queerphobia and sexism is necessary to understand colonial projects.[134]

Driskill argues that framing queer and trans experience without a settler colonial analysis is not enough to impact systemic constructions of gender and sexuality within heteropatriarchy. Throughout the piece Driskill employs the methodological approach of 'double weaving' to frame the potential in conversations across queer and Native studies fields to address the ways contemporary logics of heteropatriarchy are connected to settler colonial critique and how dismantling these logics requires an approach that accounts for both.[135] Deborah Miranda details the contemporary work in California Indian communities to resist the colonial-heteropatriarchal imposition of the gender binary through documenting the history of the targeting of *joyas*, or third gender peoples in Chumash culture, as

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[133] Qwo-Li Driskill, "Double Weaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies," *GLQ* 16, no. 1-2 (2010), 73.

[134] Driskill, "Double Weaving," 73.

[135] Driskill, "Double Weaving," 73-74. Driskill continues: "Using doubleweave as a metaphor enables me to articulate a methodological approach that draws on and intersects numerous theoretical splints — what Smith calls *dissent lines* — in order to doubleweave queer and Native concerns into a specifically Indigenous creation." Driskill, "Double Weaving," 74. Citing L. Smith, *Decolonizing Methodologies*, 13.

well as documenting how contemporary Two Spirit people are working within their communities.[136] Miranda features the work of people such as L. Frank Manriquez, a Tongva/Ajachmen artist and tribal activist, whose work Miranda frames as "deeply traditional and part of the reemerging *joya* or Two-Spirit renaissance: as a person with the energy of two genders balancing within her, and conscious of the value of her work with the dead to nurture the living."[137] These logics undergirding heteropatriarchy are not central only to settler colonialism, but also to colonialism writ large.[138]

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[136] Miranda, "Extermination of the *Joyas*," 278. Miranda continues: "With the adoption of the name 'Two Spirit,' we have already begun the work of our lifetimes. As Sue-Ellen Jacobs, Wesley Thomas, and Sabine Lang write, 'Using the word 'Two-Spirit' emphasizes the spiritual aspect of one's life and downplays the homosexual persona.' Significantly, this move announces and enhances the Two-Spirit need for traditionally centered lives with the community's well-being at the center. Still, we face a great problem: the lack of knowledge or spiritual training for GLBTQ Native people, particularly the mystery of blending spiritual and sexual energies to manage death/rebirth. In traditional times, there would have been older *joyas* to guide inexperienced ones; there would have been ceremony, role modeling, community support, and, most importantly, there would have been a clear role waiting to be filled. The name Two-Spirit, then, is a way to alert others, and remind ourselves, that we have a cultural and historical responsibility to the larger community: our work is to attend to a balance of energies. We are still learning what this means; there has been no one to teach us but ourselves, our research, our stories, and our hearts."

[137] Miranda, "Extermination of the *Joyas*," 275.

[138] See, for example, also Ruth Vanita, ed., *Queering India: Same Sex Love and Eroticism in Indian Culture and Society* (New York: Routledge, 2002). For example, in India communities are continually resisting the impacts of colonial legislation and engulfment into a heteropatriarchal universal, where the first transwomen was elected as Mayor, working alongside a huge effort to combat the logics of heteropatriarchy.

These examples of contemporary analysis concerning the colonial constructions of regulatory categorical markings demonstrate that just as we cannot adequately theorize the racial ordering logics of white supremacy without understanding the relationality of gender and sexuality, we cannot understand heteropatriarchy without the relational analysis of settler colonialism as three deeply imbedded systemic power relations functioning to uphold the project of the United States. The fundamental logic of heteropatriarchy within settler colonialism works to naturalize social relations as the pre-condition for naturalizing racial capitalist political governance. This, in turn, functions to separate claims for rights-based inclusion determined through identity categories like gender or sexuality in mainstream LGBT discourse that does not account for the construction of those categories as implicit to settler colonial rule. Without addressing the deeply connected dynamics of the ways that settler colonialism, through heteropatriarchy and white supremacy, constructs identity, seeking inclusion into the normalizing project of the universal does not work to alter either systemic settler colonialism or heteropatriarchy.

In their piece 'Decolonizing Feminism: Challenging Connections Between Settler Colonialism and Heteropatriarchy,' Maile Arvin, Eve Tuck, and Angie Morrill frame heteropatriarchy as "the social system in which heterosexuality and patriarchy are perceived as normal and natural, and in which other configurations

are perceived as abnormal, aberrant, and abhorrent."[139] They argue that this formation of naturalized heteropatriarchy works within settler colonialism to make settler colonial governance itself seem natural, as well as without origin and end, through forcing the gender roles and sexuality of Indigenous peoples into compliance with settler-state systems.[140] Heteropatriarchy functions through all aspects of colonial imposed ideology, from the structural to interpersonal relations, by imposing European/western systems of social and political relationality while foreclosing other forms of non-European relationality as primarily upheld through the law. It imposed not only a logic of civility based in structuring conceptions of gender and sexuality, but the imposed formulation of western ways of thinking, being, and world understandings as out of line with the 'natural law' of European society. Natural law worked as a legal delineation that upheld the heteropatriarchal violence of colonization to construct the relationality of the universal based on European norms, values, and laws, as will be addressed in Part 2. The formation of colonial heteropatriarchy worked to order the settler colonial governance structures through securing juridical order based on natural law precepts as a precursor for establishing new legal systems. Morgensen argues that western law worked to uphold heteropatriarchy as a social structure that was universalized.[141]

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[139] Arvin et al., "Decolonizing Feminism," 13.

[140] Arvin et al., "Decolonizing Feminism," 15.

[141] Morgensen, "Theorising Gender," 13.

Further, he argues, gender and sexual power *condition* the power relations of settler colonialism.[142] This phenomenon, Morgensen states, then became normalized not just to settlers or the Indigenous nations they occupy – but as applied to the whole world, which worked to force the totality of human life to conform to the western universal.

The specificity of the formation of colonial relations is important for framing the calls to enter into the space of the 'universal' through rights-based redress. Arvin, Tuck, and Morrill argue that incorporation through civil rights functions as a project of expansion into a 'multicultural universal' to maintain settler colonialism. By incorporating more people into the project of the United States, settler colonial governance is routinely secured and expanded so as to elide the ongoing conditions of occupation and genocide that maintain it. Arvin, Tuck, and Morrill argue against this type of multicultural inclusionist project because it works to naturalize settler colonialism, heteropatriarchy, and capitalism: "the prevalence of liberal multicultural discourses today effectively works to maintain settler colonialism because they make it easy to assume that all minorities and ethnic groups are different though working toward inclusion and equality, each in its own similar and parallel way."[143] Flattening the conditions of oppression for different categories of people under multicultural inclusionist laws and policies works to reaffirm the

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[142] Morgensen, "Theorising Gender," 14-15.

[143] Arvin et al., "Decolonizing Feminism," 10.

notion that these issues can be overcome if groups conform to standards of white life and achieve recognition through rights. Multiculturalism assumes not only that all groups of people fighting for rights have equal concerns, but that the universal will be able to account for all of them. A relational analysis instead allows us to understand that different groups of people experience different proximities to the systems of settler colonialism, white supremacy, and heteropatriarchy, and receive different access to their privileges and benefits. This framework then allows for a rearticulation of concerns based not on formal inclusion into the universal through flattened positionalities of 'diverse' groups, but rather a focus on the dismantlement of the very systems that produce such privileges and inequalities in the first place.

Native Hawaiian Scholar Haunani-Kay Trask articulates the limitations of rights-based redress for occupied Indigenous nations because the settler construction of rights is fundamentally centered on a relation between the settler and the state: "In settler societies, the issue of civil rights is primarily an issue about how to protect settlers against each other and against the state."[144] Trask additionally articulates the further limitation of rights as a solution to settler colonial occupation:

> Colonialism has as one of its goals the obliteration, rather than the incorporation of indigenous peoples. Exclusion from colonial legal systems is but part of the process of obliteration. Our daily existence in the modern

[144] Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (1993, repr., Honolulu: University of Hawai'i Press, 1999), 25.

> world is thus best described not as a struggle for civil rights but as a struggle against our planned disappearance.[145]

Trask importantly frames the limitations of rights-based incorporation as unable to account for the systemic work of settler colonialism premised on the logic of Native erasure. Rights, then, are unable to alter the project of settler colonialism because rights are fundamental to the enforcement of the settler colonial relation. Rights work to broker the power dynamic of not only the settler state but the nation-state itself. This reaffirmation of the settler nation-state functions to order the differently-related racialized 'others' whose positionality may fluctuate depending on proximities to whiteness, wealth, and heterocisnormativity within the 'universal' of the United States as a project of continued expansion. The universal seeks to engulf any other form of social relationality by either disciplining towards incorporation or dispelling those who threaten the universal as disposable, as demonstrated over and over again through the containment logics of enslavement and erasure central to settler coloniality.

The promise of rights and inclusion into the body politic rests on the notion of continuing the violent project of the nation-state. Anti-colonial Native Studies scholars articulate how calls for universal inclusion normalize the ongoing logics of settler colonial governance. Political Theory scholar Robert Nichols argues that compelling Indigenous peoples to appeal for recognition to settler colonial state

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[145] Trask, *From a Native Daughter*, 26.

apparatuses and International legal bodies works to uphold the existence of the modern nation-state as the primary recognizable form of governance.[146] Native Studies scholar Dian Million argues that "Indigenous peoples preexist nation-states and reject nation-state authority to grant them a right to a political self-determination that they have never relinquished."[147] Glen Couthlard's work addresses the notion that the colonial relationship between Indigenous peoples and the settler state cannot be 'adequately transformed' through a politics of recognition: "I argue that instead of ushering in an era of peaceful coexistence grounded on the ideal of *reciprocity* or *mutual* recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous people's demands for recognition have historically sought to transcend."[148] Coulthard argues that settler governing bodies use the status of 'recognition' to re-establish state authority over land through determinations about what counts as Indigeneity.[149]

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[146] Robert Nichols, "Indigeneity and the Settler Contract today," *Philosophy Social Criticism* 39, no. 2 (2013): 165-186.

[147] Million, *Therapeutic Nations,* 3.

[148] Million, *Therapeutic Nations,* 3.

[149] See Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada," *Contemporary Political Theory*, 6 (2007): 437-460. See also Morgensen, "Theorising Gender," 9.

Calls towards inclusion in the universal are premised on the futurity of the United States as a project that can incorporate enough perceived threats to stabilize large-scale discontent. The settler colonial state mediates its legitimacy through offers of inclusion into its 'universal' legal system that simultaneously works to reify the settler colonial dynamic regulating the social order based on racialized, gendered, and economic hierarchies. Federal Indian Law scholar Robert Williams Jr.'s work looks at the history of legal decisions in the United States against Indian tribes as predicated on racialized stereotypes that continually limit access to recognition and rights.[150] Specifically focusing on the work of the Rehnquist court in the 21st century, Williams Jr. articulates the dynamics of the US legal system that has continually delimited Native access to recognition and land claims.[151]

The legal system functioned throughout the history of the project of the United State to contain Native peoples as 'threats' in order to clear the 'vacant' land for the white settler imaginary's claim of ownership. The carceral-containment logics of the mission system, reservations, and boarding schools were all legally codified as institutions that underwrote the expansion project of the United States. Documenting the centrality of this carceral logic to the United States within the contemporary context of Hawaii, Native Hawaiian trans activist Kalaniopua Young

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[150] Robert Williams Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).

[151] Ibid.

details how the dynamics of heteropatriarchy and settler colonial rule enforce legal and juridical apparatuses to justify the encapsulation of Indigenous peoples into the carceral space of prisons and policing.[152] The contemporary construction and expansion of the Prison Industrial Complex is deeply rooted in the logic of settler colonial expansion secured through both the simultaneous structures of plantations and missions that violently enslaved Indigenous Africans and Native peoples. Reflecting on the historical continuity of the logic of colonialism to imprison 'enemy combatants' at the US military prison in Guantanamo Bay as 'threats' to national security, Historian Robert Perez details the use of the island of Cuba as a location to detain 'enemy Indians' during Spanish colonialism.[153] Perez argues that Native people resisting Spanish colonial occupation and inciting rebellion would be sent there for the explicit purposes of separating those in resistance from their land and communities by deporting them to Cuba.[154] The logic of spatial-carceral containment is intimately connected to the project of settler colonial expansion, as evidenced both historically as well as in contemporary ongoing settler towns, reservations, and prisons.

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[152] Kalaniopua Young, "From a Native *Trans* Daughter: Carceral Refusal, Settler Colonialism, Re-routing the roots on an Indigenous Abolitionist Imaginary," in Stanley and Smith, eds., *Captive Genders.*

[153] Robert C. Perez, "Guantanamo and the Logic of Colonialism: The Deportation of Enemy Indians and Enemy Combatants to Cuba," *Radical Philosophy Review* 14, no. 1 (2011): 25-47.

[154] Perez, "Guantanamo and the Logic of Colonialism," 33.

The disciplinary logic of carceral-containment used to manage incorporation into the western universal is also particularly evident in the period of decolonization following the formation of the United Nations in the wake of World War II. The United Nations functioned to stabilize the contestations for western power over the colonial mandate territories of the first two World Wars and mediate conflict through the newly legitimized regulations of International law, as further addressed in Part 3. The UN as a regulatory body furthers a 'universal' set of rules and regulations that nations are to abide by in times of conflict and also acts as a forum to mediate international relations. Cultural studies scholar Vijay Prashad details how the project of Third World Liberation movement to combat neocolonial affirmations of power were forced into the polarizing dynamic of the US-Soviet Cold War. This dynamic played out through western states enforcing 'proper' nation-state compliance with western hegemonic political rule by disciplining governing relations that did not align with western capitalist interests.[155]

Compliance with such rule functioned through western determinations concerning which formations of political, economic, and social relations were to be considered legitimate. In *The Divided World,* Randall Williams argues that the post-UN formation era produced a rearticulated set of global relations centered on which countries could enact 'legitimate' state violence and which countries would be

[155] Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New Press People's History, 2008).

disciplined for 'illegitimate' state violence.[156] Arguing that this historical moment produced a re-emergent global division along western/nonwestern lines through the advent of the United Nations, Williams details how international regulation under the United Nations functions to reify the power of western countries, as exemplified earlier in Part 1 through the Civil Right's Congress *We Charge Genocide* petition to the UN. The transfer from colonial dependency relationships into the neocolonial imperialism emerging after World War II rearticulated the same notions of the rule of the 'civilized' and therefore 'legitimate' governance to condition power in the hands of the west.[157] Power mediated through the United Nations is then positioned through logics of containment in various ways, whether through military occupation, control over free market enterprise, policies enacted on the premise of saving 'uncivilized' countries, or often the use of all of these justifications, as further addressed in chapter 9.[158]

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[156] Randall Williams, *The Divided World*.

[157] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

[158] Programs funded to 'save' third world countries forced the indebted into the practices of global capitalism through UN branches such as the World Bank and the International Monetary Fund and the globalized projects of neoliberal 'structural adjustment programs,' for example, worked to bring state control of business into the privatized realm for International investment. See, for example, Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Picador, 2007); Guillermo Bonfil Batalla, *Mexico Profundo: Reclaiming A Civilization*, trans. Philip A. Dennis (Austin: University of Texas Press, 1996); María Josefina Saldaña-Portillo, *The Revolutionary Imaginary in the Americas and the Age of Development* (Durham: Duke University Press, 2003).

The coherence of the United Nations functioned not only to contain global power relationships through economic disciplining and military defense, but also through the promised protection of all peoples through the Universal Declaration of Human Rights. Williams argues that the focus on liberal notions of universal human rights through the rise of the UN implemented a forum whereby all peoples are supposed to be able to find relief for violations of human rights. Instead, he argues, the forum articulates only certain forms of violence as violations of rights, which reifies the forms of state violence enacted by western countries as legitimate. Thus the formations of prisons, policing, reservations, genocide, enslavement, violence and death enacted through both the structure and agents of the US nation-state are not viewed as 'illegitimate' violence to be sanctioned, but rather are implicitly condoned. Anti-colonial scholar Frantz Fanon most aptly sums up this phenomenon of the postwar formation of international relations as 'peaceful violence.'[159] Million characterizes international decolonization practices as that of Indigenous people's entry into the universal realm of human rights, conditioned through the colonial power's commitment to a revised strategy of development, based on the creation of conditions of economic dependency for former colonies.[160]

Within this dynamic, the United Nations is proffered as a space to contest the human rights violations of the colonial nation-state. But appeals through the

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[159] Frantz Fanon, *Wretched of the Earth* (New York: Grove Press, 1963), 81.

[160] Million, *Therapeutic Nations*, 13.

channel of human rights are not able to account for settler colonialism because the harm of colonial occupation is mediated through rights-based recourse that is inherently dependent on appealing to the body of states producing the ongoing harm of land occupation, genocidal practices, and resource maldistribution in the first place. Million argues that state sanctioned places where Indigenous people can seek protections, such as human rights law or the UN DRIP, are never neutral, objective, or 'safer' legal spaces.[161] Million critiques the use of human rights as a function of the development process through the UN and NGOs for bringing underdeveloped countries of newly decolonized state into parity with the first world: "the post war formation of capital, reorganized and heralded by a universalism within the 'rights of man' or human rights, was not less racist but posed and practiced racialization projects quite differently."[162] Thus, following Million and Williams, human rights center a reordering of relationships into a different disciplinary realm that continues to function within the racialized logics of the white supremacist settler colonial universal. Universal human rights in the UN era function to affirm a shift into a new formation of power relations that embodies the same globalized power imbalance and logics of containment as before 1948, but now under a new guise of administrative expansion coordinated through a universal 'international' realm where global powers compete for the 'legitimate' extraction of

[161] Million, *Therapeutic Nations*, 9.

[162] Million, *Therapeutic Nations*, 140.

labor, resources, and land of 'underdeveloped' nation-states through neocolonial and neoliberalism.

Walter Rodney critiques the developed/underdeveloped binary within the era of post UN International aid.[163] In his book, *How Europe Underdeveloped Africa*, he argues that the more accurate binary is in fact underdevelopment and overdevelopment. Articulating the historical and political relationship between Europe's exploitation of Africa, first through the trans-Atlantic slave trade and later followed by Europe's colonization in the 19-20th centuries, Rodney details how the extraction of bodies and resources from continental Africa produced its underdevelopment through the expropriative logics of Europe's overdevelopment. Framing this dynamic through an overdeveloped/underdevelopment binary exposes the fundamental power imbalance explicitly produced through European colonialism. A developed/underdeveloped binary reinforces the notion that some countries are just not working hard enough to develop and should be brought in line with the western universal's political and economic modalities. The framework of 'development' supports the policies that further the neoliberal economic agenda to allow unfettered access for private enterprise in 'developing' countries through exploitative and damaging neocolonial practices through both implicit and explicit military backing.[164] Providing aid to 'underdeveloped' areas in promotion of

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[163] Walter Rodney, *How Europe Underdeveloped Africa.*

[164] See, for example, Klein, *The Shock Doctrine*; Batalla, *Mexico Profundo:* Saldaña-Portillo, *The Revolutionary Imaginary*.

universal human rights reifies the overdeveloped/underdeveloped binary where the west is sent to 'save' other localities.[165] Million documents the rise of NGO humanitarian aid under neoliberalism as "a field where a dissolving welfare-state capitalism once positioned as benefactor abandons the subjects of its development to allow capital to choose its most 'viable.' It is a field of humanitarian struggle between life and death."[166]

In settler colonial states, discourses of universal inclusion and protection also take on the form of internal policies directed at smoothing over conflict and building 'peace' with Native peoples through state sponsored channels, as exemplified in Canada with the call for First Nations people to 'move on' from the harm of colonialism and assimilate into settler society.[167] In "For Our Nations to Live, Capitalism Must Die," Glen Coulthard argues that the organizing and protests against the settler colonial state of Canada are seen as 'illegitimate' whereas only the government sanctioned formal negotiations are seen as 'legitimate' and acceptable forums for articulating disagreement. Documenting this dynamic through the organizing movement in Canada and the United States of *Idle No More,* an Indigenous movement working to resist the ongoing practice of settler colonialism, Coulthard argues that Indigenous communities resisting the logics of settler colonial

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[165] See, for example, critiques on this matter from the *Revolutionary Association of the Women of Afghanistan*, "About RAWA," www.rawa.org/rawa.html.

[166] Million, *Therapeutic Nations*, 10.

[167] Coulthard, *Red Skin White Masks.*

governance must target multiple power relations in resisting the call for state-sponsored incorporation:

> The capacity of resurgent Indigenous economies to challenge the hegemony of settler-colonial capitalism in the long term can only happen if certain conditions are met, however. First, all of the colonial, racist, and patriarchal legal and political obstacles that have been used to block our access to land need to be confronted and removed. Of course capitalism continues to play a core role in dispossessing us of our lands and self-determining authority, but it only does so in concert with axes of exploitation and domination configured along racial, gender and state lines. Given the resilience of these equally devastating relations of power, our efforts to decolonize must directly confront more than just economic relations; they must account for the complex ways that capitalism, patriarchy, white supremacy, and the state interact with one another to form the constellation of power relations that sustain colonial patterns of behavior, structures, and relationships. Dismantling these oppressive structures will not be easy. It will require that we continue to assert our presence on all of our territories, coupled with an escalation of confrontations with the forces of colonization through the forms of direct action.[168]

Coulthard argues that in order to fundamentally alter the dynamic of settler colonialism, it is necessary to attend to the logics of capitalism, white supremacy, and patriarchy that maintain the legitimacy of the settler state's 'rule of law.' This focus on the power relations of settler colonialism is especially important in the United Nation-era articulation of global democracy, freedom, and human rights as universal, so as to expose the long standing colonial logics that are re-formulated when global powers undergo new and different arrangements.

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[168] Glen Coulthard, "For Our Nations to Live Capitalism Must Die," *Indigenous Nationhood Movement,* November 5th, 2013, http://nationsrising.org/for-our-nations-to-live-capitalism-must-die/.

The moment of global restructuring ushered in by the United Nations is one that formulates universal guarantees of inclusion by claiming the necessary conformity over *all* peoples into the project of the western 'universal' through the proliferation of neoliberal capitalism, the spread of neocolonial democracy through militarism and terrorism, and the rhetoric of western savior narratives across all corners of the globe. Thus 1948, following the end of the Second World War, is a commensurate moment in forming contemporary power relations where we can locate multiple dynamics at work under the auspices of universality and equality that actively maintain the violent and white supremacist practices of colonial-modernity. At the same time that global colonialism transforms into the Third World Non-Align movement to decolonize and build new governing dynamics, US economist Milton Freidman was penning the 1951 article "Neoliberalism and its Prospects" which founded the rise of western neoliberal disciplinary policies world-wide.[169] Just as the solidification for International governance over the 51-member body of the United Nations was forming, so too was the coherence of the economic powerhouse of the European Union which rose as a bastion of neoliberal policies and deregulated neocolonial markets in the decades to come. Not only did 1948 cohere the foundation of the United Nations as well as the Universal Declaration of Human Rights, it also saw the confirmation of apartheid South Africa as well as the

[169] Milton Friedman, "Neo-Liberalism and its Prospects," *Farmand*, February 17, 1951, 89-93.

settler colonial state of Israel, who has been in violation of the United Nation's own International law and Declaration of Human Rights for the displacement and genocidal deaths of Palestinians since its legalized UN-sanctioned inception. We must ask ourselves then, how is it possible that in the age of universal human rights not only are all peoples actively *not* protected against state violence, but that such violence is flagrantly legitimated in the hands of western settler colonial interests such as the United States, Canada, Europe, and Israel?

The Universal as Reiteration

As the movements and scholarship concerning white supremacy, heteropatriarchy, and settler colonialism have demonstrated here in Part 1, rights cannot account for state violence, and are in fact central to the maintenance of the 'universal' project of the United States and western nation-state interests. We cannot adequately theorize the power relations of settler colonialism, heteropatriarchy, and white supremacy as foundational to our globalized contemporary order without understanding how they work through reinforcing one another. To see these power relations not as separate but in fact constitutive of the formation of the 'universal' of modernity exposes the limitations of rights-based incorporation as a fundamental reaffirmation of settler state power used to

negotiate the freedom and legitimacy for some as constantly premised on the unfreedom and illegitimacy of others.

Ongoing histories and practices of struggle and resistance have demonstrated what is at stake when our focus is solely on inclusion into that universal. Moving from a space that questions universal inclusion allows for a consideration of what other possibilities for relationality are foreclosed when engaging primarily in rights-based redress, as well as what possibilities exist that offer other ways of being in the world. Reframing the relationality of the systemic violence and harm of settler colonialism, white supremacy, heteropatriarchy, and capitalism as integral components of the universal uncovers the conditions at work in producing the inherent discrepancies between the promise of rights and the universal: that rights do not work to alleviate the violence of state and systemic harm of the universal, but rather re-inscribe them.

The notion of universal rights, it could be argued, is a new one, emergent in the dawning of the United Nations era's espousal of universal freedom and equality for all. In order to contribute to theorizing the formation of such 'universal' notions, it is necessary to uncover the deeply intertwined formations of settler colonialism, heteropatriarchy, and white supremacy that produce the promise of rights within our contemporary notions of the universal. It is necessary to go beyond the age of the United Nations to understand how the present political global order disciplines the growth of any political projects rejecting capitalism and the rhetoric of democracy. It is also necessary to go beyond the Enlightenment discourse of

liberalism's individuated possession of rights to uncover the systems at work that produced the conditions of possibility for the arrival a rights-bearing subject premised on the 'self evidential truths of man' that all are treated equally within an explicitly unequal order narrativized as always seeking to perfect itself towards universal equality.

To do so requires turning to the formation of colonialism as a global project of social re-ordering so as to uncover the ways that the small region of Europe came to articulate its Christian-Roman worldview as *the* universal order, one that would seek to engulf all other multiplicities of global societies and worldsenses into the trajectory of the contemporary multicultural white supremacist capitalist heteropatriarchal order. Framing the emergence of such a universal might offer possibilities towards practicing a present that does not unwittingly reaffirm these systems of power, but moves towards recentering the modes of resistance, survival, and relationality already in practice. Turning to the legal constructions of the justifications for New World conquest and systemic colonialism, Part 2 will examine the role of rights in cohering the foundational power relations of the universal.

PART 2

On the Ontological Construction of Modern Universal Rights: Civility, Crisis, and Carcerality in the Making of Colonial-Modernity

Introduction: Medieval and Modern Rights

As inherently political entities, rights function to mediate social practices within particular historical genealogies. Rights, then, reflect the various constructions of social and political relationality – both between the state and citizens, and also between citizens themselves. Rights mediate the relation between the 'citizen' and 'state' through determining whether assertions of rights are distributed in a valid and inclusive way. This logic rests on the idea that if people are considered citizens of a state they should have equal rights, and in turn have those rights taken away only for good cause. As such, rights are also a mechanism for delimiting access to the privileges and benefits of 'deserving' citizenry. Rights, as Ivison argues, are fundamentally dynamic, housed in a system of beliefs in order to be justified.[1] They both change and reflect back their socio-political relationality. My interest is in focusing on the socio-political relationality of rights, rather than arriving at definitive claim of what rights are. I am interested instead in how rights

[1] Duncan Ivison, *Rights* (Ithaca: McGill-Queens University Press, 2008), 12.

work to mediate social and political spheres, how they are imbricated in the creation of the relationality of 'modernity,' and how the creation of those spheres is both constituted by and constitutive of rights-based relationality.

Rights of modernity are often defined in contradistinction to medieval understandings of rights. The defining features of rights from the European middle ages are that they are understood as 'duties' that function to determine how individuals exercise what is considered 'just' within community standards.[2] Ivison frames this understanding of rights in the objective sense – as a duty – through the example that "it is right to help the poor," as opposed to a subjective understanding of the right framed as the "right to do something."[3] Subjective rights, Ivison argues, are distinctively modern, understood as something that individuals can possess or claim, such as "a right to enter the competition."[4] The narrative of 'separation' between the two notions of objective and subjective is one that is not entirely clear, and even contested within scholarship on rights development.[5] The emergence of

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[2] For example, see Ivison, *Rights;* Janet Coleman, "Are There Any Individual Rights or Only Duties? On the Limits of Obedience in the Avoidance of Sin according to Late Medieval and Early Modern Scholars," in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Virpi Makinen and Petter Korkman (The Netherlands: Springer, 2006); Brian Tierney, *Rights, Laws and Infallibility in Medieval Thought* (Brookfield, Vt.: Variorum, 1997).

[3] Ivison, *Rights,* 7.

[4] Ivison, *Rights,* 7.

[5] See Tierney, *Rights, Laws and Infallibility*; Coleman, "Individual Rights." Richard Tuck, *Natural Rights Theories: Their Origin and Development* (New York: Cambridge University Press, 1979).

'modern' rights can be traced over a wide range of time, from the 14th century work of William of Ockham to the 18th century work of John Locke. Contemporary theorists such as Brian Tierney, Richard Tuck, Janet Coleman, and others argue that there is no one *single* moment of emergence, but rather a range of influences that usher in the transition of medieval rights-based understandings into modernity.

Contemporary scholarship questions what aspects of modern rights mark a theory of rights as distinctively modern. Theories of modern rights are attached to natural law theories that are most often centered on the moral and political discourse of 17th century Enlightenment thinking in figures such as John Locke, Samuel Pufendorf, and Thomas Hobbes.[6] Korkman and Makinen argue that the idea of subjective rights discourse as emergent only at the end of the 18th century is challenged within a wide range of debates concerning the influences and emergence of how and when individuated rights emerge. While there is no concrete answer, contemporary theorists involved in these conversations argue that to understand the nature and origins of contemporary language of rights, we must study debates from the medieval, early modern, as well as Enlightenment contexts.[7]

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[6] Virpi Makinen and Petter Korkman, "Preface," in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Virpi Makinen and Petter Korkman, (The Netherlands: Springer, 2006), vii.

[7] Makinen and Korkman, "Preface," viii.

Within the medieval context of rights traditions, there is a wide range of rights frameworks, including civil law, natural law, divine law, and roman law.[8] Each set of rights had their own dominium, overlapping in physical space, but jurisdictionally different. The development of western law was interspersed through the refinement of roman law, and especially through the development of canon or ecclesiastical law from 11th century onwards.[9] The prominent legal features included institutions, professionals, and distinct bodies of law, where natural law predominated and through it the idea of 'rule of law' as center stage – both the ecclesiastical realm and the secular were to be ruled by the law.[10] The overlapping legal spheres were complex, with different courts and different laws to treat different circumstances.[11]

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[8] See Antony Black, *Political Thought in Europe 125-1450* (Cambridge: Cambridge University Press, 1992); Coleman, "Individual Rights;" Michael E. Tigar and Madeleine R. Levy, *Law and the Rise of Capitalism*, (New York: Monthly Review Press, 1977).

[9] Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Burlington: Ashgate Publishing Company, 2002), 68. On the importance of 13th-15th century canon law to the development of international law via Vitoria and Las Casas, see Muldoon *Popes, Lawyers, and Infidels.*

[10] Cavallar, *Rights of Strangers,* 68. Cavallar argues details that it is claimed that the beginnings of the western legal tradition began with the papal revolution of 1075-1122 that established the supreme authority of the Pope and Independence of the clergy from the secular sphere with a separate ecclesiastical community with its own law, that he cites from Berman, *Law and Revolution*, paved the ground for the modern legal system. Cavallar, *Rights of Strangers,* 69.

[11] See Tigar and Levy, *Law and Capitalism,* 8-9. This included roman law, feudal law, canon law, royal law, merchant law (as developed from Roman law), natural law, as

Broadly speaking, medieval debates concerning rights focused on what the nature of rights entailed, where they were derived from, and in turn, how they were applied. Janet Coleman argues that the understanding of rights as duties frames how individuals exercise what is 'just' within community standards. The conception of what was just also entailed a range of debates. A specific concern for this inquiry was the framing of rights as a moral claim on behalf of a 'normative' conception of human nature, as guided by natural law.[12] The nature of the relationship between the individual and community was a concern that rights frameworks sought to addresses. Coleman argues that the Augustan framing of the relationship between individual possessions of freedom and the self-sufficiency of the whole was based on conceptions of what was 'common.'[13] The framework of what was common, then, provided the base for determining equity amongst the community, according to a hierarchy of worth that associated individuals exemplified in the 'just' ordering of their interpersonal relations.[14] According to Coleman, the community was understood in European medieval conceptions as "a community of the species guided by fixed and universally known norms."[15]

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well as various courts for different transactions; for example, a case in 1448 and where to take contract disputes which included 6 different court options.

[12] Coleman, "Individual Rights," 4.

[13] Coleman, "Individual Rights," 6.

[14] Ibid.

[15] Coleman, "Individual Rights," 4.

In medieval Europe, norms governed the relationship of the community via rights. Ivison argues that rights are entities that presuppose a wider account of social and political order, that in turn presuppose community: "the distribution of rights also depends on deeper and more systematic arguments about the interests or capacities they are said to protect and promote, and ultimately about the kind of society in which they are best realized or 'housed.'"[16] This same framework applies to how rights function today. Both medieval and modern conceptions of rights function within the idea of 'a normative universe' – a *nomos* that both creates and maintains a world based on demarcations of what is right and wrong, lawful and unlawful, valid and void.[17] Legal scholar Robert Cover argues that "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[18] The law is not merely a system of rules to be observed, but a world in which we live, one that joins narrative and law as inseparably related.[19]

The discourse of rights in the rise of modernity reflects the shift into a universal '*nomos*' emergent in Europe yet applied to the whole world. Brian Tierney argues that the transitional phase between medieval and modern thought is evident

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[16] Ivison, *Rights,* 21.

[17] Robert M. Cover, 'Foreword Nomos and Narrative,' in "The Supreme Court 1982 Term," *Harvard Law Review* 97 (Nov. 1983): 4.

[18] Cover, "Nomos and Narrative," 4.

[19] Cover, "Nomos and Narrative," 5.

within the Spanish theories of rights dealing with issues of New World 'encounters.'[20] Part 2 looks to understand how the massive socio-political shift of world relations instituted through systemic colonialism impacted the transition into modern conception of rights as duties into rights as 'subjective' entitlements. To engage in this inquiry, Part 2 centers the work of 16th century political thinker Francisco de Vitoria, whose legal deliberation on the legitimacy of Spanish title in the New World relied on a set of 'universal rights' derived from the revival of the Roman legal institution of the law of nations. Delivered in 1537, Vitoria argued for the universal rights of the Spanish rights to trade, travel, and preach as the primary justifications for Spanish title in the New World, as a set of universal rights afforded to all people globally. Vitoria's work is important for understandings of the role of rights in constructing the legal legitimations of colonialism, and in particular the formation of 'universal' rights. In 1951 Carl Schmitt argued for the *nomos* of Europe as 'the *nomos* of the earth,' drawing on Vitoria's work as reflective of a particular kind of *nomos* as a universal framework from which to connect the world.[21] But whose world is it? Whose norms govern? Why is this considered 'universal,' and how did one set of norms and values as come to be considered universal? What

[20] Brian Tierney, *Rights, Laws and Infallibility in Medieval Thought* (Brookfield, Vt.: Variorum, 1997), 296.

[21] Carl Shmitt, *Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* (Candor, New York: Telos Press Publishing, 2006).

then does it mean to position certain set of norms and values originating in specific form of European construction and thought as a 'universal' community?

The legal frameworks of the Middle Ages were not self-contained, neat entities. It is hard to even clearly articulate the various roles that rights held within medieval European society. Rights, by their very nature, are shifting entities, reflective of their socio-political context. Given this, what do universal rights mean in the context of emerging colonialism, of drastic global shifts instantiating the rise of capitalism through violent groupings of people based on societal difference that marks some to perpetually labor the rise of modernity and others to capitalize on it? What, then, do rights signify in Vitoria's use of them? This inquiry is centered on complicating both how Vitoria is understood as well as what his work represents, by thinking through the shifting construction of rights in colonialism. If anything about Vitoria *can* be agreed upon, it is that he approaches the issue of the right to New World conquest from a new and different juridical framing. This is the point from which I am interested in beginning with, to take a risk, and to think dangerously, as Cesaire beckons for, about the makings and remakings of colonialism through the justificatory logic of rights.[22]

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[22] "In other words, the essential thing here is to see clearly, to think clearly - that is, dangerously - and to answer clearly the innocent first question: what, fundamentally, is colonization? To agree on what it is not: neither evangelization, nor a philanthropic enterprise, nor a desire to push back the frontiers of ignorance, disease, and tyranny, nor a project undertaken for the greater glory of God, nor an attempt to extend the rule of law. To admit once for all, without flinching at the consequences, that the decisive actors here are the adventurer and the pirate, the wholesale grocer and the ship owner, the gold digger and the merchant, appetite

Chapter 4
Vitoria's Universal Rights

Vitoria's work continues to be a source of contemporary study particularly because of its revival in the 20th century transition of global power relations and the rise of universal human rights and the United Nations, as will be addressed further in Part 3. Vitoria is heralded both as the father of International law and of human rights. Much scholarship is devoted to the legitimacy of these claims, where traditional accounts in political science and legal history engage the question of how to situate Vitoria in his appropriate 'place' in the progression of either International law or human rights, primarily centered on whether or not he should be bestowed as the 'father.'[23]

It is less important to my inquiry whether or not Vitoria is the 'true father.' I am more so interested that his work is valorized as the first legitimation of the colonial project. This fact sheds light onto the ways that rights, law, and colonial

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and force, and behind them, the baleful projected shadow of a form of civilization which, at a certain point in its history, finds itself obliged, for internal reasons, to extend to a world scale the competition of its antagonistic economies." Aime Cesaire, *Discourse On Colonialism*, trans. Joan Pinkham (1955, repr., New York and London: Monthly Review Press, 1972), 2.

[23] For the debate about Vitoria as 'father,' see, for example: Fernando Gomez, "Francisco de Vitoria in 1934, Before and After," *MLN Hispanic Issue* 117:2 (March 2002), 365-405; Charles McKenna, "Francisco de Vitoria: Father of International Law," *Studies: An Irish Quarterly Review* 21, no. 84 (Dec 1932): 635-648; and Joseph M. de Torre, "The Roots of International Law and the Teachings of Francisco de Vitoria as a Foundation For Transcendent Human Rights and Global Peace," *Ave Maria Law Review* 2 (2004): 123-151.

power were manifesting to produce ideologies of colonial-modernity of which Vitoria is both productive of and responsive to. I am interested in reading Vitoria through the intersection of a number of legal, political, theoretical, religious, and ideological constructs that are constitutive of the rise of 'modernity' to locate how universal rights were constructed as justifications for colonialism. Critical scholarship demonstrates Vitoria's connection to the colonial formations of International law, as most prominently discussed by the work of legal scholar Antony Anghie.[24] Additionally, Native legal scholar Robert Williams Jr. traces the import of Vitoria into the construction of American Federal Indian Law.[25] Peter Fitzpatrick locates the impact of Vitoria's scholarship on western political thought.[26] My analysis draws from these contentions as a body of critical scholarship on Vitoria. My work seeks to contribute to this foundation by analyzing how Vitoria is reflective of the shift of the ontological nature of rights into modernity through the use of universal rights to justify Spanish colonialism.

Vitoria was a scholar and theologian at the School of Salamanca in Spain, a prominent center of deliberation on politics, governance, and economy, which

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[24] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

[25] Robert Williams, Jr. "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought," *Southern California Law Review* 57 (Nov. 1983): 1-99.

[26] Peter Fitzpatrick, "Legal Theology: Law, Modernity and the Sacred," *Seattle University law Review,* 32 (Winter 2009): 321-341.

produced work on topics ranging from economic theory, divisions in natural and divine law, laws of contract, jurisprudence more generally, and moral philosophy.[27] Vitoria was a central figure whose work would influence late medieval scholarship of De Soto, Las Casas, and Sepulveda in addition to influencing the rise of Enlightenment legal thinking and International law through scholars such as Grotius.[28]

Vitoria's ancestry is traced as *converso* Jew, where during the 14th century, many Jewish and Muslim families converted to Catholicism to avoid being expelled and shunned for their non-Christian beliefs across Europe.[29] Vitoria studied in Paris from 1509-23 where he encountered French humanists as well as classical Greek and Latin thinkers.[30] His views on humanism, however, were affected by the rise of

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[27] Martti Koskenniemi, "International Law and *raison d'etat*: Rethinking the Pre History of International Law," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 297-339. *See also*: Johannes Thumfart, "On Grotius'*s Mare Liberum* and Vitoria's *De Indis,* Following Agamben and Schmitt," *Grotiana* 30 (2009), 65-87. *See also:* Juan Manuel Elegido, "The Just Price: Three Insights from the Salamanca School," *Journal of Business Ethics* 90, no. 1 (November 2009), 29-46.

[28] Martti Koskenniemi, "International Law and *raison d'etat*: Rethinking the Pre History of International Law," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 297-339. See also Schmitt, *Nomos of the Earth* (1950; repr., Candor, NY: Telos Press Publishing), 117.

[29] J.H. Elliott, *Imperial Spain 1469-1716* (New York: St. Martin's Press, 1964), 95-99.

[30] Pagden, *Vitoria Political Writings*, xiii- xiv.

the Protestant 'heresy' during this time. Pagden and Lawrance state that the source of Vitoria's 'originality' was not his association with the 'new grammar' of humanism, nor in his methods, but rather in the incorporation of Roman law with natural law discourse.[31] This element required a reinvigoration of roman rights and the concept of *ius gentium*, law of nations, influenced by the 13th century work of Thomas Aquinas, as well as a resurgence of classical Greek theorists, most notably Aristotle. Vitoria's work, set in the trajectory of the larger juridical work of the Middle Ages, follows similar lines of arguments practiced over the course of many centuries. Vitoria's work follows the precedence of theologian theorists that James Muldoon argues began with the work of 13th century Pope Innocent IV.[32]

Vitoria's work was delivered to academic audiences in the period following the consolidation of Spanish power into the Castilian crown and its recent defeat of the 1521 revolt, when the primary ideological concern of the Spanish became the defense of the state through the self-appointed role as the guardian of universal Christendom.[33] Pagden and Lawrance argue that the dispute about the legality of Spanish title in the New World became more intensified after the conquest in Mexico beginning in 1520 and Peru in 1531. Vitoria was asked to address these

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[31] Pagden, *Vitoria Political Writings*, xiv.

[32] See James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World* (Pennsylvania: University of Pennsylvania Press 1979).

[33] Pagden, *Vitoria Political Writings*, xviii.

circumstances in the 1530s, culminating in the 1539 lecture *On the American Indians*.[34] This lecture was written between 1537-1538, but not delivered until 1539, when it was copied by Juan de Heredia.[35] *On the American Indians* specifically concerned the Spanish titles to conquest in the New World. Vitoria would later deliver the lecture *On the Law of War* in the months following *On the American Indians* as an extension of that lecture to elaborate on the legal justifications for his determination "that possession and occupation of these lands is most defensible in terms of the laws of war."[36] In *On the Law of War*, Vitoria discerns more intricately the justifications for engaging in 'just war' as a right the Spanish carry to defend their land holdings under the law of nations, as introduced in *On the American Indians.*

Vitoria delivered these two lectures concerning the legitimacy of Spanish title in the New World. Spanish King Charles V tasked Vitoria with determining 'by what right' the Spanish had in occupying the New World. This concern for legitimate jurisdiction arose primarily because of desires of other European kingdoms to challenge the Spanish holdings.[37] This manifested though claims to 'protect' the

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[34] Pagden, *Vitoria Political Writings*, xxiii.

[35] Pagden and Lawrance, *Vitoria: Political Writings*, 231.

[36] Vitoria, "On the Law of War," in *Vitoria: Political Writings*, eds. Anthony Pagden and Jeremy Lawrance, (1991; repr., New York: Cambridge University Press, 2010), 295.

[37] James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World* (Pennsylvania: University of Pennsylvania Press 1979), 142.

Native peoples exposed to the genocidal violence of Spanish conquest. This concern, however, was about demonstrating that the Spanish were appropriately conducting policies of Christian conquest and colonization. Historian James Muldoon contends that the Spanish crown's concern for the conquest of the Americas was based on a desire to control the conquistadores enacting the brutal features of conquest so as to keep the conquistadors in check and prevent the creation of a class of nobles that would flout the authority of the monarchy.[38] Further, Muldoon argues that Spain was fending off other European claims to the Spanish conquest project by demonstrating Spain was in accordance with the law.[39] Thus, Vitoria was tasked with determining by what *right* the Spanish were in the New World, not whether or not they should be there, but rather under which juridical framework the Spanish must use to justify the legality of colonialism, and in turn which framework justified their continued occupation.

Pagden and Lawrance state that Vitoria's writing on power and the rights of conquest were the prominent rulings on the legitimation of colonization and became orthodoxy in early modern Spain as the theoretical underpinnings of both

[38] Muldoon, *Popes, Lawyers and Infidels*, 140. Muldoon argues that this is exemplified through the notion of the *Requirmento*, the document that was supposed to be read to Native peoples when the Spanish began their conquest and occupation measures. Muldoon, *Popes, Lawyers and Infidels*, 141.

[39] Muldoon, *Popes, Lawyers and Infidels*, 142.

the legal and ethnographic writing on the Indies.[40] Vitoria was working largely from medieval legal precedence that dealt often with contestations concerning the rights of 'infidels' in Christian conquest.[41] Vitoria operated from a particular precedence that did not allow for him to rely either on the lack of Christianity, nor discovery, as the legal mechanisms by which to justify the project of colonialism. Instead, he reinvigorated a millennia old concept from Roman law – the law of nation's 'universal rights.' It is this refashioning that elicited the heralding of Vitoria as the father of human rights. He, like Bartolome de Las Casas, (in)famous defender of Native rights, argued that Native peoples also possess rights that are universal, and as such cannot be usurped simply because of their non-Christianity. However, this chapter instead engages how the concept of Vitoria's universal rights did not enable Native peoples to retain autonomy over their lands, resources, peoples, or governance. Vitoria configured a 'universal' based entirely on European Christian norms and values so as to allow the Spanish justified entry to trade, travel, and preach, just as he in turn claimed that Indigenous people of the New World would be entitled to coming to Europe in the same manner as the Spanish.

Vitoria is called the father of human rights because he stated that Native people had the same universal rights as Europeans, and that conquest was not

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[40] Anthony Pagden and Jeremy Lawrance, "Introduction," in *Vitoria: Political Writings*, eds. Anthony Pagden and Jeremy Lawrance (1991; repr., New York: Cambridge University Press, 2010), xxviii.

[41] Muldoon, *Popes, Lawyers and Infidels*.

legitimate on basis of non-Christianity, as this chapter will unpack. But the fact that these universal rights did not stop the projects of genocide and enslavement, but rather *justified* them, demonstrates how the role of rights worked to cohere the incoherent violence of colonialism as 'objective,' legitimate, and justified as early tenants of liberalism. These rights are premised on logics of differentiation under the construction of civility, managed and regulated through systemic crisis and the use of carceral containment though legally imposed hierarchies. I argue these foundational logics of colonial-modernity – civility, crisis, and the carceral – infuse and shift rights-based relationality as a means of ushering in new forms of colonialism over time. Rights are positioned to broker the dynamic of the 'universal' as already unequal, under the auspices of a 'shared' space, which configures the rise of modern universal rights through the drastic shift in socio-political ordering of colonialism.

Vitoria is the thread for the inquiry because his work functions as a touchstone for both the concept of the universal and as well as rights – to understand how they are related. This is a project about the role of rights in maintaining the construction of a universal built on European ideology. Vitoria is important because we can see in his work the construction of the universal – its legal scope (rights) and also its justification (order). This concept of the universal will expand out, though the basic tenants that order it do not change, but rather incorporate challenges that always serve to maintain the universal itself.

Rights of Conquest

Vitoria conceded early on that the Spanish had no right to be in the New World when they landed. Vitoria found, in the tradition of acknowledging the rights of infidels, that this is because Native people possessed true *dominium:* "the Spaniards, when they first sailed to the land of the barbarians, carried with them no right at all to occupy their countries:"[42]

> The conclusion of all that has been said is that the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians. That is to say, they could not be robbed of their property, either as private citizens or as princes, on the grounds that they were not true masters. It would be harsh to deny them, who have never done us any wrong, the rights we concede to Saracens and Jews, who have been continual enemies of the Christian religion. Yet we do not deny the right of ownership of the latter, unless it be in the case of Christian lands which they have conquered.[43]

This passage is important because in it Vitoria states that Native peoples have true *dominion* – in that they were the original inhabitants, and thus their land and property cannot be taken on grounds that they are not true masters: "That is to say, they could not be robbed of their property, either as private citizens or as princes, on the grounds that they were not true masters." The right of ownership in this

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[42] Francisco de Vitoria, "On the American Indians," in *Vitoria: Political Writings*, eds. Anthony Pagden and Jeremy Lawrance, (1991; repr., New York: Cambridge University Press, 2010), 264.

[43] Vitoria, "On the American Indians," 250-251.

framework remains intact. Second, Vitoria then states after this passage that Native peoples are not considered 'natural slaves' in the Aristotelian sense. He reads Aristotle as stating that 'those of less intelligence' need others to govern and direct them as 'princes and guides.' Vitoria concludes that because Native peoples are neither slaves nor can be denied their true dominion, that therefore "before the arrival of the Spaniards these barbarians possessed true dominion, both in public and private affairs." However, Vitoria *does* reserve both of these arguments, that Native peoples could be slaves and that they are of 'lesser intelligence,' as the 'legal grounds' for subjecting them as to Spanish governance, but it does not provide the basis for debasing Native *dominion* on those grounds.[44]

Vitoria finds that the grounds for Spanish *dominium* are not based on either argument that the Pope is ruler of the whole world, or that Spanish King Charles V is the 'supreme emperor' of the world. Concerning the argument that 'just' possession of the New World territories is on behalf of the supreme pontiff, Vitoria argues that the Pope is neither the civil nor temporal master of the whole world, as he holds no power in temporal matters, and any power in the temporal is only held as it concerns spiritual matters.[45] Under this determination, the unbelief of Christianity alone does not subject Native peoples to Spanish rule or to despoil their property, as

[44] Vitoria, "On the American Indians," 251.

[45] Vitoria, "On the American Indians," 260-261.

medieval Christian scholars Thomas Aquinas and Innocent IV also state.[46] Bound to this precedence, Vitoria must maintain the fact that the rights to be in the New World cannot be based on the fact that the people were non-Christian.

In maintaining that Native people possess *dominium* over their land, Vitoria is not making any sort of groundbreaking argument. He is relying on the historical precedence that recognizes 'infidel' *dominium*, rooted in Pope Innocent IV's 1250 work on the matter. 1250 is a key moment in medieval legal thought that shapes the precedence throughout Vitoria's work. Vitoria's return to the Roman era notion of a 'universal' set of rights in the law of nations is rooted in a resurgence of Greco-Roman ideals in the 13th century, when the works of Aristotle, and later Plato, Cicero, and other Greco-Roman philosophers were translated into Latin from Arabic during the Moorish rule in the Iberian Peninsula.[47] Vitoria heavily draws on the 13th

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[46] Vitoria, "On the American Indians," 263.

[47] See Antony Black, *Political Thought in Europe*, 3-11. In 1260 Aristotle was translated into Latin, followed by Plato in the 14th and 15th centuries (3), which Black states added to the overall tension between Judeo-Christian and Greco-Roman ideologies, and impacted its intellectual and political development in comparison to Eastern Christendom and the Islamic world. He finds that the development of political thought in Europe during this time centered on finding the best constitution and reforming existing states in light of it (4). Roman law and the Justinian Digest, *Codex*, became collectively known as civil law (8). This, alongside more recent imperial legislation, comprised common law for the Roman world of Christendom, via the canon law of the church, as comprised in the texts of Decretum of Gratian in 1140 (8). Black argues that Cicero's revival influenced a distinct political language throughout the middle ages that later ruled the component of humanism (9). Aristotle was cited for conceptions of government and Black states that medieval thinkers took his work as ready-made classifications rather than challenging or studying them, and used it as a language and not as a doctrine (9-10). An examination of the medieval authors who used Aristotle shows that his

century work of Innocent IV and Thomas Aquinas (who were both Genoese) concerning natural law and the rights of infidels. The precedence takes a particular shape during 1250 to the 1500s, when the work of Vitoria actively shifts this precedence into a new direction in dealing with the new issue that New World conquest presented.[48] A particularly important precedence Vitoria is beholden to concerns the ruling that non-Christianity alone cannot justify title to conquered land as determined by the 1414 Council of Constance. The Council of Constance ruling emerged from a longer line centering concern over the rights of infidels as tied to Christian conquest, also rooted in the work of Pope Innocent IV.[49] Vitoria must rely on the Council of Constance and Innocent IV's theories of the rights of infidels, which determined that the virtue of non-Christianity *alone* couldn't justify conquest.

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arguments were used to support papal authority and the supremacy of church over state, using Aristotle to bolster what they already believed rather than deriving political convictions from it (11). For a framing on the impact of the resurrection of roman law at the University of Bologna and medieval rulers' desire to use it to strengthen their power, see also Louis Crompton, *Homosexuality and Civilization* (Cambridge, MA: The Belknap Press of Harvard University Press, 2013), 142. For an analysis of the revival of interest in roman life in the medieval construction of humanism, such as the extension of imperial power to the life and death of peoples within a territory as given to generals, not just the Emperor, see Muldoon's *Empire and Order*, where he argues that humanists in the Renaissance revived these meaning as a positive thing for ruling over other people, as a determination of their burden. James Muldoon, *Empire and Order* (New York: St. Martin's Press 1999), 18-20.

[48] See generally Muldoon, *Popes, Lawyers and Infidels*.

[49] Muldoon, *Popes, Lawyers and Infidels*, 115.

The Council of Constance was concerned with contestations over where the nature of true *dominium* derives from – God's law or God's grace – where the debate was between the arguments of Innocent IV (an infidel ruler could be forced to permit a peaceful missionary, and infidels could be punished for violating the laws of nature)[50] and Hostiensis (infidels are incapable of possessing things and therefore can be transferred to the Christian conquerors).[51] Muldoon states that the issue between conversion and conquest Christianity was whether a coerced acceptance was legitimate – something canonist had rejected.[52] This was settled when the Council of Constance ended the line of argument concerning the 'dependence of dominium upon grace,' finding that future rulers seeking to defend the conquest of infidel lands would have to do so through the loopholes of Innocent IV's right to possess property and lordship, or new arguments, to avoid heresy. The precedence of the Council of Constance, and the heretical teachings of John Wycliff, are apparent in Vitoria's denouncing of the title on the basis of rejecting those not in Christian faith as 'sinners,' as lacking true dominium, because he holds that infidels still possess certain rights.[53] Vitoria maintains the Innocent IV position that 'infidels' must permit a missionary and continues to maintain punishment for

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[50] Ibid.

[51] Muldoon, *Popes, Lawyers and Infidels*, 113.

[52] Muldoon, *Popes, Lawyers and Infidels*, 118.

[53] Vitoria, "On the American Indians," 240.

violations of natural law. However, Vitoria maintains this position under 'the right to preach' of the universal rights of the law of nations, rather than resting on Innocent IV alone. *Dominium* and property are utilized in this manner in a new way in Vitoria's work to configure a modern formation of legal justification for conquest that still acknowledges the rights of *dominium* of those being conquered, though with the exercise of any governance or 'rights' to use or ownership as entirely stripped, as we shall soon address.

The Council of Constance represents not only a solidification of the role of natural law and *dominium* in the juridical justifications for conquest, but also a momentous occasion for the internal colonization project of Europe. This specific ruling originates from the final Christian conquest within Europe over the pagan governance in Lithuania where two different claims for governance emerged via the rights to Christian conquest. The council determined the legal justifications for extinguishing pagan governance as Christendom came to a full expanse within European borders. The conquest fervor of Christendom is particularly positioned in this moment to support the continued push out of conquest beyond European borders, as demonstrated by the long-standing competition between Spain and Portugal over Ceuta in North Africa and the islands off Portugal and west Africa since 1350.[54]

[54] See Bernard Reilly, *The Medieval Spains* (Cambridge UK: Cambridge University Press, 1993), 179-180.

Throughout the late medieval period, juridical claims over conquered land were primarily made through an appeal to the Papacy to act as a mediator, particularly between Portugal and Spain as early powers jockeying for legitimations for extending their Empires. Papal bulls served to mediate and detail the rights of each crown in their claimed territories. However, by the time Vitoria is considering the question of the rights of the Spaniards in the New World, the role of the Papacy had been waning. Since the Investiture conflicts of the 13th century, many of the European crowns did not trust the authority of the Papacy and many local European congregations were condemned for buying seats in the local church, which in some cases wielded considerable power.[55] The competition between Spain and Portugal brought a resurgence in the power of the Papacy to determine which crown was entitled to which territories.[56]

This is particularly apparent in the political relations of the Spanish crown and the Papacy during the period under which colonialism emerges. By the time Vitoria is writing, the 40 years of the Castilian Crown in the New World functioned with the Church subjected *beneath* the authority of the Crown, something that did not exist in any other Christian crown or principality in Europe or otherwise.[57] All

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[55] Black, *Political Thought in Europe*, 43-45.

[56] Muldoon *Popes, Lawyers and Infidels*, 119; some lands such as the Canary Islands went back in forth between the main powers of the Iberian crown.

[57] See J.H. Elliott, *Imperial Spain 1469-1716* (1963; repr., New York, Penguin Books: 2002), 91. In the New World, the crown was the absolute master, with Elliott stating they 'exercised a virtual papal authority all its own,' where no royal cleric could go

other Christian European crowns were subject to the institutional oversight of the Churches in their states via the Pope. The Spanish throne, through the uniting marriage of the crowns of Castille and Aragon (as Isabella and Ferdinand) in the late 1400s gradually secured various forms of the *Royal Patronage* that legitimated the right of the Crowns within those kingdoms to determine ecclesiastical appointments. Under the Castilian crown, the papal grant of royal patronage to the territories of the Indies and later all the Spanish colonial territories in 1508 were generally leveraged through a political relationship that Isabella and Ferdinand, and later Charles V, exchanged in return for supporting the Papacy in either conquering non-Christians (in the case of the grant of patronage to Castilians under Isabella for the right to patronage in Granada in 1486), or helping in the Italian political realm from the Aragonese ruler Ferdinand (whose Aragonese kingdom stretched from the Iberian peninsula into Sicily and various other parts of Italy), and later Charles V receiving grants for the perpetual right to grant bishops in Spain and the New World

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to the to the Indies without Royal permission. Elliott states that they obtained from the Papacy a degree of control that did not involve the 'violent' break from Rome like that of Henry VIII. See also J Lloyd Mecham, *Church and State in Latin America, A History of Politico-Ecclesiastical Relations* (Chapel Hill: The University of North Carolina Press, 1966), 36. Mecham identifies the importance of the patronage in the Indies: "*The real patronoano de Indias*, when compared with the *patronanto de Espana,* was certainly an extraordinary patronage. Never before or since did a sovereign with the consent of the pope so completely control the Catholic Church within [their] dominions," and the rise of missions, churches, charitable institutions as evidence of the Spanish sovereigns discharging their trust into the church patronage, and the church was one of the principal agents of civil power in America for over three centuries, and the clerics were beholden to the king and regarded him more than the Pope.

in 1523 from Charles V's former tutor-turned-Pope Adrian IV in exchange for troops to fend off the Ottoman advance.[58] These points illustrate the highly politicized dynamic of European relationships, but beyond that they also illustrate the centrality of non-Christian conquest (and its attendant philosophical justifications) to the late middle ages governance dynamic, of which Vitoria is working within.

Out of this political context, Vitoria considered the question of whether the Emperor, Spanish king Charles V, might be master of the whole world, such that the Spanish occupation would be justified.[59] Vitoria dismisses this claim to title as unjust in part by stating that per St. Thomas Aquinas, no one can be emperor of the world by natural law.[60] Vitoria finally concludes that: "even if the emperor were master of the whole world, he could not on that account occupy the lands of the barbarians or depose of their masters or set up new ones. Even those who attribute dominium of the whole world to the emperor do not claim that he has it by property, but only that he has it by jurisdiction. Such a right does not allow license to turn whole countries to his own use."[61] Both the disavowal of the Pope and the

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[58] J.H. Parry, *The Audiencia of New Galicia in the Sixteenth Century: A Study in Spanish Colonial Government* (Cambridge: Cambridge University Press 1968), 97. On Ottoman advance see Lewis Hanke, "Pope Paul III and the American Indian," *The Harvard Theological Review* 30, no. 2 (April 1932), 65-102.

[59] Vitoria, "On the American Indians," 252.

[60] Vitoria, "On the American Indians," 254.

[61] Vitoria, "On the American Indians," 258.

Emperor as masters of the world as grounds for title open up the possibility for a new legal framework to justify conquest, one that is also *not* overtly based in the justifications of spreading Christianity. Vitoria diverges from the prior legal determination on this point, with important consequences for the shift from medieval into modern justifications for *dominium*, as well as sovereignty.

Thus Vitoria dismisses a number of arguments, such as justified occupation on the basis of non-Christianity, discovery, and papal mastery of the world, as invalid claims that will not legally bolster Spanish occupation. Vitoria acknowledges Native entitlement to *dominium*, but he does this because he is following legal precedent regarding rights of infidels developed out of the history of Christian conquest in Europe, not protecting the claim of Native entitlement. Because none of the traditional claims to the lands of non-Christians will suffice in considering the specific question of rights to Spanish conquest in the New World, Vitoria must ultimately resuscitate the law of nations - as the Roman doctrine that did not in fact govern the European realm - into one that would 'universally' govern the emergent relations of colonialism. Acknowledging the rights to *dominium* for Native peoples did nothing to stop or legally defend against Spanish colonialism, because the universal rights Vitoria ultimately employed legally justify the Spanish to travel, trade, and preach in the New World.

The law of nations allowed Vitoria to construct a 'shared' universal realm that provided the legitimation for conquest while sidestepping the limitations of previous concerns that Vitoria dismissed as 'unjust' titles. The justification of

colonialism based on universal rights in Vitoria's work marks a shift from medieval law into a new, early modern formation of the law of nations.[62] The roman era system of *ius gentim*, the law of nations, had an inconsistent history of application over the millennia of Roman rule into the rise of European state relations – it was not considered a normative governing relation within Europe, nor widely exercised or held.[63] Vitoria relied on a resurgence of this roman concept in order to bridge the gap of the medieval rights of conquest with the fact that they could not alone justify the Spanish occupation of the New World. Vitoria shifted to the conception of

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[62] In late medieval Europe, roman law was thought of as the common basis for legal criteria and procedures that facilitated the expansion of property rights, contracts, and commercial transactions needed for an expanding mercantile society. Within roman law were the principles of the law of nature, as embodied in the ten commandments, and the law of nations (*ius gentium*) that referred to "property rights, the sanctity of promises and principles of justice to be observed in buying, selling, lending, borrowing, letting, and hiring." Black, *Political Thought in Europe*, 89.

[63] See Cavallar, *Rights of Strangers,* 64-67. Cavallar details that in the roman era the law of nations comprised a legal sphere not covered by domestic law but that needed to be regulated – for example, the positions of non-romans in Rome, and roman relations with other political communities or peoples, commercial relations, and the right of war (64), but that there was disagreement as to the scope and foundation of *ius gentium*, with some saying it was not identical with natural law and others that it was natural law based on natural reason (64-65). From the 11th century on, the meaning of *ius gentium* was not always consistent or clear (66). For example, Aquinas stated that the law of nations was rooted in natural law and right reason, but also positive and oriented towards existing conditions. From the 14th century onward, roman legal principles were adopted and new ones created in three main areas – the law of war, law of treaties, and status of ambassadors – with just war theory dominating the field (67).

universal rights, drawn from the particular realm of Roman socio-political contexts, into configuration of New World socio-political context.

The issue of *dominium* correlates to the problem of jurisdiction, and how the Spanish were able to claim jurisdiction over lands they had no prior basis for claiming title. In the book *Imperialism, Sovereignty, and the Making of International law,* International law scholar Antony Anghie argues that Vitoria's primary concern had to do with the 'gap' of cultural difference between Native peoples and the Spanish.[64] Anghie argues that Vitoria takes up the issue of cultural difference into a determination of sovereignty that justifies colonial conquest based on the 'universal' principles of the law of nations to form the basis of what will function from this point forwards as 'international law.'[65] In accounting for cultural difference, then, Anghie argues that Vitoria must address the question of jurisdiction – namely what allows the Spanish to determine their legal, economic, and political order as justified as the 'universal' order.[66]

The shifting relationality of *dominium* as configured in the New World context is distinct from medieval contexts dealing with *dominium* and the attendant rights of 'infidels' in conquest. Vitoria's use of rights represents this shift – it is not

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[64] Anghie, *Imperialism, Sovereignty.*

[65] Anghie, *Imperialism, Sovereignty,* 16.

[66] Antony Anghie, "Chapter 1: Francisco de Vitoria and the Colonial Origins of International Law," in *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 13-31.

the medieval right that Vitoria relies on, but rather the newly configured universal right of colonial-modernity. Vitoria is forging the juridical incorporation of Indigenous societies globally into the European – as a reflection of the attempted engulfment of colonial-modernity.[67] This reflection functions through the discourse of rights and opens up the possibility for a reconfiguration of the new social relationality of colonialism – of systemic enslavement, genocide, and supremacy as foundational structures within modernity. These new 'modern' rights reflect the socio-political conditions out of which they operate. *Dominium* and jurisdiction are shifting because of the particular new issue that colonial-modernity exposes, one that lacks a clearly defined set of juridical backings, where the occupational legitimacy in the New World will not be located in the traditional medieval defense of land, but rather through a defense of *rights*.

Vitoria cannot legitimately argue that there was any justification for the Spanish to occupy the New World when they set sail, as he states in his discussion of the 'unjust titles.' Instead, he must transition medieval legal logics, alongside a revival of the law of nations and the newly elevated status of the right to trade as a universal right, to legally justify Spanish occupation. These transitions are constructed because the conditions of systemic coloniality had never before existed. The legal justifications reflect in part the large-scale shift of the ordering of bodies

[67] On engulfment as a concept central to modernity, see Denise Ferreira Da Silva, *Toward A Global Idea of Race* (Minneapolis: University of Minnesota, 2007), 29.

as Human, almost human, and subhuman that determined the ability for Europeans to extract profit from both the land and bodies of forced labor. Vitoria is not producing these changes, but rather must reformulate prior legal logics to adapt to this momentous shift in socio-political relations. Because of this, his construction of rights necessarily shifts as well. To claim rights as 'universal' but in essence apply them only for use of the Spanish, and that any resistance by the people living in the New World further justifies the rights to war and the attendant conditions of "plunder, enslavement, and depositions of former masters," illustrates that the claim of such shared and universal rights are constructed through their inherently unequal application.[68]

[68] Vitoria, "On the American Indians," 283.

Chapter 5
Civil is as Civil Does

By the time Vitoria is writing, the authority of the Papacy was functioning strongly at the behest of Charles V. As the Holy Roman Emperor, Charles V controlled much of the land of Europe, and with the expansion of the New World, a considerable amount of global territory. The Pope, also a Spaniard, was concerned about the advance of the Ottoman Empire into European Christendom and as such needed to rely on the military support of Charles V.[69] The political makings of this moment set up Vitoria's discussion concerning the rights that justify Spain in the New World. Spain needed to defend the validity of the conquest against other claims and the possibility that if the grounds of conquest were unjust, the entire 40-year project could be handed to another crown. Therefore, following medieval precedence, Vitoria was concerned with how the rights of 'infidels' figured into the rights of Spanish conquest.

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[69] Muldoon states that in the turn to Iberian expansion in the 15th century, the role of the papacy was changing, and that the fall of Constantinople "put a nail in the coffin of papal crusading policy," as the papacy had lost its leadership roles in the crusades during the 13th century, with the attempt at crusading wars now in the hands of the secular rulers. Muldoon finds that the Portuguese and Castilians acted of their own accord and *then* asked for support from the Pope, with the "temporal interests of the European secular rulers, not papal spiritual interests, directing the course," though the papacy continued to oversee missionary activities in North Africa and the Franciscans in the holy land. Muldoon, *Popes, Lawyers, Infidels*, 133.

The law of nations, according to Vitoria, is governed through natural law, which is inherently conditioned on notions of 'civility.' Civility is a foundational colonial logic legitimizing the Spanish colonial endeavor. Vitoria's text offers the legal landscape through which we can unpack the codification of systemic power relations as they emerge via constructions of civility. Through positioning the justification of disciplining on the basis of the 'universal rights,' Vitoria inverts civility as the 'objective' universal framework for legally legitimizing European supremacy. In turn, the ability to exercise or access the 'universal rights' that Vitoria claims all peoples possess is based explicitly on determinations of civility. This process in turn functions to limit access as to who can possess reason and rationality within the order of the 'universal,' as ordering of bodies through singular conceptions of gender, social hierarchy, cultural difference, and political frameworks enforced by the spread of European Christian norms and values as 'universal.'

Civilizing is framed as a spiritual matter, but for Vitoria it is primarily that of a temporal matter.[70] This feature is what allows Vitoria's argument to diverge from the medieval trajectories of Innocent IV to newly encompass a justification that is not dependent on the authority of the Pope, but rather on that of the realm of temporal governance. Put another way, this in effect shifts the justification from one of a divine law – as primarily a Christian framework of papal power – to that of the

[70] See Anghie, *Imperialism, Sovereignty*.

temporal – of the secularized governance outside of the authority of the Christian Pope. The issue Vitoria is dealing with rests on the surface concern of 'properly' Christianizing. Historian Lewis Hanke engages how both Las Casas and Vitoria were concerned with the proper Christianization in the New World.[71] However, underneath this surface concern is the root issue of maintaining Spanish governance over the land – and of protecting against any claims that the Spanish have not secured legitimate title so as to fend off other crowns from usurping the Spanish.[72] Muldoon argues that the Spanish royal goal was to prevent the creation of a noble class that could flout the monarchy, such that the Spanish crown's protestation about the abuses of the Indians was in fact about control over the conquistadores, as well as useful in European politics to continue seeking Papal approval.[73]

Vitoria's work demonstrates the juridical foundations of codifying conquest and colonialism as predicated on distinguishing the 'uncivil' as the 'other' to engulf into the emergent 'universal' order. Constructed through bounds of demarcating difference as deviant by distinguishing a cultural other who is uncivil, Vitoria' s work justifies the colonial conquest project already well underway. The essence of Vitoria's work in *On the American Indians* functions to 'close the jurisdictional gap'

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[71] See Lewis Hanke, *The Spanish Struggle For Justice in the Conquest of America* (1949; repr., Dallas: Southern Methodist University Press, 2015).

[72] See Muldoon, *Popes, Lawyers, Infidels*, 142.

[73] Muldoon, *Popes, Lawyers, Infidels*, 140.

of cultural difference – between the civil and the uncivil – so as to incorporate them into the same jurisdiction for the purposes of discipline that feeds the project of European expansion.[74]

The reformation of the law of nations allows Vitoria to construct a shared juridical order from which to engulf Native societies into the western universal – under the framework of natural law. Natural law operates as the foundation that allows the extension of the law of nations to enjoin the new and 'old' worlds. Vitoria stated early on that natural law is governed though reason: "What natural reason has established among all nations is called the law of nations."[75] Reason is the aspect that then joins Native society into the same jurisdiction with Spaniards. Vitoria states: "the proof of this is that they are not in point of fact madmen, but have judgment like other men. This is self evident, because they have some order (*ordo*) in their affairs […] which indicates the use of reason."[76] However, capacity for reason is differentiated from the actual ability to *use* reason. Anghie argues that while Vitoria acknowledged Indigenous peoples had their own governance structures and thus were not 'incapable of reason,' this same ability for reason bound the Indigenous 'other' to the system of natural law and the law of nations for the purposes of disciplining:

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[74] Anghie, *Imperialism, Sovereignty*, 22.

[75] Vitoria, "On the American Indians," 278.

[76] Vitoria, "On the American Indians," 250.

> Consequently, it is almost inevitable that the Indians, by their very existence and their own unique identity and cultural practices, violate this law, which appears to deal equally with both the Spanish and the Indians, but which produces very different effects because of the asymmetries between the Spanish and the Indians.[77]

The ability to use reason is coded as 'civil,' whereas both the 'capacity' for reason as well as the 'lack' of reason is coded as 'uncivil.'

Vitoria determined that Native societies possess only the *capacity* for reason as demonstrated by their uncivil aberrant cultural practices, which in turn justified disciplining into conformity with civilized Christian standards. Fitzpatrick argues that Vitoria first includes Indians in the universal order under the demonstration of capacity for reason, but then expels them for purposes of not matching the norms of European society and natural reason.[78] Thus, European relations and social order, naturalized through the ability to reason, constituted civilly.

The determination of capacity for reason, however, did not entitle Native people to legitimately govern their own land. Vitoria used the formation of a universal jurisdiction that binds all societies in order to determine that European ideology should be the standard for global governance and social relations. Anghie argues that the civilizing mission undergirds Vitoria's formulation of universal

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[77] Antony Anghie, "The Evolution of International Law," *Third World Quarterly* 27, no. 5 (2006), 743.

[78] Peter Fitzpatrick, "Terminal Legality: Imperialism and the (de)composition of Law," in *Law, History, Colonialism: The Reach of Empire*, eds. Diane Kirkby and Catherine Coleborne (Manchester: Manchester University Press, 2001), 11.

rights as a way to exclude non-Europeans and conquer the land.[79] Under the right to preach, Vitoria justified the imposition of civility through spreading Christianity to 'correct' those who are in a state of sin and violation of natural law as the duty of the Spanish: "since all those peoples are not merely in a state of sin, but presently in a state beyond salvation, it is the business of Christians to correct and direct them. Indeed, they are clearly obliged to do so."[80] By constructing Native societies as in possession of universal reason, Vitoria can claim that because their socio-political practices differ from Europeans, they must be properly brought into accordance with true reason.

Vitoria bases the determination of uncivility as demonstrated through 'violations' of natural law.[81] The list of violations of natural law constitutes various offenses including but not limited to sodomy, lesbianism, polygamy, buggery, bestiality, and cannibalism.[82] In this configuration, any framework for relationality that does not conform to European standards is considered a 'violation of natural

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[79] Anghie, *Imperialism, Sovereignty,* 12.

[80] Vitoria, "On the American Indians," 284.

[81] Within the discussion of the 5th just title of the 'defense of the innocent against tyranny' Vitoria refers to Question 2, Article 5: the fifth unjust title, the 'sins of the barbarians' where he defines what constitutes sins against the law of nature: either as 'sins against the law of nature' in a universal sense as "theft, fornication, and adultery," as well as 'sins against natural law' and 'against the natural order,' defined through the biblical use of 'uncleanness' as "pederasty, buggery with animals, or lesbianism," along with an extensive discussion of 'sodomites.' Vitoria, "On the American Indians," Question 2, Article 5, Section 40, in *Political Writings,* 273.

[82] Ibid.

law' and a sin against the state of nature. Violations of natural law are categorically marked in distinction to proper comportment with Christian European standards. These 'violations' of natural law form the basis of Vitoria's justification of the civilizing project and are also the root logics of heteropatriarchy. In this framework the uncivil violations of natural law position Europeans as the only legitimate governing body of the universal. The construction of a universal law of nations implicitly functions to position European standards and norms for social, political, and economic relations as the 'universal' for an entire varied pluriverse of worldsenses. Vitoria uses the formation of a universal jurisdiction that binds all societies in order to determine that European ideology should be the standard for global governance and social relations.

The Uncivil Other

The logic of civil/uncivil is foundational to the expansion of western 'civilization,' but it becomes specifically codified in colonial-modernity through the emergence of modern universal rights and systemic power relations. By coding Native societies as aberrant, especially in socio-political relations, Vitoria legitimizes the incorporation of Native society into the universal so as to be disciplined for their 'uncivility.' Through this dynamic, colonialism conditions the hierarchal ordering of peoples – first onto all peoples through the imposition of the gender binary, compulsory heterosexuality, patriarchy, and then onto the larger hierarchy of what

will emerge as 'Human' into categorical markings of race, gender, and sexuality as extensions of the logics of the carceral, civil, crisis as they merge to produce the construct of Human/almost human/subhuman.

The fervor of Spanish conquest that Vitoria must legitimate, however, did not begin in 1492 with the landfall of Columbus, but rather developed out of a long historical relationship borne of distinguishing the peninsula of Christian Iberia from the cultural 'other.' In the middle ages, Iberia was a "complex matrix of societies and cultures in an ongoing process of definition and redefinition."[83] The early modern period saw the "creation of a mythic Spanish identity" – one intended to meld Iberian history with greater Europe by casting Muslims and Jews as interlopers through tracing authentic Spanish character to the "golden age of Roman occupation."[84] This is important for understanding in part why Vitoria is returning to Roman ideals through the law of nations. Vitoria sought legitimacy and connection to Romans as a way to legitimize Spanish conquest to the rest of Europe.[85] The move to reorient Iberia towards the rest of Europe as Christian and

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[83] Josiah Blackmore and Gregory Hutcheson, "Introduction" in *Queer Iberia: Sexualities, Cultures, and Crossings From the Middle Ages to the Renaissance*, eds. Blackmore and Hutcheson (Durham: Duke University Press, 1999), 3.

[84] Blackmore and Hutcheson, *Queer Iberia*, 3.

[85] The Roman reign over 'Hispania' began in the 1-2 Centuries BCE and lasted over 700 years. See, for example, S. J. Keay, *Roman Spain* (California: University of California Press, 1988); and J.S. Richardson, *Hispaniae: Spain and the Development of Roman Imperialism, 218-82 BC* (Cambridge: Cambridge University Press, 1986).

distinguished from Arab/North African cultural and Islamic rule is ironically facilitated in part from the schools of translation in Toledo under Moorish rule in the 12th and 13th centuries which reconstituted the Greco-Roman texts from Arabic, the language they had been in for centuries, *back* into Latin, which then served as a source of historical justification for the Spanish reconquest of Iberia.[86]

Once the Spanish crowns unified under the marriage of Ferdinand and Isabella to bring together their discrete kingdoms of Castile and Aragon under the fold of a more powerful joint kingdom that would become Spain, their first major project was the *Reconquista*. In part about strengthening competition against Portugal in the Iberian Peninsula, the impact of their joining forces was to further the reconquest and Catholic Christianization of the entire peninsula for European Christian rule, to bring in line with the Roman Empire's millennia long push to control European land and center Roman history as originary for western expansion. Roman civilization spread under Christianity largely through disciplining pagan and other frameworks of Christianity that were not in alignment with the official Roman conception of Christianity.[87] The targeting of pagans, Christian mystics, Saracens, Jews, and Muslims developed over time into a

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[86] Cedric Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: University of North Carolina Press, 2000), 87- 88.

[87] See, for example, Judith Herrin, *The Formation of Christendom* (Princeton: Princeton University Press, 1987); and Ramsay MacMullen, *Christianizing the Roman Empire 1-4AD* (New Haven: Yale University Press, 1984).

concentrated notion of the 'cultural other.' The fear of the cultural other, evidenced in another way in Spain through hyper panic of 'non-Christian' blood, reflects the creation of a cultural normativity that sought to move Spain via the reconquest into identification with European Christian supremacy.[88] We can locate civility, crisis, and carcerality here as a set of systemic logics central to the project of European expansion working to create/protect/discipline. This, in turn, constituted a pathologization of difference – not only of sexual practice, gender identity, and culture, but of the very notion that different cultures could not be respected in their own manner, with their own customs, values and ideologies that may differ from another but are now compared in a hierarchy of worth.

The cultural other in Iberia was framed primarily as those who were seen 'in excess,' in violation of civility standards, and thus outside of European Christian supremacy. Throughout the middle ages, Iberia was in close contact with the 'cultural other' that fueled the later backlash of the reconquest that would precede the New World colonial conquest.[89] The reconquest of Iberia centered on the expulsion of the North Africa Islamic rule from Granada, a southern region of the Iberian Peninsula that had been under the control of the Moors since the 8th

[88] For a discussion of 'non-Christian blood' in the reconquest of Iberian Spain and the impact on *conversos,* see, for example, Elliott, *Imperial Spain*, 107-111.

[89] Blackmore and Hutcheson, *Queer Iberia*, 1.

Century.[90] Carvajal argues that the expulsion of the Moors in 1492 from Granada was fueled in part by religious fanaticism against sexual deviance in order to civilize.[91] This represented a shift from the more liberal acceptance of sodomy in Moorish culture, as evidenced by the 1497 Spanish *Pragmatica* that formally recognized sodomy as a sin against God.[92] Although in instances of sodomy the *Pragmatica* required death by fire, torture, and confiscation of property, the courts administered these polices differently depending on the social status and wealth of the offender, which resulted in a further targeting of those coded as 'infidels.'[93]

Fueled by the reconquest and rise of the Inquisition to expel or kill Jews, Moors, and sodomites, Carvajal argues that the Catholic monarchs positioned a linking of sodomy with perceptions of manliness that worked to further intertwine notions of class, religion, xenophobia, and empire.[94] At its basic definition, sodomy referred to any sexual act that did not lead to procreation that any person found engaging in could be sanctioned for, heterosexual sex included.[95] According to the

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[90] On the dynamic of the reconquest in Spain, see, for example, Angus Mackay, *Spain in the Middle Ages: From Frontier to Empire, 1000-1500* (1977; repr., London: Macmillan, 1993).

[91] Federico Garza Carvajal, *Butterflies Will Burn: Prosecuting Early Sodomites in Early Modern Spain and Mexico* (Austin: University of Texas Press, 2003), 39.

[92] Carvajal, *Butterflies Will Burn*, 39-40.

[93] Carvajal, *Butterflies Will Burn*, 42-43.

[94] Carvajal, *Butterflies Will Burn*, 43.

[95] Carvajal, *Butterflies Will Burn*, 53.

bible, sodomy was understood to be practiced by both men and women.[96] However, through the colonizing fervor of the reconquest of Iberia and the conquest of the New World, sodomy also coded aberrant gender and sexual practices. A focus only on 'sodomy' in its contemporary connotation (as male to male homosexual relations) cannot fully account for the degree and range under which the punishment for gender transgressions, sexual practices, kinship relations, polyamorous and plural relationships, and numerous other forms of relationalities were encompassed in the use of the term sodomy during this time. Thus, using the analytic of heteropatriarchy as representative of the mode of disciplining moves beyond the framing of sodomy as male to male sexual behavior, as Carvajal frames it, and into a larger scope from which to engage how a range of gender and sexual behaviors became coded as non-normative and subject to punishment and death under colonial logics of civility, crisis, and carcerality.

Spanish conquistadores continued to enact strict gender-binaried expectations as evidenced through the behavior and mindset for conquest in the New World, particularly in the targeting of effeminacy.[97] Additionally, misogyny

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[96] Carvajal, *Butterflies Will Burn*, 54.

[97] Carvajal, *Butterflies Will Burn*, 31. For example, Carvajal articulates that "Spain fostered the idea of the effeminate sodomite in the Indias primarily in response to its own decaying political and economic domination. Immediately after its occupation of Mexico in the early 16th century, notions of effeminacy and passivity had loosely characterized all the inhabitants of the Indias. However, by the mid-seventeenth century, effeminacy evolved from a loosely defined attribute associated with the entire population of New Spain to an attribute associated with the Mexican sodomite."

fueled the conquest fervor within a dynamic where soldiers could seek their own profit in warfare, thus tying their desires to conquer with attributes of 'manliness.'[98] Carvajal argues that early modern discourses of chivalry as manliness in conquistador narratives in turn worked to overdetermine notions of effeminacy as needing to be disciplined.[99] The arrival of the printing press to Spain in 1473 produced novels that centered tales of chivalry that Spaniards soldiers were consuming by reading or being read to, supported by a Catholic religious belief that framed their cause in rightness and salvation.[100]

Here, the extension of civilizing through disciplining into rigid gender and sexual norms is configured again as an extension of conquest. Through this framework, disciplining sodomy and 'sodomites' functioned as the catchall for justifications of 'civilizing.' The early modern moralists as well as the secular laws determined sodomy as no longer only seen as a sin against nature, but also in turn a

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[98] For an articulation of conquest and profit connection, see Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: The Macmillan Company, 1954), 69. For example, Carvajal details the 1487 work of Alonso de Cartagena, bishop of Burgos delineating the manly customs with respect to law, women, friendship, war and love; especially centering the 'perfect' Spanish Man as full of "gallantry, honor, veneration, and worship for his Prince." Carvajal, *Butterflies Will Burn*, 31.

[99] Carvajal, *Butterflies Will Burn*, 30- 31. Carvajal documents how the distinguishing of manliness and effeminacy functioned as the colonial project shifted power relations over Spain and Mexico.

[100] Elliott, *Imperial Spain,* 64. Elliott details the impact on the printing press and the romances of chivalry, such as the 1508 novel *Amadis of Gaul,* that conquistadores read or heard during their campaigns.

sin against the state.[101] No longer framed as a disruption of the familiar order, it affected the cosmic order – the so carefully moderated sphere of the Christian 'universal.' Thus, as the canonist lawyers framed it, a sin against nature was understood as ruining the 'order of the universe'.[102]

The universal rights to trade, travel, and preach signify the spread of the particular notion of the European universal. The rearticulating of this new formation of the modern universal 'right' is born of the reflection of a new rise in systemic power relations of colonial-modernity, so although the fact that people in the New World are non-Christian does not justify *in and of itself* the original right of the Spanish to be there, the universal rights allow for preaching to discipline societies framed as uncivil. Colonialism, through Christian conversion into a European worldview, is legitimized by Vitoria not by the right to Christianize but through the objective framing of the "right to preach their religion without interference."[103] The naturalization of European governance is founded upon this logic of civility that frames European socio-political relations as simultaneously objective *and* superior.

Though Vitoria claims the right to preach is one that is "common and lawful for all," is at the same time considered by Vitoria as right that could be specifically

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[101] Carvajal, *Butterflies Will Burn*, 52.

[102] Carvajal, *Butterflies Will Burn*, 54.

[103] Pagden, "Introduction," xxvii.

limited to the Spaniards and forbidden to other Christian crowns by the Pope, and in turn might also restrict the right to trade for other crowns where it is convenient to the spreading of the Christian religion.[104] By beginning with an articulation of a set of universal rights that all nations hold, even the Native nations the Spanish are occupying, Vitoria moves to narrow this right and who it applies to in the instance of Spanish conquest. Vitoria lays out the protective claim of the Spanish over their New World holdings where the purpose for spreading Christianity is the underlying goal of correcting and directing Native peoples:

> [I]t is quite clear that they are convenient, because if there was an indiscriminate rush to the lands of these barbarians from other Christian countries, the Christians might very well get in each other's ways and start to quarrel. *Peace would be disturbed, and the business of the faith and the conversions of the barbarians upset*.[105]

We see here the focus on maintaining the 'peace' of the universal operating as the principal claim for the Spanish to be justified in maintaining their occupation, not unlike the rhetoric that is resurfaced via Vitoria's reuptake in the interwar period of the 20th century, as addressed in Part 3. The use of peace and brotherhood, as well as the civilizing 'brotherly correction' Vitoria situates as justifications, emerge specifically through justification of colonialism, because of the ways that Vitoria must justify the enjoining, via engulfment, of New World with European societies that sets the stage for the large-scale European competition Vitoria forewarns

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[104] Vitoria, "On the American Indians," 284.

[105] Emphasis mine. Vitoria, "On the American Indians," 285.

against in this passage. This notion of peace, however, is not the absence of warfare. It is the justification of western, 'civil' warfare *over* the 'uncivil' nations that must be brought into accordance of the 'universal,' as a modern, colonial configuration. Peace is already coded here as the project of a status quo of western imperial domination that scripts the civil European as the unattainable superior that must always be in the process of converting, disciplining, or dispelling the 'uncivil threat' to the universal western order.

The positioning of Native societies as with 'capacity' for reason specifically works to incorporate non-western societies into a new, modern colonial dynamic that justifies colonial governance, but more so justifies the legitimacy of the western sovereign over the non-western 'uncivil' state. Although Vitoria frames Native societies as nations to the degree that this incorporates them into the shared rights of the law of nations, their ability to self-govern as a nation is compromised by their heteropatriarchal 'uncivil' socio-political practices, which then subjects them to Spanish rule. In the discussion of the 8th possible title, though rendered unjust, Vitoria depicts the framing that Native peoples are unfit to govern themselves:

> These barbarians, though not totally mad, as explained before, are nevertheless so close to being mad, that *they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms.* Hence they have neither appropriate laws nor magistrates fitted to the task. Indeed, they are unsuited even to governing their own households.[106]

[106] Emphasis mine. Vitoria, "On the American Indians," 290.

The terms of civilizing are measured through Spanish notions and compared to heteropatriarchal frameworks of governance via the reference to household governance. Vitoria codes the ability to administer governance as representative of the status of 'human.' This coding, as will be further unpacked in the next section, implicitly links human-ness with 'civility,' of which only Europeans can be said to embody. This same notion of unfit for self-governance would also be furthered by Las Casas as justification for continued 'proper' Christianizing.[107] The concern of both Vitoria and Las Casas is on 'properly' civilizing through Christianizing, making sure this is done with less brutality and more systemic coaxing, as evidenced by the change of the Laws of Burgos restricting enslavement of Native peoples to 7 years or less (though it is thought that this promulgation was either soon overturned, or never enforced, leaving no enslavement restrictions).[108] Regardless, though both Vitoria and Las Casas are arguing for the rights of the Native societies, they are functionally arguing for the rights of the Spanish *over* Native societies to prevail in order to civilize, and in turn, legitimize Spanish sovereignty. Neither Las Casas nor Vitoria at any point argues that the Spanish should stop their conquest and leave. In fact, both Las Casas and Vitoria advocate for increased governance with more oversight, where both cite the necessity of occupation for the purposes of 'protecting children.'

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[107] See Hanke, *The Struggle For Justice.*

[108] See Hanke, *The Struggle For Justice;* Hanke "Pope Paul III."

The naturalization of European governance then follows: if a people are uncivil, they need a civil ruler to govern them. They are uncivil not because of their non-Christianity, Vitoria determines, but because of their need for a ruler to civilize their aberrant socio-political practices – coded by Vitoria as sodomy, lesbianism, bestiality, cannibalism – as violations of natural law. Natural law functions here as the system that pre-supposes a certain order as natural, and therefore right, as an order that is governed through 'universal rights.' Thus the concept of the 'universal right' is always already subjective and based on the heteropatriarchal and supremacist view of the European as 'civil.' This dynamic codes Native societies as aberrant from European societies, and uncivil – thus in need of disciplining, to naturalize the notion of a civil, European governance, and to discipline the 'uncivil' now globalized category of Indigenous people into the standards of the Universal.

Natural Law into Civilizing - Heteropatriarchy

In Vitoria's work, natural law underpins the structure of a natural ordering based on a gender binary that conforms to dyadic patriarchal social relations. In the discussion of natural law, Vitoria explains that natural law determines *dominium* in the same way that fathers have *dominium* over children and wives, which is the only basis that restricts one's freedom within natural law:

> First, as regards natural law: St Thomas rightly says that in natural law all are free other than from the dominion (*dominium*) of fathers or husbands, who

> have dominion over their children and wives in natural law; therefore no one can be emperor of the world by natural law.[109]

Following Aristotle, Vitoria states that power derived from a father over his sons or a husband over his wife is natural.[110] Vitoria distinguishes natural law as a natural order – of husbands over wives and children – as the order of heteropatriarchy, that is marked as 'civil,' – where man is an animal tied to nature, but because of legal enactments, is marked by civility, coded as an ability to follow higher order as evidenced through reason.

The disciplining and criminalization of gender non-normativity and sexual acts between people not perceived as in compliance with the dyadic male-female gender binary is well documented throughout the colonial register.[111] For example, in 1519 Hernan Cortez sent a letter to Spanish King Charles V asking for permission to punish Native peoples on the basis of claiming all Native peoples as sodomites engaging in 'abominable sin.'[112] The Spanish historians publishing the *General History of the Indies* beginning in 1526 detailed many first hand reports claiming

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[109] Vitoria, "On the American Indians," 254.

[110] Vitoria, "On the American Indians," 254.

[111] See Carvajal, *Butterflies Will Burn*.

[112] Richard C. Trexler, *Sex and Conquest: Gendered Violence, Political Order, and the European Conquest of the Americas.* (Ithaca: Cornell University Press, 1995), 1. See also Hanke, *The Struggle For Justice*, 6; for the experience of 16th century Spanish Conquistador Hernan Cortez to read warnings not to practice sodomy, among other things.

homosexuality and gender transgressions were common in Native societies, which continued to fuel justifications for conquest prior to Vitoria's legal examination.[113] People presenting outside the gender binary were often the first to be targeted for violence and death.[114] Native Studies scholar Scott Morgensen argues that targeting of people not conforming to the gender binary gender within structures of colonial conquest functioned as the precursor to establishing colonial rule.[115]

The logics of the gender binary and civility are long embedded within the extension of western power. The transition of the Roman Empire from a pagan relationality into a Christian-governance structure after Constantine's conversion in 324 CE exemplifies how 'difference' of gender and sexuality became heavily targeted as the Empire sought to conquer and expand. Practices of pagan communities were condemned as 'uncivilized' and fueled the justifications for the Roman-Christian Empire expansion northwards into Europe. For example, when Christianity was taken up as the official religion of the Roman Empire in the 4th century, Emperor Constantine marked all formations of androgyny as a 'monstrosity' and outlawed eunuchs in Roman society.[116] Christian governance under Constantine banned long

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[113] Trexler, *Sex and Conquest*, 1-2.

[114] See, for example, Deborah Miranda, "Extermination of the *Joyas*," *GLQ* 16, no. 1-2 (2010), 257-258.

[115] Scott Morgensen, "Theorising Gender, Sexuality, and Settler Colonialism – An Introduction" *Settler Colonial Studies* 2, no. 2 (2012), 14.

[116] See MacMullen, *Christenizing the Roman Empire*, 50.

hair on boys as associated with femininity and paganism.[117] As the Christianization of the Roman Empire continued to expand, one of the first things the Roman Emperor Justinian ordered in the 6th century, as he sought to create consistent legal doctrine and consolidate power throughout the Western Roman Empire before its fall, was to continue the policy of forcing pagan social relationality into conformity with Christian-Roman understandings of social, religious, and political practices.[118] Justinian consolidated the laws concerning the crime of sodomy throughout the reaches of the Roman Empire, elevating it to the status of punishable by death.[119] The registry of papal communications regarding Christian conquest throughout the middle-ages documents explicit information to remind newly Christianized communities in Eastern Europe that polygamy was forbidden.[120]

The imposition of the gender binary as a tool of conquest is a foundational feature of the spread of western power. For example, Mary Condren details in the *Serpent and the Goddess* how patriarchal power was naturalized through the rise of monotheism and into Christianity.[121] Christian precepts naturalized a gender binary

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[117] MacMullen, *Christenizing the Roman Empire,* 79.

[118] See, for example, Herrin, *The Formation of Christendom*, 40.

[119] Crompton, *Homosexuality and Civilization,* 142-143.

[120] Muldoon *Popes, Lawyers, and Infidels*, 88.

[121] See Mary Condren, "Chapter 1: Eve and the Serpent: The Foundation Myth of Patriarchy," in *The Serpent and the Goddess: Women, Religion, and Power in Celtic Ireland* (New York: HarperCollins Publishers, 1989).

division in distinction to Greco-Roman treatment of gender, of which it is clear from regulations enacted via the law that a wider range of gender variance was accepted before Christian uptake in the late Roman Empire, albeit in limited forms within the social structures of Greco-Roman society.[122] During the spread of Christianity throughout the reaches of the Roman Empire, resistance to gender conformity regulated by the male-female gender binary manifested in the early desert Christian communities.[123] For example, around 200 CE, a person who was living as a man in an all-male Christian desert monastery community (women were not allowed to live with the men in the desert and formed their own religious convents), was exposed after their death as not being 'male bodied'.[124] Although of course we cannot say exactly what the circumstances or experience of this person was, it is clear that the rigidly enforced separation of the gender binary was resisted against. As one example potentially among many, this instance was most likely neither the first nor the last of such responses to the regulations of gender determination in the early Roman-Christian empire.

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[122] Though limited examples exist here, more research is needed into understanding Greco-Roman frameworks of gender variance, especially with regard to the uncivil/pagan relationality to the 'civil' society of Greeks and Romans. The focus of this point is that the uptake of an institutionalized form of Christianity imposed particular forms of reformation and disciplining for gender binary dynamics, both within the religion itself and through the institutionalized uptake into Roman governance.

[123] Herrin, *Formation of Christendom*, 65.

[124] Ibid.

With the uptake of Christianity as the formal religion of the Roman Empire, heteropatriarchal civilizing operated as specifically anti pagan, which is apparent in the internal colonization of Europe. People found practicing pagan rituals, engaged in non-heterosexual relations, or generally not following Roman Christian worldviews were marked as witches and burned at the stake from the 14th century Europe to 18th century New England, where the witch hunt extended into Inquisition and into the United States, as well as over Europe.[125] Heteropatriarchy is the 'basic' social ordering mechanism enforced over all peoples under western powers in colonial-modernity. From here, the grouping of racial difference then solidifies *through* a demarcation of social practices that positions non-binary gender relations as uncivil and thus not European-Christian, and therefore not *white* (where this is also applied internally to Europe, as the case of pagan communities as well as the extension of the racial logic to the Irish as uncivil also demonstrates) functioned both internal and external to Europe, where both were necessary though differently applied enforcements of heteropatriarchy. The gender binary functions as the key mechanism of enforcement because it is the root of patriarchal order necessary for its establishment of patriarchal power dynamics.

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[125] See, for example Robert Thurston, *The Witch Hunts: A History of the Witch Persecutions in Europe and North America* (2007; repr., New York: Routledge, 2013), and Silvia Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation*, 2nd ed. (Brooklyn: Autonomedia, 2014).

However, discussions concerning the foundational aspect of the gender binary in securing western power relations have largely remained absent within scholarship on Spanish colonialism. A subset of work within Spanish colonial history centers on homosexual relations and sodomy within the colonial register (Carvajal's recent work as exemplary). Much of this scholarship is limited to identifying the legal disciplining of 'homosexual' relations, however this focus does not account for the larger structures of how gender itself is created and regulated as a social construct within colonial ideology.[126] Although the term 'sodomy' could come to represent or stand in for a variety of 'violations' of natural law in addition to its contemporary definition, most of the scholarship does not open inquiries into how the term itself was operating during the formation of legal disciplining within colonial governance.[127] This focus primarily on 'sodomy' understood as 'male to male' sexual relationships obscures how heteropatriarchal norms operated beyond and in addition to sexual practice to also include disciplining understandings of gender, polyamorous/plural partnership relations, kinship formations, and other facets of social structures and relations. Using heteropatriarchy as an analytic instead situates how the regulatory function of 'natural law' sought to order all aspects of social relations within colonial systems beyond the limiting frame of

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[126] For a critique of this phenomenon, see for example, Zeb Tortorici, "Against Nature: Sodomy and Homosexuality in Colonial Latin America," *History Compass* 10, no. 2 (2012): 161-178.

[127] Ibid.

primarily analyzing 'same-sex' relations within contemporary queer-colonial historical analysis.

In particular, the focus on sodomy assumes a naturalized understanding of a male-female gender binary where gender transgressions are framed as moving from a framework that positions gender inhabitance as 'one or the other.' But this fundamentally erases the implicit disruption of the binary that non-binary representations or ideologies of social relations – framed as gender or otherwise – represent. Understanding deviant sexual relations only through a gender binary works to discipline both the present and the past, as well as future visions of what social relationality could be, into conformity with the naturalized concept of the gender binary as inevitable, natural, and desirable.

Gender is a social construct, one that functions in relation to its socio-political context. Taking seriously the gender binary as a foundational social relation of colonial-modernity demonstrates a reconfiguration of how the logics of civility, crisis, and the carceral fundamentally determine access to 'universal rights.' Where gender non-normativity is seen as uncivil, it is also seen as a crisis – something to discipline via the logic of carcerality and its many forms. Maria Lugones situates the gender binary as a central aspect of securing colonial power, rather than a naturalized or 'normal' social dynamic.[128] Moving away from an

[128] Maria Lugones, "Heterosexualism and the Colonial/Modern Gender System," *Hypatia* 22, no. 1 (Winter 2007), 186-187.

assumption of the gender binary as naturalized, or predetermined as biological (as it will emerge in the 19th century scientific discourses), allows for an analysis of the deeply embedded nature of heteropatriarchy. All too often, discussions of colonialism and the emergence of power structures such as white supremacy assume the naturalization of the gender binary. For example, Sylvia Wynter, following Anibal Quijano, distinguishes gender as a "biogenetically determined anatomical differential correlate onto which each cultures system of gendered oppositions can be anchored," where in comparison, race is "a purely invented construct that has no such correlate."[129] However, when gender is understood not simply as biogenic, or biological, but instead as a social construction dependent on power relations of patriarchy that affirm a strict conception of gender as based on a male-female binary, which is used via Christian and later scientific justification to attempt to diminish other possibilities of gendered relations, a reconceptualization of the centrality of the imposition of the gender binary in colonial-modernity emerges. In framing the centrality of the social construction of the gender binary to western conquest and civilizing discourses and beliefs, from the Greco-Roman ages (if not before) and into in solidifying the power structures and conquest of Europe, the gender binary then both precedes and makes apparent the social conditions of

[129] Sylvia Wynter, "Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, It's Overrepresentation – An Argument." *CR: The New Centennial Review* 3, no. 3, (Fall 2003), 264.

hierarchal relations through which racial differentiation emerges in the foundations of colonial-modernity.

In contradistinction to Quijano, Lugones positions normative understandings of gender in western society as determined through Eurocentric and capitalist formations, which she argues can be understood as oppressive:

> Gender does not need to organize social arrangements, including social sexual arrangements. But gender arrangements need not be either heterosexual or patriarchal. They need not be, that is, as a matter of history. Understanding these features of the organization of gender in the modern/colonial gender system – the biological dimorphism, the patriarchal and heterosexual organization of relations – is crucial to an understanding of the differential gender arrangements along "racial" lines.[130]

Our understanding of gender in and of itself is a concept constructed through colonial imposition. Different understandings of gender, sexuality, and socio-political relations existed across not only in the 'New World', and Europe, but across the whole globe. Some social structures had an understanding of three genders, more than three genders, and some did not determine relations on a gendered relation at all.[131] Oyéronké Oyewùmí shows that the construct of gender itself is a colonial imposition, where in Yoruba society gender was not an organizing principle prior to western colonization.[132] Global colonialism imparted a *specific, singular*

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[130] Lugones, "Heterosexualism," 190.

[131] Maria Lugones, "The Coloniality of Gender," *Worlds & Knowledges Otherwise* (Spring 2008), 8-11; see also Oyéronké Oyewùmí, ed. *African Gender Studies: A Reader* (New York: Palgrave Macmillan, 2005).

[132] Oyéronké Oyewùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis: University of Minnesota Press, 1997), 31.

western framework of heteropatriarchal social relations as *the* universal, extending into both the European expanse as well as the internalized structures for framing gendered relations over colonized peoples, as Oyewùmí and other African scholars of gender and colonial history demonstrate in *African Gender Studies: A Reader*.[133] The wide range of social relations that became disciplined into the 'gender binary' permeates the contemporary and the historical register concerning both how people were disciplined into heteropatriarchy through logics of civility, crisis, and carcerality, and how 'aberrant' ideological relations have been restructured into alignment with heteropatriarchal and gendered social relations into our present.

The Civil as Human

Vitoria positions Native societies as outside the terms of what is considered 'human' in order to justify Spanish governance.[134] Sylvia Wynter's framing of the civil as Human articulates how notions of humanism in the construct of early modernity naturalize the production of human/nonhuman bodies:[135]

> [T]he large-scale accumulation of unpaid land, unpaid labor, and overall wealth expropriated by Western Europe from non- European peoples, which was to lay the basis of its global expansion from the fifteenth century onwards, was carried out within the order of truth and the self-evident order

[133] Oyewùmí*, African Gender Studies.*

[134] See discussion in previous section, also Vitoria, "On the American Indians," 290.

[135] See Wynter, "Unsettling the Coloniality," 257-337.

> of consciousness, of a creed-specific conception of what it was to be human—which, because a monotheistic conception, could not conceive of an Other to what it experienced as being human, and therefore an Other to its truth, its notion of freedom. Its subjects could therefore see the new peoples whom it encountered in Africa and the New World only as the "pagan-idolators," as "Enemies-of-Christ" as the Lack of its own narrative ideal. This was consequential. It set in motion the secularizing reinvention of its own matrix Christian identity as Man. The non-Europeans that the West encountered as it expanded would classify the West as "abnormal" relative to their own experienced Norm of being human.[136]

As Wynter articulates, the centrality of the west's specific concept of its own socio-political frameworks as civil, and thus in turn *human*, conditions the west as the normative standard for measuring civility as humanness. Vitoria's universality reflects the juridical framework underlying this socio-political shift that the western extension into the New World actualizes in its own conception of 'humanness.' It is in this moment that Wynter argues that the invention of race arrives, as "a new, extrahumanly determined classificatory principle and mechanism of domination."[137] Wynter articulates what Vitoria's work sets in motion – that to be civil is to be human, and to be outside of that, as uncivil and other, is to be framed as in violation and subject to the logics of discipline at the core of modern ideology – as carceral, as genocidal, as the brutally systemic violence of possession, scarcity, and hierarchal order of racialization.

Vitoria carries this logic through in his framework of brotherly correction, of 'loving' those who must be conquered, who must be civilized into European

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[136] Wynter, "Unsettling the Coloniality," 291-292.

[137] Wynter, "Unsettling the Coloniality," 296.

Christian standards. Under natural law**,** those who are considered against or outside of natural law are brought into incorporation into the universal for the purposes of disciplining. Wynter adds to this framework by positioning those subject to discipline and in violation of natural law as the position of the 'other,' outside humanity:

> "Crimes against humanity," [as] breaches of the ostensible universally applicable "natural law,"— a law that imposed a by-nature divide between "civilized" peoples (as true generic humans who adhered to its Greco-European cultural construct) and those, like the indigenous peoples of the Americas and the Caribbean, who did not. As such, the New World peoples had to be seen and constructed, increasingly by all Europeans, in neo-Sepúlvedan terms as forms of Human Otherness, if to varying degrees, to a now secularizing West's own.[138]

Here, civility is coded as human in the fruition of colonial-modernity, where it is supremely evident in Vitoria's juridical construction of who can access to governing of the shared universal. Framing the non-human – as the 'other'– is a constitutive force of the framing of the west as superior commensurate with the hegemonic rise of the modern state, which Wynter frames as "based on the new descriptive statement of the human, Man, as primarily a political subject—of, therefore, the West's own self-conception."[139]

Alexander Weheliye draws on Wynter's work to frame the notion of who counts as human/civil as emergent through this framework as *already racialized,*

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[138] Wynter, "Unsettling the Coloniality," 299.

[139] Wynter, "Unsettling the Coloniality," 300.

which he expounds through the concept of racial assemblages to center the role of race-making logics in the construction of the notion of the human.[140] Weheliye argues that the construction of this formative notion of modern 'humanity' was that of a systematized hierarchy that grouped people into forms of humans, almost humans, and non-humans as already racialized beings.[141] Via notions of civility, crisis, and the carceral, the white European 'human' is positioned against the racialized other through its self-appointed placement at the apex of the racial hierarchy. Vitoria's juridical reiteration of European supremacy, in its reflection of the 'human' as civil, is demarcated through his distinction of reason and civility to legitimately govern the realm of the 'universal.' The hierarchy of white supremacy and the emergent racializing logics position European supremacy as coded through skin color – through the distinction of whiteness as synonymous with civility.

Weheliye argues that whiteness, as an object of knowledge, organizes groupings of people not through actually existing groups but through hierarchical

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[140] See generally Alexander Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham: Duke University Press, 2014). Additionally, Brian Klopotek states that in American racism and colonialism, two phenomenon that are so closely related that they may be better accounted for if they are understood as behaviors resulting from an ideology of white supremacy. Brian Klopotek, *Recognition Odysseys: Indigeneity, Race and Federal Tribal Recognition Policy in Three Louisiana Indian Communities* (Durham: Duke University Press, 2011), 218-20.

[141] Weheliye further elaborates: "there exists no portion of the modern human that is not subject to racialization, which determines the hierarchal ordering of the homo sapiens species into humans, not quite humans, and non humans." Weheliye, *Habeas Viscus*, 8.

power structures that determine which people are able to claim full 'human' status.[142] Thus, heteropatriarchy and European supremacy function to extend the civil/uncivil binary classifications into disciplinary groupings through racial hierarchy, patriarchy, the gender binary, and sexual disciplining as normalized conceptions that will emerge under colonial-modernity into categorical groupings configured primarily through conceptions of race, gender, and sexuality. These hierarchal-based determinations work through the systemic power relations of crisis, carcerality, and civility to determine which bodies are subject to greater proximities of enslaved labor, dispossession of land and resources, and violence and death via white supremacy and heteropatriarchy as they are coupled with capitalism. Whiteness, through European supremacy, functions in these power relations to position itself as the apex of the racial hierarchy, bolstered in a pyramidal fashion by the logics of anti-Blackness and Native erasure, at the same time that it also positions itself outside of its own conception of racialization, as instead representative an objective condition of 'the Human' as both objective and universal.

Those cast out of the universal, are positioned then as always seeking entry or upwards trajectory, following Weheliye and Wynter, through the already racialized conception of 'humanity' that is at the same time gendered and sexually disciplined as the 'affectable' other, defined in distinction to the Spanish/western

[142] Weheliye, *Habeas Viscus*, 19.

subject who is capable of accessing universal rights. Ethnic Studies Scholar Denise da Silva's concept of the affectable other is useful for reading Vitoria's construction of universal rights within the emergent power relations of colonialism. Vitoria reflects a subject that is capable of reason, as civil, that can fully exercise the 'universal rights' justifying Spanish colonialism, while denying those same rights to anyone who cannot demonstrate 'civility' – namely Indigenous New World and African peoples as then already racialized through demarcation of un-civility, crisis, and carcerality. Silva argues that the racial operates as the political-symbolic tool that institutes the global itself as an *ontoepistomological* signifier, as it does not suppose a pre-existing or co-existing interior being that is erased in order to allow for the European transparency.[143] The western subject, as the transparent and self-evidentiary 'I', and the (racial) others it institutes emerge in contention, formulated through a relationship that Silva argues always already presumes the horizon of death.[144] This produces the racial as both an effect *and* a tool of productive violence that in fact *determines* what is framed within Vitoria's work as civil in the 'universal.'

Silva argues that the production of the racial logic is an effective strategy because the subjects instituted in this naming are the 'others' that are situated differently than Europeans within the new formation of globality.[145] The racial logic

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[143] Silva, *Toward A Global Idea*, 28.

[144] Silva, *Toward A Global Idea*, 29.

[145] Silva, *Toward A Global Idea*, 29-30.

maintains the self-determining transparent 'I' of the western subject as the only place that exists within the horizon of 'life' because it is already clear that universal reason governs it.[146] It is through this reading that I see Vitoria's work as reflective of the already emergent globality and construction of the affectable other through civility, crisis, and carcerality – as coded through the production of a racialized subject moderated by heteropatriarchy. Thus extending Silva's work into a reading of how Vitorian jurisprudence is reflective of the rise of colonial-modernity highlights that the logics of differentiation into racial/ gendered hierarchy categorized in Enlightenment as biological are in fact already solidified here. Reading the juridical configuration of universal rights in this particular socio-political moment of the rise of colonialism demonstrates the ontological configuration of the modern universal right through a determination already in place, one that codes who is able to access 'universal' rights as those who are civil, human, and thus white, which in effect renders affectable subjects without accessibility to the set of guaranteed 'universal' rights.

The Just War of Conquest

The medieval juridical framework of the 'infidel' Vitoria is working from could not account for the new construction of the affectable/uncivil 'other'

[146] Silva, *Toward A Global Idea*, 30.

colonialism institutes. The issue of the rights in colonial-modernity could not be addressed through the medieval 'rights of infidels' framework. This is because of the rise of a new issue specific to colonial *dominium* – claims for the rights to land of which there is no medieval legal entitlement that will work to justify it. Frameworks regarding the conception of *dominium* then must necessarily shift so as to support the legal justification of the project of New World, as Vitoria's work reflects. As previously addressed, traditional rules governing *dominium* via rights of infidels – as the rights to conquest – did not suffice.

The experiences of the reconquest in Spain preceding 1492 led to an elaborate formation of rules about 'just war' and the rights of the victors, including the right to enslavement.[147] This trajectory developed in particular following the conquest of the Canary Islands and the requirement that the *Requerimiento* be read upon arrival to a new land that provided the 'option' of Spanish rule and Christianity. This example highlights the highly administrative and *legal* nature by which conquest moved forward – always about asserting legal rights. Just as the rights of the crown superseded the rights of the conquerors, the rights of the conquerors always superseded the rights of the Native peoples in the ideology of 'objective' European law, undergirded by the role of jurists like Vitoria in determining the legal terms of conquest.[148]

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[147] Elliott, *Imperial Spain*, 69.

[148] On the rights of conquers see Elliott, *Imperial Spain*, 67. Elliott details that most of the soldiers and people who came over in the early Spanish New World were

The *Requerimiento* document articulated that Native people possessed *dominium,* or rightful ownership over the land, and as such were required to admit the 'peaceful' Spanish missions, who were protected by the Spanish soldiers, under their universal right to preach. Thus the Spanish had to justify their invasion by demonstrating the unwillingness of Native people to admit the 'peaceful' missionaries.[149] Muldoon argues that the purpose of the *Requerimiento* was in fact to demonstrate to the papacy that the reason for invasion was based on the refusal to admit missionaries, which would justify the force and just war of the Spanish in securing their occupation.[150] Muldoon argues that this is because the Castilians (Spanish) may have feared the Portuguese or some other people would inform the Pope that the Castilian conquest was illegal and revoke the consent of the Pope. The Spanish had a heightened concern for claiming that their invasion was premised on the idea that the Indians lacked *dominium* as this form of justification would have been heretical to the Council of Constance legal precedent addressed earlier in Chapter 4.

Castilian, part of the gentry class and below, who had previous military experience, and had the incentive of being younger sons of aristocratic homes denied access to their family's wealth from primogeniture (62-63). Elliott states they were professional soldiers and also legalistically minded, drawing up documents with the rights and duties for members of expeditions (64).

[149] Muldoon *Popes, Lawyers, and Infidels*, 141.

[150] Muldoon *Popes, Lawyers, and Infidels*, 142.

Jurisdiction and *dominium,* as related concerns that Vitoria takes up, will necessarily shift from their prior middle ages application to account for the emergence of a system of global ordering facilitated through crisis. Elliott frames the terms of how Spanish settlement set forth the conditions of the legalized structure of settler colonialism: "from the legal point of view it was early established that Indians were the proprietors of all lands which they possessed and cultivated at the time of the Spaniards arrival, with the rest of the land and sub-soil became property of the State."[151] So the idea is that Native peoples are only entitled to land they 'possessed and cultivated,' leaving all other land – as common land in Vitoria's jurisprudence – that could then be taken by the Spanish (addressed later in this chapter). This framework is in line with the legalized dispossession that Thomas Jefferson would come to facilitate in the securing of American, via European, claim of United States' title over land after the 1803 Louisiana Purchase, as it later became codified in the 1823 Supreme Court case Johnson v M'Itonsh.[152]

The conception of *dominium* shifted in the rise of settler coloniality, both through Spanish formation and later the United States – as means for the settler to engulf entities of *dominium* – as land, bodies, resources that reflect the ongoing structural relation of coloniality, and specifically settler coloniality. Thus Vitoria's

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[151] Elliott, *Imperial Spain,* 67.

[152] See, generally, Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clarke, and Manifest Destiny* (Lincoln: University of Nebraska Press, 2008). This point will be further elaborated on in book form.

work reflects the medieval relation of *dominium* as it shifts to the modern. This transition is directly facilitated through a relationality with the 'affectable' subject – the uncivil other – who under the systematic imposition of European/white supremacy and heteropatriarchy is delimited from accessing the claimed 'universal' rights proffered by Vitoria as shared amongst all people, though only accessible to those demonstrating reason – as the transparent I subject of Silva's terms.

According to Hanke, the crown's colonial policy centered on 'economic expansion' with the key question being method. Columbus died in 1506, and from 1508 the pattern of 'discovery' campaigns began to change, with Hispaniola fully under Spanish control and replacing Spain as the base for future expeditions and the conquest of Cuba and the Antilles.[153] In 1519 the Spanish took control of the Isthmus of Panama and the continental opening to the Pacific when at the same time Cortez went into Mexico, and by 1540 the extensive basis for conquest had been executed according to Elliott, alongside the contemporaneous extension to the Philippines and South Asia as now expanding colonial logics across the globe.[154]

The missionary objectives beginning with the Papal Bull *Inter caetera* in 1493 merged the method of Christian conquest with the desire for economic

[153] Elliott, *Imperial Spain,* 62.

[154] Elliott, *Imperial Spain,* 62-63.

extraction.[155] Hanke argues that in 1511 there was a turning point in Christianity, whereby the settlers were expected to participate in the expansion of Christianity, not just the ecclesiastics.[156] This is important to highlight within the shifting governing apparatus and the 'universalized' logics of Christianity – of the 'duty' of the 'people' to convert – not only through *encomiendas* but through enforcing regulatory apparatuses – marriage, gender binary roles, and other heteropatriarchal structures maintained through legal enforcement, alongside Indigenous and chattel enslavement of African peoples that disciplined non-western social kinship structures and formations. However, in addition to the duty of the people to Christianize, the missionaries arrived soon after the *Laws of Burgos* were enacted,[157] initiating the expansive network of missions that would then spread from Mexico through into Alta California, serving as prisons and work camps that brutally enslaved, targeted, and disciplined Indigenous peoples into the 19th century.

Muldoon argues that beginning with Innocent IV in the 13th century, a discussion of the 'rights of infidels,' especially with respect to possessing *dominium,*

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[155] Lewis Hanke, *All Mankind is One: A Study of the Disputation Between Bartolome de Las Casas and Juan Gines Sepulveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (Illinois: Northern Illinois University Press 1974), 7.

[156] Ibid.

[157] Elliott documents that the missionaries arrived soon after the Law of Burgos, with the Dominicans in 1526, the Franciscans in 1523, and the Augustinians in 1533. Elliott, *Imperial Spain,* 71.

was prominent within medieval legal theories from the 14th century onwards.[158] But in the New World, the land in question for 'rightful occupation' is not one previously associated with Christianity. 300 years later, Vitoria extended Innocent IV's 13th century construction to justify an entirely *different* juridical justification for conquest, with specific implications for the additional legitimizing condition of the occupation of 'just war' – that of the denial of the right to preach.

As 'lords of the world,' European crowns were not only entitled to access anything and everything to their liking under the structure of universal rights, but could fend off any resistance to their access via the doctrine of just war. Vitoria refers to this theory both in *On the American Indians* and also supplements it with a follow up treatise titled *On Just War.* In *On Just War*, the ability to wage just war is only given to the 'sovereign.' Vitoria states this right can only be found with the Spanish, as all 'Saracens' are inherently incapable of waging a just war.[159] Anghie finds that there are two essential ways that sovereignty relates to Indians: "in the first place, the Indian is excluded from the sphere of sovereignty; in the second place

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[158] Muldoon argues that Innocent IV provides a unique lens into legal theory and papal practice, looking specifically at the way Innocent IV framed relations with infidels – as those living in Christian Europe, as those outside it, and as recent converts. Muldoon *Popes, Lawyers, and Infidels*, 29. Muldoon sets the 13th century re-conquest of Spain as an important entry into understanding Innocent IV's work, finding that he did not diverge much from papal relations in the past. Muldoon finds that Innocent "recognizes the right of the infidels" to their own *dominium* yet that the Pope's responsibility is still for the souls of all men. Muldoon *Popes, Lawyers, and Infidels*, 45.

[159] Anghie, *Imperialism, Sovereignty,* 26.

it is the Indian who acts as the object against which the powers of sovereignty may be exercised in the most extreme ways."[160] Anghie argues that since Indians are, by Vitoria's definition, incapable of waging a just war, they exist in Vitoria's framework only as people violating the law of nations, which then justifies enslavement and long term warfare.[161] Sovereignty is conditioned through this dynamic as defined by who is capable of controlling the governance of these 'universal' norms and values of European-Christian origin.

Vitoria employs the doctrine of just war as another legitimate title and grounds for colonial occupation. Additionally, just war doctrine also acts as the primary legal legitimation for systemic enslavement. In continental Africa, the European justification for legitimizing the slave trade was based on classifications of the enslaved as 'prizes' of just war, as derived from late 1350s legitimation when slavery was legitimized first for non-Christians on the sugar plantations of Madeira.[162] The just war doctrine worked as a way to remove the imperative for Vitoria to attend to the legal justification for enslaving African peoples. Under the juridical logic of 'just war,' European crowns, as well as the *encomienda*-plantation owners, were absolved from the concern of enslavement outside the bounds of legal

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[160] Anghie, *Imperialism, Sovereignty,* 27-28.

[161] Anghie, *Imperialism, Sovereignty,* 26-27.

[162] Muldoon, *Popes, Lawyers, and Infidels*, 134-135. Muldoon states that the papal bull *Romanus Pontifex* gave the King of Portugal Alfonso V the right to reduce the pagans, under just war, to 'perpetual slavery.' For a discussion of "captives of just war" as slaves, see also Robinson, *Black Marxism,* 111.

legitimacy. However, the dynamics of enslavement of African peoples in the New World were not the same as late medieval practices of slavery in Europe, or the history of the slave trade in Europe.[163] The ontological construction of the body that is sub-human, as chattel in perpetuity,[164] is a difference that the dynamic of colonialism cohered in a large-scale systemic manner through the crisis, carcerality, and civility logics underlying white supremacy and capitalism.

Vitoria utilizes the just war doctrine as another means to justify the warfare of colonial genocide, enslavement, and dispossession, to quell any resistance that would limit Spanish access of their entitled universal rights. In this justification, people can be enslaved and land can be seized:

> My fifth proposition is that if the barbarians attempt to deny the Spaniards in these matters which I have described as belonging to the law of nations, that is to say from trading and the rest, the Spaniards ought first to remove any cause of provocation by reasoning and persuasion, and demonstrate with every argument at their disposal that they have not come to do harm, but wish to dwell in peace and travel without any inconvenience to the barbarians. And they should demonstrate this not merely in words, but with proof. [sentence omitted] But if reasoning fails to win the acquiescence of the barbarians, and they insist on replying with violence, the Spaniards may defend themselves, and do everything needful for their own safety. It is lawful to meet force with force. And not only in this eventuality, but also if there is no other means of remaining safe, they may build forts and defenses; and if they have suffered an offence, they may on the authority of their prince seek redress for it in war, and exercise the other rights of war. The proof is that the cause of the just war is to redress and avenge an offense, as said above in the passage quoted from St. Thomas. But if the barbarians deny the

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[163] On the history of the medieval European slave trade, see Robinson, *Black Marxism*, 11-12; and Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982), 152-157.

[164] Patterson, *Slavery and Social Death.*

> Spaniards what is theirs by the law of nations, they commit an offense against them. Hence, if war is necessary to obtain their rights, they may lawfully go to war.[165]

Thus through articulating European standards as universal, Vitoria's work configures *dominium* over property – as bodies, and also as land – as the entitlement of the sovereign authority of the European crown through both the universal rights of the law of nations as well as the doctrine of just war.

The Right to Common Land and the Spatiality of Conquest

A central way Vitoria constructs the application of the rights to both trade and travel is through theories of natural law to claim access to any things "held in common."[166] He articulates that all water, including rivers, ports, and the open sea, are 'common property' that allow for the right to travel and trade.[167] He argues that "if travelers are allowed to dig for gold in common land or in rivers or to fish for

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[165] Vitoria, "On the American Indians," 282.

[166] "My third proposition is that if there are any things among the barbarians which are held in common both by their own people and by strangers, it is not lawful for the barbarians to prohibit the Spanish from sharing and enjoying them." Vitoria, "On the American Indians," 280.

[167] "[T]he jurist's determination that by natural law running water and the open sea, rivers, and ports are the common property of all, and by the law of nations (*ius gentium*) ships from any country may lawfully put in anywhere; by this token these things are clearly public property from which no one may lawfully be barred, so that it follows that the barbarians would do wrong to the Spaniards if they were to bar them from their lands." Vitoria, "On the American Indians," 279.

pearls in the sea or rivers," then the Spanish may not be prevented from doing so.[168] Vitoria relies on a relationship to land that is extraction based, but framed through a 'common use' argument under the law of nations:

> [I]n the law of nations a thing which does not belong to anyone becomes the property of the first taker, according to the law *Faerae bestiae*; therefore, if gold in the ground or pearls in the sea or anything else in the rivers has not be appropriated, they will belong by the law of nations to the first taker, just like the little fishes of the sea.[169]

Claiming the land in 'common' facilitates expansion of European universal under the assumption that the land should be used for extraction purposes in order to create profit. This produces a focus on consumption as a primary relation in the European universal, which is also connected to the creation of scarcity – in order to consume there must be supply, and in order to create supply there must be a sequestering such that the loss of that consumption is always a threat, driving concerns for scarcity. In this way, both the rights to trade and travel reflect the underlying logics of civility, carcerality, and crisis driving capitalist expansion through colonialism. Utilizing 'universality' for shared access also works to cohere notions of European supremacy that claim objectivity while in reality function only for their profit and

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[168] "My third proposition is that if there are any things among the barbarians which are held in common both by their own people and by strangers, it is not lawful for the barbarians to prohibit the Spanish from sharing and enjoying them. For example, if travelers are allowed to dig for gold in common land or in rivers or to fish for pearls in the sea or rivers, the barbarians may not prohibit Spaniards for doing so. But the later are only allowed to do this kind of thing on the same terms as the former, namely without causing offense to the native inhabitants and citizens." Vitoria, "On the American Indians," 280.

[169] Ibid.

consumption, outside of any concern for what Indigenous societies or worldsenses held as differently articulated relationships to land.[170] Because rights function as entitlements to things that can be contracted or exercised, centering land through a right to access for purposes of travel and trade furthers a relationality that does not center responsibility, but one for the purposes of creating property and in turn ownership, extraction, and profit.

As has been examined thus far, a central structural aspect in the coherence of colonialism is the institution of hierarchies of difference that work to position European socio-political relations as representative of the 'universal.' Wynter argues that the thesis of a 'by-nature difference' in rationality was central to a shift in rights discourse, where it functioned as a "new legitimation of Spain's right to sovereignty, as well as of its settlers' rights both to land and labor of the Indians."[171] Using this justification to gain access to land – both as land held in 'common' and otherwise, simultaneously configured the extensions of the racialized demarcation of who works the land versus who owns the land. The legitimation of rights in colonial-modernity was materially mediated in the space of the *encomienda* system, a place where carceral and crisis logics attached through the extension of civility from anti-pagan and anti-Muslim outgrowth into the mediated forms of colonial-

[170] See, for example, Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave, 1999).

[171] Wynter, "Unsettling the Coloniality," 297.

modernity as logics of Indigenous erasure and anti-Blackness. Thus, as Wynter locates, the space of the *encomienda*-plantation demonstrates the material effects of the natural law of universal order that configured the propertied labor relation of the affectable other:

> With, in consequence, the institution of the encomienda system, which attached groups of Indians to settlers as neo-serf form of labor, together with the institution of the slave plantation system manned by "Negroes" coming to centrally function so as to produce and reproduce the socioeconomic and ontological hierarchies of the order as if they indeed had been mandated by the ostensibly extrahuman agency of "natural law."[172]

In this system, both bodies and land are configured as property, as possessable, and entitled pieces of ownership *through* the access of the universal rights. Though Vitoria establishes that 'infidels' hold *dominium* under the universal rights, the 'universality' is mediated through demonstrating the reason that enables Europeans to claim their unfettered rights to travel, trade, and preach. Vitoria's framework of the universal conditions the affectable other as relegated outside the bounds of the universal, only to be incorporated as the disciplined uncivil other, whose presence juridically is *within* the universal, but materially cast outside of it, which functions to maintain the universal as a place of power and control that mediates access through the discourse of rights. The dynamic of the affectable subject as the uncivil other bolsters the claim of European supremacist governance over the universal in distinction to those rendered as not fully human.

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[172] Ibid.

Systemic slavery, both on the *encomienda*-plantation and through the related system of racial chattel slavery as a system of labor as well as trade, represents the simultaneous coherence of the logics of crisis, carcerality, and civility. Vitoria does not explicitly address the relationship of Indigenous Africans who were exported to the New World to the *encomienda*-plantation. Instead, Vitoria addresses enslavement but does not attest to it as something that is illegitimate but rather considers that Native peoples can be enslaved via just war:

> Once the Spaniards have demonstrated diligently both in word and deed that for their own part they have every intention of letting the barbarians carry on in peaceful and undisturbed enjoyment of their property, if the barbarians nevertheless persist in their wickedness and strive to destroy the Spaniards, they may then treat them no longer as innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their former masters, and the institution of new ones.[173]

The resurgence of Aristotle's work on natural slavery during this time is evidenced in debates concerning the enslavement and conquest of Native peoples such as the 1557 Sepulveda and Las Casas debate.[174] Vitoria's work did not refute enslavement, but neither does he condition the justifications for occupation on it either. This in effect reflects the nature by which systemic enslavement was normalized as an import from the prior two centuries of sugar plantation enslavement practices in Portuguese and Spanish occupied islands off the coast of Northern Africa. In returning to the law of nations, Vitoria is able to sidestep issues concerning systemic

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[173] Vitoria, "On the American Indians," 283.

[174] On the resurgence of Aristotle's work see Black, *Political Thought*, 3-11.

enslavement that absolve such matters to those of the right to trade and just war. Vitoria affirmatively relies on a return to Greco-Roman ideals to create his framework, which is not only about rights, but rather about a move to import a different socio-political ideology – Roman – to account for the new and specific shifts in legal reasoning that colonialism imposes. Thus through Vitoria's legal formation, enslavement becomes an implicit and fundamental logic of colonial *dominium* as it functions through the 'objective' status of the right to trade as a universal right.

Because Vitoria is concerned with the right to be in the New World as a question of *dominium* as title to the land, he cannot justify the outright expulsion or death of Native peoples. Settler colonialism naturalizes the propertied relationship to the land, to claim it as property of the settler. The *encomienda* settlements usually operated under the command of a Spanish citizen, who extracted tribute from the Native people in the villages, though some were retained as crown tributaries, where the 'right to commend' a Native person was reserved for the crown and delegated out through the *repartimiento* as dividing or allotting Indian peoples under the *encomienda.*[175] The *Laws of Burgos* stated that Indians were to be subject to the Castilian crown, and the enslaved people from West Africa were instead claimed as subjects of another crown and thus could be legitimately

[175] Parry, *The Audiencia,* 9-10.

enslaved.[176] Elliott argues that the institution of the *encomienda* was a 'solution' to the general ban on wholesale Indigenous enslavement that came down in 1500.[177] The Spanish then turned to West African slaves as the principle source of labor, where in 1510 the Spanish government ordered 250 slaves to be sent to Hispaniola to work in the gold mines.[178] The first sugar mill was built in Hispaniola in 1508, and by 1523 there were 24 working mills on the island.[179] The Spanish slave trade was regulated through the *Casa de Contratacion* that developed in 1503 as a checkpoint area in the Canary Islands for inspecting cargoes to the West Indies, and from 1518 on the Spanish – in response to Portuguese smuggling – began granting private license to traders to import slaves to the West Indies.[180]

After losing the crown's approval of forced Indigenous labor, the state-issued *repartimiento* provided a degree of legal definition concerning the labor requirements that all Indians, whether in *encomienda* or not, were subject to, where each village was called upon to provide a fixed number of workers per week, who were assigned tasks for either public or private work, and were paid according to

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[176] David S. Berry, "The Caribbean," in *The Oxford Handbook of the History of International Law*, Bardo Fassbender and Anne Peters, eds. (Oxford: Oxford University Press 2012), 586.

[177] Elliott, *Imperial Spain,* 59.

[178] Berry, "The Caribbean," 586.

[179] Ibid.

[180] Berry, "The Caribbean," 587.

the law in a fixed rate.[181] Each village was responsible for its tribute, and in 1549 personal servitude was 'condemned' by the *Recopilacion de Leyes de Indies.*[182] Parry states that between 1545-1550 there was a 'tripartite program' proposed by the Crown for the Indians – the inculcation of law, industry, and the Christian religion, where the *encomienda* was expected to provide the last two, and the local judges attended to the administration of law.[183]

Parry details the *audencia* (court) rule over the parts of colonial Mexico known as 'New Galicia:' "the general intentions of the crown with regard to the economic life of the Indians was to accustom them to working for wages, while preserving their personal freedom and protecting them in possession of their lands," leaving clear the objects of colonial legislation as "control of the alienation of Indian land and the prevention of forcible seizure by the Spaniards; elimination of arable and pasture areas, rigid separation of the *encomienda* from *hacienda*; limitations of tributes and services due to the *encomenderos*; strict supervision of *repartimientos* and of labor conditions generally; and the abolition of Indian slavery."[184]

However, the prohibition against Indian slavery, though legally enacted for 7 years, was codified only in law and not in practice. The *Laws of Burgos* and the *New*

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[181] Parry, *The Audiencia,* 10.

[182] Parry, *The Audiencia,* 11.

[183] Parry, *The Audiencia,* 11-12.

[184] Parry, *The Audiencia,* 58.

Laws of the Indies were promulgated 30 years apart, and both concerned the specifics about the *encomiendas* and how they should be run. The language in the *New Laws* seems to indicate that the terms of the 1512 *Laws of Burgos* had not led to the 2 year period of Indians required to be on the *encomienda*, but rather led to the implementation of plantations and increased enslavement of Indigenous New World peoples as well as Africans. Simpson states that the *Law of Burgos* was the "first comprehensive attempt to regulate relations between Indians and Spaniards," and argues that it foreshadowed the policy later codified in the *Recopilacion de las Leyes de Indias*, which imposed the plan to restrict Indigenous peoples into villages for surveillance and control.[185] Simpson argues that the *Laws of Burgos* were commissioned by Ferdinand after the loss of Indigenous slave labor from the Caribbean Islands.[186] The *Laws of Burgos* was the first promulgation of governing relations between the Spaniards and the Indians, and demonstrated a newly framed 'responsibility' for the Spaniards to Christianize.[187]

Charles V was elected as head of the Council of the Indies in 1519. It was this council that sought advice on the 'capacity of the Indians' in 1532, and in 1535

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[185] Lesley Byrd Simpson, *Studies in the Administration of the Indians in New Spain* (Berkley: University of California *Press* 1934), 1-2. Simpson draws from the Las Casas recount that describes laws such as one prohibiting the teaching of Latin to children of the caciques, a law forbidding dancing among the Indians, and laws restraining blood letting, and drinking by Indians, among others.

[186] Simpson, *Studies in the Administration,* 3.

[187] Hanke, *All Mankind is One*, 16.

Vitoria wrote a letter about the debate of the Indians and their status as 'men.'[188] The conversation concerning the status of the Indians, as is the title of Vitoria's very lecture, centers the debate concerning 'humanist' ideals. For those on the side of 'protecting the Indians,' such as Vitoria and Las Casas, the concern was on 'fair treatment' of Native peoples as subjects of the Spanish crown.

The *New Laws* of 1542 prohibited enslavement of Indians (though in actuality this did not follow), which in turn was supplanted by the shift from the *encomienda* system into 'paying' the Indians for state labor, as mentioned above.[189] Parry argues that the 'problem' of Indians not wanting to work was dealt with in the legislation of 1549 that prohibited personal servitude but "permitted the colonial authorities to compel Indians to seek employment," and that instead of waiting to be summoned to work, all unemployed Indians "whether held by the crown or by *encomenderos* were to offer themselves for hire in the public places of their district."[190] Parry finds that only for certain (usually public) purposes were the compulsory *repartimiento* gangs to be used, and that legislation defined these purposes as building roads, bridges, buildings, silver mining, and tending crops for local purposes.[191] Thus systemic enslavement was legally incorporated through the

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[188] Ibid.

[189] Parry, *The Audiencia,* 63.

[190] Parry, *The Audiencia,* 64.

[191] Ibid.

carceral space of the *encomienda*, which worked to simultaneously position the attempted eradication and assimilation of Native peoples through enslavement as well as economic disciplining into the modern formation of wage labor under capitalism.

Chapter 6
Capitalism and the Scarcity of Modern Rights

Colonialism brought on the large-scale re-ordering of multiple continents of peoples via European extension and its desires for Christian conquest as *the* universal set of values and norms for social, political, and economic relationality. Crisis is a fundamental aspect ordering these relations. Through the flux of the late middle ages market developments, capital was sequestered into the hands of the Genoese and Venetian banking houses that would come to completely finance both the New World expeditions as well as the trade in human bodies. Such accumulation was only made possible by the large-scale conquest of land that would serve to house resource extraction and cultivation for European crowns. The ability to *produce* crisis as a fundamental logic of colonialism facilitated competition and consumption as driving forces between European powers. The sequestering of an overdeveloped accumulation through the forced and genocidal project of conquest and enslavement central to the social-political ordering of colonialism facilitated crisis as the fundamental imperative of the sovereign. The crisis of colonialism was not a byproduct, but in fact was facilitated through every element of administrative control. The legal justifications of this project positioned the formation of crisis as 'objective' and 'natural,' an outgrowth of the superior mechanisms of European-Christian expansion.

Vitoria's elevation of the right to trade

The push for European expansion centered logics of consumption through forming a propertied relationship in order to consume. Consumption and scarcity configure access to land, resources, and bodies as inherently violable within the 'universal.' In this framework, the histories of European Christian conquest demonstrate the extension of consumption as central logics of conquest. Lithuania represents the extension of Christianization of European bounds that the reconquest then extended further out. This desire continued beyond the Iberian Peninsula, where the 13-15th centuries battles for Ceuta, the Canary Islands, and Maderia[192] demonstrate the 'fits and starts' of colonial capitalism. When word of Columbus befalling the 'Indies' reached the Spanish crown, they had been losing their attack into North Africa, looking to conquer more land from Islamic rule. The Christian conquest of the Iberian Peninsula was complete, as was securing the bounds of European Christendom established with the rooting out of the last vestiges of pagan governance in Lithuania in 1414. The project of the continental European Christian 'universal' was complete but brimming at the edges for expansion – of land, profit, and the bodies to complete this triangulation. It would not be Europeans sent into the New World mines and plantations to labor the rise of modernity.

[192] Muldoon, *Popes, Lawyers, and Infidels*, 74.

The spread to the New World is an extension of these medieval conquest logics, however it also represents a distinct shift. The universal rights Vitoria resuscitates as the rights to trade, travel, and preach in the Roman era law of nations did not originally configure the right to trade as a universal right. The status of the merchant in medieval Europe, as well as in the Roman empire, was not a category of employment that was well trusted or considered within the bounds of proper Christian comport. The Greek stoics position was one distrustful of trade,[193] and even as late as 1000 CE, the position of the merchant in European Christianity was scorned – profit was considered dishonorable and a form of usury which put the merchant's soul in jeopardy.[194] Law during this time was either silent about trade or hostile to it, where merchants were the ones creating institutions of commerce and setting up laws to serve their interests and establish zones of free commerce.[195] But Cavallar argues a second tradition emerged causing the medieval scholastic community to move from a framework of ambivalence towards the professional commerce to one where merchants became more frequently accepted based on the morality of their motivations and conduct from the 11th-12th centuries onward.[196] In this manner, he argues that mercantile law developed alongside the

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[193] Cavallar, *Rights of Strangers,* 72.

[194] Tigar and Levy, *Law and Capitalism,* 4.

[195] Tigar and Levy, *Law and Capitalism,* 5.

[196] Cavallar, *Rights of Strangers,* 73.

'commercial revolution,' extending through bilateral treaties and reciprocity of rights as medieval trade transitioned out of the Roman framework.[197]

The position of the merchant began shifting in the mid-period of the middle ages. Cavallar argues that Aquinas and other theologians opened the way for a pro-trade attitude through focusing on the 'moral benefits' of mercantilism, such as promoting mutual assistance and coming to the aid of another part of the world.[198] During this period, economic activities of merchants began to be regarded as acceptable, provided they conformed with certain principles and ends, where a new system of commercial laws emerged, designed to guarantee the souls of merchants were not endangered.[199] From the 13th century on, the Church, while espousing the detestment of the merchant, was also making back deals. Mackay states that despite the papal prohibitions on trading with the infidels, trade was not only flourishing but also "encouraged by absolutions which could be purchased from a special royal-ecclesiastical tribunal."[200]

However, by the time Vitoria was writing, the view that trade was a morally neutral occupation, but always in danger of corruption of the soul, was still

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[197] Cavallar, *Rights of Strangers,* 69.

[198] Cavallar, *Rights of Strangers,* 74.

[199] Cavallar, *Rights of Strangers,* 73.

[200] Mackay, *Spain in the Middle Ages*, 165.

widespread.[201] But, Cavallar argues that Vitoria, seeing commerce as useful, elevated the right to trade into a norm of the law of nations and to the status of a 'universal right.'[202] In many ways this is the only factor that Vitoria could use to justify colonialism, as well as the only factor worth the justification – as the accumulation of New World profit at this point was unlike anything the Spanish crown has ever seen. Previous to this historical moment, the right to trade had not been considered a universal right within the law of nations. As code for profit and consumption, through the conditioning of scarcity and accumulation, the right to trade was elevated into a newly distinguished system within colonial-modernity. Though framed as universal, as argued in this Part, the logic of civility limited who could actually access the rights of the law of nations. Trade, in its elevated universal right status, is no longer reflective of the trade of Roman civilization, but represents the shift into a concept undergirded by the logic of crisis which drove the production of scarcity and accumulation in emergent colonial expansion.

The resurgence of the roman law of nations is reflected through the return to the enjoining of conquest and trade. In *Law and Capitalism*, the authors state that the civil law of the law of nations governed the creation of a new magistracy, the 'praetorship,' created in 367 BCE for Roman merchants, generated in part by

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[201] Cavallar, *Rights of Strangers,* 74.

[202] Ibid.

treaties ceding commercial rights to some non-Romans.[203] The authors situate this development in line with the Roman conquest of Carthage and the lands bordering the Mediterranean, replacing village-based economies with economic structure of the Empire – traders, bankers, merchants, military – from 280 BCE to 146 BCE, where the labor force was primarily enslaved or half-free. They state that the "adoption of the term *jus gentium* reflected the conquest by the new Roman ruling class of its foreign and domestic enemies,"[204] where *jus gentium* (law of nations) functioned as a tool of the newly rich and powerful merchants.[205] Thus, from its origination the law of nations utilized conquest and economic interests to extend colonial reach. Cavallar argues that Vitoria frames the unwritten law of nations as binding because a violation would contradict the common consent and thus the law derived from it, where the legitimatizing authority is the consent of all because it promotes the common good.[206] In turn, Cavallar states that Vitoria moved the idea of a global common wealth espoused by ancient stoics and medieval Christianity from its ethical context to the sphere of 'international law' – or the emergence of a legal sphere we call International law that attempted to govern the newly forming

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[203] Tigar and Levy, *Law and Capitalism,* 13-14.

[204] Tigar and Levy, *Law and Capitalism,* 14.

[205] Tigar and Levy, *Law and Capitalism,* 20.

[206] Cavallar, *Rights of Strangers,* 91.

socio-political context of colonial-modernity.[207] Vitoria used the notion of hospitality, via the right to travel as an immutable right, that does not depend on consent so as to force the universal rights of entry of the Spanish into the New World.[208] It is no accident, then, that Vitoria returns to this Roman era framework in order to account for the newly forming social dynamics fomented by colonial-modernity and in turn, fashions a shift into a new modern conception of the universal right to trade as a reflection of the commensurate rise of capitalism .

The Genoese and the Rise of European Trade

1492 is not an accident of 'discovery' in the history of the quest for European Christian expansion. It was a carefully constructed project, one that was administered through close command over new institutions put in place to maintain power and hierarchy. The *why* of colonial expansion cannot be answered by a singular explanation. There are many important factors facilitating this dynamic, which are rooted in the expansion of Roman-Christendom and ideologies that sought to order bodies in dominant relationship to land. What is certain, however, is that this dynamic would drastically alter socio-political relations in a manner never before seen.

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[207] Cavallar, *Rights of Strangers,* 92.

[208] Ibid.

The Genoese played an imperative role in this development. They, along with the Venetians, lent out vast sums of money to support the early (and formative) venture capitalist projects in both Portugal in Spain. Finding a trade route to Asia was of the utmost concern, for many reasons, but most salient was the impact of the Ottoman Empire blocking trade routes and Christianizing missions from Eastern Europe, as well as shifts in the relationships with Arab ports and routes that sent the Spanish and Portuguese crowns into a competition for new routes. Cedric Robison argues for an understanding of this dynamic as a mix of political and economic forces that played a key role in the transfer of African labor into capital in the New World, and that to better understand the slave trade, and I would argue to better understand colonialism as well, an engagement with the formative role of Portugal is necessary.[209]

There are a multiplicity of arguments which demonstrate that there is no single explanation of why Portugal sought to expand, but that many factors produced that moment. Robinson brings to light a "generally unrecognized but crucial relationship… [that] involved a relatively weak but native feudal ruling class and its more powerful extra-national ruling-class allies," which resulted in an alliance between an emergent British capitalist aristocracy and the Portuguese nobility and bourgeoisie.[210] It was this political merging and its long-standing

[209] Robinson, *Black Marxism*, 101.

[210] Robinson, *Black Marxism*, 102.

effects through the centuries, coupled with what Robinson determines to be the even more important force of Italian merchants and capital in Portugal, that laid the basis for the slave trade.[211] These merchant-capitalist Italian houses "ensconced themselves into the entire structure of Portuguese power: serving as creditors to the monarchy, financiers for the state's ambitions and adventures, monopolists under royal charters of security, and ultimately Portuguese nobles by a series of events including royal decrees, marriage into the native nobility, and participation in the military projects organized by the state."[212]

It was primarily because of the Genoese, though, that Portugal's competition arose, as the Genoese carved themselves a spot in Portugal's royal court through their financing, fraternizing, and general social connections facilitated by a rivalry with Venice and fueled by the assimilation of the Genoese into Portuguese culture over time.[213] Robinson argues that this favored status facilitated Portuguese claims in Rome which "resulted in Papal Bulls sympathetic to Portuguese commerce and state imperialism."[214] The Genoese also had parallel relations with the British crown, where they comprised the majority of the merchants within the British kingdom in the 14th century. The role of the Genoese in Portugal and in Britain was

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[211] Robinson, *Black Marxism*, 102-103.

[212] Robinson, *Black Marxism*, 104.

[213] Ibid.

[214] Ibid.

similar: "they won royal exemptions from commercial taxes and restrictions, and managed to monopolize imported goods… Finally, in England, too, as creditors for its kings, as factors and merchants for royal monopolies, they came to occupy special positions in English trade."[215]

Documenting the relationships of Genoese capital with both Portugal and England through the 14th century is extremely important for situating the colonizing and slave trade dynamic that erupts at the end of the 15th century into the global system of colonization through various European entities. The relationship between merchant capital and the European crowns shows not only how the wealth to finance the expeditions developed, but also the political dynamic that was to first position Portugal and Spain into competition, and later other European crowns, namely the British, Spanish, Dutch, and French, to follow suit.

Italian capitalists situated themselves to play the crucial role they did in the next century facilitating the large scale African slave trade through "determining the pace, the character, and the structure" of venture capitalist expansion.[216] The economic recession of the 13th century shifted power to the Genoese, who extended their wealth throughout their vast banking network communities across Italy to London and Spain.[217] The Portuguese expeditions set in motion the early extension

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[215] Robinson, *Black Marxism*, 104-105.

[216] Robinson, *Black Marxism*, 105.

[217] See Reilly, *The Medieval Spains,* 176-178. Reilly details how the population decrease after the Plague and the inflation and price control of 1350-1450 caused

of trade into colonialism along the eastern and southern coast of continental Africa, where the motives explained to Tunisian traders for their travels were for 'Christians and spices.'[218] The Portuguese and the Italians then took over the southern African trade route, but were soon after challenged by the Spanish Castilians through papally determined claims over Guinea and the Canary Islands, which Portugal won at first.[219] As early as 1344 the Castilians claimed the Canary Islands, and by the early 15th century were involved in the slave trade of the Guanche people (with a Papal bull to support this) established in Seville, which led the Portuguese to begin exploration of the West-African coast for the prospect of

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the Arangonese to lose control of the seas to the Genoese which then led to trade in Lisbon increasing in the hands of the Genoese, who competed with the Basque for the northern Spanish trade. Reilly, *The Medieval Spains* 174-178. See also Mackay, *Spain in the Middle Ages,* 127-131. Mackay details the impact of the economic recession after the 1348 Black Death in Spain, which Mackay states like "other Mediterranean areas, such as Genoa and Portugal, which were to lead the way in the age of discoveries, Castile recovered fairly quickly from the crisis," but in the Crown of Aragon, Catalan declined. Mackay, *Spain in the Middle Ages,* 165. See also Elliott, *Imperial Spain,* 33. Elliott details how this dynamic was impacted by the Black Death of the 14th century, which Elliott states impacted Castile less than Aragon, and allowed for an increase in wool production and thus power for strengthening the position of the wool producers through the century, which Elliott states founded the great aristocracies of Castile, which in turn led to political chaos in Castile as the Crown struggled with minority factions and disputed successions in the face of a burgeoning aristocratic power.

[218] Robinson notes the Portuguese were following a similar expedition and plunder made by the Chinese around the Cape of Good Hope earlier in the 15th century, with the Chinese Empire attempting to challenge the Arab and Muslim traders who dominated the East African and Indian Ocean trade routes. Robinson, *Black Marxism*, 105-106.

[219] Robinson, *Black Marxism*, 106.

gold, slaves, and spices.[220] Muldoon states a theory that the linkage of the kingdoms with the Papacy missionary would unite the Christians that lived beyond the Muslim world and end the 'Muslim danger,' with 1415 bringing the first major attempt to Christianize the Canary Islands.[221] Thus ensued a battle over colonial possessions in the 15th century, foreshadowing the dynamic of colonial expansion century later, by the merchants of Castile, Catalan, Genoese, and Portuguese within these southern ports.[222]

The Importance of the Canary Islands

The role of the Canary Islands as the staging ground of colonial expansion reflects an important place in the trajectory of colonial-modernity. The island itself, much like the occupation of Hispaniola, functioned as a spatial carcerality where the Spanish colonizing power maintained occupation forces which were not under threat in the way they would have been had the space not been an island. This dynamic emerged in the early Iberian competition for islands close to North Africa and Iberia. For example, Genoese sailors licensed by the Portuguese to travel the western coast of Africa began Iberian expansion into the Canary Islands during the

[220] Mackay, *Spain in the Middle Ages,* 131.

[221] Muldoon, *Popes, Lawyers, and Infidels,* 104.

[222] Mackay, *Spain in the Middle Ages,* 131.

12th-13th centuries. The Canary Islands were first colonized in 1350.[223] Muldoon finds that the debate over the Canary Islands provided a new justification for conquest – civilizing.[224] The traditional hostility between Castile and Portugal and

[223] Reilly, *The Medieval Spains*, 178-180.

[224] Muldoon *Popes, Lawyers, and Infidels*, 119. Muldoon elaborates on the role of the papacy as mediating conflicts between kings. Clement IV awarded the Canary Islands to Portugal in 1344, but they had not yet been seriously occupying the islands as well as other islands recently 'discovered' as well – Maderia and the Azores in the 14th century, Cape Verde Islands in the 15th century, and the 'agricultural opportunities' of the coast of Africa (120). Both Portugal and Castile claimed the Canary Islands in the 15th century 'by virtue of discovery.' These conflicting interests in the Canary Islands caused Pope Eugenius IV (1431-7) to ban further Christian penetration on the island in 1434. The Portuguese worked around this ban by claiming how 'primitive' the islands were and that the primary mission was to Christianize them (121). The king reminded the Pope of the strategic importance of the Canary Islands for battling the Muslims (122). Also, the King stated that even if the Pope did not lift the ban on further colonizing the islands, could he actually enforce it – the Portuguese would obey it, but would others such as pirates and slave traders? The Portuguese argued their conquests were protecting the papal interests. He further relied on the 'universal jurisdiction' of the Pope, which Muldoon finds was important in the time of the Conciliatory reform that was trying to take power away from the ecclesiastical (123). The King also appealed to the Pope by stating that the 'fierce natives' would not allow missionaries to the land, so the king would need military protection if the church's mission was to be fulfilled (124) which Muldoon finds to be an extension of the natural law argument – violating natural law and therefore subject to the Pope's punishment. Canon lawyers (as distinct from cardinals) (124) were called upon to argue this issue, which Muldoon finds is framed in such a way as to only allow arguments drawn from Innocent IV (125). Muldoon finds they reframed the question, though still generally, not about Portugal specifically, but instead as whether it was lawful to wage war against the infidels who occupied lands never belonging to Christians (126). Eugenuis as Pope then responded to the letter in the bull *Romanus Pontifex* authorizing the Portuguese to oversee the conversion of the infidels in the Canary Islands (128), as a general theme of universal papal authority (129). Muldoon finds that Eugenuis recognized the papacy's need to ally itself with the advancing conquerors, much like Innocent III had done in 1204 when crusaders invaded Constantinople and he then reunited the Eastern Church with Rome (130). See Muldoon *Popes, Lawyers, and Infidels*, 120-130.

the conflict of expansion were evidenced in the Canary Islands, which Ferdinand and Isabella later sent an expedition to occupy in 1478.[225] Portugal renounced its claim on the Canary Islands in return for "recognition of an exclusive right to Guinea, Fez, Maderia, and the Azores."[226] Castilian occupation of the Canary Islands was of primary importance in its colonial expansion, serving as a staging point for the route to the Americas, and importantly as link in the reconquest of Spain into continental Africa.[227] From here the Genoese introduce sugar cultivation into the Algarve and Canary Islands, which was then introduced by the Genoese into the Caribbean in the 16th century.[228] The Castilian-controlled Canary Islands then received enslaved people, though Mackay notes that the Portuguese controlled a larger volume of the slave trade and also "gained access to the gold supplies which had previously been filtered through to the Iberian and European economies by the trans-Saharan trade routes."[229]

The Genoese were the primary backing of the venture capital necessary for the colonial expeditions. The Genoese family of Centurione owned the largest bank in Genoa and was active in Lisbon, where Christopher Columbus was working for

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[225] Elliott, *Imperial Spain,* 58.

[226] Elliott, *Imperial Spain,* 58.

[227] Ibid.

[228] Mackay, *Spain in the Middle Ages,* 172.

[229] Ibid.

them in 1478 and sent to purchase sugar in Madeira.[230] Columbus, as a member of the Genoese bourgeois who relocated to Lisbon and married into Portuguese nobility, petitioned the Portuguese crown for a trade route expedition in the Atlantic, though it was seemingly rejected due to the likelihood that it was 'clumsily constructed,' and subsequently was also rejected by the English, Castilian, and Andalusian crowns from 1485-1489.[231] Columbus' Genoese heritage is not something to be passed over inconsequentially, but in fact was reflective of one of the key dynamics of how the project of colonialism was even able to get off through ground. By the late 15th century, the Genoese, whose European locality was a city-state in the conglomeration of Italian states, had amassed large amounts of wealth.[232] The network of Genoese bankers living across European cities would act as primary financers of the New World conquest. Their wealth was built over centuries of pillaging as mercenaries, slave trading, building war ships, and extending their banking houses across prominent European cities.[233]

Columbus won the Spanish crown's support through longstanding Genoese connections in Seville, seeking to compete with the Portuguese expansion into the

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[230] Ibid.

[231] Robinson, *Black Marxism*, 107.

[232] Robinson, *Black Marxism,* 103-109. For a detailed history of the rise of the Genoese power, see Steven A. Epstein, *Genoa and the Genoese 958-1528* (Chapel Hill: University of North Carolina Press, 1996).

[233] Ibid.

Azores Island in the Atlantic within the same moment that Spain, through Isabella and Ferdinand, were desiring to unify and conquer the Iberian peninsula.[234] The dynamic of the Timurid Dynasty in Central Asia expanding west towards Europe caused eastern trade route blockages, such that a new route to the Eastern trade was in high demand.[235] This further impacted the conquest dynamic emergent in the new consolidation of the Spanish crowns and the expansion of their empire in the 15 and 16th centuries, such that Aragon added experience and history for the organization and administration of Spain, while Castile brought the dynamism and vigor of the reconquest.[236]

Within this emergent colonial dynamic Robison situates the role of Italian, and specifically Venetian, capital in the long-standing slave trade within the Mediterranean, noting that the trade of slaves was more important to Venetian commerce than slave labor. Robinson details this shift as a dynamic of the maturation of Italian capitalism as evidenced in three reasons: first, the expansion of power of the Ottoman Turks within the eastern Mediterranean in the 15th century; second, the extension of sugar cultivation from Asia Minor into Cyprus, Sicily, and the Atlantic Islands of the Portuguese colonies of the Azores, Madeira, and Cape Verde at the end of the 15th century; and finally the collaboration of the Genoese

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[234] Robinson, *Black Marxism*, 108.

[235] See Muldoon *Popes, Lawyers, and Infidels*.

[236] Elliott, *Imperial Spain,* 43-44.

capitalists with the ruling classes in the Iberian peninsula.[237] It was on Madeira where Robinson argues the "physical and historical juncture where these processes congealed" through the introduction of sugar cane alongside the enslavement of first the inhabitants of the Canary Islands followed by Moors and then Africans, to produce the slave labor that would cultivate commercial crops for sale in European markets, characterizing the emergence of the colonial transatlantic slave trade.[238]

Robinson states that "as these colonies grew, so did their appetite for *piezas de Indias*, 'captives of just war.'"[239] Though Robinson does not elaborate on the legal and theocratic underpinnings of just war, he ties this philosophical-ideological construct into the very foundation of the slave trade and colonization, showing further that the slave trade dynamic accelerated through the Spanish conquest of Portugal in 1580, where the Spanish left the trade to the Portuguese to administer under the now totally united Iberian Peninsula through Charles V's son who inherited both thrones.[240] This shift in merchant capitalism, through the expanse of European 'New World' land holdings, propelled the nature of the trans-Atlantic slave trade such that Robinsons states before the 19th century there were more

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[237] Robinson, *Black Marxism*, 110.

[238] Ibid.

[239] Robinson, *Black Marxism*, 111.

[240] Ibid.

Africans crossing the Atlantic than Europeans.[241] Robinson demonstrates continually that slavery – both the trade and slave labor – produced the shift from mercantile to industrial capitalism through the impetus of the emerging modern European states.[242]

Trade and the Safety Valve of Feudalism

Thus the 'trade' Vitoria elevates is not simply one of barter and exchange, but one emerging through the extension of venture capital and European conquest, fueled by the conquest rhetoric of disciplining the 'affectable other.' This process involved both the New World colonies and European crowns as constitutively impacting the global shift of economic, political, and social relationalities instituted by colonialism as the rise of a new form of trade – the trade of capitalism. In *Caliban and the Witch*, Silvia Federici argues for a reframing of capitalism not as the antithesis of feudalism, but as its 'safety valve,' one that coupled the late middle age crisis of feudal power in Europe with the conquest extension into the New World. Federici approaches the question of the emergence of capitalism by examining the disciplining of the cultural other in Europe – through the entrenchment of patriarchy and the disciplinary logics of the witch hunt as they extended into the

[241] Robinson, *Black Marxism*, 112.

[242] Robinson, *Black Marxism*, 116.

colonial purview - to challenge traditional histories of the rise of capitalism: "to look at history from a feminist viewpoint means to redefine in fundamental ways the accepted historical categories and to make visible hidden structures of domination and exploitation."[243]

Federici reframes the traditional Marxist narrative of colonialism as 'primitive accumulation' to instead conceptualize the violence of colonialism as a "universal process in every phase of capitalist development,"[244] demonstrating that it was the response of the European ruling class that launched the formation of capitalism through colonial conquest.[245] Federici posits Marx's framework of primitive accumulation as exclusively from the viewpoint of the waged industrial proletariat in the expropriation of the land from the European peasantry.[246] Federici instead repositions 'primitive accumulation' as an "accumulation of differences and divisions within the working class," through hierarchies built on gender and race.[247] Through this lens, Federici argues that we cannot identify capitalist accumulation as the liberation of the worker, as Marx has done, or to see

[243] Federici, *Caliban and the Witch*, 13.

[244] Federici, *Caliban and the Witch*, 16.

[245] Federici, *Caliban and the Witch*, 62.

[246] Federici, *Caliban and the Witch*, 63.

[247] Federici, *Caliban and the Witch*, 63-64.

the advent of capitalism as historical progress.[248] Federici argues instead that capitalism emerges as the safety valve of feudalism, where land privatization and the production of scarcity functioned simultaneously with the expansion of colonialism.[249]

Capitalism emerges as the response of the feudal lords, merchants, bishops, and papal throne as the "counter revolution that destroyed the possibilities that had emerged from the anti-feudal struggle," where the privatization of land gradually disciplined the working class into wage labor relationality in early modern Europe.[250] Key aspects in this disciplining were the monetization of labor through the rise of money services in 13th century, the use of charters, and the transition into more contractual-based relations of labor services with monetary payments.[251]

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[248] Federici, *Caliban and the Witch*, 64.

[249] Federici, *Caliban and the Witch*, 68.

[250] Federici, *Caliban and the Witch*, 21. Federici details the history of serfdom as developed in Europe between the 5th and 7th century as responsible for the breakdown of the slave system of Rome (23). Serfdom marked the end of gang-labor of the *ergastula* (prison) and the violent punishments of slavery, but serfs were then subjected to the law of the lord. This changed the slave-master relation, giving serfs direct access to means of their reproduction, in exchange for their work they were given land that was passed down to children (23-24). Access to land produced self-reliance and reduced fear of starvation for being kicked off land, as people rarely were because it was hard to recruit new labor (24). Within the hierarchy of serfs, women were given second-class status (25), overseen by the Lord who determined things such as whether a woman should remarry and also the right of *primae noctis* to sleep with a serf's wife on first night of marriage.

[251] Federici, *Caliban and the Witch*, 28.

Federici argues that commutation into monetary payments in turn functioned to co-opt the goals of feudal struggle and instituted the rise of chronic debt for poor workers who began borrowing against future harvests.[252] This then had two major effects: first, it made it more difficult for producers to measure their exploitation because as soon as labor service was converted into money payments, the peasants could no longer differentiate between the work they did for themselves and that which was done for landlords.[253] Second, the now 'free' tenants then turned down the ladder to employ and exploit other workers.[254]

Federici details how patriarchy was a fundamental aspect in disciplining the rise of capitalist labor, imposed by the spread of the Christian church and the power of the state.[255] The late medieval Church was a despotic power, and as the largest landowner of Europe, used extortion, selling of offices, and corruption, from the Pope down to the village priest, to maintain power across various principalities.[256] The power of both the Church and the state combined to enforce the disciplining of women's bodies as subservient to men, which within the male-female binary power relation of patriarchy, occurred in a number of ways: the institution of female

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[252] Federici, *Caliban and the Witch*, 29.

[253] Ibid.

[254] Ibid.

[255] Federici, *Caliban and the Witch*, 37.

[256] Federici, *Caliban and the Witch*, 34.

specific clothing, handbooks on when sex could happen,[257] the use of sexual politics as a counter revolution in the rise of the modern state,[258] the decriminalization of rape,[259] and the institutionalization of municipal brothels starting in 1350.[260] Between 1350 and 1500 a major shift occurred after the Black Plague, where the reduction of the population moved to favor the worker as encroaching on the powers of the feudal lords – real wages increased by 100%, prices declined by 33%, rent declined, the work day shortened, and there was increased self-sufficiency, which Federici argues threatened the very fabric of feudal society.[261]

The feudal bourgeoisie allied with the nobility in the suppression of the lower classes[262] through a "crisis of feudal power."[263] The relations of feudal power that kept landowners and merchants in power and control were distinctly threatened by the turn of the 16th century. However, with the rise of colonial trade, and the influx of silver and other metals into Europe from the colonies, alongside wage creation, monetization, and the increasingly diminished access of farming

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[257] Federici, *Caliban and the Witch*, 38.

[258] Federici, *Caliban and the Witch*, 47.

[259] Federici, *Caliban and the Witch*, 47-48.

[260] Federici, *Caliban and the Witch*, 49.

[261] Federici, *Caliban and the Witch*, 62.

[262] Federici, *Caliban and the Witch*, 50.

[263] Federici, *Caliban and the Witch*, 61.

populations to the land, people began to buy the food and goods they had once produced: "prices rose because of the development of a national and international market-system encouraging the export-import of agricultural products, and because merchants hoarded goods to sell them later at a higher price."[264] This dynamic ruined small farmers and made capitalists merchants richer – through the price revolution and the pauperization of the European working class in the rise of colonialism, the price of food went up 8 times, while wages went up 3 times.[265]

State policy prevented laborers from organizing and gave merchants decisions over pricing, such that Federici demonstrates that in the 14-15th century the proletarian struggle was about liberty, but in the 16-17th centuries the struggle centered on issues of hunger and food revolts.[266] Following this, the rise of the state intervention in the reproduction of labor developed through relief to the poor alongside the criminalization of the working class.[267] Federici details that this aspect was key in disciplining the rise of capitalism: "pauperization, rebellion, and the escalation of 'crime' are structural elements of capitalist accumulation as capitalism must strip the work force from its means of reproduction to impose its

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[264] Federici, *Caliban and the Witch*, 76.

[265] Ibid.

[266] Federici, *Caliban and the Witch*, 80.

[267] Federici, *Caliban and the Witch*, 82.

own rule."[268] This functioned as a turning point in the state relation between workers and capital as well as the definition of the function of the state, situated between 1530-1560, precisely when Vitoria was writing – reflective of the massive shift in social, political, and economic relations globally under colonialism.[269]

Federici argues that social denegation is fundamental to the accumulation of capital.[270] The logic of the separation of the worker from the land positioned land as an entity now reconfigured to primarily center accumulation and exploitation. Federici argues for three key aspects that influenced the transition from feudalism to capitalism: the constitution of the proletarian body into a work-machine, the persecution of women as witches, and the creation of 'savages' and cannibals both in Europe in the New World.[271] I would like to extend and perhaps reframe this analysis towards thinking through the coherence of the disciplining of the uncivil other through systemic heteropatriarchy and European supremacy as factors working to stimulate the growth of capitalism both in the colonies and in Europe, where universal rights and the status of the merchant emerged through the rise of scarcity, consumption, and accumulation in the extension of the European jurisdiction into the 'New World' via Vitoria's newly elevated right to trade.

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[268] Federici, *Caliban and the Witch*, 82.

[269] Federici, *Caliban and the Witch*, 84.

[270] Federici, *Caliban and the Witch*, 75.

[271] Federici, *Caliban and the Witch*, 115.

Federici shows that the 'construction of difference' reformulated feudal relations to subordinate women as a key aspect of the transition into capitalism. Resistance arose through anti Church establishments and rise of millenarian and heretic movements to create a new society.[272] By the late 15th century, the disciplining of non-procreative sex and the subordination of women in the midst of a population decline functioned to produce a labor force that was paid less or not paid at all, while at the same time reproducing this labor force as a component of the rise of capitalism.[273] As the outgrowth of structural heteropatriarchy, the massive global transition of colonialism worked to reconfigure of the legal protections of European women in the 16-17th centuries such that they lost considerable rights, including the right to conduct economic activities alone, to make contracts, to represent themselves in court, and to manage affairs as "a process of legal infantilization" within a larger trend of patriarchy and misogyny:[274]

> On the one hand, new cultural canons were constructed maximizing the differences between women and men creating more feminine and more masculine prototypes. On the other hand, it was established that women were inherently inferior to men – excessively emotional and lusty – unable to govern themselves – and had to be placed under male control. As with the condemnation of witchcraft, consensus on this matter cut across religious and intellectual lines. From the pulpit or the written page, humanists, Protestant Reformers, counter-reformation Catholics, all cooperated in the vilification of women, constantly and obsessively.[275]

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[272] See Federici, *Caliban and the Witch*, 31-47.

[273] See Federici, *Caliban and the Witch*, 85-98.

[274] Federici, *Caliban and the Witch*, 100.

[275] Federici, *Caliban and the Witch*, 100-101.

Thus, in the context of capitalism, women are conditioned under men within the gender binary hierarchy, but also as white/European women, still above the positionality of people lower in the racial hierarchy, such that both gender and race were inextricably linked in the outgrowth of heteropatriarchy into white supremacy through colonialism. The disciplining of all peoples into conformity with heteropatriarchy and white supremacy took the form of two primary modes during the rise of colonialism, both centered on enforcing logics of colonial power – as the Inquisition and the witch hunts.

Federici contends that the witch hunt was one of the most important events in the development of capitalist society, something that has never been fully centered in historical Marxist critiques:[276]

> It should have seemed significant that the which-hunt occurred simultaneously with the colonization and extermination of the populations of the New World, the English enclosures, the beginning of the slave trade, the enactment of "bloody laws" against vagabonds and beggars, and it climaxed in the interregnum between the end of feudalism and the capitalist "take off" when the peasantry in Europe reached the peak of its power, but in time, also consummated its historic defeat.[277]

Federici argues that the effect of the witch hunt deepened the divisions between men and women, taught men to fear the power of women, and destroyed a "universe of practices, beliefs, and social subjects whose existence was incompatible with the

[276] Federici, *Caliban and the Witch*, 165.

[277] Federici, *Caliban and the Witch*, 164-165.

capitalist work discipline, thus redefining the main elements of social reproduction."[278] After the doctrine of witchcraft formed and sorcery was declared a form of heresy and crime against God, nature, and the state in the 15th century,[279] witch hunting hit is peak between the Inquisition and spread of conquistadors in the New World, where Charles V established witchcraft to be punished by death.[280]

The witch hunt, like the Inquisition, is about subduing the population – the effect is to create crisis in every manner through the hierarchy of power relations, and with the appearance that those at the top – men, white people, state officials – had control over the crisis through massive accumulation. Witch trials bolstered the banning of 'non-productive' sexuality (as sex that did not result in procreation), in much the *same* way sodomy was configured through the Inquisition: "sex banned as 'non-productive:' homosexuality, sex between young an old, sex between people of different classes, anal coitus, coitus from behind (reputedly leading to sterile relations), nudity, and dances."[281] Also proscribed against was the public, collective

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[278] Federici, *Caliban and the Witch*, 165.

[279] Ibid.

[280] Federici, *Caliban and the Witch*, 166. A wide range of activities constituted targeting of witchcraft, legally considered the crime of *maleficium*. In the 7th and 8th centuries it was introduced into the codes of the new Teutonic kingdoms, as it had been in the roman code. In the conquest of Iberia, brought about by the elite fear of the "Saracens" as magical experts, instead inspired revolts by peasant workers. Federici, *Caliban and the Witch*, 165. For example, *maleficium* also included abortion potions and was documented as targeted by the Church/state as in the 11th century. Federici, *Caliban and the Witch*, 39.

[281] Federici, *Caliban and the Witch*, 194.

sexuality that had prevailed in the Middle Ages, as in the Spring festivals of pagan origins. The disciplining of pagan uncivility under heteropatriarchy is a key feature of the disciplining into capitalism, both in Europe and its extensions into the New World.

The emergence of capitalism here is not coincidental, or not 'too early' as some would claim, but rather a systemica coherence via colonialism to produce the global orderings of white supremacy and heteropatriarchy and their intertwined relationship to capitalism. Moving out of 'feudal' Europe, from the patriarchal ordering of male power, of the rise of money over bartering, the desire for new markets, the increasing status of the merchant, the banking houses and states of Genoa and Venetia, the expansion of the slave trade, and the rhetorical fear of a Muslim invasion, capitalism becomes the safety valve of European economy, not its antithesis. Robinson, in turn, sees the points of emergence – in the sugar cultivating plantations of Madeira, in the colonizing of Indigenous people in the coasts of Africa – all as firecrackers, fuses of the explosion that is European colonialism as it is inextricably tied to capitalism. Similar to the ways that race, gender, and sexuality are understood as concepts only emergent in the 17-18th centuries, capitalism is also thought to have emerged then, in the countryside of England.[282] But even those who agree with that assessment, such as Ellen Wood in *On the Origins of Capitalism*,

[282] See, for example, Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View,* (New York: Verso, 2002).

frame the emergence of capitalism as contingent upon a massive shift in socio-political context.[283] And that context is not specific or originary to 17th century England, but rather within the massive shift in sociopolitical relations that colonialism manifests in 1492, and the years preceding it.

The problem is that most scholarship on capitalism is framed through a western lens that sees its inevitability of capitalism in that of Europe itself – at worst as a predetermined prophecy, and at best as something that emerges almost out of thin air, with its only relation to colonialism as framed through 'primitive accumulation.' Then there is the other camp that sees capitalism as an emergence that could have been possible anywhere, but that happened to develop in Europe, with other feudal and proto-capital states existing in other global localities. Capitalism is a system of inequitable resource distribution driven by scarcity and possession – logics that have produced the overdevelopment of Europe and the west through a severe underdevelopment of Africa, Asia, and the Americas.[284] Capitalism, however, does not emerge or exist in a vacuum – it emerges precisely *because o*f the colonizing fervor of Christian Europe, because of the thrust of the sentiments of the cultural other – as anti-Muslim, anti-Black, anti-pagan, anti-Romani, and anti-Native – rooted in the ideological framework of a group of people who position themselves

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[283] Ibid.

[284] On the concept of underdevelopment and overdevelopment, see Walter Rodney, *How Europe Underdeveloped Africa,* (Baltimore: Black Classic Press, 2011).

as more superior and more justified than any other.[285] This Christian framework allowed conquistadors to justify their actions – as genocide, dispossession, the imposition of a universal framework – on the promise of eternal life in another world as the divine justification that further bolstered the juridical justifications of the law of nations.[286]

The Civil as 'Human' and the Ontological Construction of Modern Rights

In shifting the lens to Vitoria's universal rights, Part 2 demonstrates how the formation of colonialism is generative of a new 'modern' right, and in turn, modern subjecthood through the formation of racialized, gendered, and sexually disciplined hierarchies. From this point forward in the development of modernity, the western contestation over the universal will not be whether the notion of a universal representative of Europeans ideology should exist, but instead over which European crowns will compete for control over particular localities colonized into the 'universal.' Modern rights shift from their medieval notion *because of* and *through* the power relations inherent to the rise of colonial-modernity, such that this ontological relationship will always function to produce the limitation of universal

[285] On the emergence of capitalism through medieval European racialization, see Robinson, *Black Marxism.*

[286] On Christianity and the motivations for salvation in a divine after life, see, for example, Elliott, *Imperial Spain,* 66.

rights for fundamentally disrupting the systemic violence of colonialism. This trajectory set into motion the shift into modern rights as entitlements configured through logics of scarcity and possession, such that rights remain inherently limited for resolving systemic harm, not only because of disciplinary logics of racial, gender, sexual, and class hierarchies, but because the power systems of white supremacy, heteropatriarchy, and capitalism are constantly reconfigured *through* the discourse of modern rights.

In the emergence of colonial-modernity, civility positioned certain bodies as marked for conquest. By justifying difference as deviant power, governance power coalesced into the hands of a few and its justifications for doing so projected out through a hierarchy of access predicated on constructions of scarcity. Civility, crisis, and carcerality merge through the hierarchization of power so that excess and profit are seen as normal and necessary, and the production of consumable resources, bodies, and land as configured and controlled through logics of scarcity, is placed on those identified as the cultural/racialized/uncivil 'other.'

Weheliye argues that the imposition of race is a mysterious thing, in that the social character of racializing assemblages appears as an 'objective' character stamped upon humans, which is presented not in the form of socio-political relations between humans, but as hierarchically structured races.[287] Taken together, these factors form the basis for what Weheliye terms racializing

[287] Weheliye, *Habeas Viscus*, 51.

assemblages, which although borne partially of political violence, cannot be reduced to it alone.[288] Racializing logics of white supremacy, like heteropatriarchy, are coded through their supposed inevitability as the distinguishing features of civility – framed as natural and inevitable as part of a 'universal law.' Under the logics of colonial-modernity, gender, sexuality, and race function as disaggregated markers of uncivility that are now measured against a universalized standard of normalcy predicated on European Christian frameworks. Emergent from the logics of civility, racial logics position this universalizing framework as functioning according to objective 'laws:'

> Consequently, racialization figures as a master code within the genre of the human represented by western Man, because its law-like operations are yoked to species sustaining physiological mechanisms in the form of a global color line – instituted by cultural laws so as to register in human neural networks – that distinguish the good/life/fully-human from the bad/death/not-quite-human. This, in turn, authorizes the conflation of racialization with mere biological life, enabling white subjects to "see" themselves as transcending racialization due to their full embodiment of this particular genre of the human.[289]

Here, whiteness functions to position a full subjecthood of the human that nonwhite subjects lack, which in turn creates the idea of the nonwhite subject as experiencing the physiological impact of such differentiation through the violence of being coded by cultural laws as negative.[290]

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[288] Ibid.

[289] Weheliye, *Habeas Viscus*, 27.

[290] Weheliye, *Habeas Viscus*, 27-28.

We can extend the contemporary reading of Weheliye's work that frames groups constituted as aberrations – racialized, trans, disabled, poor, imprisoned – through racializing assemblages that establish natural differences as populations that then become 'real' within legally justified institutions. And even though racializing assemblages rely on phenotypical difference, their primary function of categorical markings, like the gender binary, is to *create and maintain* distinctions between different members so as to explain hierarchy. Through Vitoria's work, we can locate how difference is distinguished as the uncivil other and is disciplined into categorical hierarchy under colonialism. Vitoria employs the framework of natural law that produces the consolidation of crisis, civility, and carcerality into heteropatriarchal European supremacy and then into the rise of racial marking that takes on various forms of explanation – through science in our current order, but its base formation in colonialism as through universality – already places it outside religion, as secularized but following the framework of being 'beyond the reach of human intervention.' It is the function of naturalization that evolution and biology neatly claim as 'secular,' and yet the notions of natural order, natural law for that matter, as deeply central to the ongoing structures of colonialism rooted in Christian ideology.

This distinctly structurally imposed relation, framed as natural and objective, and later as biological and scientific, are inherently political. As Dorothy Roberts argues, "race is not a biological category that is politically charged. It is a political

category that has been disguised as a biological one."[291] The political dynamic of modernity then extends to the larger conglomeration of the aspects that race, gender, and sexuality mark as determinative of who counts as representation of reason and modernity. This becomes, as Wynter finds, the notion of the human as the primary political subject of the west's own self-conception.[292] Rights, also as entities that are distinctly political in nature, reflect the relationality of social categorization that becomes specifically connected as attachments of who can access entitlements of civility in colonial-modernity. Modern rights cohere as already attached to the formations of race, gender, and sexuality as political categories that *become* naturalized through their maintenance as tools that limit who can access resources that are redistributed through logics of capitalism as scarcity and excess in the 'universal' of colonial-modernity.

Rights are shifting through this framework to regulate political relationships, to legitimize, maintain, and explain hierarchy as naturalized and later scientific, but in reality are a manifestation of the political construction of colonial-modernity. In Vitoria's work, it is the naturalization of the civil as Human – of the European Christian order as what represents the civil, the human, and in turn, the universal that demonstrates how rights are apportioned for use based on who is positioned as 'human.' Thus universal rights are already functioning here to limit access to the

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[291] Dorothy Roberts, *Fatal Invention: How Science, Politics and Big Business Re-Create Race in the 21st Century* (New York: New Press, 2011), 4.

[292] Wynter, "Unsettling the Coloniality," 300.

liberal sphere of entitlements that frames itself as objective. The construction of the human is simultaneously already subjected to logics of racialization and heteropatriarchy that configure the formation of a new, distinctive 'modern' right as emerging prior to Enlightenment. This is perhaps most aptly demonstrated not through an example of who is cast out, as has been attended to by numerous accounts, but rather through an example of how certain forms of aberrance are in fact supported by the same universal that determines entry on the basis of conformity when the aberrance continues to work to uphold the power relations of white supremacy, capitalism, and heteropatriarchy, as is further explored in Coda through the case of the 16th century transmasculine Spanish solider Alonso Diaz.

The Ontological Construction of the Modern Right

It is the shifting *juridical* construction of the modern right that will lay the basis for European expansion and its socio-political foundations – its very ideology – that is also the basis of the construction of rights in modernity that determine the inability of rights to fundamentally alter the inequality and unfreedoms produced by systemic power relations of colonial-modernity. The marking of the civil subject then as the individuated subject capable of humanity, civility, and who can exercise access to the universal rights of entitlement over conquest and colonialism – property ownership, wealth accumulation, legitimate violence and way of being in

the world – as opposed to the uncivil, enslavable, sub human or potentially human as the affectable subject who cannot exercise the 'universal rights.'

This construction of the universal is dependent on the nonaffectable/affectable binary – on the freedom of some over the unfreedom of others as the foundation of the construction of the modern universal. Modernity and the construction of 'objectivity' and universality work to mystify foundational power relations that limit access to governing power – objectivity and universality, like rights, which is not about a misapplication of a promise or a potential as they are framed, but rather through their very construction as concepts that determine access to power in accordance with maintaining systems of power and letting in just enough to quell dissent and maintain the status quo – so that shifts in colonial governance emerge through contestation, but the power relations of white supremacy, heteropatriarchy, and capitalism remain intact.

Universal rights are configured to solidify and uphold this construct – as if they are objective – which naturalizes European governance as universal, such that if the justification of the act of governance is universal, so is the act of governance itself (and vice versa). Universal rights mediate power through production of scarcity of access to power, authority, and resources via the formation of the superior as the entities who can then exercise rights. The privilege/benefit of who can exercise these 'universal' rights is attached and formed through the construction of scarcity with regard to access and power, as differentiated from middle ages as civil/uncivil through modern power relations. Rights are a fundamental part of this

– constituted by and constitutive of this relationality as both the legal mechanism and fiction of objectivity that justifies distribution of power within the colonial-modern construction of the 'universal.'

Inclusion for subjects as fully human hinges on accepting the codification of personhood as property, as based on the comparative distinction between groups. The modern rise of personhood as property, or 'possessing one's personhood' works through granting humanity as a legal status. Weheliye argues that the denial of personhood through whiteness to Black subject is not in opposition to 'the genocidal wages of whiteness' aimed towards Indigenous subjects, "but rather represents different properties of the same racializing juridical assemblage that differently produces both black and native subjects as aberrations from Man and thus not-quite-human."[293] The universal order, or in Weheliye's framing, the normal order – as in colonial-modernity, genocide, the military, settler occupation, prisons, policing - *is* the standard order of the western 'universal,' "differentially and hierarchically structured and [as such] does not necessitate a legal state of exception in order to fabricate the mere life of those subjects already marked for violent exclusion; in fact, *we might even say that this is its end goal*."[294]

The law then, and specifically Vitoria's formulation of universal rights, reflects the legitimization of both itself and these systems. The modern order was

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[293] Weheliye, *Habeas Viscus*, 79.

[294] Emphasis mine; Weheliye, *Habeas Viscus*, 86.

constructed through logics of scarcity central to capitalism, where the idea of capitalism claims to reduce scarcity through supply and demand, but in effect must configure a group of people and resources always in scarcity, both to drive prices but also to compete for the lowest form of wage labor. The narrative of the contemporary order claims to bring people into the universal, through guaranteed or achieved rights or protection, but is always dependent on expelling and determining which people and or populations are expendable, and necessarily needs this dynamic in order to 'profit.'

Universal rights are an important feature in tracing not just the 'emergence' of human rights, but also how universal rights operate in the shift of medieval rights into modern rights. It is not the assertion of individuated property rights undergirding the rights of man in the so-called Enlightenment, but rather the wholesale *denial* of rights to peoples as predicated on the determination of uncivility. The denial of rights solidifies the racial hierarchy emergent within colonialism, producing the shift of rights as duties into shared universal rights that only some people can exercise, as determined by their proximity to whiteness, which at this moment was coded as the European Christian cisman. The denial of shared universal rights functions in their application over those that cannot own property because they are seen as property, either as attachment to land or as the propertied bodies that are forced to work the land. Modern rights work to configure scarcity – over land, bodies, resources – that place limitations on who is in fact entitled to access them.

The formation of colonial governance brings forth a system of governance that will not be challenged from a structural matter, but rather in terms of who governs the universal. The dynamic between rights and the sovereign are moving together here, in the shift both towards nation-state and the individuated rights bearing subject. This shift embodies a new framework of justification for conquest as no longer rooted in Christianity or by mere virtue of 'discovery.' It ushers in a globalized notion of universal rights, but rights as backed in European Christian ideology. This framework will then govern the claims of European colonial crowns against each other through claims of 'discovery.'[295]

Closing thoughts

If Vitoria's work represents anything then, it is the framework reflective of this moment, of a drastic shift into socio-political relations that at its heart functions through logics of induced scarcity, possession, and violence. Vitoria represents what comes more fully into fruition in the 18th century – of what is then deemed as 'secularization.' But in actuality Vitoria already conditioned the legal legitimacy of colonialism on the secular by conditioning the justifications for defending universal

[295] For scholarship focused on the doctrine of discovery, I contend that this will have an important impact in understanding how the 17th century applications of 'discovery' claims are founded in Vitoria's political moment, and the particularized impact of this shift through the rise of US Setter colonialism commensurate with the rise of 'individuated rights,' to be addressed further in book form.

rights not on the Church, nor the Pope, but through the authority of the sovereign Spanish crown to defend its title against other European sovereign crowns. It is this political moment that catapults the 'age of discovery' through the expansion of European crowns competing for land *outside* the authority of the Church and via the funding of Italian venture capitalists. It is no accident that we see the Genoese Giovanni Cabot (John Cabot) sailing for the British Crown to claim 'discovery' against *other* European crowns as the rise of Anglicanism under Henry VIII breaks from the Papal authority, in the midst of the break of the Lutherans and 'heretical' work of the Protestant Reformation, as European colonial powers compete against one other in a forum no longer brokered on Papal approval.

It is a disservice to anticolonial projects to continue to situate the rise of 'modernity' - the modern nation state, and the logics of race, gender, and sexuality – as emerging only within the post Westphalian world of Enlightenment. To do so risks framing the formational coherence of systemic power relations that produce governing and disciplinary logics as they manifest into their Enlightenment form through the referential context of liberal individuated rights. Framing the relationship between freedom and oppression that liberalism posits as in opposition as instead inherently bound to one another in a cyclical dynamic that continues to fuel subjugation in the name of freedom positions the urgency for undoing these systems beyond a call for the extension of rights-based inclusion. To instead position universal rights and colonialism in the same lens allows for the patterns of white supremacy, heteropatriarchy, and capitalism to jump to the fore as

constitutive of modernity, as central power dynamics that shift through rearticulations of colonialism reliant on the maintenance of hierarchal power relations in service of the values and logics of 'the universal.' In tracing Vitoria's universal rights commensurate with the moment of Spanish colonialism to the liberal individuated rights of the solidification of US Settler Colonialism and the reuptake of Vitoria's work as it influences the shift into universal human rights and neocolonialism, the reconstitutions and concentric genealogies of these power relations are made clearer.

PART 3

The Universal Human Rights Regime: The Influence of Vitoria in the Rise of Neocolonialism

Introduction: The Return to Vitoria

The turn to the 20th century marks a resurgence of Vitoria's work, where it is published as a 'classic on international law,' circulated at conferences on International law, and positioned as the founding 'father' of International law.[1] This dynamic is particularly useful for thinking through the question of what about Vitoria and his work animates the relationship between International law, neocolonialism, and universal human rights. The universal rights framework of the law of nations Vitoria constructed to legislate the initial Spanish colonial project is brought forth to anchor 20th century discourses of International law. It is no coincidence, then, that universal rights of Vitoria disseminate into the emergence of a universal human right.

[1] See, for example, Charles McKenna, "Francisco de Vitoria: Father of International Law," *Studies: An Irish Quarterly Review* 21, no. 84 (Dec 1932): 635-648; and Joseph M. de Torre, "The Roots of International Law and the Teachings of Francisco de Vitoria as a Foundation For Transcendent Human Rights and Global Peace," *Ave Maria Law Review* 2:123 (2004), 123-151; for the debate about Vitoria as 'father,' see, for example: Fernando Gomez, "Francisco de Vitoria in 1934, Before and After," *MLN Hispanic Issue* 117:2 (March 2002), 365-405.

Anghie argues that virtually every book written on the 20th century Mandate colonial system makes some reference to Vitoria.[2] Vitoria is immortalized in the US state department's 'founders of law' mural and also as a bust in the United Nations garden.[3] Vitoria's work proliferates in the period before and after World War I largely due to the influence of James Brown Scott, who connected with Vitoria's work through the Spanish scholar Camillo Barcis Trelles and Belgian scholar Ernest Nys, both of whom were doing work on Vitoria in the late 19th century, and subsequently became Scott's colleagues in International law circles.[4] Both Trelles and Nys relied heavily on the work of Vitoria and the other jurists of the School of Salamanca[5] in working towards a theory of International law that would serve as a

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[2] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 145.

[3] Joseph M. de Torre, "The Roots of International Law and the Teachings of Francisco de Vitoria as a Foundation for Transcendent Human Rights and Global Peace," *Ave Maria Law Review* 2:123 (2004), 123-151.

[4] Carl Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum*, (1950; repr., Candor, NY: Telos Press Publishing, 2003) 117. In addition to Trelles and Nys, Schmitt also cites James Lorimer and his *Institutes of International Law* (1883-1884), translated into French by Nys, as citing Vitoria, Soto, and Suarez as the founders of International Law and influential to Nys. See Schmitt, *Nomos of the Earth*, 117; footnote 24. Scott first studied international law under Freeman Snow at Harvard's History department. John Hepp, "James Brown Scott and the Rise of Public International Law," *The Journal of the Gilded Age and Progressive Era* 2, no. 7 (April 2008): 155.

[5] Vitoria was a theologian at the School of Salamanca, which remained dominant into the 1600s and included Domingo de Soto and Francisco Juarez, and whose theories covered topics ranging from economic theory, divisions in natural and divine law, laws of contract, jurisprudence more generally and moral philosophy. For historical context of the role of these theorists in relation to International law,

foundation from which to approach the early 20th century European-colonial global conflicts. Scott in turn approached shaping 20th century International law as a tool for the US to mitigate global conflict. Out of this context, International law rose also as a forum directing the project of US imperialism to emerge into new forms and institutions.

The resurgence of Vitoria and his work during this time period is significant for a number of reasons. The most imperative one, for the purposes of this study, is that his work is used as a means of grounding the transition out of the older franchise colonial models into one of imperialism, which I argue facilitates the transition into neocolonialism marked by the rise of the United Nations. Vitoria's work emerges in the mid 16th century to negotiate colonial competition and the legitimacy of the Spanish 'right' to New World conquest against other European crowns. In the turn to the late 19th/early 20th centuries, intra European issues as well as issues between European colonies and the Russian and Ottoman empires, which in turn sparked the rise of World War I, were shifting towards the neocolonial imperial projects of competition. In the mid 19th century, the US moves to more aggressively enter the international sphere, as the fight between which type of capitalism will better position the US to enter global economic competition –

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see Martti Koskenniemi, "International Law and *raison d'etat*: Rethinking the Pre History of International Law," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 297-339. *See also*: Johannes Thumfart, "On Grotius'*s Mare Liberum* and Vitoria's *De Indis,* Following Agamben and Schmitt," *Grotiana* 30 (2009), 65-87.

plantation capitalism or industrial capitalism – of the Civil War demonstrates. The 'closing' of the eastern and western territories of the continental US through the acquisition of California other western territories from Mexico in 1848 and the push of manifest destiny to expand white settlement further west through logics of Native erasure secured the emergence of industrial capitalism as a means of entering trade in Asia and therefore competing globally (which the expansion of the US settler colonial project to the west coast and into Hawaii exemplify as the staging ground for the 1898 Spanish – American war).[6] The global context of colonialism, moving from franchise expansions and warfare and into the 1884-5 Conference on Berlin and the colonial carving up of Africa, signaled a shift towards a different type of colonial competition and resource cooperation that will emerge in a systematic manner under the Mandate System and the League of Nations in the wake of World War I. It is in this context through which we can make sense of the relationship between Vitoria, Scott, and the rise of International law.

[6] The dynamic of US settler colonial expansion via manifest destiny and its construction through the expansion of white supremacy via the continuation of logics of Native erasure and anti-Blackness will be further addressed in the larger book project with a separate chapter on this relationship as codified by the rights of man and doctrine of discovery competition.

Chapter 7
Vitoria's Resurgence

Vitoria signifies the connection of colonial epochs in the moment of the US global imperial project that in turn shift global power relations towards the rise of neocolonialism. His work is used to envision a long-standing connection between the origins of International law into the 20th century expansion of the project of International law as an epistemic ideology, which in turn will foment the emergence of universal human rights. American lawyer and state department official James Brown Scott was the foremost contributor to this project, which he approached from a multitude of roles over his lifetime, from the position of both professor and Dean of the burgeoning project of formalized legal education that arose in the turn to the 20th century; to acting as the head of the Carnegie Institute of International Law for over a decade, responsible for spreading Vitoria's work through publishing textbooks, conferences, and other publicly disseminated information; to participating in numerous International law societies and conferences; to state department official. Throughout all this work, Scott firmly held Vitoria as the central figure responsible for configuring the relationship between nations as one mediated by 'International law.' For example, Scott delivered a 1932 speech for the closing of an international conference at The Hague, titled *The First International Congress for Comparative Law*:

> For, as Francis of Vitoria so finely, truly, and prophetically said four centuries ago from his chair in the University of Salamanca: 'International law has not

> only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single state, has the power to create laws that are just and fitting for all persons, as are the rules of international law ... they who violate these international rules, whether in peace or in war, commit a mortal sin, moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.'[7]

Vitoria's work offers the grounds to connect a global community via International law as "a single state … established by the authority of the whole world." Scott was not alone in centralizing Vitoria's work so as to position International law as a tool for global governance. Though the heralding of Vitoria as a father of International law was a particular project that Scott, Trelles, Nys and others took seriously, they also included other European jurists in the trajectory of this project, though always in relationship to Vitoria as the origin point. This framing of Vitoria as progenitor, however, is not shared by all International law perspectives, and is still a point that is actively debated over – whether or not Vitoria is in fact the forbearer of International law, or if that title can instead be located in other European thinkers writing on issues of nation to nation relationships such as other School of Salamanca scholars like Soto, who was writing shortly after Vitoria, or Hugo Grotius, who was

[7] Georgetown Archives, James Brown Scott Papers, Box 73, Folder 8, "The First International Congress for Comparative Law," 9 (7/25/13).

prominent a century after Vitoria, for example.[8] In turn, the resultant framing of Vitoria as father of human rights confers similar contestations.

The fact that Vitoria constituted the right of the Spanish to New World conquest is the very reason why he is positioned as the originary International law theorist, which coincides directly with the emergence of the shift into colonial-modernity. Although all the scholars that Scott and his colleagues (and scholars today for that matter) locate within the trajectory of International law development contribute in different ways to the project of International law, as a legislative dynamic concerning state to state issues of colonial competition, Vitoria's work in

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[8] Distinctions between Vitoria – as protecting Spanish claims against other Catholic crowns, especially Portugal; Grotius – mediating an 'open seas' trade dispute to legitimize the Dutch East India trade and 'free' seas against Spanish and Portuguese monopoly; and Gentili – framing just wars. See, for example, Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Cambridge, MA: Kluwer Law International, 1998). On Grotius see Johannes Thumfart, "On Grotius'*s Mare Liberum* and Vitoria's *De Indis,* Following Agamben and Schmitt," *Grotiana* 30 (2009), 65-87; and Martti Koskenniemi, "Colonization of the 'Indies' – The Origin of International Law?" Talk at the University of Zaragoza, December 2009. For an engagement with Gentili and his role in forming international law and just war arguments, see Anthony Pagden, "Gentili and the Fabrication of the Law of Nations," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 340-362; and Martti Koskenniemi, "International Law and *raison d'etat*: Rethinking the Pre History of International Law," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 297-339. For a discussion of Gentili, Grotius, and Vitoria, see Theodor Meron, "Common Rights of Mankind In Gentili, Grotius and Suarez," *American Journal International Law* 85: 110 (1991), 110-116; and Peter Schroder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 163-186.

particular positions the originary dynamic of colonial-modernity via colonial competition in political, social, and economic terms. His work is commensurate with the rise of colonial-modernity, and in turn the interrelated and interdependent systemic power relationships of colonial-modernity – white supremacy, capitalism, and heteropatriarchy – as Part 2 addresses.

These power relationships move in relation to colonial iterations because the underlying logics of colonial-modernity, as crisis, civility, and carcerality, are central to maintaining the order of colonial-modernity and its 'progress' into different iterations and institutions. Universal rights – as the cornerstone of International law – are in turn a cornerstone of colonial-modernity, where they function as a tool of demarcation to determine who will be targeted by and who will control the logics of civility, crisis, and carcerality in their varied institutional, metaphysical, and epistemological forms. Rights in modernity are bound in the negotiation of power-over as states between states, peoples over peoples, individuals over other individuals, all rooted in a demarcation of Human/not human/not yet human. International law creates the jurisdictional forum for peoples to be bound and grouped through a determination of who has full access to rights and who do not. Within colonial-modernity, this manifests both globally and within the localized nation-state or colony; both the nation-state and the concept of the 'inter-national' are a necessary dialectical relationship within colonial-modernity, where each maintains the other. It is important, then, to understand the context of the solidification of an International law project that will usher in the most recent

iteration of colonial-modernity: neocolonialism. Vitoria's work functions at the heart of this shift, both in what it represents ideologically, as well as the role his work played in facilitating the technological and institutional markings of 20th century International law, which in turn is the basis of our contemporary international legal institutions.

Scott's lifetime of work situates a particular framing of International law – via Vitoria's work and the School of Salamanca scholars – as humanitarian.[9] Scott was deeply invested in understanding the foundations of International law as project of peace and brotherly love, two concepts he credits directly to Vitoria.[10] In addition to Vitoria and his foundational work on International law as part of a larger humanitarian project, Scott saw himself as a humanitarian. Scott was venerated as an advocate of international peace and credited with bringing "the cause of justice between nations."[11] For example, in 1912 Secretary of State Robert Lansing wrote about Scott as the most prominent American advocate of an international judicial system, one that will "issue equal justice to all nations, both great and small."[12] Scott's embodiment of Vitorian ideals even manifested in a physical way, as Scott's

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[9] For example, see Hepp "Scott and International Law;" and Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Cambridge MA: Kluwer Law International, 1998).
[10] See, for example, James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford, Clarendon Press, 1934).

[11] Arthur Derrin Call, "James Brown Scott: A Sketch of His Service to the Cause of Justice Between Nations," *The Advocate of Peace* 80, no. 6 (June 1918): 179-181.

[12] Call, "James Brown Scott," 180.

image served as the 'face' of Vitoria in the State Department commissioned mural of the founders of law in the Department of Justice Building in Washington D.C.[13]

Though the humanitarian approach to international relations was a specific concern Scott brought to his work in expanding the scope of International law, this framework proliferated in part within the community of International lawyers and 'peace advocates' because of the warfare of World Wars I and II. During the interwar period after the end of World War I, Scott was very alarmed by the fact that the United States was not a part of the League of Nations. Many international lawyers shared Scott's larger concerns about the context of global warfare in the early to mid 20th century, with some lawyers looking to reform International law into a more 'humanist' project – through a return to Vitoria.[14] Before the rise of the 20th century, International law had not been fully codified as a form or practice of law. Scott worked through international channels such as conferences to spread Vitoria's notions of peace, 'brotherly love,' and the law of nations. International law scholar John Hepp situates Scott's work within the post-World War I 'Progressive Era' politics, as a lens through which to understand what Hepp frames as the "birth

[13] Scott's face actually stands in for the likeness of Vitoria for the state department mural. See Georgetown Archives, James Brown Scott Papers, Box 63, Folders 9 & 10 (7/25/13). See also John Hepp, "Scott and International Law," 171, footnote 44.

[14] Anghie, *Imperialism, Sovereignty,* 144.

of the discipline of international law" in the late 19th century through to what he considers "the end of its golden age in the 1930s."[15]

However, Fernando Gomez's article, "Francisco de Vitoria in 1934, Before and After," posits that Scott had an enormously influential impact on the uptake of Vitoria's work both in the 1930's and after.[16] Scott published *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* in 1934. Scott's work is a valorization of Vitoria, which Gomez describes as a moralizing scholarship that represents the transformation of Vitoria's work, built on the renovations of 13th century European legal precepts, into a humanitarian and 'liberal' mission:[17]

> What Scott does not explicitly say is that this vision of an inevitable and desirable incorporation, by force if necessary, of all nations under one unified world-system, will unmistakably materialize into the modern civilization of industrial capitalism. The brittle scholarship of *The Spanish Origin* constitutes the rather arrogant irony that dares not speak its name; the emerging world center by 1934 is willing to teach the morality lesson to the rest of the world. To do this, Scott "rescues" the colonial legacy of the Iberian peninsula as the useful foundation for the times to come.[18]

This framework both underwrites and is representative of the dynamic of US imperialism as humanitarian, liberal, and supportive of a free market ideology. Gomez argues that for Scott, modernity is "the desirable horizon of ever-expanding,

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[15] Hepp, "Scott and International Law," 154.

[16] Fernando Gomez, "Francisco de Vitoria in 1934, Before and After," *MLN* 117, no. 2 Hispanic Issue (March 2002): 365-405.

[17] Gomez, "Vitoria in 1934," 369.

[18] Gomez, "Vitoria in 1934," 369.

difference-erasing regulation, and regulation appears to demand the association of nation and history in a particularly dehistoricized way."[19] In this way, Scott re-centers Vitoria in the project of modernity and the centrality of US expansion within global competition by focusing on International law as a means of regulating a 'universal' that realigns with a colonial vision of the global order, where the order is based on nations who participate peacefully in a community regulated by International law founded in the law of nations. Though Scott's text is important in the lineage of the proliferation of Vitoria, it is his only major publication.[20] The greater influence of Scott's work lies in his fervor for Vitorian scholarship as demonstrated in his participation in International societies, and in particular, his work promoting Vitoria through the Carnegie Institute.

The Carnegie Endowment for International Peace

Andrew Carnegie's steel and railroad income backed the founding of the Carnegie Endowment for International Peace in 1910, one of many charitable trusts sponsored by the Carnegie Steel Company.[21] Approached by Carnegie himself, Scott headed up the newly formed International Law wing of the Carnegie Institute, which

[19] Gomez, "Vitoria in 1934," 370.

[20] Gomez, "Vitoria in 1934," 368. In particular, see footnote 6 of that page.

[21] Gomez, "Vitoria in 1934," 365.

functioned alongside the other departments and various endowments such as the Carnegie Library under the mandate to "promote the advancement and diffusion of knowledge among the people of the United States."[22] In 1910, Carnegie gave $10 million to the Division of International Law, which was charged with the precept of "hasten[ing] the abolition of international war, the foulest blot upon our civilization."[23] In 1911 the Carnegie Endowment for International Peace was formally incorporated, endowed with $125 million.[24] Scott left the state department office and went to the Carnegie Endowment in 1911, as one of the first professionals to move between academia, government, NGOs, and think tanks.[25]

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[22] Ellen Condliffe Lagemann, *The Politics of Knowledge: The Carnegie Corporation, Philanthropy, and Public Policy* (Chicago: University of Chicago Press, 1989), 3.

[23] Georgetown Archives, James Brown Scott Papers, Box 36, Folder 5 (7/24/13).

[24] Georgetown Archives, James Brown Scott Papers, Box 2, Folder 15 (7/24/13); Lagemann, *The Carnegie Corporation*, 3.

[25] Hepp, "Scott and International Law," 169-170. Hepp continues: "A list of the roles he played in 1911 shows the many options open to an attorney during this period. Scott was at the same time a professor of law at the George Washington University Law School, an instructor of international law in the Political Science Department of the Johns Hopkins University, the general editor of West's American Casebook Series, secretary of the American Society of International Law, editor-in-chief of *The American Journal of International IMW,* a member of the Institut de Droit International, a member of the American Bar Association's Committee on International Law, a vice president of the American Peace Society, president of the American Society for Judicial Settlement of International Disputes, trustee and secretary of the Carnegie Endowment for International Peace, and director of the Endowment's International Law Section. He would continue most of these associations (or similar ones), interspersed with periods of temporary government service, until 1940." Hepp, "Scott and International Law," 170.

The Carnegie Institute exemplifies how the late 19th/early 20th century wealth of railroad and robber baron income ushered in a mechanism of tax sheltering through the funneling of wealth into philanthropic organizations known as endowments, which prefigures the rise of the non-profit industrial complex in the 1970s.[26] Ellen Condliffe Lagemann, in *The Politics of Knowledge: The Carnegie Corporation, Philanthropy, and Public Policy,* argues that as networks between cities began to grow, different professions emerged to manage human services, both in an administrative as well as educational manner. This led to organizations like the Carnegie Institute funding private universities and other various knowledge-production sites. For example, in the early 1920s, the Carnegie Institute built a facet of scientific philanthropy so as to become a center of scientific expertise.[27] The mission of the Carnegie Institute was to disseminate traditionally 'elite culture,' like books, fine arts, and other traditions of western civilization, to a wider (white) American public.[28] Scott's work at the Carnegie Institute reflects a microcosm of

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[26] Dylan Rodríguez, in *The Revolution Will Not Be Funded,* defines the Non-Profit Industrial Complex as "a set of symbiotic relationships that link political and financial technologies of state and owning class control with surveillance over public political ideology, including and especially emergent progressive and leftist social movements." INCITE!, *The Revolution Will Not Be Funded* (Cambridge: South End Press, 2007), 8. For a history of tax sheltering and philanthropic organizations, see Andrea Smith, "Introduction: The Revolution Will Not Be Funded," in *The Revolution Will Not Be Funded*, eds. INCITE!. (Cambridge: South End Press, 2007).

[27] Lagemann, *The Politics of Knowledge*, 7.

[28] Ibid.

this project, through spreading International law as a means of managing conflict between (colonizing) nation-states in a scientific, orderly manner, framed as 'peace.'

Scott worked with the Carnegie Endowment for International Peace for many years as Director of the Endowment's International Law section until his retirement in 1940. In particular, Scott strongly influenced legal education through the knowledge production of what constituted International law, where he was responsible for the dissemination of multiple textbooks for law school coursework, including International law as newly formed category of legal education. Scott was also responsible for shaping the course of American lawyering education. Before the turn to the 20th century, US legal education existed primarily as apprenticeship model. Formalizing legal concepts into an organized manner for teaching was necessary for disseminating them into something that could be standardized across institutions.[29]

Scott graduated from Harvard in 1890 and spent 3 years in Europe as a Parker Fellow in International Law.[30] After receiving a *Juris Utriusque Doctor* from Heidelberg in 1894, he returned to practice in California, where he was involved in setting up the Los Angeles Law School (now integrated into USC), where he subsequently spent three years as Dean.[31] In 1899 he worked as a Dean at

[29] Hepp, "Scott and International Law."

[30] Call, "James Brown Scott," 180.

[31] Ibid.

University of Illinois Law School, and then held professorships at Colombia University, University of Chicago, George Washington University, and Johns Hopkins University through the early 1900's.[32]

A part of Scott's involvement in formalizing legal education in the United States involved producing textbooks as a means of legitimizing law as a true 'science.' He produced some of the first casebooks in International law, which were part of the 'revolution' in legal education, known as the Harvard case method, which still exists today. In terms of legal education, the casebook method articulates a 'scientific method' of systematic classification similar to that of evolutionary life sciences, framed by categorical thinking and bright line classifications of legal phenomena.[33] Hepp argues that this methodology of legal knowledge production was a primary means of legitimating law as a science: "casebooks also allowed law schools to focus on the underlying principles of the law, which in turn helped to legitimate law as a 'science' during a period when scientism gripped American universities and the middle class."[34] The taxonomical casebook contributed to a sense that when the 'rational' principles governing International law were understood more scientifically and therefore more precisely, the international

[32] Ibid.

[33] Hepp, "Scott and International Law," 163.

[34] Hepp, "Scott and International Law," 162.

community would have order.[35] Hepp finds that this produced general principles of law that were more important than the specific details for Scott, but that in reality no neat outline of principles actually existed in may common law jurisdictions.[36]

The primary method for teaching legal coursework relies on a taxonomical form of ordering legal concepts borrowed from the scientific ordering of taxonomy. Thus, scientific methodology is actually a key framework that continues within legal education and practice, though often unbeknownst to most lawyers or law students. This is important, not only because this same scientific mindset was applied to the legitimation of International law within the American context of legal education, but also because this model is one built on a particularly western mode of organizing the world through hierarchical relationality that grounds evolutionary sciences and the institution of western 'Science' as a primary mode of US settler colonial and imperial expansion.[37]

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[35] "Unlike a civil code, which would fix in place one generation's understanding of the law, the common law under the scientific guidance of law-school- trained practitioners could evolve. Theoretically, each generation's taxonomy of the law would be more precise than the previous one. And when lawyers at last understood all the rational principles that underlay international law, order could be created throughout the world community." Hepp, "Scott and International Law," 164.

[36] Hepp, "Scott and International Law," 164.

[37] The concept of the institutionalization of Science and the expansion of US settler colonialism and imperialism will be further developed in a new chapter for the book project.

Science as an Institution of Colonial Expansion

In *Not in Our Genes*, Lewontin, Rose, and Kamin argue that the emergence of modern science can be traced to northwestern Europe in the 17th century, out of the transition from feudalism into a more mercantilist-based social relations.[38] Within this context, they argue that social and economic life had to become disarticulated so that an individual could play many roles.[39] This set up a dynamic whereby becoming 'free' in European metropolitan society meant freedom from certain ties – like those impacted via enclosure, where landowners became 'free' to alienate land and workers were 'free' to leave to find other modes of work.[40] This also connects with the 'freedom' to own one's body – as labor – as a form of possessive individualism.[41] European people were now 'free' to sell their labor power. A new form of economic relations then developed, rooted in the idea of presumptive equality for the expanding bourgeoisie class, as represented in generating a legal system that could guarantee redress as well as access to political power.[42] This changing mode of economic relations created shifts in production along with new

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[38] R.C. Lewontin, Steven Rose, and Leon J. Kamin, *Not in Our Genes: Biology, Ideology, and Human Nature,* 2nd ed. (1984; repr., Chicago: Haymarket Books, 2017), 39-40.

[39] Lewontin, Rose, and Kamin, *Not in Our Genes*, 39.

[40] Ibid.

[41] Lewontin, Rose, and Kamin, *Not in Our Genes*, 39-40.

[42] Lewontin, Rose, and Kamin, *Not in Our Genes*, 40.

technical problems, which in turn created the need for new solutions and epistemological frameworks – as scientific solutions:[43]

> This radical reorganization of social relations that marked the rise of bourgeois economy had, as a concomitant, the rise of an ideology expressive of these new relations. This ideology, which dominates today, was both a reflection onto the natural world of the social order that was being built and a legitimizing political philosophy by which the new order could be seen as following from eternal principles.[44]

Lewontin, Rose and Kamin detail here this ideology as Science – what I am framing as the institution of Science.[45] But this ideology arises within the larger framework not just of economic modality, but also of the colonial relationality through which these modalities came into being. New modes of production were necessary because resource extraction and transportation drastically shifted in the advent of the colonial extractive-occupation dynamic. This is a point of awareness acutely lacking in most historical accounts of European 'Enlightenment;' that this period of time is not one of 'primitive accumulation' but rather a massive shift in which global relations form an entirely new socio-political dynamic under colonial-modernity, as Part 2 examines. The institution of Science, then, arose as a manner of ordering this new relationality in all its modes – economic, political, as well as social.

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[43] Ibid.

[44] Lewontin, Rose, and Kamin, *Not in Our Genes*, 41-42.

[45] I capitalize Science to denote it as an institution, as opposed to lower case science as understandings of the ways the world exists that may or may not be called into support the institution of Science.

The crisis brought on by colonial-modernity shifted the various socio-political orders of the world into an attempted alignment as 'one' - that of western socio-political order. Science as an institution grew out of the space occupied previously (though still a mainstay) by Christianity as the governing ideological institution of the western socio-political order. In many ways, this was already happening within the advent of colonial-modernity. We see it beginning even in Vitoria's work, in his displacement of the Pope as the supreme lord over all things. Vitoria dismisses the Pope as the universal governor, a tenet central to medieval law, and instead creates his own version of 'secular law.' This divorcing of the Pope from ruler of the 'universal' is one step in the later chain of events that ultimately diminishes the power of the Papacy and the creation of new modes of Christian-political ideologies (Anglicanism and the English crown; Protestantism and the German crown, for example) that in turn justify a secular governance above that of the divine, and shift the realm of political power towards the emergent modes of statecraft of the European crowns through the 15th- late 18th centuries. The rise of Science as an institution also legitimates this shift; when God is not seen as controlling everything, new frameworks – as laws – emerge to explain them. Laws of gravity, physics, and the natural world abound. Many of these are extensions of the Christian telos and are taken up in new scientific forms.

Western 'Science' explains the world as it exists – as a natural order and set of circumstances reflective of the social-political conditions under which it arises.[46] Thus, the specificity of colonial-modernity as the socio-political ideological condition produces a set of epistemological justifications for those conditions. Evolution emerges as top among them as a theory that reflects the making of order in the socio-political realm within the natural. Competition, scarcity, natural selection, survival of the fittest are all dynamics of colonial competition, and specifically driven by the logic of crisis, which serve to explain and order the natural world in reflection of the larger social conditions. This takes the form of instituting classification and hierarchy – as taxonomies, orders, and systems to explain why the world is the way it is. Lewontin, Rose, and Kamin articulate that evolutionary theory is "an apotheosis of a bourgeois world view," which itself represents the inherent contradictions of such a worldview.[47] The crisis of capitalism and the continual shifts in modes of production introduce concepts of mutability and adaptation into biology.[48] Along with this emerged a notion of progressive development – of a linear trajectory that saw itself not as in a seasonal, cyclical relationship to the natural world, but one that provoked a linear progress narrative

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[46] See also Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 9th printing (1999; repr., New York: Palgrave, 2006) for a critique of western methodologies of knowledge production.

[47] Lewontin, Rose, and Kamin, *Not in Our Genes*, 49.

[48] Ibid.

of evolutionary change over time.[49] Darwinian theory directly challenged the older modes of western socio-political relations and "dethroned God and replaced him with science."[50] The effect of this was not to unfix social relations entirely, but to place them as products not of a deity but of a natural order.[51] McClintock details that within this 18th framework was the cornerstone of systemic hierarchical thinking and the rise of planetary consciousness – drawing the whole world into a single science of order through classification.[52]

The scientific approach of the west develops in the manner in which it does because of the larger context of colonialism, racial capitalism, and the root power dynamic of heteropatriarchy. Science as an institution explains all of these things. It supplies a rational order to the crisis instituted via colonialism, the necessary pacification of White/European anxieties of revolt that would challenge their positionality as 'naturally' in positions of power, which in turn is supported by scientific hierarchal theories of race, gender, and natural intelligence, among others.

The dynamic of western scientific ordering as applied to *all* world relations is a key manner of managing crisis and instilling forms of carcerality. Hierarchy itself in this dynamic becomes a form of carcerality because it is about maintaining an

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[49] Ibid.

[50] Lewontin, Rose, and Kamin, *Not in Our Genes*, 51.

[51] Ibid.

[52] Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (New York: Routledge, 1995), 34, citing Linnaeus in particular.

order of power as 'naturalized' at all costs. Though hierarchy many not always function in this form, employed by the logic of carcerality within racial-capitalism of colonial-modernity it functions to order difference as a form of distancing access to power. Applied over nature via Darwinism and the social order via Social Darwinism by Herbert Spencer, Darwin's cousin, hierarchal ordering is a key means of securing the logics of carcerality, crisis, and civility into institutionalized power relations. Social Darwinism, as the dynamic that applied scientific justifications for racialized and gender ordering to justify the already racialized and gendered structure of colonial-modernity, extrapolated the mentality of the survival of the fittest to one that explains structural problems of resource maldistribution as naturalized. This is an earlier trajectory of the emergent neoliberalism of neocolonialism showcasing how structural problems becomes individuated, as a means of blaming the individual for maldistributions of resources. Survival of the fittest implies a fitness of genes as they are expressed within a hierarchical human-racialized populace and positioned over the more-than-human world. If the genes that are considered the most fit, and therefore healthy to lead and govern, congregate and manifest as whiteness, ability, and wealth, then it is because those genes determine the order of society as such. This is of course the framework of

eugenics, which Carnegie staunchly supported.[53] But it is also worth mentioning that eugenics is not the only framework through which this idea manifests.

The notion of survival of the fittest permeates no matter what school of thought takes it up because it is a manifestation of colonial logics as they are codified within 19th century social and political institutions – it is inherent in the framework of evolutionary biology, as well as inherent in the underlying framework of International law, evidenced for our purposes here through Scott's work expanding the scientific concept of International law through the Carnegie Institute's publication of International Law textbook series.

The Carnegie Textbook Series on International Law

Perhaps the most influential aspect of this vision to legitimize International law as science was the textbook series published by the Carnegie Institute starting in 1910. The *Classics of International Law* also served as the mechanism for framing International law as a necessary aspect of American lawyering. In 1905 the Carnegie Board of Trustees met concerning the publication of the 'classics of international law,' and in a 1907 letter Scott details the desire to publish Vitoria as

[53] See, for example, Frederick Osborn, "History of the American Eugenics Society," *Social Biology* 21, no. 2 (1974): 115-126. This point will be extrapolated further for the book project.

the forerunner of the publication series, alongside Grotius, Gentili, as well as Italian forbearers Belli and Legnano.[54]

In 1909 Scott authored a report on a project for the publication of the classics of International law.[55] Scott indicates he sent correspondences to European professors to see what they thought should be included.[56] He desired to print the 'predecessors' of Grotius, as Scott believed they have been overlooked. Scott calls Grotius not the founder of International law but "the first systematic expounder of international law."[57] By 1913 this list had grown to detail the texts already published as well as those that were upcoming: Zouche, Ayala, Grotius, Vattel, Legnano, Rachel, Textor, and Vitoria.[58]

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[54] Georgetown Archives, James Brown Scott Papers, Box 36, Folder 12, "1905-1948 Memoranda on the Classics of International Law," (7/24/13).

[55] Columbia Special Collections, Carnegie Archives, Volume 346, International Law Classics 1910-1926, "Report on Project for the Republication of the Classics of International Law - James Brown Scott," 11 Dec 1909, (8/13/13), 1479.

[56] Columbia Special Collections, Carnegie Archives, Volume 346, International Law Classics 1910-1926, "Letter Scott to Nys," 14 January 1913, (8/13/13), 1205. Scott lists Vitoria, Legnano, Belli, Brunus, Ayla, Suarez and Gentili as figures singled out by Professor Oppenheim for his treatise on International Law, first edition, Volume 1.

[57] Ibid.

[58] Columbia Special Collections, Carnegie Archives, Volume 346, International Law Classics 1910-1926, "Letter to RS Woodward, President Carnegie Institute," 13 November 1913, (8/13/13), 1329.

The interest in Vitoria spreads throughout Scott's work not only in International law societies, but also into US library holdings,[59] European circles,[60] as well as the US government. For example, a letter from R S Woodward to Scott details that Senator Henry Cabot Lodge had an interest in 'the classics' and asked Scott to send Lodge a copy of the work on Vitoria.[61] In the meeting notes of *The Christian Foundation of International Relations*, there was a proposal to have students in the US go to Spain for their junior year at the University of Valladolid to learn International law because "it is one of the cities were Spanish is more purely spoken," and also is in the town where Columbus died and the laws of the Indies were formulated.[62] Other ideas included plans to establish Academies of International Law in Cuba, the United States, and The Hague.[63] International law in

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[59] For a discussion of library distribution, see March 6 1918 letter concerning purchasing copies on Vitoria for distribution to libraries or institutions on their mailing list - Walter Gilbert for the Carnegie Endowment. Columbia Special Collections, Carnegie Archives, Volume 348, International Law Classics 1910-1926 (1918), "Letter 6 March 1918," (8/14/13), 573. See also page 586 for the confirmation of distribution of volumes on Vitoria to many different libraries, May 25, 1918.

[60] For an example of correspondence on the distribution to Europe see letter to Alexander Cruger from S N D North, Secretary to Scott about sending 12 copies to Nys in Brussels to be distributed. Columbia Special Collections, Carnegie Archives, Volume 349, International Law Classics 1910-1926 (1919-1920), "Letter Alexander Cruger and S N D North," (8/14/13), 215.

[61] Columbia Special Collections, Carnegie Archives, Volume 348, International Law Classics 1910-1926 (1918), "Correspondence R S Woodward and James Brown Scott," 17 January 1918, (8/14/13), 569-570; 576.

[62] Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, (7/23/13).

[63] Ibid.

this particular manner was packaged out to legal institutions and organizations of people across the globe.

Within the United States, Scott managed the expansion of International law concepts in systemized manner, through surveying law schools who reported information to the Carnegie Institute concerning whether they were teaching International law as well as which schools were using which law school textbooks. Specifically, the Institute sent out surveys to law schools asking whether or not they teach International law, how many students took it, and what their genders were.[64] The textbook series was also accompanied by a number of conferences on the teaching of International law, which represents a desire to spread the legitimacy of

[64] Other questions range from who teaches the course, at what level, how many hours, if it is an elective or required course, and what casebooks are used. Some of this data also includes charts concerning which schools and departments teach international law or other similarly related course work, for example one school teaches international law in their Mathematics Department. The chart in this volume seems to indicate Harvard is at the top of hours per year spent on international law among college, graduate, and law classes. Columbia Special Collections, Carnegie Archives, Volume 394, International Law Classics 1910-1926, IV. Division of International Law, 1913-1921, "Report on the Teaching of International law," (8/14/13). See also Volumes 396 and 397. Volume 397 has a report from 1921 specifying school, course taught, hours, number of students, gender, department, college year taught, and whether required or elective. Columbia Special Collections, Carnegie Archives, Volume 396-367, International Law Classics 1910-1926, IV. Division of International Law, "1913-1921," (8/14/13).

international law in a coordinated manner.[65] Scott, via the Carnegie Institute, also organized a number of conferences on the teaching of International law.[66]

Additionally, The Carnegie Institute sponsored visiting Professors as Carnegie Lecturers to other countries. For example, in 1938 Lewis Hanke was a visiting Carnegie Lecturer from Harvard to Brazil, and asked the Carnegie Institute to supply publications to a library in Brazil in order to create a 'friendly feeling' towards the Carnegie Endowment and the United States in general.[67] This exemplifies a coordinated effort at steering the project of International law and its 20th century consolidation of colonial logics into a standardized, scientific form to distribute its ideals, frameworks, and historiographies, which rely heavily on Scott's influence.[68] It is also an interesting parallel to draw with the Chicago School and Milton Friedman's extensions of neoliberal economic policy in Chile emerging soon after.[69]

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[65] Columbia Special Collections, Carnegie Archives, Volumes 398 - 399, International Law Classics 1910-1926, (8/14/13).

[66] Columbia Special Collections, Carnegie Archives, Volumes 398 - 399, International Law Classics 1910-1926, IV. Division of International Law, "1938," (8/14/13).

[67] Columbia Special Collections, Carnegie Archives, Volume 399, Box 332, "VII. Projects - Visiting Professors - Lewis Hanke," folder 332.1, "Letter 1938" (8/15/13).

[68] It seems as though there was one other main International law textbook in use by Wilson and Tucker, but that many of the schools responding in their surveys used Scott's textbook as well as Wilson's cases on International law. Columbia Special Collections, Carnegie Archives, Volume 396, International Law Classics 1910-1926, IV. Division of International Law, "1921," (8/14/13), 399.

[69] For more on the Chicago School impact in Chile, Latin America, and globally, see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Picador, 2007).

Publishing the 'classics' in a widespread way and disseminating this epistemological framework through education does something particular that is different than just having conventions or conferences. It makes the framing of a certain kind of lineage founded in Vitoria and colonialism 'accessible' in the sense that it can be taught in schools, written and referenced in academic journals, and read by people who will be potentially lawyers, professors, policy officials, and government actors. Essentially, it permeates a normalized framework that the general public, through these channels, will come to accept, know, and understand as a necessary and positive 'advancement.'

Peace, Positivism, and the Return to a Colonial Order

In the 1930's other scholars began engaging with Vitoria and his relationship to International law and colonialism. Gomez locates the surge of the scholarship in the 1930s within the emergent capitalism of the New Deal and the particular ordering of global state relationships leading up to World War II: "against this background Vitoria is thus the harbinger of better things to come... American expansionism makes the link with the pre-Enlightenment missing link of Spain inside the five-hundred-year frame of Western expansionism."[70] This sentiment is most aptly expressed by Scott in a correspondence regarding publishing the Classics

[70] Gomez, "Vitoria in 1934," 387.

of International Law: "International law is not a thing of our day and generation or of The Hague Convention, nor indeed the creation of Grotius, *but [is] almost as old as the new world*."[71] Vitoria exemplifies the importance of anchoring the 'field' of International law by returning to a juridical framework mediating colonial expansion – not only is International law founded *in* that, it cannot be understood outside of intra-colonial state conflict, trade, and the formation of juridical techniques that in turn legislate the expansion of the colonial encounter.

The Carnegie Institute, and in particular Scott, shape this field through an invigoration of early colonial juridical proceedings, such as the work of Vitoria, Grotius, Gentilli, and others who were focused on juridically mediating intra-European conflict concerning legitimacy of conquest.[72] International law is not just of colonial origins, as Anghie and others argue, but it is a primary mechanism of a juridical framework and ideology that orchestrates the ongoing political, economic,

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[71] Emphasis mine. "Nys is unwilling to allow this volume to go to press without a tribute in passing to the broad-minded and generous hearted Dominican, justly regarded as one of the founders of International law, and whose two tractates here reproduced are, as Thucydides would say, a perpetual possession to the international lawyer. Vitoria's claim as a founder of the law of nations must unfortunately be based upon these two readings taken down by a pupil and published after his death, without the professor's revision and in a very summary form. They are sufficient, however, to show that International law is not a thing of our day and generation or of The Hague Convention, not indeed the creation of Grotius, but that the system is almost as old as the new world." Columbia Special Collections, Carnegie Archives, Volume 344, International Law Classics 1910-1926, Scott correspondence concerning Vitoria by William Barnum (1913-1916), (8/13/13), 182.

[72] See *supra.,* footnote 8.

and social management of racial capitalism structuring the global political frameworks of colonial-modernity. It not merely an 'institution' in the discrete sense of functioning as a 'field' governing international relations, but it materially manifests the ongoing logics of colonialism that ultimately sanctions and expands hierarchical domination.

The re-invigoration of Vitoria's work also coincides with the 400-year anniversary of Spain's first conquest venture. The discourse of the various international meetings, conferences, and societies locate Vitoria, and International law, as commensurate with the 'colonial discovery' of America. For example, in a 1929 meeting of the *Institut de Droit International* (Institute of International Law) in Briarcliff, New York, Scott put forth a manuscript called the "Discovery of America and its Influence on International law" that focused on Vitoria, Grotius, and the law of nations.[73] This framework aligns with the larger movement of locating the origin story of the United States with the project of Spanish colonialism via Christopher Columbus spreading a 'Christian foundation' in the New World.

Scott participated in forming the *Committee for the Vitoria Conference,* which was to be held at the University of Salamanca in Spain in 1932, to celebrate the

[73] About 60 people attended this meeting, including professors, law professors, Europeans, Cubans, and Americans. Georgetown Archives, James Brown Scott Papers, Box 32, Folder 16, (7/24/13). See also Columbia Special Collections, Carnegie Archives, Volume 399, Box 201 Meetings and Fellowships, Folder 201.2, "Meetings 1928-1929: Division of International Law," (8/15/13), 4.

400th year anniversary of Vitoria's foundational lecture.[74] Professors from elite law schools such as Harvard Law, Georgetown, Catholic University, and the University of Michigan joined him. In relation to this meeting, a memo was produced called "The Christian Foundation of International Relations," which outlined the reason for and objective of the foundation. The memo details the reasoning behind the use of the word 'foundation' as implied to "maintain the secular and Christian traditions which have made the modern law of nations, and which should continue to control its development."[75] A main interest in Vitoria's work was the universal rights of the law of nations, which were located within Christian epistemological frameworks. For example, in a memo written by the planning committee for the 1932 conference celebrating Vitoria, held at the University of Salamanca,[76] it is argued that the work of international lawyers should aim to "maintain the secular and Christian traditions which have made the modern law of nations, and which should continue to control its development."[77] It identifies St. Augustine, Thomas Aquinas, Vitoria, Suarez, and Grotius as having "authority that has been determinative in the creation and the

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[74] Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, (7/23/13).

[75] Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, "Memo: The Christian Foundation of International Relations," (7/23/13), 2.

[76] Vitoria Conference held at University of Salamanca, Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, 1.

[77] Vitoria Conference held at University of Salamanca, Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, 2. This committee included Camillo Bracia Trelles.

development of the law of nations," legitimated in their standings because they "were all Christian."[78]

The identification of Christianity and the western universal is one in the same. Scott relies on Vitoria and other previous Christian scholars to imbue 20th century International law as in alignment with a Christian foundation. In many ways this is perfunctory – Christian ideals and values and the western universal ideals and values are one in the same within colonial-modernity, but it shows the historical positioning and, furthermore, justification for connecting Vitoria's law of nations into the context of US settler colonialism and its imperial colonial extensions out of the project of manifest destiny. For example, the idea that a "faith in Vitoria's morality and law" should be the standard for the global community was expressed in 1933 at the 7th annual international conference of American States in Montevideo:

> There is no need to attempt an estimate or measure of Vitoria's contribution to international law, for on Dec 23, 1933, by a unanimous resolution of the seventh International Conference of American States held at Montevideo, he was officially recognized as having established the foundations of modern international law. By this resolution the twenty-one American republics, successors to the barbarian principalities of the new world to which Vitoria extended his law, confessed their faith in the Victorian standard of morality and law as the standard not only of his days, of our day, but of all days.[79]

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[78] Vitoria Conference held at University of Salamanca, Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, 2.

[79] Georgetown Archives, James Brown Scott Papers, Box 52, folder 2, (7/25/13).

Here, we see the combination of all of Latin America as united 'American republics' via Vitoria's legal standards under a shared colonial past.

The Briarcliff memo also details the negotiation between a past colonial dynamic that is now rejected instead for the new type of 'protectorate,' transitionary colonialism of the 'new age,' and how the law of nations (as a stand in for International law), though contested, offers a platform to return to:

> We are living in a period of reconstruction. Theories and practices which were accepted in the past are questioned. There is a desire everywhere prevalent that they be replaced by theories based upon fact and practices in touch with right thinking. The law of nations is no exception. Not merely its practices, which have often been questionable, but its theories, often admirable, are challenged. There is a feeling that we are living in a new world, and that we must, therefore, have a new international law.[80]

This sentiment in part could represent a reflection of the shift of positivism into pragmatism, where the feeling that the colonial problems of governance and intra-European conflict previous to the 20th century, and in turn dynamics of colonial warfare, were not solved via the law of nations, and therefore a different version must be formulated. Drawing on the theoretical foundation, then, of Vitoria and the work of the School of Salamanca adds historical perspective to the origins of a project of peace as colonial disciplining gone wrong through intra-Empire conflict and warfare. Positivism as a legal framework emerged in the 1700s and persisted into the late 1800s. It coincides with a shift in the idea of sovereignty – from the

[80] Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, "Memo: The Christian Foundation of International Relations," (7/23/13), 3.

King as the ultimate authority to the notion of the sovereign as the one who makes the laws as embodied in the form of the state as the ultimate authority. It also coincides with the shift into evolutionary scientific thinking with the rise of hierarchical ordering based on scientific observation as applied to a specific methodology. The late 19th century/early 20th century turn to pragmatism constructed a 'new International law' that combined multiple interventions beyond the traditional precepts.

The vision for such a new project was expansive – a plan for a Francisco de Vitoria School of International Relations in Salamanca, Spain; publishing the Carnegie Institute's forthcoming textbook series *The Classics of International Law*; plans to gain university-affiliated support to publish works on Vitoria and Soto; planning for the 400th year celebration of Vitoria and the School of Salamanca in Salamanca, Spain; and a headquarters for the Foundation where the new and old worlds meet – in America, with a principal branch in Cuba.[81] Though only certain aspects of this project became fully realized, they are not unlike the type of global visioning Scott and his affiliate International law projects, committees, and institutes were involved with.

[81] Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, "Minutes on first meeting: The Christian Foundation of International Relations, 1929," (7/23/13); Georgetown Archives, James Brown Scott Papers, Box 62, Folder 3, "Memo" (7/23/13).

Re-visioning US Origins: from Vitoria to Columbus in the Articulations of US Imperialism

This larger context of the historical drive for US settler imperialism to reconnect to a colonial past is also evident in the move to claim Christopher Columbus and the 1492 colonial origin moment within the lineage of American history. An example occurs during the end of the 19th century, when the US is completing its conquest campaign to close the gaps of the newly acquired west coast territories with that of its project of manifest destiny westward expansion as an imperial extension of American superiority. The 1876 and 1893 World's Fairs showcase the framing of US expansion as built on the logic of recuperating the colonial origins of the United States as emergent with Columbus. It exemplifies how the discourse of conquest origins becomes encapsulated into a reimaginary of US history to facilitate the transition into a US-based project of imperial expansion, so as to surpass that of a European colonial history. In "Imagining America: Race, Nation, and Imperialism at the Turn of the Century," Shari Huhndorf situates both World's Fairs as part of the larger work of memory production and the creation of tradition in post-Civil War America:[82]

> Although U.S. fairs advertised that their primary purpose was to increase global trade and to promote American technology, they also served as an important means of asserting American superiority and imperial might. Both these goals played against a background of European competition, a

[82] Shari M. Huhndorf, "Chapter 1: Imagining America: Race, Nation, and Imperialism at the Turn of the Century," in *Going Native: Indians in the American Cultural Imagination* (Ithaca, Cornell University Press: 2001), 23.

> competition of the "new" United States was intent on winning over the "old" nations of Europe. In the expositions, notions of race, progress, and empire intertwined in fundamental ways. In these 'symbolic universes,' technology signified progress, a notion which defined America and rendered it different from (even superior to) its European counterparts. In addition, progress – equated with technological advances – justified Western paternalism toward its 'less developed' neighbors, a sentiment that paved the way for imperial expansion at the close of the century.[83]

These fairs demonstrate the desire for Americans to situate themselves in the longer history of European expansion, thus constructing a narrative that allows the US a historical past from which to progress out of into a newer, better, technologically advanced US Empire. This is evidenced in a number of ways including the return to a Roman historical foundation through showcasing Roman architecture and buildings on the fairgrounds. This is particularly evident in the subject matter of the 1893 "World's Columbian Exposition" in Chicago, where this World's Fair celebrated the 400th anniversary of Columbus's 'discovery' of the New World. Huhndorf states that figures of Columbus dominated the scene of the fair, with one in particular featuring him riding in a Roman chariot, which she argues suggests both "a historical connection with Roman imperialism and a Biblical association that linked conquest with Christian redemption."[84]

Though of course Columbus – an Italian from Genoa, sailing for the Spanish crown – never actually landed on the continental US, the connection to his 1492

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[83] Huhndorf, "Imagining America," 24-25.

[84] Huhndorf, "Imagining America," 37.

New World arrival situates the United States not just as a newly formed nation out of a revolution with England some 200 years after Columbus lands, but instead as a deeply connected historical presence in the history of New World conquest for the last 400 years:

> For many Americans, this interpretation of the Columbus story resonated with 1890s concerns. If Columbus had brought progress and civilization to the chaotic Old World, the story implied, so too could the vision of progress at the exposition resolve the fin de siècle chaos of the United States… By defining [Columbus'] story as the nation's originary moment, planners created a vision of an America born into imperial conquest.[85]

This positioning, coupled with the expansionist and imperialist projects in the turn to the 20th century, situated the direct lineage of an imaginary colonial past rooted in Columbus so as to project an entitlement to the burgeoning global identity of US power as one that spans the length of colonial-modernity. James Brown Scott represents how this sentiment was represented through a recuperation of originary colonial frameworks, like that of Vitoria, that could be renewed and applied to the new expansionist vision of the US imperial project, which post Spanish-American war, envisioned itself not as a colonial empire, but as a benevolent 'protectorate' of formally colonized territories.

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[85] Huhndorf, "Imagining America," 37-38. Additionally, Huhndorf further contextualizes the meaning of Columbus: "For many, the figure of Columbus resonated with a more recent hero of American culture, the Pioneer. Columbus, in one critic's words, 'could be seen as the original prototype of the American adventurer/hero, who like Boone or Crockett or Carson, blazed trails into an unknown wilderness so that others might follow and begin building the American Empire," thus connected the recuperation of Columbus with the US settler logic of manifest destiny. Huhndorf, "Imagining America," 53.

Out of this context, the US is actually able to shape and influence International law as a legal doctrine that supports their ideology of imperialism as distinct from colonialism. This is done in part through a return to humanitarian ideals in order to extend a different type of civilizing project, as distinguished from a distinctly colonial project of extending the logic of civility. For example, much of the political rhetoric of this time, evidenced in political cartoons, depicts the new civilizing approach of the United States as one that is designed to function as a 'protectorate' status, where territories the US occupied, particularly after the Spanish American War, were held in anticipation of 'self-governance.' The cartoon "School Begins," by Louis Dalrymple, dated January 25, 1899, depicts a classroom of children who are supposed to represent the American project of civilizing protectorate nations, depicted as studious children deep in study of the 'textbooks' of newly formed US states. In the front of the classroom are children being disciplined into this globalized American order, depicted with faces of both obstinance and fear with overly dramatized facial features racialized as Black, representing the Philippines, Hawaii, Puerto Rico, and Cuba. Sitting in the far corner of the classroom is an Indigenous child, distanced from the other children and reading an upside down textbook, as well a child who is supposed to represent China, who stands at the doorway with a book in arm. Uncle Sam is teaching at the front of the classroom, and behind them their 'lesson' on the chalkboard:

> The consent of the governed is a good thing in theory but very rare in fact. England has governed her colonies whether they consented or not, by not waiting for their consent she has greatly advanced the world's civilization.

> The US must govern its new territories with or without their consent until they can govern themselves.[86]

The rhetoric of the blackboard offers a particular twist on the white man's burden that follows in line with a 'humanitarian' model. This discourse signifies the particular way the US does this – as a way of distancing/distinguishing from European colonialism, though in actuality is not different in effect, desire, or strategy of colonial expansionism. The spatial arrangement of the disciplining zones in the classroom depict the dynamic of the United States bringing the 'protectorate' states into the assimilative-civilizing logics, Native communities into the ongoing state of 'detention' – as reservations under a logic of Native erasure-assimilation, and leaving the one child outside the 'class' element altogether – depicted as an American Black child – cleaning the classroom windows, demonstrative of the anti-Black logic whose conscription of labor/life is necessary for maintaining the physical space of the classroom as the US state.

This rise of 20th century US imperialism – built from the white supremacist settler expansionist project as exemplified in this political cartoon – in particular plays a role in the shifting rise towards global neocolonialism. In *Nomos of the Earth,* Carl Schmitt articulates the European anxieties concerning the new role of the United States as an imperial power. Schmitt's perspective, in particular as a Nazi, frames a white supremacist perspective that is inherent to the logics of colonial

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[86] See Louis Dalrymple, "School Begins," 25 January 1899, can be accessed at the United States Library of Congress's Prints and Photographs division under the digital ID cph.3b48925.

expansion, a protectoratism of the civilizing European logic that is threatened, though extended in a new way, by the rise of the US as an international power.

Schmitt aptly expresses the European anxiety over this shift in global political ordering and the rise of US power, beginning with the 1823 Monroe Doctrine as reconfiguring the European global order.[87] He argues that the Monroe Doctrine, and its transition into Open Door American policy, signifies a distinction between colonialism and imperialism. He sees the Truman doctrine and the rise of US global power as the 'end of modernity.'[88] While certainly a shift from the colonial mainstay of European domination into the rise of the US as a global power, which in turn expands the western 'European-American' *nomos* into imperialism, this period actually invokes a recodification of the logics of colonialism, rather than a distancing from them or an end to an old world order. Though the US plays a particular role in this shift in a way that does distinguish the previous colonial relationality of the 18th-19th centuries from the 'new' 20th century formation of settler colonial imperialism that will usher in the move to neocolonialism, it still functions entirely within the order of colonial-modernity.

The US extends its settler colonial conquest of the continental US into a larger push for land and colonial competition. With the colonial occupation of

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[87] Schmitt, *Nomos of the Earth,* 23. Schmitt follows how from the middle Christian ages emerges the first European 'order' that shifts as European states rise to a global order Schmitt, *Nomos of the Earth,* 25.

[88] Schmitt, *Nomos of the Earth,* 30.

Hawaii and its overthrow via the Bayonet constitution in 1893, the US follows suit with the Spanish American war in 1898 and new governance over the territories of Guam, the Philippines, Puerto Rico, and Cuba. From this follows the 1899 development of the Open Door policy for trade purposes in China as well as Latin America and by 1902 the US takes over the Panama Canal construction. This move further cements the American 'walk softly and carry a big stick' philosophy of Teddy Roosevelt to gain trade and commercial access to formerly colonized territories, which will in turn position the emergent free-trade privatization and neoliberalism as a response to the burgeoning Third World Non-Align decolonial movement emergent after World War II. Though the framework of 'imperialism' is distinguished by US politicians from that of 'colonialism,' the dynamic of occupation for the purpose of resource extraction, military extension of power, and a cheap labor base extends the same logics of colonial-modernity under the auspices of a dressed-up settler colonial expansion framed as imperialism. International law is a key discourse of this doctrine, one that American lawyers, and later NGOs, would take up as a means from which to steer the growth of US imperialism and neocolonialism.

International Courts

If International law as science is the ideology behind the spread of international law in 20th century forums, then the international courts are the

application of the ideology – an apparatus that serves to solidify the authority of the 'universality' of international law by organizing, ordering, and mediating colonial logics of civility, crisis, and carcerality. Courts, especially international ones, enforce the juridical aspects of civility – of what states (governments as representatives of peoples) can and cannot do. They are carceral in the sense that they function to discipline as well as determine the bounds of what state actors can and can't do, which ultimately serves to determine which types of violence is considered legitimate, and who has access to those forms of legitimate violence (ie; western states versus colonized states).[89] They mediate crisis by presiding over certain aspects of conflict so as to determine which ones are considered illegitimate, but maintain larger global dynamics of crisis that are read as legitimate forms of violence (i.e.; wars started by western states, capitalist resource and labor extraction).

The international court system was not a 'true' court in its late 19th century manifestation. Court reform was an important aspect in the question of managing International law in a global forum. Scott was unhappy with the 1899 Permanent Tribunal of Arbitration that came out of the First Hague Conference. He was not alone in his frustration that it was neither a tribunal, nor was it 'permanent' – all it offered was a list of non-judicial arbiters.[90] Hepp argues that both international and

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[89] See Randall Williams, *The Divided World: Human Rights and Its Violence* (Minneapolis: University of Minnesota Press, 2010).

[90] Hepp, "Scott and International Law," 160.

domestic attorneys emphasized court reform as a 'development' of the law, wherein the 'scientific' use of the law was thought to reduce conflicts.[91]

In 1907 Scott was a member of the American Delegation to the Second Peace Conference at The Hague in the role of both technical delegate and expert in International law.[92] He also represented the US Government at two subsequent European conferences on the interests of an International Court of Justice in 1910. Call details Scott's framework for an International Court of Justice as mirrored from the US Supreme Court and Constitutional Convention: "[T]he framework was one law for all, the law which governs all law, that law of our Creator, the law of humanity, justice, equity – the law of Nature and of Nations."[93] These are the same concepts Vitoria relied on to justify a universal rule of order in the name of 'peace.' Both Scott and Vitoria drew on the conception of the law of nations from Roman law, but one that was exercised differently given the differing colonial contexts. Scott connects the Roman model of arbitration to the idea of an international court, as evidenced by a pamphlet he published in 1910 titled "Judicial Proceedings as a

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[91] On the subject of International law as also 'domestic law,' Hepp states that domestic reformers sought only to moderate the excesses of the American judicial system, and Scott and his colleagues sought to export the successes. Scott believed international law to be "truly law and not ethics, diplomacy, or morality" and wrote an article upholding the Supreme Court's opinion in *Paquete Habana v. United States* as 'holding that international Law is law and that it is part of our municipal [or domestic] law.'" Hepp, "Scott and International Law," 154.

[92] Call, "James Brown Scott," 180.

[93] Call, "James Brown Scott," 181.

Substitute for War or International Self-Redress."[94] This pamphlet advocates for the support of the international court, calling for something beyond the international arbitration already approved by first Hague conference. This is framed in an incremental step argument in Scott's view, as he articulates that general judicial proceedings for all of society follow if there is private arbitration first, as is the case of the Roman history. The ultimate idea promises that forming an international court will bring disputes into court and not into war.[95] At a 'peace meeting' held at Johns Hopkins, Scott and his colleagues adopted resolutions for seeking the support of both the US President and the state department to establish international courts so as to actualize the formation of an international court, which in turn would serve to "accustom nations to the regular and peaceable settlement of international controversies."[96]

Hepp details Scott's views on International law as including a "world court made up of full-time judges who would decide cases brought by national governments on legal grounds," dedicating his career to replacing the system of

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[94] James Brown Scott, "Judicial Proceedings as a Substitute for War or International Self-Redress," 1910, "Pamphlet Published Maryland Peace Society 1925 Park Ave Baltimore," George Washington Law Special Collection Books Notes, (7/21/13).

[95] James Brown Scott, "Judicial Proceedings as a Substitute for War or International Self-Redress," 1910, "Pamphlet Published Maryland Peace Society 1925 Park Ave Baltimore," George Washington Law Special Collection Books Notes, (7/21/13), 16.

[96] James Brown Scott, "Judicial Proceedings as a Substitute for War or International Self-Redress," 1910, "Pamphlet Published Maryland Peace Society 1925 Park Ave Baltimore," George Washington Law Special Collection Books Notes, (7/21/13), 16.

international arbitration of the 19th century.[97] Scott's view on international arbitration was that the US Supreme Court should be the model for a world court, where there would be less arbitration and an actual judiciary would exist instead.[98] While at Second Peace Conference at The Hague, Scott compiled drafts of a tribunal proposal – the Court of Arbitral Justice - based on studying the US Constitutional Convention of 1787 and the origin and growth of the US Supreme Court in order to detail "how peace is actually maintained between 48 states, a lesson the nations can afford to learn."[99] Ultimately, Scott argues that the "real sanction of an international court would be 'public opinion.'"[100]

This context produced the more developed institutional body of the United Nations and the International Criminal Court.[101] However, the precursor to the formation of the United Nations is the League of Nations, formed after the First World War. Anghie argues that the League of Nations formed as a means to create a new international order based on respect for the international rule of law, framed as

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[97] Hepp, "Scott and the Rise International Law," 158.

[98] Hepp, "Scott and the Rise International Law," 161.

[99] Call, "James Brown Scott," 181.

[100] Hepp, "Scott and the Rise International Law," 161.

[101] Interestingly, the Carnegie Institute is the financial backing for the first international court in The Hague in 1907, and in 1922 it was codified as the Peace Palace.

the maintenance of peace, disarmament, and outlawing of aggression.[102] It also marks the rise of the formation of a global institution for mediating conflict. During this time, lawyers were calling for the codification of International law and the importance of holding large international conferences at regular intervals to address major international problems of the times.[103]

One of the earliest international law groups to form was the Institute of International law founded in Ghent, Belgium in 1873, supposedly by suggestion of a professor at Columbia University.[104] The *American Society of International Law* formed after the 11th annual meeting of the *Conference on International Arbitration* in 1905.[105] In 1911 Scott's *Institute de Droit International* met for the first time in Spain.[106] In 1912 the *American Institute of International Law* was founded via the Carnegie Endowment for International Peace as a 'scientific body' composed of non-governmental officials. The concept of non-governmental official was important to the debate concerning the principles of International law so as to ensure that government representatives would not influence it.[107] Other organizations included

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[102] Anghie, *Imperialism, Sovereignty,* 124.

[103] Ibid.

[104] Georgetown Archives, James Brown Scott Papers, Box 32, Folder 12, (7/24/13).

[105] Georgetown Archives, James Brown Scott Papers, Box 37, Folder 1, (7/25/13).

[106] Georgetown Archives, James Brown Scott Papers, Box 32, Folder 1, (7/24/13).

[107] Georgetown Archives, James Brown Scott Papers, Box 32, Folder 12, (7/24/13).

the *Organization of International Justice*,[108] the *International Commission of Jurists*,[109] and countless other conferences, groups, and congressional meeting through the 1940s leading up to the 1945 UN Charter.[110]

The coupling of Scott's work within the larger context of legitimizing International law into a global forum of nation-state management signifies the long push to institutionalize such a body, from the forming of the League of Nations tribunal to the establishment of the International Criminal Court to the founding of the United Nations. The entrenchment of colonial logics into these institutions is most apparent in the League of Nation's priority to manage the former colonies of the Empires defeated in World War I as 'mandates.' The US, however, responded by desiring a framework that privileged a shift towards a free market access policy that was new to colonial management. The League of Nations was an early forum legislating International law, and the Mandate System in particular offers a useful vantage point from which to locate how colonial logics of crisis, civility, and carcerality moved within the development of new colonial technologies, scientific frameworks, and free market ideology, to which we will now turn.

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[108] James Brown Scott, "The Organization of International Justice," Pamphlet 1914, Georgetown Archives, James Brown Scott Papers, Box 73, Folder 22, (7/25/13).

[109] Georgetown Archives, James Brown Scott Papers, Box 41, "International Commission of Jurists" 1927 (7/24/13).

[110] See, for example, Georgetown Archives, James Brown Scott Papers, Box 47, (7/24/13).

Chapter 8
International Law and the Turn to Neocolonialism:

Twentieth century jurists look to Vitoria because his work directly addresses the idea of civilized states re-articulating their relationship to 'uncivilized' states – as states that must continue to remain under colonial domination, albeit in a new form. Anghie argues that this is not actually so much a problem of creating 'order' among those states, but about creating a system of law to account for the relations between two different cultural orders.[111] International law, sovereignty, and rights are bound up in one another in the extensions of colonial-modernity. Within the colonial-international organization of political order, a state is only recognized as a state in the sense that it is sovereign, developed from western state model, which the Mandate System was set up to foster.

New technologies, institutions, and formations of colonialism spread through the scientific application of standards and administrative structures under the Mandate System, housed within the League of Nations. This formalization of International law as a science is both foundational to the spread of new forms of colonial governance, as well as a primary tool used to legislate relationships between colonial governing states, colonized states, and those being fought over by colonizing powers. Anghie argues that International law is a colonial invention. Understood in this manner, we can trace the notion of universal rights legislating a

[111] Anghie, *Imperialism, Sovereignty,* 16.

socio-political order on the basis of racial hierarchy dependent on the heteropatriarchal gender binary, commensurate with Vitoria's jurisprudence, as it continues into the various iterations of colonial development and into the rise of the 20th century formalization of International law in the United Nations and universal human rights.

The League of Nations

Vitoria is credited as the father of International law because he exemplifies that which jurists in the inter-war period are looking for: a rubric for creating 'order' among sovereign – i.e. colonizing – states; and in particular, a set of rules as laws to determine what is or isn't allowed so as to prevent conflict between colonizing powers. Anghie argues that the acquisition of sovereignty is the acquisition of European civilization – such that, for the non-European society, personhood or acknowledgement occurred when it no longer had an independent existence and was instead absorbed into European empires; or when it had acquiesced its own cultural practices and political organizations in alignment with European civilization: "the development of the idea of sovereignty in relation to the non-European world occurs in terms of dispossession, its ability to alienate its lands

and rights. As in the case of Vitorian jurisprudence, the Native is granted a personality in order to be bound."[112]

This dynamic is evidenced within the emergence of the League of Nations, which represents a systemized attempt to prevent global conflict between colonial powers. The League of Nations developed as a response to the warfare of World War I, as the first international institution recognized by International law. Before the beginning of the 20th century, only sovereign states were recognized as actors within International law.[113] The League of Nations emerged as an international institution that was in and of itself an actor, which provided International law with a new form of techniques and ambitions from which to manage international relations.[114] Instead of redistributing the former colonial territories of the defeated empires to the prevailing empires after World War I, those prevailing powers decided to place them under a system of 'international tutelage' known as the Mandate System.[115]

The Mandate System is a particularly useful and important example of the transition of colonial logics of civility, crisis, and carcerality into new institutional iterations. Tuori argues that besides Anghie's work on the subject, there is hardly

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[112] Anghie, *Imperialism, Sovereignty,* 104-105.

[113] Anghie, *Imperialism, Sovereignty,* 115.

[114] Ibid.

[115] Ibid.

any work concerning the legal dynamic of the Mandates, and even less addressing the connection between the rise of human rights and the Mandate System.[116] Anghie argues that whereas the positivist International law of the 19th century endorsed the conquest and exploitation of non-European peoples, the pragmatist Mandate System sought the 'protection' and the integration of previously colonized peoples into the international system as sovereign, independent states.[117]

The League of Nations challenged the positivist legal ideals of the previous century. Some key aspects of these ideals were that International law is a form of law which governs over states, and that therefore states are the only actors in International law.[118] For positivists there was actually no authority that would rule over the sovereign state, because they were bound only to the rules they had consented to.[119] But interwar lawyers claimed this system and positivist approach caused the First World War.[120] The League suggested new ways of approaching the problem of sovereignty and led interwar lawyers to question conceptions of sovereignty fundamental to positivist International law of the 19th century.[121] To

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[116] Taina Tuori, "From League of Mandates to decolonization: a brief history of rights," in *Revisiting the Origins of Human Rights,* 268.

[117] Anghie, *Imperialism, Sovereignty,* 119

[118] Anghie, *Imperialism, Sovereignty,* 124.

[119] Anghie, *Imperialism, Sovereignty,* 125.

[120] Ibid.

[121] Anghie, *Imperialism, Sovereignty,* 124.

deal with this, the emergence of new institutions replicated the institutions already found in domestic systems – legislature and courts.[122] The League functioned then as a means of organizing states into a community, which the League could then claim to represent as furthering the interests of the 'international' community and fostering cooperation among those incorporated states.[123] Positivism was considered the scientific element of thinking about International law – pragmatism moved away from a formalist idea of science, to center focus instead through the social sciences (political science, sociology, international relations) to then determine whether International law furthered social objectives.[124] The formation of the League of Nations challenged the formalist system of positivist International law that was based on the concept of an absolute sovereign, but Anghie argues that the basic positivist principles were maintained – states remained the major actors of International law, but were enacting new versions of International law through the creation of social science based metrics, policies, and administrative systems.[125]

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[122] Anghie, *Imperialism, Sovereignty,* 125.

[123] Anghie, *Imperialism, Sovereignty,* 126- 127.

[124] Anghie, *Imperialism, Sovereignty,* 128-129.

[125] Anghie, *Imperialism, Sovereignty,* 131 – 132.

The Mandate System

Anghie shows how interwar lawyers and scholars understood their role in the League as representing the international community's aspiration to address colonial problems *in a systemic and coordinated manner* – as ethical.[126] General Smuts of South Africa originally proposed the creation of the Mandate System to encompass European territories left in the wake of the collapsed Empires, whose people were considered incapable of self-governance.[127] However, while US President Wilson supported the basic implementation of the system to the Ottoman territories in the Middle East and the former German colonies in Africa and the Pacific, he did not want this dynamic to extend to the European-based territories. He also argued against annexation of the non-European territories by the victorious powers as contrary to policies of freedom and democracy that the war was supposed to promote. Instead, Wilson proposed the application for the Mandate System to the non-European people and territories as protecting the interests 'of backward people' and guiding them towards self-governance.[128] Certain states

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[126] Emphasis mine. Anghie, *Imperialism, Sovereignty,* 137.

[127] See Anghie, *Imperialism, Sovereignty*, 119 where he cites Smut's original proposal: J.C. Smuts, "The League of Nations: A Practical Suggestion," reprinted in David Hunter Miller, *The Drafting of the Covenant* (2 vol., New York: G.P. Putnam's Sons, 1971, 1928), II, 26. See also Tuori, "League of Mandates to Decolonization," 269.

[128] Anghie, *Imperialism, Sovereignty,* 120.

designated as 'mandatories' would then be administrators of the territories on behalf of the League and under its supervision.[129] By framing the conquered mandate territories as protectorates in need of tutelage and trusteeships to be administered in the interest of the peoples of the mandate territories within the framework of moral responsibility, Wilson avoided charges of imperial colonial conquest.[130]

The US argued for free-trade access in mandate territories, a point of contention that would ultimately cause them to pull out of the League. While Wilson condemned formal colonialism, alongside international lawyers, he simultaneously endorsed and authored an International law that sanctioned conquest and exploitation under a new name.[131] Thus the 'civilizing mission' is seen as the paramount framing for the Mandate, which both extends and distinguishes itself from the colonial imperial practices leading up to World War I.[132]

Western powers legitimized the Mandate System by showing that a creation of international institutions would be the better way to address colonial

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[129] Ibid.

[130] Tuori, "League of Mandates to Decolonization," 269-270.

[131] Anghie, *Imperialism, Sovereignty,* 144.

[132] Tuori, "League of Mandates to Decolonization," 270. See also Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), 174.

problems.[133] Anghie argues that this dynamic continued the colonial framework of Native treatment, where like under Vitoria, 'barbaric' customs were to be eliminated and governance was then directed at integration of the colony into the larger economic structure of the metropolitan power via the Mandate System.[134] Under the Mandate System, economic progress was considered a universal category, transcending particularities of race or culture.[135] The primacy of economy made explicit the focus on free trade in the mandates, whereas the prior system of Empire-based colonialism had inhibited free trade because those colonial powers established monopolies over the trade in their colonies.[136] Anghie argues that by the start of World War I the central importance of colonial possessions was for economic well-being – as imperialism.[137] The colonies provided both soldiers and raw materials. Wilson and the US actually pull out of the League because they

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[133] Anghie, *Imperialism, Sovereignty,* 137.

[134] Anghie, *Imperialism, Sovereignty,* 168.

[135] Anghie, *Imperialism, Sovereignty,* 161.

[136] Anghie, *Imperialism, Sovereignty,* 162. Until later half of 19th century large trading companies such as the Dutch East India Company and British East India had driven the colonial enterprise. But by the end of the 19th century, the imperial state itself had established economic links with its colonies. From 1880 to the turn of the century, imperialism shifted towards military and economic extraction to pull profit out of colonies, as evidenced by the 1895 Chamberlain speech where he details the principle purpose was in finding new markets and defending old ones. The colonies provided both soldiers and raw materials such as cotton, rubber, tin, leather, and jute. Anghie, *Imperialism, Sovereignty,* 141-142.

[137] Anghie, *Imperialism, Sovereignty,* 142.

wanted the open door policy to secure access to interests in oil under the French and British Mandates that were not being supported by the League in accordance with Wilson's 14 points plan.[138] Although the mandates essentially became integrated into the economic structure of the mandate colonial power, the US, though no longer in the League of Nations, still maintained trade access by making bilateral treaties to enable access to the mandate territories.[139]

Although empire colonialism continues under the British and French Empires until well into the mid to late 20th century, the push to open up the markets of the mandate colonies, especially by the US and its open door policy, positions a new kind of colonial ideology premised on a new form economic access. This is evidenced within the ideological framing of the Mandate System, where the resources of colonized states were framed as belonging to the larger international community.[140] The economic development of mandate territories was the primary interest for the League.[141] Economic progress was considered a universal category, transcending particularities of race or culture, with much less concern for whether Native populations survived the technologies of the mandate colonial governance.[142]

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[138] Anghie, *Imperialism, Sovereignty,* 163.

[139] Anghie, 163, footnote 186.

[140] Anghie, *Imperialism, Sovereignty,* 160.

[141] Anghie, *Imperialism, Sovereignty,* 159 – 161.

[142] Anghie, *Imperialism, Sovereignty,* 161.

Anghie argues that the Mandate System is not a departure from colonialism, but rather a system of 'progressive, enlightened colonialism.' This is turn was seen as 'good' colonialism, as opposed to 'bad' colonialism of the 19th century, because it justified the continued colonial expansion of Britain and France as mandate powers, and in turn the imperialism of the United States as a protectorate 'good' colonialism.[143]

Under mandate colonialism, the focus on economic progress positioned the framing of the 'right to labor' as justification for labor subjugation. This is evident in the work of British Mandate representative Fredrick Lugard's approach to colonial administration in *The Dual Mandate in British Tropical Africa,* dated 1921. The idea behind the dual mandate was protecting the welfare of formerly colonized peoples by bringing the dual aspects of 'civilization' as well as expanding trade and international commerce in previously colonized territories.[144] Lugard sums up this relationship by an appeal to a right to work, stating that "the democracies of to-day claim the right to work, and the satisfaction of that claim is impossible without the raw materials of the tropics on the one hand and their markets on the other."[145]

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[143] Anghie, *Imperialism, Sovereignty,* 157.

[144] Anghie, *Imperialism, Sovereignty,* 157-158; Tuori, "League of Mandates to Decolonization," 273-274.

[145] Anghie, *Imperialism, Sovereignty,* 158. See also Anghie, *Imperialism, Sovereignty,* 167 for a discussion of the relationship between the abolition of slavery and forced labor. This is also connected to the 16th century Spanish New Laws of Burgos and forced labor in place of enslavement as addressed in Part 2 of this dissertation.

Vitoria's work appealed to interwar lawyers as a foundation for a humanist International law framework. Through the American Society of International Law, Scott connected with Quincy Wright, who authored the text *Mandates Under the League of Nations.*[146] Wright was part of the group of inter-war lawyers who drew on Vitoria's focus on Indians as 'wards' in need of guardianship as a framework for the Mandate System, in part to distinguish from the formalist law of International law they saw as legitimating a 'dispossession' form of conquest.[147] Wright's text offers a comprehensive detail on the framework and exemplification of the Mandate governance as constructed out of the resurgence of Vitoria's work.

Under protectorate/mandate status, the right to work functions as two fold: the right of the people colonizing the country to work, and the right of those forced to labor for the colonial power to work; both of which reinforce the other. In claiming to 'end' colonialism, the International law community returned to the origins of the colonial encounter to refashion a new formation of colonial relationality that maintained the subjugated/subjugator colonial logics. Vitoria is seen not as jurist legitimating Spanish war waged on Indians but as advocate of Indian rights whose work suggested that International law, from its beginning, had

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[146] Hepp, "Scott and the Rise of International Law," 168. Quincy Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930; New York: Greenwood Press, 1968).

[147] Anghie, *Imperialism, Sovereignty,* 144-145.

been concerned with protecting welfare of dependent peoples.[148] Anghie argues that main issue for the mandates was to use the disciplining of labor as a means of civilizing:

> Labour thus served the same purpose within the mandate scheme as the 'universal human being' postulated by Vitoria. It suggested that the discipline of economics being applied to the mandates in turn was universally valid, embodying a set of processes by which natives could be civilized. Further, labour was connected so intimately with the physical existence of the native that it provided the League with a means of entering into the very being of the native, of disciplining and civilizing him. The latent capacity of the native to enter the universal realm of progress and modernity could be furthered precisely by using his labour to further economic development. The native and his surroundings were thus rendered in economic terms: economics and its related complex of concepts provided the vocabulary by which the essential features common to all mandates could be both identified and then integrated into a programme of reform.[149]

The inter-war mandate period exemplifies the framework of the 'law of labor' – that people should be made to work – as a 'right,' as one that emerges directly from the law of nature itself.[150] This in turn ensured that the continued colonial framework of Native treatment under the logics of civility, crisis, and the carceral. As similar under the Vitorian framework, 'barbaric customs' were to be eliminated and then replaced by governance directed for integration of the colony into the larger economic structure of the metropolitan power.[151]

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[148] Anghie, *Imperialism, Sovereignty,* 145.

[149] Anghie, *Imperialism, Sovereignty,* 165-166.

[150] See Quincy Wright, *Mandates Under the League of Nations* (1930, repr.; New York: Greenwood Press, 1968), 249.

[151] Anghie, *Imperialism, Sovereignty,* 168.

The Mandate System functioned via two sets of obligations under the concept of a 'sacred trust of civilization:' "1. the substantive obligations according to which the mandatory undertook to protect the Native and advance their welfare, and 2. the procedural obligations relating to the system of supervision designed to ensure that mandatory power was properly administering the mandate territory," as enunciated in Article 22 of the League Covenant.[152] The broad primary goal of the Mandate System under the League of Nations was to first prevent the exploitation of Native peoples, and secondarily to promote well-being and development through self-government.[153] Countries were placed in classifications for provisional recognition via tiered regimes in the three-part system. The mandate powers had to submit reports to the League Council to ensure proper supervision and a proper mechanism for such supervision.[154] Any disputes between members of the League would be referred to the Permanent Court of International Justice.[155] This was a forum where only the claims of the colonizing powers were heard, as opposed to the any claims made by colonized peoples who instead had to rely on a petition-based forum overseen by the governing mandate powers.

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[152] Anghie, *Imperialism, Sovereignty,* 120.

[153] Anghie, *Imperialism, Sovereignty,* 121.

[154] Anghie, *Imperialism, Sovereignty,* 122.

[155] Anghie, *Imperialism, Sovereignty,* 123.

Under the Mandate System, International law institutions could conduct experiments and develop technologies not possible in the western world. The 'dynamic of difference' moved from the crude jurisprudence of 19th century positivism into the sophisticated techniques and technologies of pragmatism, framed now to address the 'deficiency' of Native peoples and societies as the project of the mandate.[156] Anghie argues that such processes confirmed that economic relations between colonizer and developed notions were based on the 'cultural differences' between western states and 'backward' mandate peoples.[157] Anghie argues that the civilizing mission was furthered by colonial experts intent on acquiring detailed knowledge of Native societies and economies for development of Native peoples – framed as objective and disinterested science.[158]

Legally the Mandate System was succeeded by trusteeship system, though the technologies of management under the Mandate System became institutionalized through the Bretton Woods institutions of the World Bank and International Monetary Fund, which continue to operate in our contemporary moment.[159] Anghie argues that the mechanisms of International law used to de-colonize formally colonized states were also the mechanisms that created

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[156] Anghie, *Imperialism, Sovereignty,* 155-156.

[157] Anghie, *Imperialism, Sovereignty,* 136.

[158] Ibid.

[159] Anghie, *Imperialism, Sovereignty,* 190.

neocolonialism, and that the structures, ideologies, and jurisprudential techniques of neocolonialism were in fact largely in place before 'third world' states acquired independence.[160]

Anghie argues not only that International law functions to continue colonialism, but that International law seeks to suppress its relationship to colonialism – as a central feature of international law's identity.[161] The Mandate System arises through a shift from a discourse based on race to one based on economics, which is crucial to conventional narrative of International law.[162] Anghie argues that the explicit characterization of non-Europeans as inferior because of racial differences becomes regarded as unscientific and replaced instead by the civilizing mission of the neutral and scientific discourse of economics.[163] This is a crucial rearticulation that is taken up throughout many 20th century discourses, and in particular is evident in the relationships between eugenics, the Carnegie Institute, and Scott as they extend into the 'scientific' frameworks of International law and the free market access to colonized territories.[164]

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[160] Anghie, *Imperialism, Sovereignty,* 192.

[161] Anghie, *Imperialism, Sovereignty,* 193.

[162] Ibid.

[163] Ibid.

[164] There is much to examine regarding the relationship between the Carnegie Institute, International law, and eugenics as also a key relationality that perpetuates the dynamic of difference via scientific justification, that itself is rising from the project of US settler colonial expansion and eugenics as an imperial tool for

A Look Towards the Move to the Human as Universal

Vitoria's work and its 20th century revival under Scott offers a thread through which to trace this shift, as well as the epicenter, so to speak, of colonial logics as they proliferate within colonial-modernity towards neocolonialism. Universal rights, which as I argue ontologically speaking are a construction *of* colonial-modernity, shift in size and scope to accommodate the further refined and granulated extensions of colonial logics as they pervade into a new level of global expansion. This manifests not only as the full on incorporation of all states of the world into the hegemonic western sovereign-state political order post 1948, but in the saturation of the norms, values, and scientific disciplining tools into western ideological, epistemological, and socio-juridical-political frameworks that permeate into new technologies, such as the widespread surveillance technologies proliferating by the end of the 20th century. Universal human rights, in particular, function as a technology for mediating which groups of people experience a higher proximity to such violences and disciplinary logics, and which will not.

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expansion. On eugenics and colonial relationality, see for example Maile Arvin, *Possessing Polynesians: the Science of Settler Colonial Whiteness in Hawai'i and Oceania* (Durham: Duke University Press, 2019). For a discussion of US imperialism and eugenics, see James A. Tyner "The Geopolitics of Eugenics and the Exclusion of Philippine Immigrants from the United States," *The Geographical Review* 89, no. 1 (January 1999): 54-73.

Within the project of colonial-modernity, universal rights change over time to incorporate new categories of people, as reflective of shifts in colonial iterations responsive to political and social unrest. In this way, it becomes clear that rights are not actually a fixed unit of subjecthood. Hunt argues that "rights cannot be defined once and for all because their emotional basis continues to shift, in part in reaction to declarations of rights. Rights remain open to question because our sense of who has rights and what those rights are constantly changes."[165] Rights are considered rigid categories, yet understood from the long genealogical view of colonial-modernity, they in fact shift to accommodate changing socio-political dynamics. The move to the human right from the rights of man can be tracked as a shift in colonialism that requires a more blanketing and inclusive label, one that eschews the hierarchies of the Human/almost human/non-human prefiguring Vitoria's universal rights. The move to label such rights as 'human rights,' rather than say 'minority rights,' as was the term articulated within interwar legal spheres, is a particular move animated by the conditions of burgeoning neocolonial neoliberalism positioned by the United States, as the next chapter will address.

Talal Asad argues that the move from legal protections from citizens to the abstract universality of 'the human family' in UN Declaration of Human Rights separates the concept of the 'human family' from that of the non-human, but with no

[165] Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Company, 2007), 29.

real attempt to define the human.[166] Instead, he argues that this dynamic articulates a move from the 'human family' to that of the state:

> In doing so it underlines the fact that the universal character of the rights-bearing person is made the responsibility of sovereign states, each of which has jurisdiction over a limited group within the human family. This limited population — as Foucault noted — is at once the object of the state's care and the means of securing its own power.[167]

The universal is expanded on an individual basis to demarcate nations whose legitimacy is dependent on enacting certain kinds of legitimate violences over other nation-states that are now at the behest of scrutiny and surveillance through the new channel of humanitarian interventions and human rights protections. In turn, the state claims protection via 'the rule of law' where Asad argues the UNDHR evidences a direct convergence between the rule of law and 'justice:' "not only does *The Declaration* equate law with justice, it also privileges the state's norm-producing function, and thereby encourages the questionable thought that the authority of norms corresponds to the political force that supports them as law." [168]

Anghie articulates how the emergence of international human rights law during the formative period of the United Nations allowed International law and institutions to regulate relations between a sovereign and its citizens.[169] He argues

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[166] Talal Asad, "What Do Human Rights Do? An Anthropological Enquiry," *Theory and Event* 4, no. 4 (2000), 3.

[167] Ibid.

[168] Ibid.

[169] Anghie, *Imperialism, Sovereignty,* 132.

that the Mandate System did not seek to merely qualify rights of the sovereign, but to create the sovereign in and of itself. In the Mandate System, International law and institutions could conduct experiments and develop technologies not possible in the sovereign western world.[170] Sovereignty here is not in the context of war and collective security, but about economic relations between colonizer and colonized that mediate notions of the cultural difference between western states and 'backward' mandate peoples as uncivil.[171] International human rights law enables International law and institutions to enter the interior of the colonized space in order to administer what Anghie terms a 'civilizing therapy' to the body politic of the newly sovereign state, using the same technologies developed during the Mandate System.[172]

This dynamic was made possible via the transition of the Mandate System into a new form.[173] The mechanisms of International law used to decolonize were also the mechanisms that created neocolonialism via the "neutral, scientific discourse of economics."[174] The impact of the Mandate System created a particular

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[170] Anghie, *Imperialism, Sovereignty,* 136.

[171] Ibid.

[172] Anghie, *Imperialism, Sovereignty,* 135.

[173] Anghie, *Imperialism, Sovereignty,* 190.

[174] Anghie, *Imperialism, Sovereignty,* 193. For a discussion of how the focus on economic rights not taken up by the major western human rights organizations, such as Amnesty International and Human Rights Watch, see Kenneth Cmiel, "The

set of administrative standards that were applied universally to a wide range of social, economic, and political structures of the mandate territories, including in the areas of labor policy, systems of land holding, and trade relations, which Anghie argues served to standardize conduct and culture within the mandate territories.[175] In addition, it functioned to create a standardized legal framework via the synthesis of law and administration along with the fusing of law and social science.[176] By creating international institutions, International law became a possibility – through the linkage between law and institutions as a mechanism of social engineering.[177]

The Mandate System is an example of how International law and institutions also linked law and administration in a new way. The Mandate System consisted of a set of rules and legal measures, but also a systemic framework of collecting and analyzing information to formulate policies.[178] In turn, Anghie argues this served as a connection between sociology and sovereignty, such that through institutional access to the interior of the state, International law could develop a new set of technologies and methods of control to address the problems of the colonial 'gap' between the civilized and the uncivilized.

Recent History of Human Rights," *American Historical Review* 109, no. 1 (February 2004): 128.

[175] Anghie, *Imperialism, Sovereignty,* 150.

[176] Anghie, *Imperialism, Sovereignty,* 152-4.

[177] Anghie, *Imperialism, Sovereignty,* 154-5, citing Pound on social engineering, 154.

[178] Anghie, *Imperialism, Sovereignty,* 155.

The move towards universal human rights brought together a new type of articulation of the human. If we return to Vitoria's moment, as argued in Part 2, universal rights are used to position categorical distinctions between Human/non-Human/not yet Human as they become grouped into populations via racial hierarchy that function as demarcations of who is entitled to enact violence and who will receive it. Universal rights are a representation of the legitimacy of some states to enact violence over populations of humans. In the turn towards neocolonialism, this distinction is replaced by a notion of a universal human – where all peoples, as individuals, are measured within the bounds of what is considered to be 'civilized and normal,' as projections of a western set of norms and values now no longer distinguished by a Human/un-Human, but rather as a standardization that all peoples should uphold. When they do not, or will not meet those standards, especially as nation-states, there are apparatuses in place for disciplining them into the universal via the same colonial logics of civility, crisis, and carcerality, albeit under new names such as the IMF and World Bank.

For Asad, the operation of the universal, however, is a space where the disciplining and regulation into a universal set of standards also allows for the both the justification for intervention against 'illegitimate' forms of violence while simultaneously sanctioning 'legitimate' ones:

> "Universalism" is an indispensable term especially when it is used to criticize an arrangement that we consider needs greater inclusion. But it is always important to ask what universe is being alluded to when it is upheld as a principle. How are the members of the universal class "human" defined? With what properties are humans endowed? By whom? Employing what sanctions?

> To what ends? If historians of social thought are correct about the increasing salience of a language of "normality" in modern society, we should not look to *theories* of "human nature" to answer such questions. We should attend instead to the *practices* by which attempts are made to regulate "normal conduct" in the world, both within the nation state and beyond it. This requires us to analyze human rights law as a mode of converting and regulating people, making them at once happier and more governable. (Only a step away, surely, from the promise of genetic engineering to cure all causes of suffering?) As such we should not be surprised to find that human rights are used both as a justification for intervening against the perpetration of cruelty but also for justifying international action that is itself cruel even though it aims at a more peaceful, civilized, and empowered world.[179]

Seen as a means of regulation and conversion, human rights are employed in a manner so as to enforce the 'universal' peace of western interests. The move towards the language of universal human rights brings the universal condition of a Humanity as extended to all – all so as to be incorporated into a neocolonial iteration where all have the right to labor and other enumerated universal rights to live free yet within structural conditions that continue to produce that very same (universal) conditionality of proximities to violence that rights claim to bolster against. Under neoliberalism, then, and as manifested by the economic incentivization of the mandate schema, labor continues to function most prominently within the structuring of capitalist colonial-modernity, where the right to labor – as a negation of enslavement – positions Indigenous/formerly Indigenous peoples as in a contractual right to perform the labor for (white) nations, via corporations, to profit from. This produces a 'less than' dynamic – of whose bodies,

[179] Asad, "What Do Human Rights Do?," 12.

health, value, livelihood is *worth* less in a 'universal' context. This is the trap of human rights – on the surface, they sound like they are capable of remedying the structural harm inherent to colonial-modernity. But because the adoption of the term 'human' in front of rights doesn't actually negate any of the structural power relations of colonial-modernity, it becomes perfunctory, an empty signifier used as a technology that increases surveillance and enhances warfare on the grounds of 'humanitarian' intervention.

The formation of the United Nation confirms a new articulation of sovereignty. Anghie shows that under classic positivist International law, states came into being when they possessed certain attributes, such as territorial boundaries and governments that were recognized as independent by other states.[180] International law was at first more passive in this construct, leaving it to be decided by states holding power which other states were considered independent and who was not. But under the Mandate System, International law and institutions actively created sovereignty – as a pragmatist approach – by establishing the social foundations, sociological structures, and political, social, and economic practices determining statehood.[181] This structuring in turn allowed sovereignty to be graded into mandate classifications based on state of political and economic advancement. Every society then could exist on a continuum of

[180] Anghie, *Imperialism, Sovereignty,* 147-148.

[181] Anghie, *Imperialism, Sovereignty,* 148.

sovereignty in comparison and approximation to the European/western nation-state.

Anghie argues that this structure therefore repudiated the idea that different societies with different forms of political organizing should been seen with respect and validity in the International law realm. Thus the 'universalizing' nature that a sovereign state would emerge through mandate status – any country whether that be in Asia, the Middle East, or Latin America, would be measured against the same principles of European nation-state sovereignty articulated as 'self-government.'[182] Anghie shows that from the 1950s onward, these technologies ultimately confirmed that the reason underdeveloped nations were 'behind' so to speak was purely cultural – that their 'backward' cultural, political, and economic systems were the reason for discrepancies of wealth as compared to western nations.[183] Once colonial independence was granted, any differentiation of access to resources or even the impact of colonization was imputed as due to "indigenous conditions and incapacities" embodied in the modernization theories taken up by political scientists and economists..[184]

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[182] Anghie, *Imperialism, Sovereignty,* 148.

[183] Anghie, *Imperialism, Sovereignty,* 207.

[184] Ibid.

Asad locates human rights discourse as continuation of the civilizing logic that transitions into theories and practices of development/modernization as an extension of the savior/burden framework endemic to colonial-modernity:

> Human rights discourse is also about undermining styles of life by means of the law as well as by means of a wider culture that sustains and motivates the law. In the nineteenth century and the first half of the twentieth the expansion of European law in the Third World — its growing universalization — was openly recognized as an instrument of cultural transformation described first as "civilization" or "Europeanization" and then as "development" or "modernization," always linked to some vision of a humanity redeemed by its chosen elite. Today human rights discourse, with its emphasis on the required autonomy of rights-exercising individuals, represents a universal ideal of justice.[185]

Justice here configures hand in hand with peace. Post World War II, peace is proclaimed by western powers as the ultimate aim of the creation of an order between nation-states. But what is peace in the framework of colonial-modernity? Vitoria's work is extensively valorized during this time because of the idea of promoting 'peace' and 'brotherly love' among nations. Peace, in this context, is the justification of genocide, warfare, and colonial conquest structures over non-European peoples and the 'right' to do so without interference from other European powers. This same notion of peace is at work in the transition from World War I and II and the colonial dynamics governing intra-European competition. Peace means those nations getting to do what they want without going to war with one another.

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[185] Asad, "What Do Human Rights Do?," 11.

But how did the concepts of the universal, human, and rights come to be attached together? How is the shift into neocolonialism and neoliberalism guided, initiated by, and situated through the construction of a 'universal human right?' What role does Vitoria's work play in that shift? The next chapter will engage these questions to consider what constitutes the human in the construct of universal human rights by tracing the emergence of human rights discourse from the fall of the League of Nations and Mandate System and into the rise of the United Nations.

Chapter 9
From the Mandate System to Universal Human Rights

Contemporary accounts of the history of human rights indicate a range of 'origin' moments of human rights activism – from as early as the 18th century theories of individual liberalism as well as narratives extending further back to Roman era-thinking.[186] Many of these narratives also locate Vitoria in the line of human rights discourse, where some contemporary scholars consider him to be the 'father of human rights.'[187] For example, Iwe states that "right from the days of Francisco de Vitoria, eminent jurists have not failed to see that the protection of the rights of man and human values is a factor which the international bodies or

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[186] See, for example, Makau Mutua, "Standard Setting In Human Rights: Critique and Prognosis," *Human Rights Quarterly* 29 (2007): 550-551, engaging the liberal framework for how human right emerged; see also Rossi, *Broken Chain of Being*; Nwachukwuike S.S. Iwe, *The History and Contents of Human Rights: A Study of the History and Interpretation of Human Rights* (New York: Peter Lang Publishing, 1986); Pamela Slotte and Miia Halme-Tuomisaari, eds. *Revisiting the Origins of Human Rights* (Cambridge UK: Cambridge University Press, 2015).

[187] Robert John Araujo, "The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation," *Ave Maria Law Review*, no. 1 (2003), 159-174; Joseph M. de Torre, "The Roots of International Law and the Teachings of Francisco de Vitoria as a Foundation For Transcendent Human Rights and Global Peace," *Ave Maria Law Review* 2:123 (2004), 123-151; Jose Carlos Moreira da Silva Filho, "The Existential Subject as Rights and Private Law," *Nevada Law Journal* 10:646 (2010), 646-666; R.P. Boast, "The Spanish Origins of International Human Rights Law: A Historiographical Review," *Victoria University of Wellington Law Review* 41, no. 15 (2010): 235-271; and Annabel Brett, "Human Rights and the Thomasist tradition," in *Revisiting the Origins of Human Rights,* eds. Pamela Slotte and Miia Halme-Tuomisaari, 101, citing Lynn Hunt, *Invention Human Rights* (New York: Norton, 2007), 82-101.

community must concern themselves."[188] Origin theories locating human rights as emergent from natural law abound, including connections between the US declaration of the Rights of Man as an early human rights document developed from the natural law theories of the Enlightenment.[189]

Proponents of human rights discourse locate its origins across many historical epochs in the trajectory of western civilizational development. Sklar details the use of the term human rights ranging from British poetic expression in the early 1700s, followed by Thomas Paine's use of the term in 1792, as well as Thomas Jefferson use of the term in reference to the violations of human rights inherent in the slave trade in his 1806 State of the Nation speech, to John Adams articulating that colonists sought independence because they were nurtured by the original doctrines of human rights.[190] The 1870's saw the beginning of International law societies, the focus on humanitarian peace, and the spread of the discourse of International law, as addressed in the last chapter. Lynn Hunt attributes the spread of human rights discourse in part to the spread of the novel as conditioning a new

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[188] Nwachukwuike S.S. Iwe, *The History and Contents of Human Rights: A Study of the History and Interpretation of Human Rights* (New York: Peter Lang Publishing, 1986); 118.

[189] Cmiel, "The Recent History of Human Rights," 122.

[190] Kathryn Kish Sklar, "Human rights discourse within women's rights conventions in the Unites States, 1848-70," in *Revisiting the Origins of Human Rights*, Pamela Slotte and Miia Halme-Tuomisaari, eds. (Cambridge UK: Cambridge University Press, 2015), 164-165.

forum through which to empathize with other positionalities, thereby crafting a foundation for a universal character of human rights.[191]

A number of resolutions by institutions were developed prior to the 1930s on human rights, including resolutions adopted by the International Diplomatic Academy in 1928, the International Law Institute in 1929, and the International Union of League of Nations Associations in June 1933, which had been brought to the attention of the League of Nations at various points preceding the 1945 conference on the formation of the UN.[192] Additionally, there are also distinctions within human rights frameworks that include the divide between political and civil rights from 'economic, social, and cultural rights,' where the later are considered categorically distinct rights projects.[193] In the 1940s the proposition that the self-determination of people was a human right was not ultimately approved by the International law community. This in turn indicates the deep disciplinary logics at work in securing a 'universal' predicated on the same western governance values

[191] Hunt, *Inventing Human Rights,* 20.

[192] Jan Herman Burgers, "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century," *Human Rights Quarterly*, 14 (1992): 457.

[193] Cmiel, "The Recent History of Human Rights," 122, citing an example of how the linking of political and civil as once discrete categories was demonstrated by the example of women gaining the right to own property but not the right to vote in the 1800s.

and colonial logics that are not eliminated in the rise of universal human rights and the United Nations, but rather are codified into new forms and institutions.[194]

The Road to the United Nations

In 1929 Russian Andre Mandelstam authored the Declaration of Rights of Man.[195] Mandelstam considered the First World War to be a turning point between an earlier system of law based in the theory of absolute sovereignty of states and a newly emerging system of the rule of law in International law.[196] This idea for Mandelstam emerged in the 1870s, and grew within the 1873 Institute of International law as a 'laboratory' of law.[197] Koskenniemi argues that many of the political objectives of this international group – general suffrage, social welfare

[194] Cmiel, "The Recent History of Human Rights," 123; see also Paul Lauren, *The Evolution of International Human Rights: Visions Seen*, 2nd. ed. (Philadelphia: University of Pennsylvania Press, 2003).

[195] Dzovinar Kevonian, "Andre Mandelstam and the internationalization of human rights (1869-1949)," in *Revisiting the Origins of Human Rights*, Pamela Slotte and Miia Halme-Tuomisaari, eds. (Cambridge UK: Cambridge University Press, 2015), 241. Kevonian locates Mandelstam as the father of international human rights. Kevonian, "Mandelstam," 240.

[196] Kevonian, "Mandelstam," 249. As a lawyer, academic, and diplomat, Kevonian states that Mandelstam was influenced in particular by the question of the Armenian genocide by the Ottoman Empire and his own personal experiences.

[197] Ibid.

legislation, and rule of law – later became realized in domestic societies.[198] For example, *The International Parliamentary Union for Arbitration and Peace* formed in Paris in 1888 to support an international law specifying the 'rights and duties of states.'[199]

Mandelstam's 1929 Declaration of Rights of Man, like Vitoria's work, dehistoricizes any particularities specific to the circumstances underlying the need to assert human or universal rights. Kevonian argues that this functions to produce a universalism through which origins or cultural specifics are negated.[200] This is the same framework that Scott exalts in Vitoria's work, and that the international law in the Mandate System exemplifies, in that all mandate states are compared across a universalized set of standards. This universalization functions as a means of creating a blanketed notion of 'universal human rights' that is almost so broad conceptually as to be rendered meaningless.

Though drawing on different legal theorists, Scott and Mandelstam, who collaborated together, both assert the importance of a set of individual rights governed by International law, as evidenced by Mandelstam's 1929 Declaration at

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[198] Koskenniemi, *The Gentle Civilizer of Nations*, 3.

[199] Kevonian, "Mandelstam," 250. As well as compulsory arbitration.

[200] Ibid.

the *Institut de Droit International's* Briarcliff, New York meeting that Scott presided over.[201] In a note Scott wrote for the United Press regarding this meeting he states:

> [T]he most important measure adopted by the resolution was unquestionably a series of six resolutions with a preamble bearing the title of "International Declaration of the Rights of Man." … It is interesting to note that this important measure was adopted on October 12, the 437 anniversary of the discovery of the New World.[202]

By the 1940s, the work of spreading International law undertaken by Scott and others, and through the influence of the Carnegie Institute in particular, produced the normalization of International law as a concept that would remedy nation-state disputes.

An example of this discussion exists in the form of a 1941 pamphlet by the Carnegie Institute titled "After the War: Plans and Problems," by Pennington Haile.[203] The stated purpose of the leaflet is to offer understanding and an exchange of ideas to address the question of whether it will be possible to establish a peaceful world after the end of the war, "so that the American people will be ready

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[201] Kevonian, "Mandelstam," 259. For theories of humanitarian intervention and human rights, Mandelstam draws from Pasquale Fiore, Atonie Pillet, Antoine Rougier, and Leon Patrazycki. Kevonian, "Mandelstam," 251.

[202] Columbia Special Collections, Carnegie Archives, Volume 399, International Law Classics 1910-1926, Volume 401, Folder 3, (8/15/13), 1001-2.

[203] Pennington Haile, "After the War: Plans and Problems", United Nations Archive, Binder AG-037 United Nations Information Organization (UNIO) 1940-1945; s-0537 - 0044-0007 & 8; Carnegie Institute, Catholic Association, Folder 7 Carnegie Institute: 1941 Carnegie Institute.

ahead of time to understand post-war problems."[204] The pamphlet includes a brief history of the League of Nations. It details that principal features at the end of the First World War were to provide: "1. machinery for conference, consultation, and settlement of international disputes; 2. machinery in the functional fields such as control of international trade in narcotic drugs, health, communications, economic and financial problems; 3. a permanent international civil service; 4. an international labor organization; and 5. a functioning and experienced court of international justice."[205]

Haile argues that even though the League succeeded in drug trafficking control, it did not succeed with preventing war. Therefore, Haile contends that the League should grow into an 'orderly development' that supports a 'federal system' much like US states function in relationship to the federal government as a central authority.[206] Ultimately, Haile argues that International law offers "the oldest and most fundamental basis for orderly and just relationships between nations."[207] In particular, Haile elaborates on the set up of the Permanent Court of Arbitration at The Hague in 1920.[208] The pamphlet also gave different ideas of how to structure

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[204] Emphasis mine. Haile, "After the War," United Nations Archive, 5.

[205] Haile, "After the War," United Nations Archive, 7-8.

[206] Haile, "After the War," United Nations Archive, 8.

[207] Haile, "After the War," United Nations Archive, 11-12.

[208] Haile, "After the War," United Nations Archive, 12.

world organization and 'peace,' where the maintenance of peace relies on a legislature, court system, and police power.[209]

But how does the human become employed in this project? And what of this dynamic produced the shift from the Human/almost human/non-human to the 'universal human' of the 20th century?

Pagden argues that the genealogy of human rights is one that endorses a western European notion of the human.[210] He shows that the French Revolution changed this through the linkage of human rights with citizenship: "Human rights were thus tied not only to a specific ethical-legal code but also implicitly to a particular kind of political system, both of inescapably European origin. In both cases, however, being employed was an underlying idea of universality whose origins are to be found in the Greek and Roman idea of a common law for all humanity."[211] This framework of a common law, for all of humanity, is the animating factor behind the particular use of the term universal human rights, as opposed to rights of man, or minority rights. This development, I argue, emerges from three distinct camps leading to the 1945 codification of universal human rights: the histories of white women's liberation movements, the discourse of racial

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[209] Haile, "After the War," United Nations Archive, 7.

[210] Pagden, "Human Rights," 171.

[211] Anthony Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," *Political Theory* 31, no. 2 (April 2003): 171.

inclusion and minority rights during the League of Nations, and through the attachment to global ordering under the auspices of 'peace.' The next section will briefly address these different genealogical trajectories to better situation how the universal human rights discourse was positioned prior to ratification of the UNDHR.

"We are all human" – White Women's Liberation and Racial Minority Inclusion in the Movements for Global Peace

Kathryn Sklar historicizes the mid 19th century women's rights conventions as the first group to use the term 'human rights' in a sustained and systemic matter in the United States.[212] Sklar details that the phrase held a particular meaning because 'human rights' as term transcended both 'rights of man' and 'women's rights' to offer instead a more complete assertion of women's rights as human beings.[213] In particular, she shows how the women's rights movement absorbed this language from the anti-slavery movement. Within the debates over whether to eradicate or maintain plantation slavery in the 1820s, Sklar articulates that both sides employed human rights discourse to support their positions.[214] This supposed 'contestation' of two sides using it with regards to institutional slavery is telling –

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[212] Sklar, "Human rights discourse," 163-188.

[213] Sklar, "Human rights discourse," 164.

[214] Sklar, "Human rights discourse," 165.

and in fact speaks to the very nature of human rights as fundamentally a categorical signifier that demarcates who holds power, as opposed to a claim for morality. White women were urged to join the anti-slavery movement under the framework of 'human rights.'[215] Though the use of the term human rights in the anti-slavery movement began to waiver in the 1830s, it was subsequently revived and brought forth into the discourse of women's rights movements.[216] This early combination of women's rights and anti-slavery movement among white people foreshadows how the (white) women's liberation movement would later abandon the inclusion of Black women, and Black people generally, in their fight to secure suffrage after building momentum and support on the backs of a movement for Black liberation.[217]

Another moment where women's liberation and human rights discourse merge is in the wake of World War I. Alongside the post-World War I Paris Peace Conference of 1919, French women's rights advocates created a parallel conference, the Inter-Allied Women's Conference, because they were barred from participating in the all-male conference. Through the work of the Inter-Allied Women's Conference, women were in turn granted permission to sit on commissions of the Paris Peace Conference dealing specifically with issues related to women and

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[215] Sklar, "Human rights discourse," 166.

[216] Sklar, "Human rights discourse," 167.

[217] See, for example Angela Davis, *Women, Race and Class* (New York: Vintage Books, 1983).

children. Ultimately they also argued for and received the rights to participate as staff or delegates to the League of Nations, though few ever did.

White women's position for inclusion was secured through appealing to a framework of peace:[218] "if the peace to be forged in Paris was to bring democratic governance to the nations of the world, women needed to be there to remind global statesmen that neither democracy nor peace could be secured were they to exclude half of humanity."[219] The appeal for equality of white women with white men connects here with the extensions of the 'white man's burden,' where white women secured the claim for 'protecting' other women and children across the globe as the position of the white women savior. This, in the context of global power imbalances of colonial-modernity, means that white women negotiated for their legal equality and rights by aligning themselves with the power position of white men in order to secure and include 'protections' over those who are the 'lesser' populations in this global dynamic – third world nations, developing nations, mandate nations, protectorate nations. International peace as a concept motivated a framework of

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[218] Francine D'Amico, "Women Workers in the United Nations: From Margin to Mainstream?" in *Gender Politics in Global Governance,* eds. Mary K. Meyer and Elisabeth Prügl (Lanham, Maryland: Rowman & Littlefield, 1999), 20.

[219] Mona Siegal, "In the Drawing Rooms of Paris: The Inter-Allied Women's Conference of 1919, abstract for *Global Feminisims and 1919: Centennial Reconsiderations,* January 6, 2019. https://web.archive.org/web/20190129122854/https://aha.confex.com/aha/2019/webprogram/Paper25304.html

human rights by distinguishing from the 'international rights of man' towards a set of 'universal human rights' that is in part built off the reaffirmation of whiteness.

Kenneth Cmiel argues that much of the recent work on the history of human rights activism focuses on the 1940s. In particular, he shows that this decade constitutes the time period when the discourse of 'minority rights' shifted instead to 'human rights.'[220] Considerations of minority rights were common place in peace treaties in Europe from the mid 16th century up until the League of Nations and its 'minority regime.'[221] Krasner details that minority rights encompassed mostly religious or ethnic groups arising within European and eastern European peace treaties from the 17th – 20th centuries. Further, minority rights provide protection as an 'affective self-identity,' as opposed to human rights which provide protection that does not rely on any kind of affective self-identity.[222] Krasner details that after World War II the emphasis moved from minority rights to human rights, as "a reflection both of the failure of the interwar minorities regime and the preference of the leaders of the United States."[223] This move signifies a transition from

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[220] Cmiel, "The Recent History of Human Rights," 128. See also Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 105. See also Krasner, *Sovereignty*, for historical reference on minority rights protections since the Peace of Westphalia.

[221] Krasner, *Sovereignty*, 103.

[222] Krasner, *Sovereignty*, 98. For example, see also Iwe, *The History and Contents of Human Rights*, 120, for treaties concerning the protection of minorities in Eastern European states during the 1920's.

[223] Krasner, *Sovereignty*, 105.

distinguishing between a set of rights asserted by claiming membership in a group demarcated as different, to a blanket notion of rights for all people on the basis of their status as human and thus sameness.

The shift then from minority rights to human rights functions by eliding the (necessary) functioning of racial hierarchy within colonial-modernity. Scott exhibits the anxieties concerning including 'minorities' in the 'universalizing' notion of human rights *by not referring to race at all*. Kevonian details how after Mandelstam submitted his 1929 Declarations of the Rights of Man, Scott asked him to "'cross out as much as possible of the passages pertaining to minorities so that it would be solely a declaration on human rights."[224] Kevonian shows that even after these changes were made, the declaration was adopted with difficulty after certain corrections were imposed so as to "render the text inapplicable to colonized people."[225] This text thus offers an example of an early articulation of a rights discourse moving towards incorporation of all peoples under a 'universal.' Rights are positioned as universal so that no state could refuse the exercise of those rights, and in so doing, are premised as without distinction to the differences in material realities on the basis of race, gender, or nation (or their compounding and intersecting dynamics).[226]

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[224] Kevonian, "Mandelstam," 260. Kevonian cites both Scott and Mandelstam's account of this.

[225] Kevonian, "Mandelstam," 260.

[226] Kevonian, "Mandelstam," 262.

The emergence of the debate between minority rights and human rights can be traced within the Mandate System's tiered system for granting independence to mandate states. In order for a mandate state to gain its 'independence,' the Permanent Mandates Commission outlined the necessary established safeguards that would demonstrate a state's arrival by way of demonstrating a 'civilized' government such that independence could then be granted. Such guarantees were focused on safeguarding the interests of "racial, linguistic, and religious minorities, securing freedom of conscience and worship and providing legal protection for foreigners."[227] A 1931 report also details that legislation in the newly 'civilized' independent country must grant all people, citizen and foreigners alike, "individual rights and guarantees corresponding to the general principles of International law."[228] In this way, the individual rights of the colonizer remained intact even within the newly independent state's legal realm – as the extension of the same 'universal rights' of all nations to trade, travel, and preach, now articulated as the individual right for the colonizer to maintain their status in the formerly colonized state.

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[227] Tuori, "League of Nations to Mandates," 283, citing a note by M van Rees, Permanent Mandates Commission, Minuets of the 20th session (1931), 198; footnote 64.

[228] Tuori, "League of Nations to Mandates," 283, citing Report by Count de Penha Garcia, Rapporteur, Permanent Mandates Commission, Minutes of the 20th session (1931), 210; footnote 65.

During the operations of the League of Nations, Cmiel argues that the League was not yet committed to human rights in the way we now understand the term.[229] Cmiel shows that the League's interest was not in protecting individuals, but in protecting the rights of groups, and that non-European racial minorities "were left to fend for themselves."[230] With the desire for global peace and the question of what to do with countries under former colonial, protectorate, and mandate control, the 1940's positioned the shift from minority rights to human rights within the discourse of global peace. This, in turn, allowed for the articulation of a universal subjecthood that was both depoliticized and dehistoricized.

Tuori argues that although human rights were not an explicit feature of the Mandate System governance, lawyers in the aftermath of World War II retroactively imputed a human rights interpretation onto mandate practices that had not actually existed within the League itself.[231] This is an important factor elucidating the derivation of human rights protections as dynamics directly adapted from the colonial mandate governance of the League of Nations. This particular framing also shows that International law advocates extended the civilizing mission of the mandate colonial system, framed as humanitarian and peace work, into a newer, 'better' system of global management of the United Nations.

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[229] Cmiel, "The Recent History of Human Rights," 128.

[230] Ibid.

[231] Tuori, "League of Nations to Mandates," 291.

Despite the lack of formal resolutions on human rights, the League had a number of discussions related to the emergent language of human rights.[232] These discussions however did not result in a formal adoption of a position or declaration of human rights. For example, in the face of the rise of Nazi Germany in the early 1930s, the Haitian delegate Frangulis criticized the limitations of League's existing systems for protecting minorities and called for international guarantees of human rights.[233] Krasner details that within discussions of individual rights in the Covenant of the League of Nations, the US and UK blocked the addition of a racial equity clause proposed by Japan.[234]

In forsaking a specific notion of minority or ethnic/racial/religious distinction, the framework of the human right does not implicitly afford redress to groups or individuals impacted by state violence by virtue of their ethnic/racial/religious difference. In part, this is because a more explicit indication of hierarchical difference would call into question the standard operation of western powers, including that of the United States. In the context of World War II, the rhetoric of universal human rights meant to function to protect against the holocaust, considered as the worst imaginable crime, for its illegitimate violence.

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[232] Jan Herman Burgers, *The Road to San Francisco.* See also Tuori for tracing the 'proto-rights' discourse in the Mandate Commission. Tuori, "League of Nations Mandates to decolonization," 275-282.

[233] Burgers *The Road to San Francisco*, 457.

[234] Krasner, *Sovereignty,* 94.

However, the ongoing genocidal violences of colonialism and settler colonialism, including the induction of Israel as a nation-state in 1948, are all distinguished as legitimate violence, as violences that are in fact either considered necessary for 'peace' or else not considered violent at all. Germany occupies the position of the western scapegoat to signify the illegitimate genocidal practices of the state against European (white) citizenry, whereas claims from racial and ethnic minorities were rendered illegible in this framework (despite the fact that Hitler used American laws and practices of racialized violence and genocide as a blueprint for the Nazi regime.)[235]

During the drafting debates of the UNDHR, Eleanor Roosevelt, the leading author, argued the document should not make any indication of minorities.[236] Any reference to a guaranteed protection of 'minority rights' would bind the United States to some form of international accountability which in turn would call into question the then contemporary structures, both *de jure* and *de facto*, of segregationist policies and practices targeting Black, Native, Mexican, Asian, and other non-white peoples under institutionalized Jim Crow.[237] A focus on minority

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[235] See, for example, James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton: Princeton University Press, 2017).

[236] Krasner, *Organized Hypocrisy,* 99.

[237] Elizabeth Borgwardt, "Race, Rights, and Nongovernmental Organizations at the UN San Francisco Conference: a Contested history of 'Human Rights … Without Discrimination,'" in *Fog of War: The Second World War and the Civil Rights Movement* (New York: Oxford University Press, 2012), 190.

rights would also call into question the trusteeship conflict concerns of the US protectorate states. The United States was invested in framing a depoliticized 'human' right as opposed to a specified protection for minority rights because the history of the US political system was grounded in the individuated political values of capitalism and emphasized democracy.[238] Krasner shows that in 1943 then US secretary of State Sumner Wells argued that the liberty of individuals should be the main protection under the law, as opposed to specific terms for racial or religious minorities. Alice Bullard argues that "the language of human rights appears particularly ill suited to situations of radical cultural difference."[239] This is because the construct of universal rights is a tool designed for joining cultural difference into the same western jurisdiction – the so called universal – where conceptions of natural law/civility determine global relations of power.

Towards the close of World War II, the limitations of the League of Nations were apparent, as was the need for a new form of institutionalized global socio-political governance to administer 'peace.' Jan Herman Burgers claims that wartime brought human rights to international status: "The wartime proposals for giving human rights an international status related to catalogues of rights as well as to international machinery for promoting and protecting these rights."[240] The

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[238] Krasner, *Organized Hypocrisy,* 98.

[239] Alice Bullard, *Human Rights and Revolutions*, 95.

[240] Burgers, "The Road to San Francisco," 471.

framework of peace was the primary lens for incorporation the notion of the universal, the human, and rights into a coherent concept.

Annabel Brett argues that human rights are not just about articulating a set of discrete entitlements known as 'rights,' but rather what I consider to be a regime: "human rights is not simply an aggregate of rights, it is a program, an outlook, embedded in our political and cultural imagination."[241] The universal human rights regime encompassed a particular framing of universality to support the political project of the United States. For example, the framework of human rights was positioned in direct opposition to movements for self-determination.[242] Interestingly, Gandhi held a distrust of rights talk, urging people instead to focus on duties rather than rights.[243] Duties are clearer, framed as obligations that the state must uphold. Rights, especially universal human rights, are aspirational, where people claim a right as opposed to upholding a duty. This is because the move to the use of 'human' functions as a tool of depoliticization – where the 'universal human' signifies the shift from the earlier use of the Human/not yet human/non-human civilizing discourse that justified franchise and settler colonialism, instead towards

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[241] Annabel Brett, "Human Rights and the Thomaist tradition," in *Revisiting the Origins of Human Rights,* eds. Pamela Slotte and Miia Halme-Tuomisaari, 101, citing Lynn Hunt *Invention Human Rights,* (New York: Norton, 2007).

[242] Consequently, Cmiel also indicates that out of this move also arose the more clearly defined opposition between self-determination and human rights. Cmiel, "The Recent History of Human Rights," 128 footnote 34.

[243] See Cmiel, "The Recent History of Human Rights," 119 footnote 8.

the flattening multicultural realm of the 'depoliticized human' as one that subsumes the overt focus on civilizing differences as racial and cultural to one that is about economic advancement and access within racialized neoliberal discourse as central to the shift into neocolonialism.[244]

In shifting to the blanketing and universalizing discourse of 'human rights,' as opposed to the discourse of minority rights, or fundamental rights,[245] or even individuated rights, the notion of international 'peace' maintains the hierarchal divisions inherent to governing structures of colonial-modernity. The use of the discourse of the human is an important factor upholding that elision, but in particular the notion of a universal set of rights for all humans works as a flattening tool that pre-figures the rise of the inclusionist logics of multicultural white supremacy. The move to a universal human also functions as a blank slate for which to receive the universal standards of western intervention and standards for civilized conduct and governance, while placing the humans who are of the 'developing nations' status as in need of protection and the therapeutic participation in the civilizing economic framework of free-trade that all universal humans must abide by. That the American involvement in this process takes a more covert, behind the scenes influence is not surprising given the historical register of covert US involvement for 'stabilizing' regional conflicts so as to open trade options in the

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[244] Williams, Divided World, 14, citing Neil Belton, *The Good Listener, Helen Bamber: A Life Against Cruelty* (New York: Pantheon Books, 1999), 180, in footnote 32.

[245] Borgwardt, "Race, Rights, and Nongovernmental Organizations," 190.

United Nations era. However, the coordination between Non-Governmental Organizations and the State Department to support the codification of the 1945 UN Charter and its subsequent 1948 Declaration of Human Rights demonstrates the emergent rise of neoliberalism and neocolonialism through the uptake of the universal human rights regime.

The Turn to Human Rights: The Role of the US and NGOs in UNDHR Codification

The human rights regime becomes fully solidified as a project of the United States and the global elite through the push of US NGOs, backed and directed by the US government at the 1945 San Francisco Conference. In the early 1940s, the US government, alongside humanitarian NGOs based in the US, positioned the discourse of human rights so as to promote the United States as a global leader that backed international humanitarian and peace projects. For example, the Commission to Study the Organization of Peace issued a number of reports concerning postwar world organization.[246] In February 1943, it published, together with its Third Report, a paper presented to the Commission by Quincy Wright entitled "Human Rights and the World Order."[247] Burgers argues that although the Nazi regime influenced the final codification of human rights, the concept of human

[246] Burgers, "The Road to San Francisco," 448; 472.

[247] Burgers, "The Road to San Francisco," 472.

rights had already been recognized as a matter of international concern prior to the holocaust.[248] The global dynamic of World War II and its aftermath positioned the uptake of human rights, but not in a manner that privileged support for minority groups most greatly affected by the power dynamics of colonial conquest. Instead, the US backed a particular framework of a universal human right that would be supported through the new global 'police power' organization of the United Nations.

Halme-Tuomisaari articulates that although the universal human rights movement is touted as originating from the 'underprivileged masses,' it is in fact a project of the global elite.[249] Halme-Tuomisaari argues that first human rights NGO, formed by a group of French émigrés that re-formed the *International des Ligues des Droits de l'Homme* (the International League) had roots in pre-war Europe, including contacts with highest orders of political decision making bodies.[250] In the US, they were joined by ACLU co-founder Roger Baldwin, and operated in New York out of the New School for Social Research throughout the 1940's.[251] In addition to this camp, there was also a wealthier set of interests represented by a coalition of

[248] Burgers, "The Road to San Francisco," 448.

[249] Halme-Tuomisaari , "Lobbying for Relevance," 334.

[250] Halme-Tuomisaari , "Lobbying for Relevance," 332.

[251] Halme-Tuomisaari , "Lobbying for Relevance," 332-333.

prominent US interest groups/NGOs linked to the Ivy Leagues and the Carnegie Institute.[252]

However, human rights were not articulated in any of the founding documents of the UN. The original charter of the UN does not actually make a declaration of human rights, instead framing the equal rights of men and women, nations large and small.[253] Between August and October 1944, preceding the San Francisco conference, Allied Powers and associates convened to bring together proposals for world peace at the Dumbarton Oaks Conference.[254] The draft chapter that came out of the conference mentions human rights only in one place, because of opposition by different groups over inclusion of statements respecting human rights as well as the equality of all races.[255]

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[252] Halme-Tuomisaari , "Lobbying for Relevance," 332-333.

[253] Iwe, *The History and Contents of Human Rights*, 125.

[254] Iwe, *The History and Contents of Human Rights*, 124.

[255] Burgers, "The Road to San Francisco," 474. Burgers details: "As regards to an international status for human rights, the proposals for a new world organization worked out by the United States, the United Kingdom, the Soviet Union and China at the Dumbarton Oaks Conference in September-October 1944 did not meet the expectations raised by the human rights movement. An American proposal to insert into the Charter a statement of principle about respecting human rights had been opposed both by the United Kingdom and the Soviet Union. A Chinese proposal to write into the Charter the principle of equality of all races (reminiscent of the Japanese proposal at the Paris Peace Conference of 1919) had even been opposed by the United States. As a result, the draft charter emanating from Dumbarton Oaks mentioned human rights only in one place, in one of the last chapters, where it was said that 'the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms.'"

Burgers details two main groups that ultimately succeeded in gaining the inclusion of human rights clauses in the UN Charter: Latin American states, disgruntled by not having a say in the Dumbarton Oaks proposals (because the United States had indicated they would); and United States NGOs.[256] Burgers explains that the US was determined to avoid a repeat of the post-World War I failure to enter the League of Nations, and therefore sent forty-two American NGOs as consultants to the US delegation:

> [T]he State Department invited forty-two American nongovernmental organizations to send representatives to San Francisco to act as Consultants to the US delegation. These NGOs included organizations in the fields of law, education and labor, church groups, women's associations and civic organizations such as the NAACP and the American Association for the United Nations.[257]

According to Burgers, it is this group of NGOs that is responsible for ultimately persuading the US delegation, who until then had been divided on the issue of human rights, to in turn persuade the UK, USSR, and Chinese delegations to also support amendments that would explicitly include human rights in the stated purposes of the United Nations, as well as support the establishment of a commission for the promotion of human rights.[258] Among the advocates present at

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[256] Burgers, "The Road to San Francisco," 475.

[257] "Among the Consultants in San Francisco were several key spokesmen of the human rights movement, such as Judge Proskauer of the American Jewish Committee, Frederick Nolde of the Joint Committee on Religious Liberty, and James Shotwell who was chosen as chairman of the Consultants." Burgers, "The Road to San Francisco," 476.

[258] Burgers, "The Road to San Francisco," 476.

the 1945 UN Charter Conference in San Francisco was Scott's protégé and personal assistant George Finch.[259]

The lobbying by US NGOs at the 1945 San Francisco conference succeeded in including a human rights in the charter of the UN, as well as the creation of the drafting commission for the Declaration of Human Rights during 1946-8.[260] This was preceded by a number of State Department-coordinated NGO summits, as well as individual meetings with NGO's from 1944-5.[261] A motivating outcome to garner support included a phase of public debate on the importance of the US joining the newly forming United Nations. This was achieved in part through polling of public opinion and the inclusion of the public through "parades, rallies, show-window exhibits, school projects, radio programs" to spread desire for the US joining a "world organization with police power to maintain world peace."[262] Borgwardt argues that the US state department utilized the advent of scientific public polling and pressure groups of the 1940s to bolster and extend the reach of international NGOs "as a way of disseminating and reinforcing the administration's positions on

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[259] Hepp, "Scott and International Law," 168. See also George A. Finch, "The United Nations Charter," *American Society of International Law* 39, no. 3 (July 1945): 541-546.

[260] Miia Halme-Tuomisaari , "Lobbying for relevance," 332.

[261] Borgwardt, "Race, Rights, and Nongovernmental Organizations," 195.

[262] Ibid.

international institutions without directly incurring the ire of isolationist constituencies, in the Senate and elsewhere."[263]

Halme-Tuomisaari articulates a shift in 1947 from what was then called the International Bill of Rights to the Universal Declaration of Human Rights.[264] Olivier Barsalou argues that the US position on human rights ultimately prevailed in the global contestation to define and articulate human rights, where the policy of the US was explained by one US legal advisor as attaining a Declaration that was the 'carbon copy' of the US Bill of Rights.[265] One international theorist framed human rights as the modernization of natural law principles.[266] Borgwardt shows that the NGO-led interests were in fact backed by the US government:

> [T]he Dumbarton Oaks planners believed that they had learned the essential lessons from the First World War on how to devise a postwar multilateral order: start planning while hostilities were still continuing; make the plan identifiably and organically American-led, use "experts" and "technicians" to make the process appear less politicized; and separate the actual peace treaty from the machinery for resolving later disputes.[267]

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[263] Ibid.

[264] Miia Halme-Tuomisaari , "Lobbying for relevance: American internationalists, French civil libertarians and the UNDHR," in *Revisiting the Origins of Human Rights,* 333.

[265] Olivier Barsalou, "The Cold War and the rise of an American conception of human rights, 1945-8," in *Revisiting the Origins of Human Rights*, 363, citing *Interview with James P. Hendrick,* 5 May 1970, Joseph P. Lash Papers, F.D. Roosevelt Library, Box 44, Lash Papers in footnote 6.

[266] Barsalou, "The Cold War," 364, citing Hersch Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man," *Transactions of the Grotius Society* 29 (1943) in footnote 15, 365.

[267] Borgwardt, "Race, Rights, and Nongovernmental Organizations," 192.

The US-generated and pre-circulated proposals at the conference served as the basis for discussion.[268] The most powerful nations present agreed that they must take an active role in enforcing a world peace-keeping system based on Franklin Roosevelt's idea of a "Four Policemen" global order.[269]

The idea that the United States wielded this degree of behind-the-scenes power in solidifying the discourse of human rights is obscured from the historical discourse on universal human rights and the formation of the UN. Though perhaps not surprising, it is nonetheless important to the trajectory of universal human rights, especially as they are codified from the imperialist rise of neocolonialism and a new 'world order' dominated by the United States after World War II. This is especially exemplified as the push to codify human rights moves through both the NGO and official delegate routes of the UN charter formation process. This evidences something inherent to the dynamic of colonial-modernity, that corporate tax havens as foundations such as the Carnegie Institute and NGOs alike bolster the nation-state governance of the western universal framework, from the early colonial corporate charters to the International law societies and American NGOs role in the codification of human rights in the UN Charter.[270] This functions in part because

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[268] Ibid.

[269] Ibid.

[270] On the relationship between corporations and the colonial state, see, for example, Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press, 2013).

universal rights, though theoretically pertaining to nation-states, are often a dynamic of the corporate charters and economic ventures that extend the tentacles of the colonizing state but are not actual governing entities under the universal rights to trade, travel, and preach.

The US backs the incorporation of the discourse of human rights to advance a neocolonial agenda premised on notions of freedom, equality, and rights. Asad asserts:

> The prophetic language of America, for all its particularity, works as a force in the field of foreign relations to globalize human rights. For that language does, after all, draw on the idea that "freedom" and "America" are virtually interchangeable — that American political culture is (as the Bible says of the Chosen People) "a light unto the nations." Hence "democracy" and "human rights" are integral to the universalizing moral project of America — the project of redeeming the world — and an important part of the way America sees itself.[271]

Asad asks, "is human rights discourse the only language used to talk about justice?"[272] Given the universalizing construction of universal rights discourse, from Vitoria to the UNDHR, I might reframe Asad's query to instead ask – *why* is human rights discourse the only language used to talk about justice? In the sphere of colonial-modernity, justice, like freedom, is fundamentally only ever available for those with power-over. Within the material realities of capitalism, white supremacy, and heteropatriarchy, rights are the shifting tools that keep these

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[271] Asad, "What Do Human Rights Do?," 7.

[272] Asad, "What Do Human Rights Do?," 4.

structures in place. Justice cannot be understood outside the terms that universal rights codify – the ideas of equality, freedom, sovereignty – all of which are dependent on their necessarily exclusionary corollaries. Thus, rights solidify the invisibilizing binaries of a freedom dependent on subjugated unfreedoms, where the ever-elusive concept of 'justice' is dependent on resolving the injustices that in fact maintain such systems. The codification of universal human rights is constitutive of new institutions so as to take on the expansion of these binaries, as well as the logics of civility, crisis, and the carceral through the extension of neocolonial technologies.

Spreading the Western Universal in the Age of the United Nations – Developmentalism and Modernization

In the age of the United Nations, the Bretton Woods Institutes – the World Bank (formerly the International Bank for Reconstruction and Development), and the International Monetary Fund (IMF) delineate the clearest institutionalization of the civilizing logic. This is most prominently evidenced through the mainstay of the economic disciplining of modernization theory for 'developing nations' forced into neoliberalism as a condition for decolonial statehood. For example, Saldaña-Portillo, in *The Revolutionary Imaginary in the Americas and the Age of Development*, shows how in conversations concerning the formation of the IMF, US treasury secretary Henry Morgenthau argued that the ultimate cause of war is lack of free

trade.[273] This mindset is reflective of the larger relationship between the crisis/carceral states of capitalism and how these logics take root in new form, in this case, the formation and function of the IMF.

The advent of development theory was introduced via John Maynard Keynes into the World Bank's articles during the chartering of the United Nations.[274] Saldaña-Portillo argues that the Keynes is responsible for replacing the former colonial-empire rhetoric of the social Darwinist justification for colonialism as premised on disciplining the biologically inferior 'lower races' instead with the non-biological, evolutionary sociology of 'less developed countries.' This discursive shift emphasized a universalized notion of productive capacity of all world citizens in the transition to the United Nations:[275]

> [A]t its inception, development is inextricably linked to managing a crisis in capitalist production precipitated equally by the exhaustion of colonial capitalism's expansive capacities and by the greatly expanded productive capacity of the U.S. postwar economy. As a globalizing system, capitalism has always relied on supplementary discourses for its perpetuation and extension. Development, as it took shape in the fields of diplomacy and political economy, under the auspices of the United Nations, the IMF, the IBRD/WB, and the U.S. Treasury Department, began as precisely such a supplementary discourse. Development replaced the 'civilizing mission' of the age of colonialism with the imperatives of self-determination,

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[273] Saldaña-Portillo, *The Revolutionary Imaginary,* 20.

[274] See Saldaña-Portillo, *The Revolutionary Imaginary,* 20-21 for an analysis of Keynes role in institutionalizing developmentalism at the Bretton Woods conference.

[275] Saldaña-Portillo, *The Revolutionary Imaginary*, 21.

> independence, free trade, industrialization, and economic growth in a postcolonial era.[276]

Read through the lens of the logics of colonial-modernity, this transition from scientific-race framework towards evolutionary social development is a trajectory within the same overarching structure of colonial-modernity. In the 16th century, Vitoria, and later Las Casas and others, debated the fundamental capacity for Native peoples to 'receive' European civilization as religious, political, and social practices. In the 20th century, this debate moves towards the capacity for 'production.' Economic production is the extended focus throughout all of colonial-modernity under capitalism, but it becomes the driving force within the transition into neoliberalism that facilitates a primary focus on free trade and economic expansionism. It functions to bring forth the universalizing alignment of the human into a civilizing logic via the extension of western free trade as a means of 'developing.' This too operates as a carcerality – as a form of relationality that binds the human to their value through labor production, as well as forcing an assimilative capitalist ideology to pay people for the terrible conditions that neoliberalism configures for 'developing' nations. Capitalism is inherently a state of crisis, and the move towards the free trade of neoliberalism further institutionalizes the logic of crisis as a universalizing feature that people 'have the right' to labor within. Though the technologies of developmentalism are a different than the technologies of

[276] Saldaña-Portillo, *The Revolutionary Imaginary,* 19-20.

mandate colonialism or franchise colonialism, they move from the same root logics.[277]

Developmentalism is a function of neocolonial universalism – producing the notion of a 'universal' human bound by progress and economic ability. The notion of the universal extends this project forward, where modernization and development are configured as the end-all-be-all of liberal progress. To do this work, the universal is employed throughout the entire project of colonial-modernity to articulate a 'shared' notion of civility, which in the age of universal human rights is now synonymous with 'human' as measured through development theory. Saldaña-Portillo shows that the transition from developmentalism to modernization is one that positions the human within a nation-state framework of developed/underdeveloped, which arises as a counter framework to communism instituted by the 1949 Truman doctrine.[278] By articulating certain nation-states as underdeveloped, Saldaña-Portillo argues that this discourse positions peoples as primitive and stagnant, and in turn shifted the target of development from *national* economies to *individuated* subjectivities:[279]

> From former colonizing elites to independence leaders in Africa and Asia, from liberal economists in the United States to revolutionary leaders in Latin

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[277] See Saldaña-Portillo for frameworks of developmentalism as different than colonialism, a system she argues surpasses colonialism. Saldaña-Portillo, *The Revolutionary Imaginary,* 21-22.

[278] Saldaña-Portillo, *The Revolutionary Imaginary,* 23.

[279] Saldaña-Portillo, *The Revolutionary Imaginary,* 24.

> America, all had come to understand in the span of a few years the Southern Hemisphere and its inhabitants as existing in a condition of "underdevelopment." More remarkable still, many of these same leaders believed the proper application of development aid in the fields of "scientific advances" and "industrial progress" would rapidly remake the world in the image of the United States.[280]

Saldaña-Portillo argues that the turn to individuals in need of development manifests though the Modernization theory. Modernization theory shifted the target of development from national economies to that of individuated subjectivities.[281] Saldaña-Portillo articulates that failure of Keynesianism to produce immediate results in the decolonizing world led to the rise of modernization theories.[282] These theories sought to place explanations for why development occurred in some places and not others as based on the attitudes and choices of national societies and citizens.[283] This, in turn, lead to a framework that articulated the developed subjects or nations as the chosen ones, where their positions came to be so that the underdeveloped might follow in their path.[284]

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[280] Saldaña-Portillo, *The Revolutionary Imaginary,* 23.

[281] Saldaña-Portillo, *The Revolutionary Imaginary,* 24.

[282] Saldaña-Portillo, *The Revolutionary Imaginary,* 26.

[283] Saldaña-Portillo, *The Revolutionary Imaginary,* 27.

[284] Ibid.

Walter Rodney extrapolates the notion of 'underdevelopment' as rooted in the European pillaging of the Gold trade and later Atlantic Slave trade in continental Africa.[285] In particular, he examines how Europe became the dominant section of a world trade system. Rodney asserts that the idea of development and underdevelopment are in a dialectical relationship with one another – where Africa helped to develop Europe in a manner of overaccumulation, to the same proportion that Europe underdeveloped by the deaccumulation of continental Africa of resources and people.[286]

Though neoliberal policy takes a stronger hold in the 1970s, Milton Friedman forms the free-market economist club *The Mont Pelerin Society* in 1947.[287] I position 1948 as the marker for neoliberalism and neocolonialism because the global world order post-48 takes on a new form. To position the emergence of neoliberalism as commensurate with neocolonialism recognizes the technological shifts orchestrating the primacy of economics driving institutional formations and socio-political shifts arising post-48. Neoliberalism, beyond an economic policy, individuates subjects as humans in relationship to their value as laborers but also their value as consumers.

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[285] See Walter Rodney, *How Europe Underdeveloped Africa* (Washington D.C.: Howard University Press, 1982).

[286] Rodney, *How Europe Underdeveloped Africa,* 75.

[287] Friedman joins with Austrian Friedrich Hayek to form the *Mont Pelerin Society* – a club of free-market economists in 1947 in Switzerland founded on the idea that business should govern the world. Naomi Klein, *The Shock Doctrine*, 53-54.

The construction of the human as a universal human that is also a rights-bearing subject is a shift in rights relationality that functions as a part of the individuating process of neoliberal neocolonialism. The shift from developmentalism towards modernization in the neocolonial era exemplifies the individuation of the human as a subject, but it does so through the articulation of the new designations of nation-states outside of their previous colonial empire relationality and into the new global order of developed/developing. Development rhetoric encompasses manifestations of the logic civility as further articulated into a now modern developed-civil/pre-modern undeveloped-uncivil relationality. Saldaña-Portillo elaborates:

> [T]he tropes of civilization were incorporated into the idiom of development in the 1950s and 1960s. From that incorporation emerged two new manifest subjects: the modern, fully developed subject and its premodern, underdeveloped counterpart. These subjects are *manifest* because their level of development appears as self-evident. What needs to be explained was not *whether* these subjects were developed but rather *how* the developed subject came to be so, and how the underdeveloped subject might follow in his path.[288]

The notion of underdevelopment arises in part to position decolonizing countries towards accepting western democracy over eastern communism (as a simplification of the Cold War binary) so as to cohere to the neoliberal free trade agenda. In Truman's 1949 inaugural address Saldaña-Portillo documents how the

[288] Saldaña-Portillo, *The Revolutionary Imaginary,* 27.

'underdeveloped areas' of the world were intertwined with fighting communism by providing US backed aid to the "least fortunate" of the "human family."[289]

Within a framework of humanitarian intervention to support 'underdeveloped' nations, the human is positioned as an individuated subject that is a part of a larger 'human family' that must be civilized into the economic disciplining of free trade. For example, Saldaña-Portillo articulates how in framing half the world's population as "primitive," "stagnant," and "victims of disease," Truman's address reconfigures the interior space of individual subjects as living within an under-developed nation-state.[290] This reconfiguration is one that disarticulates the individual from the population – as no longer a population needing to be civilized, but a nation of individuated humans who hold universal human rights that need access to the 'universal' economic development of the free world.

Modernization theory's path to national development centered five 'universal' stages for development in all societies to become modern, secular nations. Saldaña-Portillo argues that this was essentially a study of the culture of free will, where the culture of the nation was the true indicator of whether or not modernization would take root in a society.[291] Developmentalists theorized economic growth as a means of making 'strategic choices' at transitional points in

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[289] Saldaña-Portillo, *The Revolutionary Imaginary,* 24.

[290] Ibid.

[291] Saldaña-Portillo, *The Revolutionary Imaginary,* 28.

history. Saldaña-Portillo argues that this functioned to emphasize development as a question of free will, rather than an acknowledgement of the severe disparities in access to resources.[292] The positioning of economic development as a question of free will functions to separate an economic project from the context of ongoing colonialism – placing the focus instead as a question of capacity, of whether the subject can make 'proper' choices that would put them in alignment with western norms and values – essentially a question of civility. This perspective privileges a framework of an attainable level of development that all are on the path to achieving as a progress narrative of human development.

Humanitarian Interventions: Vitoria's Just War and the Normalization of Genocide

Twentieth century proponents of both International law and its burgeoning universal human rights discourse return to Vitoria's 16th century work as foundational because his work articulates a universal rights framework – that which will become more fully realized almost 500 years later – that is reflective of the juridical legitimations for the rising sphere of an entirely new set of socio-political relations of colonial-modernity. His work is important, then, not so much in the sense that he is a true 'father' but rather because his work is deployed to articulate the rise of a shared jurisdictional relationality that binds the construction of a

[292] Saldaña-Portillo, *The Revolutionary Imaginary,* 28-29.

Human/almost human/non-human relationality under the auspices of a shared set of 'universal rights' that in reality are the legitimation for disciplining non-Europeans into the 'natural law' of European-Christian values premised on civility (through a primary logic of disciplining gender and sexual difference into the heteropatriarchal framework as rooted in the gender binary as they emerge into populational classifications of race). The 20th century return to Vitoria through the scientific codification of International law and its institutionalization into new forms such as the United Nations, IMF, and World Bank fully realizes the idea of a shared 'universal' for all nations now disciplined into the western nation-state structure.

The humanitarian framework of these contemporary global institutions is foreshadowed in Vitoria's justifications for occupation. Vitoria secures the grounds for jurisdictional legitimacy in part through a 'human rights violation' framework by arguing that a Christian ruler could invade a land if people were being abused, even without papal authority.[293] Vitoria cites cannibalism, violations of laws of nature, sodomy, bestiality, and human sacrifice (where even if victims of a death volunteered or consented they had *no right* to do so), as 'barbarian' activity indicative of abuse that in turn sanctions Christian invasion, essentially for the protection of the 'abused' people. The common perception of 'just war' during the 16th century is as an act of self-defense, meaning that the sovereign can justly make

[293] James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World* (Pennsylvania: University of Pennsylvania Press 1979), 149.

war against another state for any violations, and in fact can do so without any requirement to demonstrate injury to their *own* state.[294] This includes fighting a war for violating a law of nature, which is how Vitoria in part reasons the Spanish conquest as just, because of 'barbarian' activity by Indigenous populations.[295] With this framework, Muldoon argues that Vitoria was verging on the argument that the purpose of government is security of life and property, and that any ruler who deprived a subject of life, except for as punishment of a crime, violated the pact between the ruler and the ruled. I extend this framework as the proto-articulation of 'universal human rights violations' as they are taken up in legislating the post World War II expansion of the western universal through the articulation of universal human rights protections as the grounds for sanction and invasion, which the next chapter will address.

[294] Anthony Pagden, "Gentili and the Fabrication of the Law of Nations," in *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire*, eds. Benedict Kingsbury and Benjamin Straumann (New York: Oxford University Press, 2010), 340-362.

[295] Pagden, "the Fabrication of the Law of Nations," 340-362.

Chapter 10
Genocide in the Age of Universal Human Rights

Scott succeeded in making Vitoria's work well known beyond legal circles, Schmitt argues, by instrumentalizing Vitoria's arguments into a new form. Schmitt positions Vitoria's influence, via Scott, as a return to older concepts of Vitoria's doctrines of free trade, freedom of propaganda, and in particular, just war:[296]

> War should cease to be simply a legally recognized matter or only a matter of legal indifference; it again should become *just* in the sense that the aggressor is declared to be a felon, meaning a criminal. The former right to neutrality, grounded in the international law of the *jus publicum Europaeum* and based on the equivalence of just and unjust war, also should be eliminated."[297]

Vitoria's just war is one where any resistance to the colonial presence by the colonized/occupied 'aggressor' justifies a response of warfare and potentially enslavement.[298] This is the foundational aspect of the juridical underpinning legalizing the conquest under colonial-modernity, which in and of itself operates a universal right, indeed the only form of universal right that is consistently upheld – that of the colonizing force's universal rights to trade, travel and preach; or framed

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[296] Schmitt, *Nomos of the Earth*, 119.

[297] Ibid.

[298] Vitoria, "On the American Indians," 282. See also Part 2 section on just war doctrine.

here differently by Schmitt – universal rights to free trade, freedom of propaganda, and just war. It is no accident then, that there is a resurgence in Vitoria's doctrine in the moment of the 20th century expansion of US settler colonial imperialism emergent from the spread of manifest destiny to acquiring of colonial 'protectorates.'

A Return to Just War

There are two key dynamics at work in International law integral to the functioning and expansion of colonial-modernity – that all nations/peoples have 'universal rights' subject to the norms and values of the European-Christian-White derived 'common natural law,' *and* that any resistance to the presence/expansion of the shared universal jurisdiction is grounds for a just war retaliation. The 20th century codification of universal human rights not only extends this concept but returns to the very same base theoretical argument that continues to maintain colonial-modernity: that non-European/non-western lands are always accessible to the west under a universal rights ideology, and that therefore all peoples of the world are subjected to the socio-political relationality of the west.

In the 16th century this entailed the spread of Christian norms and values, enslavement justifications rooted in just war and violation of natural law, European political frameworks of colonial governance, plantation-*encomiendas*, mission systems, resource extraction on a 'common land,' and the rights to travel freely

under the universal rights of all nations coupled with the elevation of the right to trade as a 'universal' conception of a burgeoning emergence of capitalism.[299] In the 20th century, especially after establishment of the United Nations, this entails the disciplined spread of western social frameworks via racialized disciplining into political systems for decolonizing nations under the Cold War political binary, the articulation of a neoliberal policy and free trade access, the scientific institutionalization of economics, the legitimation of International law as Science, a global jurisdictional forum governing western/non-western relations, and the articulation of a universal human subjectivity as a 'right'.

In the post-World War II rise of neocolonialism, human rights regulations function as an application of oversight of the activities of the now 'self-governing' third world countries via an international body in a global forum. When western states back dictatorships or coups, for example, the violations lie in the governments of those countries, not in the western states. Because outright war declaration is needed as proof of such involvement, and things that does not rise to that occasion (and many things that already do but that are not considered as such – drone warfare in Pakistan, for example), western states can maintain neocolonial practices beyond economic and military incursions without ever being held accountable to the so-called shared universal of global oversight. The technology of human rights is one of surveillance because it is not equally applied across all sovereigns, nor is it

[299] See Part 2 of this dissertation.

equally used as a method of accountability. Both Israel and the US, for instance, are constantly violating the UNDHR, in various and continuous ways, such as police warfare, settlement building, pushing out of Indigenous peoples from their land, and resource extraction, but those things would never be considered before an International Court of Crimes.

This is in part because the legacy of World War II sets up the dynamic of the 'worst' crimes against humanity as those of the Holocaust, where the historical memory is preserved in a 'we will never forget' bombardment of media, movies, books, and historical refrain. This holds legitimacy after World War II because Jewish people are recuperated and incorporated into the global sphere as 'white.'[300] This expansion of the universal, to protect against the mass targeted death on the basis of religion by a European power over European peoples, includes those who *had* previously been racialized as not fully white, into an expansion of whiteness that now includes a new form of religious difference. For the western world then, "Genocide," as the term applied to the institutionalized forms of mass death targeting Jewish people (though this targeting also included gay people, some Catholics before the Pope made an agreement with Hitler, and Polish people) as the ultimate form of institutionalized violence. The construction of big G "Genocide" is represented a form of violence that targeted whiteness to which all other forms of populational violence are then compared. The holocaust of World War II is

[300] See, for example, Aime Cesaire, *Discourse On Colonialism*, trans. Joan Pinkham (1955, repr., New York and London: Monthly Review Press, 1972).

constructed and imagined as the 'worst' kind of violence because it targeted a newly recuperated whiteness, where all other forms of violence against non-white peoples can never fully amount to the degree of harm that Genocide produced.

This in turn positions other genocidal conditions, institutions, and practices as less than the Genocide of World War II, and therefore not acknowledged as such. These practices remain intact, because they cannot create the same conditionality of Genocide so as to be legitimated – as the necessary component of European/white identity. This is not of course to take away from the violence that was enacted against Jewish and European peoples during World War II, but rather to articulate the institutionalization of the reaction to violence as almost an untouchable experience that no other form of institutionalized violence can come close to. The US, for example, refuses to recognize the ongoing genocidal practices, institutions, and conditions that continue to delimit access to resources, safety, and livelihoods of both Native and Black peoples as populations targeted by overt and covert acts of violence, to position them as less-than but necessary to maintain the distinctions of white supremacy. This is evident in the *We Charge Genocide* petition and its dismissal by the UN as discussed in Chapter 1, as well as by the dismissal of any claims of genocide by Native peoples as unable to meet the conditions for the crime of genocide as set forth in the convention.[301]

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[301] See also Ward Churchill on Genocide: Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (San Francisco: City Light Books, 1997).

What must be conveyed about this dynamic of genocide is that it is not actually exceptional to colonial-modernity, though the codification of Genocide as a crime certainly makes it seem as such. Perhaps the most striking contemporary example of a new form of institutionalized genocide post 1948 is the state of Israel and its ongoing targeting of Palestinians to clear the land for settler expansion.[302] This 'modern' example of institutionalized genocide relies on the racial construction of Jews as white post World War II to facilitate a 'settler as white/Indigenous as non-white' binary for anchoring the legitimacy of its project of violence that includes outright mass murder, warfare, and slow death technologies meant to decrease lifespans (for example the longstanding siege on Gaza and limited access to caloric intake that does not constitute famine but that is not enough to live on for an extended period of time).[303] This project was facilitated in the age of universal human rights under the United Nations, a global body tasked in part with the

[302] See, for example, Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford: Oneworld, 2006); Steven Salaita, "On Colonization and Ethnic Cleansing in North America and Palestine," in *Speaking of Indigenous Politics: Conversations with Activists, Scholars, and Tribal Leaders*, ed. J. Kēhaulani Kauanui (Minneapolis: University of Minnesota Press, 2018); and Shlomo Sand, *The Invention of the Jewish People,* trans. Yael Lotan (New York: Verso, 2009).

[303] Regarding Israeli blockade produced food insecurity in Gaza, see for example IRIN, *Occupied Palestinian Territory: Gaza food situation tight as Karni crossing closed*, 7 March 2011, available at: https://www.refworld.org/docid/4d79c562c.html.

sanctioning and disciplining and criminalization of Genocide, by the global institution *itself*.[304]

What is seen as exceptional then to the order of colonial-modernity is targeted mass death towards white populations, such that it can then in turn be codified as a criminal act. The UN, and by extension the UNDHR and the Convention on Genocide, solidify an institutional forum of new technologies that reconfigure global power relations into new forms, as military bases and resources extraction, through the sanctioning of a new settler colonial project (Israel),[305] the codification of apartheid (South Africa),[306] the continuation of many other settler colonial projects (the United States) and the sanctioning of post-colonial imperial projects to demarcate boundaries of nation-states to better support their newly forming neocolonial interests. For example, the partitioning of British colonial India into India and Pakistan and later Bangladesh separated what would be a population bound by shared nationalist interest into one now divided by religious

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[304] Israel was a former British Mandate State. In 1947 the UN council voted to approve the formation of the State of Israel. The state was sanctioned explicitly as a Zionist state in May of 1948. For a telling self-narrative about the state's legitimization process via the UN, see for example "Declaration of Establishment of State of Israel," Israeli Ministry of Foreign Affairs, May 14, 1948, available at https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx.

[305] See, for example, Steven Salaita, "On Colonization and Ethnic Cleansing in North America and Palestine," in *Speaking of Indigenous Politics: Conversations with Activists, Scholars, and Tribal Leaders*, ed. J. Kēhaulani Kauanui (Minneapolis: University of Minnesota Press, 2018), 264.

[306] Williams, *Divided World*, 12.

demarcations, which works to foster political and social instability, where a nationalist post-colonial identity would have stabilized the power of the newly formed Indian nation-state (that in and of itself is a large dynamic of different cultures, religious practices, beliefs, and social practices that is bound together in a legacy of British colonial imperialism).

While the acquisition of the 'protections' against the violations of universal human rights (including the so-called right to labor) seemingly offers a form of redress, it operates in a forum that necessitates the conditionality of violence as central to its purpose. Extending William's assertion that the demarcation of legitimate/illegitimate violence marks a central dynamic of post-World War II global order, I extrapolate the dynamic of legitimate/illegitimate violence as the hallmark of colonial-modernity, which the logics of civility, crisis, and carcerality mediate. Rights, ontologically speaking, condition these logics first through the lines of who can and can't determine legitimate and illegitimate violence, then through the expansion of this into a new form of colonial governance – as settler colonial rights and the framework of the nation-state that governs through a racialized hierarchy of labor/forced labor/enslaved labor. As Cesaire points out in *Discourses on Colonialism,* the law is used in fact to expand these institutions. Cesaire shows liberal western humanists such as Renan articulating such a phenomenon after the French Revolution, which speaks as well to the rise of 'universal human rights' as a normalizing liberal project: "We aspire not to equality but to domination. The country of a foreign race must become once again a country of serfs, of agricultural

laborers, or industrial workers. It is not a question of eliminating the inequalities among men but of widening them and making them into a law."[307]

Historian Mark Levene, in *Genocide in the Age of the Nation State,* frames genocide not as exceptional but as endemic to the historical development of the modern socio-political-economic order: "genocide is in the nature of modernity."[308] Architect of the definition of genocide under the UN Convention of Genocide, Raphael Lemkin (whose definition would be significantly diminished in both scope and content), in turn articulates genocide as structural to colonialism:

> Genocide has two phases: one, destruction of the national pattern of the oppressed group: the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals.[309]

Levene details the broader preconditions of how genocide arose in the modern world based on the manufacturing of difference as an underlying element seen as normative to international society.[310] Levene shows that this manufacturing of difference is evident, for example, in both colonial India and Nazi rule, and that in

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[307] Cesaire, quoting Renan, *Discourse on Colonialism*, 3.

[308] Mark Levene, *Genocide in the Age of the Nation-State Volume I: The Meaning of Genocide* (New York: I.B. Tauris, 2005), 10.

[309] Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Council, 1944), 79.

[310] Levene, *Genocide in the Age,* 11.

the turn to the 20th century, it works both in an essentializing and biologizing manner.[311] As a precursor to those colonial projects, Anghie locates the dynamic of difference as the central feature within Vitoria's work, as the condition through which he must build a jurisdictional bridge in order to extend the universal rights of genocidal destruction.

This manufacturing of difference is inherent to colonial-modernity. It is codified under what becomes known as International law – as a means of both regulating and distancing difference as conditions of socio-political cultural 'divisions' that must be brought into alignment with the European-western universal – where the universal is both a jurisdictional relationship between different cultural orders that brings it into the binary European/non-European, colonizing/colonized dynamic, as well as the 'universal' set of norms governing over that jurisdiction. International law mediates these differences because it is a construction of colonial order. Peace is the stated means through which to bring about this ordering in a justified manner – a manner not absent of violence but rather justified in its use of legitimate violence. If, as Foucault argues, politics is war continued by other means, then peace is the discourse shadowing the maintenance of genocide.[312]

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[311] Levene, *Genocide in the Age,* 13.

[312] Michel Foucault, *Society Must Be Defended: Lectures at the College de France 1976-1976,* trans. David Macey (New York, Picador: 2003), 15.

Genocide is thus institutional within colonial-modernity – it moves in different ways and different times via the logics of civility, crisis, and carcerality. There is something particular about the way that the UN's legitimacy is in part determined by codifying genocide into the criminalized perpetrator/victim binary. Colonial-modernity functions through determining a hierarchy of binaries built from the expansion of civil/uncivil that proliferates into a series of binaries, all of which serve to maintain the binary of white, cis, male, wealthy at the top – as built out of the power imbalances of white/nonwhite, cis/non-binary, male/female, wealth (resource/profit hording/overaccumulation)/poor (disenfranchisement of land/resources/power/forced underaccumulation). Genocide is the production of the Human/nonhuman binary. Genocide arises via the construction of populations because populations are necessary for the grouping of peoples into race from the extensions of civil-Christian/uncivil-unchristian.

Once un-Christianity is no longer justification for enslavement (because of the spreading of Christian missionaries), the underlying justification must change. This is because the motivating factor is not actually about a *belief* in Christianity, but rather about the underlying logics of un-civility and thus un-humanness as it becomes articulated over populations as un-Europeanness, essentially un-whiteness. Because whiteness is constructed in relation to that which it is not, and moves to include what was once not white into whiteness, it expands the

demarcation of who can/cannot have access to power, such as the Irish, Italians, Polish, Jews – all once seen as not white – who become assimilated into whiteness through the expansion of colonial projects, especially settler colonial projects such as the US and Israel. Genocide is the fabric underlying the logic of Native erasure, anti-Blackness, and exalted whiteness as a whiteness that can expand, as a category that is privileged at the top of a triangular relationship between the three within white supremacy. Genocide is what moves the distinction of civil/uncivil from Roman-Christian-European expansion into a colonial-modern framework and the production of civil as Human/uncivil as nonhuman.

Foucault argues "if genocide is indeed the dream of modern powers, this is not because of a recent return of the ancient right to kill; it is because power is situated and exercised at the level of life, the species, the race, and the large-scale phenomena of population."[313] Populations are key to articulating genocide. Foucault positions this development in the late 16th century rise of biopower and techniques of management, security, and discipline over the 'new problem' of populations.[314] However, I propose that rights are articulated in colonial-modernity *through* the relationship to navigating difference as a populational element

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[313] Michel Foucault, *The History of Sexuality Volume I: An Introduction*, trans. Robert Hurley (1976, repr.; New York: Pantheon Books, 1978), 137.

[314] Michel Foucault, *Security, Territory, Population*: *Lectures at the College de France, 1977-78*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador, 2009), see also Foucault, *The History of Sexuality*, 140.

emergent with the rise of colonial expansion in the late 15th century, where populations arise first through the colonial encounter.

In the dynamic of colonial-modernity, modern rights articulate differences between populations. Rights are framed as if they are a measure of equality – but they are always derived in relation to someone else's lack or loss of power. They only hold meaning so far as they are distinguishing what someone has from what someone does not have. So it is easy for Vitoria to claim that all nations share universal rights, when in fact only some groupings of people constitute sovereign nations in his framework. The same goes for the rights of man – only some people qualify as (white/wealthy/cis) men. A universal human right is interesting because though it seemingly disrupts this pattern, it is making a claim of universal 'rights' in the form of equality for all people, which essentially renders them meaningless in a system of states who hold power over individuals (citizens or not) and those states are then comprised of a power relation of (western) states that hold power over non (western) states that do not. It is an insidious type of relationality that also exists in tandem with the rights one holds as a citizen, but is virtually un-assertable except only in the claims of western states sanctioning non-western states over human rights violations.

The framework of the Mandate is supposed to provide grounds towards self-governance under a framework of European civility – where achieving the institutions and frameworks of European sovereign would supposedly deem countries 'civil' enough to (one day) self-govern. However, this is a threat to the

global order of colonial-modernity, as western states need to maintain power. Human rights as a discourse actually moves towards opposing 'self-determination' movements within the post 1950's decolonial movement. Human rights, under the auspices of the UN, facilitate a new form of carceral surveillance and disciplining into the newly neocolonial world order under the IMF, World Bank, and NGO expansion of western economic and political interests. These institutions serve to hold back certain populations as remaining 'uncivil,' no longer as unfit to self-govern, but unfit to determine what form of governance. Forced into the Cold War binary of nationalism backed by Soviet support or the 'democracy' of western support, the third way, non-align (or any other framework) is targeted and heavily disciplined into this binary. Human rights discourse – as an *individuated* subjecthood – actually operates over populations, and functions as a means of legitimating western intervention into conflict and crisis that western powers have a vested interested in controlling, and in many cases, maintaining in some way so as to stabilize their economic interests in the outcome.

This dynamic is in fact the core of colonial-modernity and rights – to sanction the legitimacy of violence, power, and genocide from the west as 'right.' The fact of individuated human rights does not serve to protect populations (or individuals for that matter) from the covert and overt forms of western violence, but rather articulates it as a non-issue, as normative, and thus necessary to maintain the 'peace' of western states. As a discourse, human rights are meant to protect from the unsanctioned violence of non-western power, such that western power can then

intervene as saviors and in turn, access resources and labor markets. The use of 'humanitarian' concerns in this discourse centers a certain type of crisis between political factions in formally colonized countries to bring in private industry and military occupation to 'stabilize' governing forces (usually towards US backed dictatorships). The human functions as the grounds of peace-making. The contradictions inherent in freedom (that it is premised on unfreedom) exist here as well – the 'stability' of experiencing 'peace' as autocratic, neoliberal policy achieved through military proliferation, both internationally and domestically.

In Vitoria's context, because capitalism is a power relation of colonial-modernity, the Human emerges as a relation of those whose bodies are worth more than the not human/not yet human, which positions worth as dependent on the ability to labor as profit. The 'universal human' is predicated on a different kind of normalized violence than the 'Human,' though within the same sphere – an addition of a more particularized form of violence, a more disseminated permeating kind of violence – manifested within the neoliberal technologies of surveillance and war-making of the turn to the 21st century. For example, in the context of the War on Terror, the universal human functions as 'enemy combatant' – where in this context of neoliberal warfare, the designation of solider/civilian as a distinction for targetable bodies in warfare has been removed, such that any person can be made an enemy combatant, anywhere, at any time. This in turn functions via a dematerialized form a warfare that is everywhere – domestic and international, sanctioned and unsanctioned, through drone strikes, expansion of material support

charges, secret prisons, and CIA black sites, in addition to various forms of legislation that increase surveillance and data tracking in a 'preemptive' manner. Through the universal human, surveillance itself is individuated to document, monitor, and order via racial-terrorist demarcations of uncivility from immigrant documentation status to the gender binary enforcement coding the uncivility of trans and non-binary people.

Thus the 'universal human' normalizes both newer and older, persistent and instrumental forms of settler colonial genocide as the social relations that neocolonialism and neoliberalism depend upon to move forward. This is evidenced in the formative dynamic of genocide, and the way rights discourses emerge via shifts into new colonial iterations. The 1492 colonial project arises via universal rights – the shift into colonial-modernity dependent on the genocide of Indigenous peoples globally and the ordering into populations of enslavement that codify racial ordering as hierarchy. The 1776 codification of US Settler colonialism arises through the liberal rights project of the Rights of Man, as dependent on the institutionalization of carceral, civilizing, and crisis logics to expand the project of the settler claim to land and production. This power materializes because the relationality of institutionalized genocide (both in the US and in other colonial nations) extended into institutions such as mission enslavement, plantation slavery, boarding schools, reservations, internment camps, prisons, policing, the institution of Science, among others. The 1948 shift into neocolonialism and the codification of Israeli settler colonialism occurs commensurate with an articulation universal

human rights – which is also dependent on a globalized order of crisis, civility and carcerality via demarcation of political lines (for example, partitioning of India, creation of Israel, South African apartheid - all in the year 1948), institutionalization of neoliberal social, political, economic practices through the UN, World Bank and IMF. That these shifts into new colonial iterations occur commensurate with new rights discourses is no accident; it is reflective of how new colonial orders come into being.

The form of political subjecthood rights offer is not a false subjecthood, but rather exactly the type of subjecthood that colonial logics fashion – that of a tool that can only be used so far in that it represents the subjecthood of the person bringing it – as limited by the racialized, gendered, classed demarcations that precede the rights bearing subject. The projection of the right only goes so far as the placement on the hierarchy of that person asserting that right. Meaning that the rights of a white, cisgendered wealthy man are always more protected, as a fuller embodiment of Human, than anyone underneath this positionality, despite the fact that now are all rendered 'universal humans.' Rights are relational because they are borne of a relational dynamic mediating Human/non-Human status that is at the core of what rights *do*. If genocide is indeed a modern invention, then it is also therefore a colonial invention – sanctioned through the ontology of universal rights.

CODA

Reclaiming Our Vision:
Moving Beyond Rights-Based Redress

I know you are reading this poem listening for something, torn
between bitterness and hope
turning back once again to the task you cannot refuse.
I know you are reading this poem because there is nothing else
left to read
there where you have landed, stripped as you are.

– Adrienne Rich,
An Atlas of the Difficult World[315]

Introduction: Speculative Visioning

Engagement with the archive of Vitoria offers a way to read the concentric and overlapping dynamics of the long historical past of colonial-modernity into the present. The *longue durée* of the geneoalogy of modern rights provides a means to engage the urgency of our contemproary moment through understanding how rights operate as a means of bolstering colonial logics and power relations across many forums, entities, and institutions. To that end, the archive is a jumping off point for foregrounding an anlysis of the urgency of the now, as a means of making sense of the materiality of struggle, resistance, and survival. The imperative aim of this work is not only to showcase how and where the construction of univeral rights

[315] Adrienne Rich, "An Atlas of the Difficult World," in *An Atlas of the Difficult World: Poems 1988-1991* (New York: W. W. Norton & Company, 1991), 26.

emerge, but also to engage the very sociallity of what living in and against a rights-based framework might entail. There are are other ways of understanding different forms of relationality that need not include rights-based redress or appeals to state-based recognition and inlcusion. The practices of speculative visioning, I contend, offer ways of seeing a world beyond rights-based relation and the reiteration of old promises of freedom that can never fully deliver, towards a visioning and building of collective and collaborative liberation.

I. From Gay Rights as Human Rights to Trans Rights in the Military

The most recent extension of the claim for universal human rights is a move to call for gay rights to be included as human rights. Ronald Holzhacker details the argument to establish international human rights norms so that they can then be claimed as protections at the national level.[316] He shows how this spread first from calls in Europe to the US and then to the United Nations, a decades long process seeking to expand human rights to include gay rights as proliferated through gay and lesbian NGOs, such as the International Lesbian and Gay Association and the International Gay and Lesbian Human Rights Commission, as well as larger human

[316] Ronald Holzhacker, "Gay Rights are Human Rights: The Framing of New Interpretations of International Human Rights Norms," in *The Uses and Misuses of Human Rights*, eds. George Andreopoulos and Zehra Arat (New York; Palgrave Macmillan, 2014), 30.

rights groups like Amnesty International and Human Rights Watch.[317] The role of NGOs in solidifying the legitimacy of human rights dates back to the work of the pre-UN conferences, such as the 1945 San Francisco convention, as Chapter 9 addressed.

The notion of including more people into the project of the universal via human rights is one that seeks to stabilize the universal by co-opting movements with radical critiques of colonial institutions and state violence into a liberal project of state inclusion for previously excluded 'uncivil' populations. Take, for example, the rhetoric of human rights as gay rights, as exemplified in 2011 by then secretary of State Hillary Clinton. Building on a memorandum issued by then President Barack Obama, Clinton extrapolates the need to expand the category of human rights to include gay rights:

> This morning, back in Washington, President Obama put into place the first U.S. Government strategy dedicated to combating human rights abuses against LGBT persons abroad. Building on efforts already underway at the State Department and across the government, the President has directed all U.S. Government agencies engaged overseas to combat the criminalization of LGBT status and conduct, to enhance efforts to protect vulnerable LGBT refugees and asylum seekers, to ensure that our foreign assistance promotes the protection of LGBT rights, to enlist international organizations in the fight against discrimination, and to respond swiftly to abuses against LGBT persons.
>
> I am also pleased to announce that we are launching a new Global Equality Fund that will support the work of civil society organizations working on these issues around the world. This fund will help them record facts so they can target their advocacy, learn how to use the law as a tool, manage their budgets, train their staffs, and forge partnerships with women's organizations and other human rights groups. We have committed more than

[317] Holzhacker, "Gay Rights are Human Rights," 29.

> $3 million to start this fund, and we have hope that others will join us in supporting it.[318]

Contemporary gay rights discourses work by expanding neoliberal imperialism. Here, Clinton advocates for the expansion of criminalization and the creation of new NGO watchdog organizations and US backed funds to 'teach' civil society organizations how to properly function as an NGO. The expansion of criminalization measures to promote 'safety' is a hallmark of neocolonial neoliberalism, as most strongly evidenced by the establishments of the World Court and United Nations. Chandan Reddy articulates how the notion of an expanding 'freedom' functions through the simultaneous expansion of technologies of violence through state-based incorporation of racial and sexual difference.[319]

Dean Spade and Craig Willse show how contemporary claims of gay rights actually work to expand neoliberalism, imperialism, and militarism.[320] In particular, they argue that the incorporation of gay rights as human rights moves gay rights from the realm of the particular to that of the universal:

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[318] Hillary Clinton, "Remarks in Recognition of International Human Right Day," Speech, December 6, 2011, http://www.state.gov/secretary/rm/2011/12/178368.html.

[319] Chandan Reddy, *Freedom With Violence: Race, Sexuality, and the US State* (Durham: Duke University Press, 2011). See also Mimi Thi Nguyen, *The Gift of Freedom: War, Debt, and Other Refugee Passages* (Durham: Duke University Press, 2012).

[320] Dean Spade and Craig Willse, "Sex, Gender, and War in an Age of Multicultural Imperialism," *QED: A Journal in GLBTQ Worldmaking* 1, vol. 1 (Spring 2014): 7.

> Clinton enacts a chain of equivalences drawing from the U.S. context: women, African Americans, and now gays. A lot is accomplished in this deft move. It reinstates the obviousness of human rights as universal, an abstraction from history and geopolitical struggle that the efficacy of human rights as a technology for capital and empire depends upon (a point to which we will return). It isolates gayness as separate and distinct from gender and race. This echoes the *Advocate*'s infamous cover declaring, "Gay is the New Black" in response to the passage of Proposition 8 at the time of Barack Obama's historic election to office. This move both codes gay as white, and also suggests that anti-black racism is in the past, something that has been resolved by U.S. law, cleaving the "bad old days" of slavery and Jim Crow. Thus the United States can declare equality achieved at home and operate as global leader on human rights. In this move, Clinton reaffirms the possibility of progress narratives (the universal march of time forward and better) and makes a "the time is now" call for gay rights. Rather than disrupt the universality of human rights discourse, this new gay moment brings gayness into the universal and affirms the universal. It affirms as well the role of the United States as arbiter of the universal, which comes across in the scolding Clinton offers other nations who are falling behind this universal, gay march forward.[321]

Human rights as gay rights expands the constructions of legitimate and illegitimate violence over populations to now be included as factors for expanding the western universal, which in turn normalizes the idea of going to war or 'civilizing' homophobic countries, despite the fact that the US has some of the highest rates of homophobic and transphobic violence in the world.

Clinton is also gesturing from the same white women's rights are human rights rhetoric of late 19th/early 20th century to incorporate gay rights as human rights within the ascendancy to whiteness, where gay people are included only when they seek inclusion within what Lisa Duggan has termed the 3 M's – marriage,

[321] Spade and Willse, "Sex, Gender, and War," 9.

military, and market participation.[322] The discourse of gay rights as human rights expands neoliberal frameworks for legitimacy of incorporation where queer people must be engaged in activities that uphold the neoliberal and neocolonial expansion of the nation-state. The ascendancy to whiteness is crucial to this factor, as it allows people who have been previously excluded from the realm of rights entitlements to join the expanding universal by taking on the norms of 'civility,' coded through ascendancies to both whiteness and class. This dynamic functions to expand the sphere of both white supremacy and heteropatriarchy as a new form of heteropatriarchal-multicultural white supremacy where it's okay to be gay as long as you conform to the norms of whiteness, class ascendancy, and 'just like you' replications of heteronormativity.[323]

A New Spin on an Old Story – Trans Inclusion in the Military

Inclusion of transgender people in the military is another recent example of the dynamic seeking to utilize incorporation into the state via rights to normalize trans experience. With Obama's removal of the ban in 2016 and Trump's reinstitution of it in 2019, though announced in 2017, this specific realm of inclusion for trans people has been a centerpiece of debate and contestation over the last few

[322] Lisa Duggan, "After Neoliberalism? From Crisis to Organizing for Queer Economic Justice," A New Queer Agenda in *S&F Online* 10.1-10.2 (Fall 2011/Spring 2012).

[323] See also discussion of multicultural white supremacy from Chapter 1.

years. Coming off the wings of the lift on banning gay people from participating in the military under "Don't Ask Don't Tell" in 2011, the large-scale backing of the call for trans inclusion in the military by LGBT organizations was funded by trans military veteran Jennifer Pritzker, known as the first trans billionaire and heir to the Hyatt hotel fortune, who in 2013 gave $1.35 million dollars to create the Transgender Military Service Initiative at her foundation, the Palm Center.[324] This backing also coincided with Kristen Beck's memoir on her transgender experience in the military – *Warrior Princess: A U.S. Navy Seal's Journey to Coming out Transgender.*[325] As Dean Spade and Craig Willse argue, this sudden hyper-focus on trans participation in the military also left a remarkable silence from the same large LGBT organizations backing these projects, such as the Human Rights Campaign, on the former military solider Chelsea Manning's cotemporaneous statement coming out as trans, commensurate with her imprisonment for exposure of classified documentation – an act which demonstrates her opposition to projects of US imperialism.[326] So it would seem that an affiliation of both trans-identification and military service is not worth the backing of mainstream LGBT organizations writ

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[324] Mattilda Bernstein Sycamore, "'Transgender Troops' Should Be an Oxymoron," *Truthout*, June 29, 2016, https://truthout.org/articles/transgender-troops-should-be-an-oxymoron/; Dean Spade and Craig Willse, "Sex, Gender, and War in an Age of Multicultural Imperialism," *QED: A Journal in GLBTQ Worldmaking* 1, vol. 1 (Spring 2014): 5-6.

[325] Spade and Willse, "Sex, Gender, and War," 5.

[326] Spade and Willse, "Sex, Gender, and War," 6.

large, but rather only for those who uphold the proper behavior of nationalism and state violence to undergird trans existence.

This narrative of trans inclusion by way of military participation as the mainstay call of trans acceptance in society works to normalize heteropatriarchal dynamics upheld by the colonial logics of civility, as well as carcerality and crisis, in a few key ways. Perhaps most evidently it functions to normalize the state's maintenance of power on the basis of perpetuating those logics through the US military industrial complex. It works to normalize the gender binary – seeking inclusion into the military for a trans subjectivity that complies with the binary of presenting as either masculine or feminine, where non-binary experience is erased through a projection of the desirability of cis-normativity as a fundamental basis of inclusion. It normalizes state-based projects of violence by legitimizing trans people through seeking acceptance into a system that further perpetuates institutional harm, US settler colonialism, and US imperialism.

But the funneling of trans bodies into military service is not necessarily a new way of seeking incorporation for the non-normative trans subject. Take for example the case of Alonso Diaz, a transmasculine Spanish conquistador posted in South America in the early 1600s. He was arrested in Peru on charges of murder, where it was brought to the attention of the Spanish authorities by Diaz that he was in fact a nun who had run away from a convent as an adolescent and then, presenting as a man, joined the Spanish military, during which time he was a

celebrated solider.[327] Rather than face trial for murder, Diaz successfully negotiated for his return to Spain on account of his gender transgression to meet with King Felipe IV and seek pardon.

There is much that could be traced here about Diaz's life – the ways he survived in the hyper-gendered context of Spanish social norms, how he escaped from a convent, how he treated his chest with herbs so as to make it flatter, the public ridicule he received as a non-normative spectacle upon return back to Spain.[328] There is also much that could be said about the subsequent treatment of Alonso Diaz in the numerous books that continue to refer to him by his given feminine name Catalina de Erauso, and use she pronouns even though in Diaz's own biography he refers to himself consistently with the masculine form of Spanish words and only very rarely with the feminine.[329] The recent work of translators, publishers, and scholars consulted for this study have all made the decision to locate Diaz either as a 'woman dressed as a man,' or as a cross-dresser. The conflation of gender and sexuality run rampant through these texts, many of which were

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[327] Federico Garza Carvajal, *Butterflies Will Burn: Prosecuting Early Sodomites in Early Modern Spain and Mexico* (Austin: University of Texas Press, 2003), 18.

[328] Carvajal, *Butterflies,* 36-38.

[329] Michele Stepto and Gabriel Stepto, translator's note for *Lieutenant Nun*: *Memoir of A Basque Transvestite in the New World,* by Catalina de Erauso, trans. Michele Stepto and Gabriel Stepto (Boston: Beacon Press, 1996), xlvi.

published in the early to mid 2000s.[330] Diaz did chose to go by another name later in life, perhaps because the name Alonso Diaz was associated with the ensuing ridicule and scrutiny in Spain when he was forced to return in feminine clothing and present before the King, which I believe is why he fled again to Mexico as Antonio de Erauso after his pardon.[331] I have chosen in this work to use the name Alonso Diaz and he/him pronouns to respect what I have surmised to be Diaz's self-identification, which despite the complete lack of respect of this name and pronoun by recent scholarship, is clearly the name and pronoun Diaz chose to use and go by. Much of the work on Diaz's life (as Catalina Erauso) speculates about hiding under a gender identity to escape life as a woman, and conflates gender identity with sexual identity – treating them at times as one in the same, while at the same time these texts might simultaneously acknowledge Diaz's identification as a man.[332] This operates, I argue, as a form of negating one's own identification, and instead places harmful and disrespectful narratives about trans existence, desire, and identity into the historical past.

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[330] See, for example, Carvajal, *Butterflies*; Eva Mendieta, *In Search of Catalina de Erauso: The National and Sexual Identity of the Lieutenant Nun*, trans. Angeles Prado (Reno, NV: Center For Basque Studies, 2009).

[331] Carvajal, *Butterflies,* 38.

[332] See, for example, Eva Mendieta, *In Search of Catalina de Erauso: The National and Sexual Identity of the Lieutenant Nun*, trans. Angeles Prado (Reno, NV: Center For Basque Studies, 2009), 15.

On the one hand, it is difficult to know if what is written about Alonso Diaz, even by his own supposed autobiography, is true. This is in part because the original manuscript that Diaz supposedly penned under his birth name is widely considered to have, at the very least, been falsified in parts by subsequent scribes, or potentially fabricated all together.[333] Even with this document as the mainstay of information on Diaz, to disregard his own identification with his name and pronoun is deeply transphobic and problematic. There are plenty of arguments about importing language and identity terms from today onto the past, basically critiques of claiming historical figures as trans. But what is the harm done by categorically placing people into the compulsory gender binary that they were actively defying by rejecting their socialized gender? This act projects a heteropatriarchal notion that the assigned at birth male-female gender binary is a universal, constant, and standard way of being. Though certainly it is normalized as such in the west, even so, plenty of people living under the framework of the gender binary in the history of the west have rejected and lived outside of it. There is a lack of robust historical detail to account for the experience of gender non-normativity because such

[333] Carvajal, *Butterflies*, 208-209. In Footnote 1, Carvajal acknowledges that Diaz supposedly wrote the original manuscript in 1625 and gave it to an editor in Madrid, and the whereabouts of it are unknown. The manuscript in this book, as well as the majority of the texts on Diaz consulted for this study, are derived from a version copied by Juan Bautista Munoz in 1784 from another copy that belonged to a Spaniard credited with literary falsifications - Candido Maria Trigueros. See also Isabel Hernández, "From Spain to the Americas, from the convent to the front: Catalina de Erauso's shifting identities," *L'Homme* (2011): 1-2.

existence has been targeted, ridiculed, and often times expelled from the historical record.

My intent here is not so much a practice of claiming a figure like Diaz into the history of trans narratives, but rather to query how Diaz's experience – as someone presenting as a man, in the Spanish military, leading conquest campaigns and violence in the New World – is treated in a markedly different manner from the targeted gender non-normativity of transfemininity; third, fourth, and fifth gender identities; Two Spirit; and other gender forms that exist(ed) across the New World, as well as in the European and North African territories and peoples that Spain extended its Inquisitorial reach over. The rise of the 16th century Spanish Inquisition became a primary institution punishing gender non-normativity and sexual transgressions outside of heteronormativity, which gathered its structural formation in the reconquest of Spain a century earlier. The reconquest of the 1490's knit together the Spanish kingdoms and Portuguese crowns into distinct, Iberian-based emperies, fueled by an anti-pagan, anti-Muslim, anti-Black, and anti-Jewish fervor that determined the Spanish as justified in their Christian conquest on the basis of their civility, to the violent detriment of the non-Christian, uncivil 'other'.

As Chapter 5 examines, this cultural 'other' in Iberia was framed primarily as those who were seen 'in excess' or in violation of gender and sexual norms and Christian standards, particularly in Iberia, which in turn then fueled the backlash of

the reconquest against the Moorish rule in the southern Iberian territories.[334] Christian theological framing of sodomy as an unnatural sexual practice became coded with non-Christians and framed as sexual excess through cultural and racialized otherness.[335] This outlook carried from the Middle Ages into the uniting of the Iberian Peninsula through the reconquest of Spain beginning with the expulsion of the Moorish rule in the 1492.[336] Through this reconquest, of which Columbus's New World venture became a globalized extension, the newly united Spanish crowns of Castile and Aragon desired to be seen as in line with the rest of Europe, as not wrought with 'otherness' of the Iberian excess, and to return to the early Roman-Christian origins of Hispania (the Roman name for its Spanish territories). This colonizing fervor, driven in part as I argue in Chapter 5 by the logics locating civility in compliance with Christian gender and sexual norms – as the gender binary and compulsory heterosexuality – anchors the extremism of Spain's internal purging through the reconquest and the trials of inquisition and into the expansion and anti-'otherness' of the New World and colonial-modernity.

For the purposes of this inquiry, though all of this is material rife for engaging with treatment of gender identity, especially in historical contexts, I am

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[334] Josiah Blackmore and Gregory Hutcheson and, "Introduction" in *Queer Iberia: Sexualities, Cultures, and Crossings from the Middle Ages to the Renaissance*, eds. Blackmore and Hutcheson (Durham: Duke University Press, 1999), 1.

[335] Ibid.

[336] Blackmore and Hutcheson, "Introduction," 2.

interested more so in how Diaz was able to position himself as a body worthy of protection and incorporation into the state and avoid the devastating courts of the Inquisition and the genocidal death that targeted gender transgressions of Indigenous peoples in the New World. Many of the New World conquers, such as Cortez, located such transgressions as both cause and justification for genocidal conquest and the indoctrination of Christian religious practices and social relations as a means of civilizing, which preceded legal justifications for conquest.[337] Why, then, did Alonso Diaz survive this internal and external colonizing fervor built on the backs of targeting gender non-normativity and queer sexual practices and identities, while so many countless others, in Spain, Europe, and especially in the New World, did not?

To defend himself, Diaz appealed to King Felipe IV in 1624 that he did not present himself as a man for any 'evil purpose,' but rather because of his "natural inclination for arms," which was for the express purpose of supporting the "defense of the Catholic faith and service to His Majesty the King of Spain."[338] Despite Diaz's own acknowledgement that it was illegal for 'a woman to dress in man's apparel' in his petition, he asks the king to grant him a lifetime pension for his military service

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[337] See Richard C. Trexler, *Sex and Conquest: Gendered Violence, Political Order, and the European Conquest of the Americas.* (Ithaca: Cornell University Press, 1995),1 and Lewis Hanke, *The Struggle for Justice in the Conquest of America* (1949; repr., Dallas: Southern Methodist University Press), 6.

[338] Carvajal, *Butterflies*, 35.

to the crown and informs the king that he will continue to dress like a man.[339] Diaz relies almost exclusively on his military career and testimony of courageous service as a 'good solider' from his former captain of the Spanish Infantry to serve as the basis for asking for exemplary treatment.[340]

In 1626 the Royal Council of the Indies in Madrid recommended to King Filipe IV to grant Diaz a yearly pension for life, which the king upheld that same year.[341] After meeting with King Filipe IV during that year, Diaz left for Rome to meet with Pope Urban VIII, who granted him license to continue dressing as a man for the remainder of his life.[342] Diaz was welcomed by the Roman senate, which named him an honorary citizen, he met with Cardinals, and was the guest of Roman nobility. He was allowed passage to return to Mexico, where King Filipe IV instructed the ministers of the *Casa de Contratacion*, the administrative wing of Spanish colonization that determined who could and could not enter Spain's territories in the New World, to allow Diaz passage to New Spain without any request for information.[343] On July 30, 1630, Diaz returned to Mexico under the

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[339] Although "cross-dressing" had been legally banned throughout this time period numerous times in 1600, 1608, 1615, 1641. See Marjorie Garber, forward to *Lieutenant Nun*: *Memoir of A Basque Transvestite in the New World,* by Catalina de Erauso, trans. Michele Stepto and Gabriel Stepto (Boston: Beacon Press, 1996), xi.

[340] Carvajal, *Butterflies*, 35-36.

[341] Carvajal, *Butterflies*, 36.

[342] Ibid.

[343] Carvajal, *Butterflies*, 37-38.

name Antonio de Erauso as a mule tanner and a small merchant, where he would live until his death in 1650.[344]

The legal constructions of the western universal, even at its early expansion, functioned to incorporate degrees of non-normativity so long as such transgressions conformed to the white, heteronormative standards enforced by the expansion of the Christian-European universal through colonialism. The aspects of Diaz's identity which served to protect him against the larger structural targeting of gender non-normativity, I argue, is threefold. First, Diaz' proximity to the construction of a white racialized logic emergent within the massive global shift of colonial-modernity and the institutionalized hierarchization of peoples through the compounding and co-constitutive binaries of European/Indigenous, civil/uncivil, and white/people of color. Second, his masculine-presenting identity, especially as a chivalrous man of Spanish valor coupled with pursuits of (toxic) masculinity which ride hand in hand with violence. Factors showcasing the violent underpinning of toxic masculinity include the following: Diaz apparently killed at least 15 men, including his own brother,[345] though accounts differ about whether he was aware of this at the time;[346] the promise of receiving vast sums of wealth (a primary

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[344] Michele Stepto, Introduction to *Lieutenant Nun*: *Memoir of A Basque Transvestite in the New World,* by Catalina de Erauso, trans. Michele Stepto and Gabriel Stepto (Boston: Beacon Press, 1996), xliv.

[345] Carvajal, *Butterflies*, 18.

[346] Garber, *Lieutenant Nun*, viii.

motivating factor for conquistadors); and objectification of women (at the very least Diaz displayed xenophobic and racist remarks concerning beauty standards and respectability of women).[347] And third, his military service to the Spanish crown. I argue that these three dynamics – whiteness, masculinity, and military participation – are the factors undergirding Diaz's incorporation and protection by both the crown and Church.

Diaz's treatment exemplifies how the colonial state, from its emergence, absorbed certain types of gender non-normativity only if and when they upheld notions of state violence, white supremacy, and cis-normativity. We see this same dynamic today with inclusion-based projects – as long as the gender transgression of a trans narrative is aligned with seeking cis-normativity, heteronormativity, and ascendency to whiteness to configure proper subjecthood and thus citizenry of the state – trans people will be included, which both Diaz and contemporary calls for trans inclusion into the military confirm. In particular, the expansion of a heteropatriarchal-multicultural white supremacy, where including 'difference' to demarcate white difference from 'uncivil' difference, manifests in the example of Alonso Diaz as well. Under the contemporary project of multicultural white supremacy's expansion of neoliberalism and neocolonialism, the ascendancy to whiteness under heteropatriarchy marks a shift towards civility, but one that is still

[347] Carvajal, *Butterflies*, 18.

manifested in the primacy of whiteness, despite the assimilation of people of color into this framework.

This, in turn, propels the notion of colonial futurity – the projection of colonial logics into the future – that I argue is maintained by expanding the protection of the state to subjects previously excluded.[348] Colonial futurity works to quell dissent by including a few more bodies to stabilize, and in turn, maintain the same trajectories and logics of colonial-modernity within the ideology of inclusion and protection through rights-based incorporation. To see our contemporary moment as part of a linear progress narrative, one where we have finally arrived at a moment of hopeful trans inclusion in the state, belies the deep logics of colonial-modernity as they work to project themselves both backwards and forwards (for a contemporary example of this framework, see Nora Barrows-Friedman's critique of the public relations campaign for a transgender Israeli solider to normalize Israeli settler colonial genocide).[349] Backwards towards a history that never included us and forwards a future that one day will – where the almost-but-never-arriving-at elides the dynamics by which the very logics of colonialism that determine who is legitimate on the basis of civility, crisis, and carcerality continues in various forms.

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[348] For a discussion of the idea of settler futurity, see Eve Tuck and K. Wayne Yang, "Decolonization is Not a Metaphor," *Decolonization: Indigeneity, Education and Society* 1, no 1 (2012): 1-40.

[349] Nora Barrows-Friedman, "Israel's first trans officer helps with ethnic cleansing," *The Electronic Intifada*, April 12, 2017, https://electronicintifada.net/content/israels-first-trans-officer-helps-ethnic-cleansing/20171.

It is historically accurate that trans bodies have already been included on the same terms being called for today. But what dynamics have changed? Who will be seen as deserving of incorporation, who will continue to be more likely to live or die based on racialized logics of gender transgressions, and whose is a 'normal' enough trans body to be included, and thus spared from the violence of the state?

II. The Body Beyond – Speculative Visioning

Given this drive towards colonial futurity, where can we look beyond the limitations of rights-based inclusion? How can we envision a world both without rights, as well as without norms around gender that reaffirm the gender-binary? Without perpetuating the logics of colonial-modernity into colonial futurity? This final section will attend to different ways of holding both of these dynamics – the ongoing structural logics of colonial-modernity alongside projects of abolition, resistance, and survival – through practices of speculative visioning.

In *Emergent Strategy*, adrienne maree brown articulates a framework for engaging change in intentional ways that can shift larger scale frameworks - by starting small. She states that "we are living in the ancestral imagination of others."[350] An imagination, then, that only includes some people at the expense of

[350] adrienne maree brown, *Emergent Strategy: Shaping Worlds, Shaping Change* (Chico, CA: AK Press, 2017), 21.

others. It is this imagination – this drive for a futurity of certain likelihoods of who will live and who will die, that projects a specific kind of futurity – a colonial futurity – one where rights are a primary vehicle used to cement the same structures to widen and bend so as to include a few more people at the expense of continually closing out so many more.

For me, the center of imagining beyond these structures, beyond rights, is in building a feminist praxis of care – a commitment to working with critical texts, activist work, radical organizing, abolitionist politics, collective care work, and speculative visioning to engage structural power relations through responses that are generative of our own collective and interrelated forms of power, liberation, care, and healing. Developing feminist responses to the systemic and interpersonal violence and harm of colonial-modernity is a direct response to projects that center calls for inclusion into the state as a form of rights-based protection.

Starting small also means starting where one feels powerful, as disability justice activist Leah Lakshmi Piepzna-Samarasinha details.[351] This notion is beautifully portrayed in her recent publication, *Care Work: Dreaming Disability Justice.*[352] Disability justice is different than disability rights. Disability justice is a

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[351] See Leah Lakshmi Piepzna-Samarasinha, "Beyond Disability Rights; Disability Justice." *The Laura Flanders Show*, June 30, 2015; https://www.youtube.com/watch?v=n_sw6Hjtfg8.

[352] Leah Lakshmi Piepzna-Samarasinha, *Care Work: Dreaming Disability Justice* (Vancouver: Arsenal Pulp Press, 2018).

term that emerged from anti-capitalist, working class, queer and trans, Black, brown and Indigenous organizing responses to the inclusion model led primarily by white disability rights activists and single issue models.[353] Piepzna-Samarasinha centers building practices of care and sustainable communities because our movements need people who can see the world differently: "disability justice, when it's really happening, is too messy and wild to really fit into traditional movement and nonprofit industrial complex structures, because our bodies and minds are too wild to fit into those structures."[354] Disability justice work centers on accessibility, though not just as an add-on but instead as offering a shift in spatial, organizing, and access norms to center "sick, disabled, mad, neurodivergent/autistic, and/or deaf people" to change the way things are run. This, Piepzna-Samarasinha details, "looks like what many mainstream able-bodied people have been taught to think of as a failure."[355] Understanding disability as a set of virtuosic skills of innovation, persistence, and a commitment to not leaving people behind, offers a framework for responding to the violent power relations of colonial-modernity and logics of colonialism as distinguished from the productivity, capitalistic, and justice-centered models that rights embody.[356] It is a framework that derives from practices of being

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[353] Piepzna-Samarasinha, *Care Work*, 15.

[354] Piepzna-Samarasinha, *Care Work*, 124.

[355] Ibid.

[356] Piepzna-Samarasinha, *Care Work*, 126.

willing to make mistakes and learn from them and try new things, building relationships and trust, showing up for one another, and centering the leadership of actually disabled peoples as strategies for survival.[357]

Rights are positioned as ultimate contractual device for access to resources and services via the state. But what about notions of reciprocity, responsibility, and care? Native Studies scholar Vine Deloira Jr. aritculates a difference between Indigenous world senses and western world senses as one of a responsibility-based society versus a rights based society.[358] A responsibility-based framework is one of mutual engagement, of reciprocity, and of valuing connections beyond a human-to human (or rather civil Human over the uncivil not-yet human instituted via colonialism) towards those that consider all beings and life-forces – plants, animals, the land – as sites of knowledge, power, and respect, as the more than human realm.

Feminist responses to systemic harm and interpersonal violence are widespread and varied, and include building practices of radical honesty about our needs, how we feel, and what we want; making space for healing from trauma and shame; building intergenerational communities of care; critiquing the myth of romance and heteropatriarchy as built on logics of scarcity and heteronormativity; creating spaces to speak about mental health; doing the work to center marginalized

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[357] Leah Lakshmi Piepzna-Samarasinha, "Cripping the Apocalypse: Some of My Wild Disability Justice Dreams," in *Care Work: Dreaming Disability Justice* (Vancouver: Arsenal Pulp Press, 2018), 126.

[358] Vine Deloria Jr., "In the Light of Reverence," *Sacred Land Film Project of Earth Island Institute,* 2001.

people; building disability justice frameworks; and developing intersectional approaches and critiques for engaging structural power relations. This work is deeply rooted in community organizing, movement work, resistance practices, and care and healing that, in particular, women of color and feminist of color spaces have been practicing for generations.

For example, INCITE! is a network of radical feminists of color organizing to end state violence and violence in our homes and communities. Since its inception in 2008, INCITE! has created networks and conferences, and toolkits, resources, and the anthology *the Revolution Will Not be Funded: Beyond the Non-Profit Industrial Complex,* as well as other resources that show how communities and individuals can approach new responses to harm and accountability.[359] For instance, their web video series on "What is Accountability" and "Self Accountability," offer short, accessible definitions for understanding what accountability means. Both as self accountability (taking responsibility for choices and consequences of those choices) and community accountability (how we support community needs around accountability).[360] This work offers possibilities for creating accountability-based spaces for people who cause harm. The set of values behind these kinds of practices

[359] INCITE! Women of Color, eds. *The Revolution Will Not Be Funded: Beyond the Non-Profit Industrial Complex* (Cambridge: South End Press, 2007).

[360] "What is Accountability" and "Self Accountability," *INCITE Women of Color*, October 5, 2018*;* accessed Septmber 2019, https://incite-national.org/2018/10/05/building-accountable-communities-a-video-series/.

are not disciplinary or juridical in their frameworks, such that rather than creating firm lines, rules, and definitions for how to engage in transformative justice and accountability, these practices instead are centered in valuing the complexities of holding complications, not having all the answers, and being open to new things and ways of engaging this work.

Transformative justice is an example of a practice of engaging harm and violence in a way that does not create more harm, violence, and abuse. Harm is also a term with a wide understanding of use, which Mimi Kim, adrienne marie brown, Shira Hassan, Leah Lakshmi Piepzna-Samarasinha, and others expound on in the April 2019 *Building Accountable Communities National Gathering* talk, "Addressing Harm."[361] Engaging harm in a fundamental manner examines how differing power dynamics produce differing types of harm that in turn require different forms of responses. Transformative justice is an approach that works outside the juridical realm to respond to different situations and needs with responses and strategies according to what might be the best option, or options, to try. This kind of work exemplifies a responsibility-based relation as opposed to a juridical, rights-based relation that standardizes punishment and carcerality.

Disability activist Mia Mingus defines transformative justice approaches as a response that is rooted in 'resisting what is not wanted' as a way of responding that

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[361] Building Accountable Communities National Gathering Talk, "Addressing Harm," *INCITE!,* April 2019, accessed February 15, 2020 https://incite-national.org/2019/07/31/new-resources-for-transformative-justice-and-community-accountability/.

does not involve the state or institutions such as ICE, foster care, and the police, and that in turn does not reinforce harmful gender norms or vigilante-style retribution.[362] Second, transformative justice actively works to build and cultivate the prevention of violence through building accountability, healing, safety, connection, and trust. She details that there are many different ways this can happen in a transformative justice (TJ) based practice:

> [I]t is critical that TJ is not simply the absence of the state and violence, but the *presence* of the values, practices, relationships and world that we want. It is not only identifying what we don't want, but proactively practicing and putting in place things we want, such as healthy relationships, good communication skills, skills to de-escalate active or "live" harm and violence in the moment, learning how to express our anger in ways that are not destructive, incorporating healing into our everyday lives. In TJ interventions we work to actively practice things such as healing and accountability for everyone involved, not only for the survivor and the person who committed the violence. TJ responses are an opportunity for us to not only address incidences of violence, harm and abuse, but to also take stock of and collectively build the kinds of relationships and communities that could intervene in instances of violence, as well as prevent violence.[363]

These practices are ones that do not involve or need the state, or judicial frameworks, to perform deeper community building work, accountability, and restoration. This type of work has been ongoing for as long as colonial-modernity, and before, in frameworks and relationality that were not primarily rights-based.

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[362] Mia Mingus, "Transformative Justice: A Brief Description," *Mia Mingus*, blog, January 9, 2019; https://leavingevidence.wordpress.com/2019/01/09/transformative-justice-a-brief-description/.

[363] Ibid.

For example, the work of Eddie Conway in *The Greatest Threat: The Black Panther Party and COINTELPRO* details that the biggest threat to the state that groups organizing for liberation pose, such as the Black Panther Party, was in taking care of community needs and organizing for self-determination.[364] Rights are positioned as ultimate contractual device for access to resources and services via the state. But the biggest threat to the state is that we do not need the state at all.

Beyond Colonial-Futurity

Speculative fiction offers an extension of these forms of collective visioning as a space for visioning different forms of collective possibilities beyond colonialism, systemic power relations, and the violence and harm of the state and its institutions and mechanisms – like rights – that maintain these structures and project them into colonial futurity.

However, science fiction can also work to promote colonial futurity, in a way that situates projects of contemporary colonial social relations into the future – even as it attempts to alter them. Colonizing space, recreating the same gender binary, expanding capitalism, extending the same notions of racial difference. An example of this is the work of Kim Stanley Robinson in the novel 2312.[365] Here, Robinson

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[364] Marshall Edward "Eddie" Conway, *The Greatest Threat: The Black Panther Party and COINTELPRO* (Baltimore: iAMWE Publications, 2009).

[365] Kim Stanley Robinson, *2312* (New York: Hachette Book Group, 2012).

envisions the colonization of space and the proliferation of primarily western models of political governance and economic trade as they develop into a universe of planets and populations engaging in new forms of political, economic, and social modality. But the vision for these new forms of relationality is based primarily in the extension of western models – as an extension of colonial-modernity. He attempts in this book to consider other forms of gender identity and bodily configurations outside the normative conception of biological 'gender,' but in doing so continues to instill the same power dynamics and cis-normative relationships of heteropatriarchy. Cismen continue to hold power, women are beneath them, capitalism is no longer globalized but galaxiezed. Cismen can have their bodies altered to have a small vagina above their penis, ciswomen can be altered to have a small penis above their vagina – thus creating a gender morphing heterosexual experience that continues the dynamic of the gender binary with an added bonus of a new body part and orgasmic experience. This does nothing to fundamentally alter power relations of heteropatriarchy, or power dynamics of men over women, but in fact further expands heteropatriarchy into a form of colonial futurity under a 'lets have it all' logic that commodifies body parts on the basis of sexual pleasure that some individuals can chose to incorporate in a new 'fun' experience, that meanwhile maintains all of the interpersonal and structural power dynamics of the gender binary. This in turn further isolates trans and non-binary experience because now cis people don't have to be trans; they could just add on a new body part and maintain heteronormative power relations. That would be a potential narrative, if,

of course, trans, gender non-conforming, and non-binary people were even mentioned in mainstream science fiction like the work of Robinson, but the logic of heteronormative colonial futurity is so strong it projects itself via science fiction into a colonial futurity – distorting an imagination of what could be based on what the dominant ideology is now.

When we use such spaces of speculative visioning as a means of recreating the systems we are already entrenched in, the projection of colonial futurity becomes real. In the apocalypse of colonial-modernity, so many worlds have ended. Let us in turn envision the ending of the world of colonial-modernity, one where rights and white supremacy and heteropatriarchy and capitalism do not configure our relationships to each other or ourselves and our projects of speculative visioning.

Speculative fiction, however, especially the projects of feminist of color speculative fiction, can offer more than colonial futurity. Cherie Dimaline's work in *The Marrow Thieves*, for example, centers Indigenous forms of knowledge to support a collective of children, adults, and elders navigating an apocalyptic world where Indigenous peoples are kidnapped and killed for the bone marrow that holds the ability to dream.[366] In this work, Dimaline positions Native ways of knowing as a cornerstone that help the group to collectively navigate their journey on foot so that they are be protected and held in safety. In *Love Beyond Space and Time: An*

[366] Cherie Dimaline, *The Marrow Thieves* (Toronto: Dancing Cat Books, 2017).

Indigenous LGBT Sci-Fi Manifesto, stories such as "The Boys Who Became Hummingbirds" by Daniel Heath Justice speculate another world where the transformative practice of finding solace in a shared experience of exile allows the two main characters, as the boys who become hummingbirds, to care and love one another while also transforming the social relations of their town from people that had turned away from one another to one where they are brought together through the hummingbird boys sharing their own beauty as a means of healing that world.[367] Because of their bravery in this commitment to sharing their beauty, despite the violence enacted against them, others in the town joined them and committed to caring for one another: "for they understood once again, as they had long ago, that no one was expendable. No one was forgotten. No one's beauty would ever again be shamed. For it was beauty, and two brave, loving hearts, that had brought them back to one another."[368] By situating the contemporary story as one that is both a remembrance and a teaching, the speculative visioning of a past remembrance being brought forth to change the present indicates how Indigenous speculative creative work positions the past, present, and futures as interrelated, as ways of understanding the transformation of social relations by imagining beyond the limitations of whatever structures are present today.

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[367] Daniel Heath Justice, "The Boys Who Became Hummingbirds" in *Love Beyond Space and Time: An Indigenous LGBT Sci-Fi Manifesto*, ed. Hope Nicholson (Canada: Bedside Press, 2016).

[368] Ibid., 59.

Speculative fiction also offers space to build critiques of colonialism and colonial futurity alongside different ideologies of gender, sexuality, race, and disability. Ursula Le Guin constructs a galaxy where many of her books interact with different aspect of colonizing project of the Hanish worlds – where the life-force instructions/necessities were sent out over many planets and developed of their own accord – in reaction and response to whatever planetary environment existed. Many of Le Guin's protagonists interact with these worlds as observers, as those who are sent to study and learn from the various social relations that have developed into drastically different societies. In *The Left Hand of Darkness*, for example, Genly encounters a society where there is no conception of the gender binary and where people engage with different gender relationalities as spiritual, sexual, and social relations dictate, thus allowing for an entirely different set of social relations and experiences that resonate across the different societies of the planet.[369] This in turn reflects the differences in political complexities, in a way, I would argue, that is different than solely relying on the construction of the gender binary as a primary determining element of social relations, which in western terms instills patriarchal political relations and the primacy of compulsory heterosexuality as models for governance. By imagining a different type of social relation that is not dependent on power arising from male-ness as cis-gender, Le Guin engages a notion of a different set of possibilities.

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[369] Ursula Le Guin, *The Left Hand of Darkness* (New York: Ace Books, 2010).

Black feminist speculative fiction writer Octavia Butler also engages with speculative differences of social relations, and in particular the construct of the gender binary in her series *Xenogenisis*, or *Lilith's Brood.*[370] Within the final book *Imago*, the experience of the third gender Oankali, known as Ooloi, of the character Jodahs, navigates a new set of social relations that bring together humans and non-earth species. In an interrelated and arguably non-consensual manner, the futurity of both species relies on the necessity of the third gender Ooloi for participation in sexual and familial reproductive relations. Butler, through this complexity, allows us to query the dynamics of genetics, biology, scent, and other factors at work surrounding other possibilities of gendered relations that move us beyond a recycling of more normative science fiction imaginations of the future, where the structures of colonial-modernity repeat themselves into a colonial-galactic futurity. Rather than project the heteropatriarchal frameworks of cis-normativity and straightness, Butler pushes us as readers to move beyond social relations that are easy to digest, situate, and understand into more complicated relations of power that reflect complex queries into speculative worlds.

Both Butler and Le Guin also use the format of a colonial future in space to critique the logics of colonial-modernity as they function within our present society by forecasting them in a manner that twists the narrative of the human-destroys-alien or alien-destroys-human, not by normalizing the logics of colonial expansion,

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[370] Octavia Butler, *Lilith's Brood* (New York: Hachette Book Group, 2007).

as series such as *Ender's Game* position the Hegemon into intergalactic imperial warfare that controls the spreading of other worlds by Earth's western political modes of governance (mainly), where in *Ender* there is also what becomes normalized as the individual desire for 'peace' and retribution, common Christian themes extended into a colonial futurity.

Instead, the work of Butler and Le Guin lead us into colonial worlds as a means of seeing the relationality between power, control, and resistance in more nuanced manners. For example, in Butler's short story *Bloodchild,* we enter into a world that is not clearly defined as colonial, where we work our way into a context where eggs are consumed to prolong life, and a mother grapples with her child's internment within a forced inter-species relationship.[371] We learn slowly through this landscape not that the Terrans have colonized the Tlic and forced them into the Preserve, but rather the other way around. We hear how T'Gatoi in particular worked to end the separation of Terran families through a more gentle, 'humane' colonizing manner. We see the dynamic unfold as one akin to slavery – of bodies that are not controlled by individuals or parents, but by outside forces who need the labor of that body to propel the positionality of their peoples forward at the expense of those forced into the slave relationality. We witness the humiliation of the mother of Gan as she resists the intoxicating and placid effects of the egg given to them as captives but is forced into it to prepare her for turning her son over to

[371] Octavia Butler, "Bloodchild," in *Bloodchild and Other Stories* (New York: Seven Stories, 2005).

T'Gatoi's control, though we see this mainly from Gan's perspective, without a full awareness yet of the larger dynamic at work. We learn that Gan was chosen and 'adopted' by T'Gatoi from before birth to fulfill the duty he is not fully aware of through the constant, addictive, and often non-consensual use of forcing the ingestion of the intoxicating egg.

Though in the afterward Butler states surprise when people see this as a story of slavery, she also outlines what I read to be a colonial relation, where to survive, 'accommodations' must be made for Terrans living in a world not their own. It is, then, the narrative of a colonial-futurity that has become flipped, where the colonizers are forced into a cyclic, slave-like relation where consent is not their own, which keeps everyone tethered into the colonial relationality of dependency, assimilation, and resistance. Butler engages readers in such a way as to bring this in subtly, through a non-consensual relationship structure that brings about an end via choice, though a forced choice it is. In this way, Butler challenges the common colonial futurity narrative by inverting the dynamic to expose, still at its core, the uneven power dynamics at work, which for Butler in many of her novels, brings forth a 'forced' accommodation where choice is present, but where that choice is also made dependent on some 'benefit' to the person in the position of less power, usually one of intoxication/gratification/extending of life. We see this with the Ooloi in *Xenogenisis*, as well as in the Vampire speculative novel *Fledgling* where the human partners to the Vampires are (depending on the Vampire) given a choice, but only after they have been exposed to the mood-altering effects of the blood

exchange and the increase in health and vitality to the human. Butler constructs a complex world of speculative visioning where normative relationalities – of gender, of colonial futurity, of consent – are not always delivered in clear-cut terms. But this dynamic of her speculative visioning also encapsulates a manner of seeing the world in other possibilities, in other complexities, and in other relations of power.

At the core of her work Butler is also committed to centering protagonists that are often Black women, and in the case of the *Parable of the Sower* duology, working outside normative constructions of disability. Piepzna-Samarasinha reads protagonist Lauren Olamina, a young Black woman, as both genderqueer and also disabled. As a *sharer*, Lauren Olamina is hyper-empathetic, which at times can put her in debilitating and potentially unsafe conditions, as well as offer her an acute awareness of pain in the world – providing what Piepzna-Samarasinha frames as both impairments and gifts similar to neurodivergence/autism experiences:

> Butler's *Parable* books are a Black disability justice narrative. Lauren often struggles with her non-normative mind, but it also gives her Black disabled brilliance. Her hyper empathy makes her refuse to leave anyone behind, even when they are a pain in the ass or she disagrees with them. It allows her to innovate, making her survival pack filled with seeds, maps, and money when everyone else things she is crazy, co creating a resistance community and rebuilding it when its destroyed.[372]

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[372] Leah Lakshmi Piepzna-Samarasinha, "Cripping the Apocalypse: Some of My Wild Disability Justice Dreams," in *Care Work: Dreaming Disability Justice* (Vancouver: Arsenal Pulp Press, 2018), 135. In footnote 41, Piepzna-Samarasinha also refers to the work of Dr. Sami Schlak for further reference on Butler and Black disability frameworks in *Bodyminds Reimagined: (Dis)ability, Race, and Gender in Black Women's Speculative Fiction.*

There are many other examples of authors in speculative fiction re-imagining and repositioning other forms of social relations through speculative visioning that do not imagine our contemporary social relations as inevitable or desirable.[373] Collections of anthologies such as *Octavia's Brood* and *Meanwhile, Elsewhere* showcase speculative works that engage in a critical manner with western and colonial logics of gender and sexuality. Speculative fiction is a space to envision more – a world where people with disabilities, queer people, Native people, Black people, trans people, and other marginalized peoples are self-determining, resilient, and at the forefront of resistance and revolutionary dynamics. In many ways the work of speculative visioning extends forth the contemporary movement, organizing, and survival work that is already happening via a politics of care – of mutual aid, of re-configuring power, access to resources, and healing historical patterns of trauma, abuse, and violence.

The potential too of imagining a world without rights, or at least challenging the commonsense notions of rights as the primary way to remedy structural harm, exists within the landscape of speculative fiction. For example, in Dawolu Jabari Anderson's speculative play "Sanford and Sun," in *Octavia's Brood: Science Fiction from Social Justice Movements*, a projected past ancestor/god Sun Ra travels from space into the contemporary moment where he frames a strong critique of rights within the movement for Back liberation:

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[373] In particular, see also the work of Samuel Delany and other works of Ursula Le Guin and Octavia Butler.

> Sun Ra: You see, you have both an outer space and an inner space to explore. One should never exceed the other. Inner development prepares you spiritually, while external works help society. When you abandon either, you suffer the consequences of subjugation. This is why you become dependent and beg for jobs from the system. This is why you beg them for rights.
> Fred: We don't beg. We deserve those rights.
> Sun Ra: To deserve means you are 'worthy of.' Whoever determines you to be worthy of something wields the power to administer judgment. You have to define your own worth, not empower someone else to decide that.[374]

Seeking rights as an end goal strategy for social justice movements is about seeking not just protection within the state, but about protection *from* the state, to limit the kinds of harm and violence the state can manage, institutionalize, condone, and create. However, rights are a tool of the state and therefore never able to fundamentally shift this dynamic, and in fact work to stabilize it. That is why colonial logics are maintained, why prisons have replaced plantations and missions, why the police are agents of harm, why power and resources still manifest into white hands, and why land is occupied through warehousing, extraction, and commodification.

Rights are attached to a particular system of governance. A governance founded on divisions and hierarchies of difference. Rights are positioned as the answer, as the one true way. But as those of us involved in social justice work know, there is no one true way, no one meaning. This is a western, colonial, Christian framing. It is in the strength of differences, in the pluriverses of the many, that care

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[374] Dawolu Jabari Anderson, "Sanford and Sun," in *Octavia's Brood: Science Fiction from Social Justice Movements*, eds. adrienne maree brown and Walidah Imarisha (Oakland: AK Press, 2015), 162.

is practiced. Not in rights or even duties. This is what the west has both forgotten and propagated, by force and by assimilation. Rights are a form of disciplining, of ascent to be governed but also ascent of those who do not agree to be governed. The law disciplines. Science disciplines. They are both grounded in colonial notions of mastery and control-over.

Modern rights are mediated by and for the state. We see this in Vitoria's construction of the modern right – as a universal right. Can we even imagine what the human is without rights? What the human is without white supremacy, heteropatriarchy, capitalism? What the human is outside of the construct of colonial-modernity? And, in turn, what does a right mean if we abandon the construct that difference should be disciplined? If we can imagine a world beyond the gender binary, beyond monogamy, beyond the state, beyond heteropatriarchy and white supremacy and capitalism, can we not also imagine a world beyond rights?

In the midst of continued and severe structural, state, and interpersonal violence and harm facing trans communities, especially those for transwomen of color, centering histories of building care and survival practices is imperative to building different futures. Take for example the work of STAR (Street Trans Action Revolutionaries), the street survival and housing project started by Marsha P. Johnson and Sylvia Rivera in New York City in the 1970s to support queer and trans youth and transwomen of color surviving in the streets in the midst of a society hyper-focused on internalizing capitalist notions of deservedness and transphobia.

These histories offer a means of learning from and continuing to build spaces for people who are most marginalized to care for one another and survive, in ways that neither the state nor rights-based redress can offer. It looks like centering disability justice and the importance of re-imagining our spaces to not just accommodate or tolerate a divergence of body/minds from a normalized body standard – i.e. those who are living with neurodivergence, disability, chronic illness, mental health issues, or other forms of experience that are marginalized in our society – but to radically rethink the structuring of our classrooms and communities as centered in the necessary importance and value of these differences in building a future that can hold us all. In the midst of ongoing settler colonial violence, it looks like beginning from a place that acknowledges whose land we are on – I am writing primarily from Riverside, California on unceded land of the Cahuilla, Serrano, Acjachemen, and Tongva people – and centering the work of Indigenous epistemologies and movements to build an awareness of the deep logics of colonialism. To center, for example, how communities resisting colonialism, such as the current protectors of Mauna Kea in Hawaii, are doing so from a place that aligns in the contributions of elders, women, and mahu – or third gender Kanaka Maoli (Native Hawaiian) people – within movement work in a relationship of care to the land and community.

This also looks like centering a practice of collective and speculative visioning in our hearts, in our communities, in our classrooms, in our minds. Of actually sitting with the questions like what would it look like to decolonize the land we are on, especially for those of us who are settlers? Of a world without white

supremacy? Of what a feminist, disability justice-based world would look like? Of what a consent-based world looks like? Of how our ideas of safety would change, of what kinds of practices might we engage with to deal with harm in ways that don't continue to produce violence.

To ask what are the practices, ideas, beliefs in our everyday lives that we might be able to enact or change now based on this vision? To center this work involves beginning small, of beginning where we feel the most powerful as opposed to powerless, as Piepzna-Samarasinha reminds us. To return Alok Vaid-Menon's idea of the power of failure, of not living up to society's expectations as actually a means of resisting and celebrating new ways of being.[375] That if to imagine a world without rights feels impossible, we can build from the experiences, knowledges, and lives of those who are told their existence is already impossible – such as trans people or people practicing polyamorous relationships – as the experiences of those who are told they are impossible indicate that there are entirely possible ways of being and living, as Dean Spade articulates in *For Lovers and Fighters.*[376] And returning to the wisdom of Audre Lorde, that our differences are our strengths, and

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[375] Alok Vaid-Menon, "We Are Nothing, And That is Beautiful," *Ted Talk,* December 17, 2013 https://www.youtube.com/watch?v=wxb-zYthAOA.

[376] Dean Spade, "For Lovers and Fighters," in *We Don't Need Another Wave: Dispatches from the Next Generation of Feminists*, ed. Melody Berger (Emeryville, CA: Seal Press, 2006).

that the tools of the master will never dismantle the master's house.[377] Collective visioning as a practice allows groups of people to come together with different experiences, ideas, bodies, beliefs, histories, genders, racial identities, and spiritual practices – as smart, brave, excited and powerful beings who can collectively build and vision together through articulating shared values and intentions. adrienne maree brown reminds us that a movement is a group of people moving in the same direction thinking different things, invoking different strategies.[378] There are so many different ways we can shift our awareness to move away from socially imposed norms/ideas/expectations that are harmful or that perpetuate colonial logics as the primary way of imagining our futures, and in turn our present and pasts.

The beauty of visioning beyond rights is that there is no one single alternative to rights. The demand for a replacement that is quick and easy is one that wants to jettison power into a new craft, a new modulator to give power to some and take from most others. There are so many alternatives to rights in structuring a society we cannot even fully imagine them all. We are creative and smart and strong and brave and all of these things mean that we also have the power to create new structures and systems, as people have always been doing in

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[377] Audre Lorde, "The Masters Tools Will Never Dismantle the Master's House," in *Sister Outsider: Essays and Speeches* (1984; repr., Berkley, CA: Crossing Press, 2007), 111.

[378] See brown*, Emergent Strategy.*

the face of colonialism, in the work of speculative fiction and collective visioning, in the continued act of dreaming this nightmare to its end.

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