

# ARTICLES

## Racial Borders

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*This Article explores the treatment of race and racial justice in dominant liberal democratic legal discourse and theory concerned with international borders. It advances two analytical claims. The first is that contemporary national borders of the international order—an order that remains structured by imperial inequity—are inherently racial. The default of liberal borders is racialized inclusion and exclusion that privileges “whiteness” in international mobility and migration. This racial privilege inheres in the facially neutral legal categories and regimes of territorial and political borders and in international legal doctrine. The second is that central to theorizing the system of neocolonial racial borders is understanding race itself as border infrastructure. That is, race operates as a means of enforcing liberal territorial and political borders, and as a result, international migration governance is also a mode of racial governance. Normatively, this Article outlines the specific relational injustices of racial borders.*

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\* Alicia Miñana Chair in Law, UCLA School of Law. © 2022, E. Tendayi Achiume. This Article has benefitted significantly from the wisdom of many more people than it is permissible to name in a footnote. Thank you to all of the profoundly incisive, supportive, skeptical, and ambivalent interlocutors who helped me work through this first iteration of *Racial Borders*—you know who you are. I would also like to thank the following for their stellar research assistance: Cooper Christiancy, Marc Jácome, Erin Shields, Mykel Skinner, and Rob Viano. With all its imperfections, this Article is nonetheless dedicated to every person who carries fatal borders on their body.

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## INTRODUCTION

The preoccupation of this Article is the manner in which race and racial justice are typically conceptualized in relation to international borders in the dominant liberal democratic legal discourse and theory of First World nation-states.<sup>1</sup> In the context of the 2020 transnational racial justice uprisings, which have pushed issues of systemic racial injustice to the forefront of the agendas of international lawmakers,<sup>2</sup> this Article brings a postcolonial racial justice lens to bear on the

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1. I use the term “First World” to refer to former European colonial powers (including settler-colonial nations such as the United States, Canada, and Australia), in keeping with the tradition of Third World Approaches to International Law Scholarship (TWAIL). I use the term “Third World” to refer to the territories and peoples formerly colonized by the First World. For an exposition of the category Third World including responses to concerns regarding anachronism or offensiveness, see Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 *THIRD WORLD LEGAL STUD.* 1, 3–4, 7–11 (1999). TWAIL interrogates ways that European colonialism continues fundamentally to structure international law and relations and uses the terms First and Third World as theoretically and politically productive categories. For helpful background, see James Thuo. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE L. & DEV.* 26 (2011); JOHN REYNOLDS, *EMPIRE, EMERGENCY AND INTERNATIONAL LAW* 21 (2017) (“[The Third World is] a social and political consciousness that bands together a diversity of actors through their common marginalisation by the particularities of global North hegemony.”); and Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 *INT’L CMTY. L. REV.* 371, 374–77 (2008). For analysis of the meaning, value, and limits of the concept of the Third World, see B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *INT’L CMTY. L. REV.* 3, 4–7 (2006); Makau Mutua, *What Is TWAIL?*, 94 *AM. SOC’Y INT’L L. PROC.* 31, 31–32 (2000); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 *WIS. INT’L L.J.* 353, 355–62 (1997); REYNOLDS, *supra*, at 21–24; and E. Tendayi Achiume, *Migration as Decolonization*, 71 *STAN. L. REV.* 1509 (2019) (illustrating the relevance of the Third World and First World categories for understanding historical and contemporary border injustice).

2. For example, in the wake of the murder of George Floyd, as tens of thousands of people across the world took to the streets under the banner of Black Lives Matter, a transnational coalition of human rights organizations mounted a campaign that resulted in the United Nations Human Rights Council holding a Special Session devoted to systemic racism in law enforcement. See Sejal Parmar, *The Internationalisation of Black Lives Matter at the Human Rights Council*, *EJIL: TALK!* (June 26, 2020), <https://www.ejiltalk.org/the-internationalisation-of-black-lives-matter-at-the-human-rights-council/> [https://perma.cc/WT9J-XG9F]. On the successes and failures of the Special Session in responding to movement demands for racial justice, see E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 *HARV. L. REV. F.* 378 (2021).

legal and political theory of borders.<sup>3</sup> A robust body of liberal legal and other scholarship critiquing the border and migration regimes of the First World exists. Characteristic of much of this scholarship—especially in its international legal variants—is what Debra Thompson, in another context, has termed “racial aphasia,” a calculated forgetting and unwillingness to confront the persisting and imperial operation of race in society.<sup>4</sup> Movement demands for a global reckoning

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3. In doing so, it elaborates the racial justice dimensions of the postcolonial critique of borders that I have initiated in prior work. See E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AJIL UNBOUND 142, 144–45 (2017); Achiume, *supra* note 1, at 1519–20.

4. According to Debra Thompson, racial aphasia is

not the same as amnesia, which indicates some unfortunate series of events that led to an unintentional forgetting of how the modern world system was founded on, and continues as, a hierarchical racial order. Racial amnesia obscures the power involved in purposeful evasion, suggesting that, like a B-movie plot, we must have accidentally fallen, hit our heads and forgotten our racist past. Amnesia disavows intent. Aphasia, on the other hand, indicates a calculated forgetting, an obstruction of discourse, language and speech. . . .

. . . International bodies and states alike profess normative and legal commitments to racial equality while racial stratification persists both between the developed and developing worlds and within most, if not all, racially heterogeneous societies. White supremacy as a global institution and racism as a pervasive social structure are obscured . . . ; as a result, racism is instead reduced to abhorrent individualistic acts or attitudes. The promise of the post-racial society is realized not through reparations or substantive equality, but in the imposition of race-free discourses that keep international and domestic racial orders firmly entrenched.

Debra Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMBRIDGE REV. INT’L AFFS. 133, 135 (2013). Within international human rights and refugee law scholarship, a robust literature exists critiquing the exclusionary, violent, and deadly nature of liberal borders. See, e.g., Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT’L L. 235, 243–44 (2015); Bethany Hastie & Francois Crepeau, *Criminalising Irregular Migration: The Failure of the Deterrence Model and the Need for a Human Rights-Based Framework*, 28 J. IMMIGR. ASYLUM & NAT’Y L. 213, 216 (2014); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 119–30 (1997). Scholarship such as that listed here has invaluable contributed to revealing the flaws of liberal borders. But it has not centered the racially discriminatory or unjust nature of these borders. Among the early and most notable exceptions is the work of Tayyab Mahmud who has powerfully written about borders, race, and migration with a focus on empire and international law. See, e.g., Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT’L L. 525 (2007) [hereinafter Mahmud, *Geography and International Law*]; Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT’L L. 1 (2010) [hereinafter Mahmud, *Colonial Cartographies*]; Tayyab Mahmud, *Cheaper than a Slave: Indentured Labor, Colonialism, and Capitalism*, 34 WHITTIER L. REV. 215 (2013) [hereinafter Mahmud, *Cheaper than a Slave*].

An emerging body of international legal scholarship is also beginning to resist the racial aphasia of the field. See, e.g., E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT’L L. 333, 344 (2018) [hereinafter Achiume, *Governing Xenophobia*]; E. Tendayi Achiume & Asli U. Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. REV. 1386 (2021); Cathryn Costello & Michelle Foster, *Race Discrimination Effaced at the International Court of Justice*, 115 AJIL UNBOUND 339 (2021); Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. REV. 1536, 1545 (2021); NADINE EL-ENANY, (B)ORDERING BRITAIN: LAW, RACE AND EMPIRE 197 (2020); Michelle Foster & Timnah Rachel

with racial injustice underscore the urgency of legal scholarship—including that on borders—capable of unmasking and explaining the complex nature of this injustice as an important contribution to the project of achieving racial justice.

I aim to advance two analytical claims and consider their normative implications. The first is that contemporary national borders of the international order, an order that is neocolonial,<sup>5</sup> are inherently racial. That is, the default manner in which they enforce exclusion and inclusion is racially disparate. Furthermore, the

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Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?*, 11 COLUM. J. RACE & L. 83, 94 (2021); Eddie Bruce-Jones, *Refugee Law in Crisis: Decolonizing the Architecture of Violence*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 176, 177, 179 (Mary Bosworth et al. eds., 2018); Glen Peterson, *Colonialism, Sovereignty and the History of the International Refugee Regime*, in REFUGEES IN EUROPE, 1919–1959: A FORTY YEARS’ CRISIS? 213, 213–14 (Matthew Frank & Jessica Reinisch eds., 2017); Karin de Vries & Thomas Spijkerboer, *Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of the European Court of Human Rights*, 39 NETH. Q. HUM. RTS. 291 (2021). For an overview of scholarship on race and international refugee law specifically, see E. Tendayi Achiume, *Race, Refugees, and International Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 43, 44 (Cathryn Costello et al. eds., 2021) [hereinafter Achiume, *Race, Refugees, and International Law*]. A subset of scholars has also foregrounded empire and colonialism in their analysis through both the TWAIL lens and other critical approaches. See Desautels-Stein, *supra*, at 1548; EL-ENANY, *supra*, at 183; B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 358 (1998); LUCY MAYBLIN, ASYLUM AFTER EMPIRE: COLONIAL LEGACIES IN THE POLITICS OF ASYLUM SEEKING (2017); Frédéric Mégret, *The Contingency of International Migration Law: ‘Freedom of Movement,’ Race, and Imperial Legacies*, in CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 179, 186 (Ingo Venzke & Kevin Jon Heller eds., 2021); James Souter, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 326, 338 (2014); James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L L.J. 129, 170 & n.241 (1990); John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. REV. 1768, 1782–83 (2021); de Vries & Spijkerboer, *supra*, at 298.

Similarly, among political theorists, the most influential communitarian and cosmopolitan theorists alike have failed to account for and grapple with the inherently racial nature of liberal borders. For an analysis of this failure in the relevant political theory and philosophy literature and its failure to confront race, see Sarah Fine, *Immigration and Discrimination*, in MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP 125, 126 (Sarah Fine & Lea Ypi eds., 2016). Duncan Bell remarks on the failures of theories of global justice more broadly to address the history of imperialism and race in empire. See generally Duncan Bell, *Introduction: Empire, Race and Global Justice*, in EMPIRE, RACE AND GLOBAL JUSTICE 1 (Duncan Bell ed., 2019). Communitarians elide the racially unjust nature of the borders they defend, and the open-border arguments of cosmopolitan theorists neglect to consider the specific racial injustices that cannot fully be rectified by their universalist ethical orientation. For recent political theory work on race and borders, see generally David Owen, *Migration, Structural Injustice and Domination on ‘Race,’ Mobility and Transnational Positional Difference*, 46 J. ETHNIC & MIGRATION STUD. 2585 (2020).

Perhaps the deepest legal literature on race and borders/migration has been produced by domestic U.S. immigration scholars, yet with a few important exceptions, this literature had centered national law and politics with limited attention to inter/transnational law and politics. For a literature review of race in U.S. immigration scholarship, see *infra* note 87.

Historians and nonlegal scholars of race and migration have also produced important knowledge on racial borders, and their work is cited across this Article.

5. By referring to national borders as “neocolonial,” I mean that they are characterized by a transnational, political, and economic interconnection that structurally benefits the First World, at the expense of their former colonies or the Third World, notwithstanding the formal decolonization of much of the world. See Achiume, *supra* note 1, at 1539–46. Whereas colonialism represented the formalized domination of a territory by a metropole through settlement or exploitation, neocolonialism “is a subsequent and distinguishable instance, which nonetheless retains the geopolitical terrain of colonial

racial disparities enforced by national borders structurally benefit some nations and racial groups at the expense of others. I build on the work of other scholars of race and of borders to detail how, because of legal doctrine developed in the service of specific imperial and colonial projects initiated in the past and that persist today, whiteness confers privileges of international mobility and migration. And proximity to whiteness calibrates these privileges. This racial privilege inheres in the facially race-neutral legal categories and regimes of territorial and political borders (sovereignty, citizenship, nationality, passports, and visas). It also inheres in rules and practices of national membership and international mobility.

I use the term “racial borders” to refer to territorial and political border regimes that disparately curtail movement (mobility) and political incorporation (membership) based on race and sustain international migration and mobility as racial privileges.<sup>6</sup> Such borders govern access to legal and political rights through access to geographic territory and vice versa. As a result, we should understand today’s national borders—especially those of the First World—as racial technology, in the sense that the default output of these borders is differential treatment and outcomes based on race, with white supremacy as one important ordering principle, among others, that determines benefit or advantage. Racial borders, then, are also a form of imperial technology that facilitate exploitation and prosperity within a transnational, political, and economic association of neocolonial empire. Notably, these borders structurally exclude and discriminate on a racial basis as a matter of course often through facially race-neutral law and policy.

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imperialism and colonial advantage.” *Id.* at 1542. For additional scholarship on neocolonialism and international law, see generally Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739 (2006); Daniel Butt, *Colonialism and Postcolonialism*, in 2 *THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS* 892 (Hugh LaFollette ed., 2013); SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); *THE DECOLONIZATION READER* (James D. Le Sueur ed., 2003); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972); and KWAME NKRUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* (1965).

6. I am not the first to use the term “racial borders.” See, e.g., Devon W. Carbado, *Racial Naturalization*, 57 *AM. Q.* 633, 634, 636 (2005) (referring to “the racial borders of America,” within which “policed black identity is a national and natural resource—an American reserve that can be mined to fuel our anxieties about race, place, and crime”). But to my knowledge, I am the first to use it to refer to the transnational, empire-centric legal account of the racial operation of borders that I introduce in this Article. I understand my work as also building on that of Nicholas De Genova, who has argued:

Europe’s deadly borders . . . must be understood as *racial* borders. The physical barricading and ever more lethal policing of Europe’s borders, likewise, signify an abundantly racialized affair. Rather than perceiving the brute racial (post)coloniality of Europe’s borders as a merely “exclusionary” matter, it is vital that we discern the ways that this profoundly racialized system of immigration and asylum operates in fact in a perfectly predictable way as a machine of *inclusion*—albeit a form of inclusion that is always one of racialized, postcolonial, illegalized labor subordination.

Nicholas De Genova, *Europe’s Racial Borders*, *MONITOR RACISM* (Jan. 2018), <http://monitoracism.eu/europes-racial-borders/> [<https://perma.cc/G374-9WWP>]. My aim is legal elaboration of De Genova’s sociological provocation. For additional treatment of Europe’s racial borders, and in particular of how emergency doctrine in international and domestic law reinforces these racial borders, see Reynolds, *supra* note 4, at 1788–93.

My second claim is that central to theorizing the system of imperial racial borders is understanding race *itself* as a border. It is useful to define what “borders” are in this analysis. As border theorists have noted, “[b]orders are complex composites,” but at least one articulation of what all borders share in common is that “they introduce a division or bifurcation of some sort into the world.”<sup>7</sup> I am especially interested in borders understood as sites of enforcement of inclusion or exclusion—they realize and concretize insider versus outsider status.<sup>8</sup> In the sense that national borders are sites or means of enforcement of national territorial and political exclusion, the second contribution of this Article is to mark race as political and territorial border infrastructure, alongside other border infrastructure, that ranges from physical walls to the institution of citizenship.<sup>9</sup> In their fairly positivist (at least relative to my analysis) study of the borders of liberal states, Steffen Mau, Heike Brabandt, Lena Laube, and Christof Roos define

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7. THOMAS NAIL, *THEORY OF THE BORDER* 1–2 (2016).

8. I focus on territorial and political borders of nation-states as articulated in: (1) legal and political concepts such as sovereignty, citizenship, and nationality; and (2) policy institutions, mechanisms, and regimes such as passports, visas, and asylum. I care about legal and political institutions that: (1) constitute and determine membership in a given nation-state; and those that (2) authorize cross-border or international mobility and confer entitlements of various kinds to those in possession of this authorization, which is typically derivative of citizenship and nationality. According to Nail, “a theory of the border aims to describe the conditions or set of relations under which empirical borders emerge.” *Id.* at 11. My transnational racial account of borders aims to describe the racial conditions and relations that attend the empirical emergence and operation of international borders as *imperial* technology. Central to this account is an approach to borders that breaks with the dogmatic public international law (and even domestic constitutional law) theorization of borders, which begin from the premise of an international order comprised of independent and equal sovereign nation-states that individually govern immigration on a unilateral basis unless they consent to alternative arrangements. Elsewhere, and building on the work of scholars such as Chantal Thomas and Anthony Anghie, I have argued that an important starting point for legal theorists of borders should instead be the fact of contemporary transnational political and economic interconnection, according to which some nation-states are super- or hyper-sovereign, such as First World or former European colonial nations and others that are only quasi-sovereign, such as Third World or former colonial nations. See generally Achiume, *supra* note 1. An important feature of this interconnection is thus its unequal relations—some nation-states structurally benefit from global or transnational interconnection at the expense of others, and benefit allocation is a function of (neo)colonial logics. I have argued that in this context, which I call neocolonial empire, legal and political borders are implicated in preserving inequality among nations and their peoples. See generally *id.* In this Article, I aim to foreground the racial nature of this inequality and injustice.

9. It is important to highlight that meaningful borders are also demarcated by other social constructions that have been appropriately theorized as intersecting with—but distinct from—race, such as gender, ethnicity, and caste. My account of racial borders does not engage their gendered nature, but intersectional analysis of this sort is undoubtedly urgent. For scholarship on the raced and gendered nature of borders, see generally JOE TURNER, *BORDERING INTIMACY: POSTCOLONIAL GOVERNANCE AND THE POLICING OF FAMILY* (2020); Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity*, 24 *UCLA J. INT’L L. & FOREIGN AFF.* 133 (2020) (examining the usage of the tropes “welfare cheat” and “criminal” in the current immigration debate to demonstrate how these narratives shape nationhood and borders as both raced and gendered); *ILLEGAL MIGRATION AND GENDER IN A GLOBAL AND HISTORICAL PERSPECTIVE* (Marlou Schrover et al. eds., 2008); and Eva Brems, Lourdes Peroni & Ellen Desmet, *Migration and Human Rights: The Law as a Reinforcer of Gendered Borders*, 37 *NETH. Q. HUM. RTS.* 282 (2019) (analyzing gendered borders in relation to asylum, domestic labor, and gender-based violence).

borders as “a system of rules (and their enforcement) determining conditions of entry into a particular territory that take into account possible costs and benefits for those inside the territory.”<sup>10</sup> Even with this definition, race seems to function as precisely such a set of rules. I will focus on whiteness as a means or site of presumptive inclusion in neocolonial empire and nonwhiteness (with specific attention to Blackness) as a means or site through which political and territorial exclusion (or subordinate inclusion) is achieved in neocolonial empire.<sup>11</sup>

To ground my two analytical claims, consider the following. In early November 2017, the bodies of twenty-six Nigerian girls and women aged between fourteen and eighteen were found floating in the Mediterranean Sea, following their failed attempt to reach Europe.<sup>12</sup> These girls and women joined the tens of thousands of Black Africans and other refugees and migrants who have met their deaths in the Mediterranean Sea, in large part because of a migration governance regime that is calculated to keep as many of these migrants and refugees out,<sup>13</sup> including through their deaths if necessary. European Union

10. STEFFEN MAU, HEIKE BRABANDT, LENA LAUBE & CHRISTOF ROOS, *LIBERAL STATES AND THE FREEDOM OF MOVEMENT: SELECTIVE BORDERS, UNEQUAL MOBILITY* 2–3 (2012).

11. In centering whiteness in addition to other racial categories, my aim is to mark what Devon Carbado has astutely termed “colorblind intersectionality”—“instances in which whiteness helps to produce and is part of a cognizable social category but is invisible or unarticulated as an intersectional subject position.” Devon W. Carbado, *Colorblind Intersectionality*, 38 *SIGNS* 811, 817 (2013). Even as increasing attention is paid to racial subordination of nonwhite migrants, it is important to account for whiteness and the constitutive and other work it performs in the context of international migration governance.

Nonwhiteness is not a monolith—Black, Asian, Indigenous peoples, and persons of other racial backgrounds are not treated the same way. And historically, these groups were hierarchically ranked in ways that translated to differential treatment among them, notwithstanding their across-the-board subordination to white people. Throughout this Article, I contrast the treatment of white to nonwhite people in general terms, mostly glossing over distribution of privilege and subordination among nonwhite people in the context of international migration. Although interrogation of the latter is important, it falls beyond the scope of my analysis here.

12. Angela Giuffrida, *Teenage Nigerian Girls Drowned at Sea, Italian Autopsies Confirm*, *GUARDIAN* (Nov. 16, 2017, 8:14 AM), <https://www.theguardian.com/world/2017/nov/16/teenage-nigerian-girls-drowned-mediterranean-sea-italian-autopsies-confirm> [<https://perma.cc/3EZC-X28J>]. Before the burial of the twenty-six Nigerian girls and women in Italy, two were identified as Marian Shaka and Osato Osaro. *Italy Holds Funeral for 26 Nigerian Women Drowned in Mediterranean*, *REUTERS* (Nov. 17, 2017, 8:32 AM) [hereinafter *Italy Holds Funeral*], <https://www.reuters.com/article/us-europe-migrants-italy/egit-holds-funeral-for-26-nigerian-women-drowned-in-mediterranean-idUSKBN1DH1NL> [<https://perma.cc/2PWW-ALLQ>]. Commentators speculated that these girls and women, like the many others who make the dangerous journey between Africa and Europe, had been physically and sexually abused prior to their drowning. Giuffrida, *supra*. Autopsies later ruled out rape or physical abuse by the smugglers associated with the drowning. *Id.* However, Nigerian and other girls and women traveling to Europe regularly experience sexual and other forms of physical abuse. See U.N. SUPPORT MISSION IN LIBYA & OFF. OF THE HIGH COMM’R FOR HUM. RTS., *DESPERATE AND DANGEROUS: REPORT ON THE HUMAN RIGHTS SITUATION OF MIGRANTS AND REFUGEES IN LIBYA* 44, 46 (2018), <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf> [<https://perma.cc/9EAF-3BHE>].

13. Crucially, these regimes are also intended to ensure the *inclusion* of refugees and migrants into Europe on subordinate terms. As discussed further below, undocumented migrants serve as a highly exploited and exploitable form of labor for Europe, and some have argued that exploitable labor weighs in favor of maintaining the current deadly migration governance regime.

coastguards and Libyan coastguards funded by the European Union heavily police the Mediterranean Sea and push migrants and refugees back to Libya where they are detained in migrant detention centers also funded by the European Union. The European Union and European national coastguards themselves used to do the work of “pushing back”<sup>14</sup> migrants and refugees but had to outsource these activities to Libyans,<sup>15</sup> presumably to avoid liability within the European human rights’ regional framework.

The drowning of the twenty-six Nigerian girls was characterized as a tragedy, as well as a crime, attributable to ruthless but organized transnational smuggling and trafficking networks. The problem—according to African and European leaders—was a pathology external to the international order and its governance mechanisms (such as criminal smuggling and trafficking networks), rather than a systemic, logical, and predictable output of the international system.<sup>16</sup> The predominant human rights critique highlighted the brutal conditions of migration including the harassment and abuse that characterizes unauthorized migration.<sup>17</sup> Such critiques also highlighted the complicity of European and African governments in consolidating punitive migration governance regimes that, among other things, violate the rights to due process and the protection that refugees and others have under international law.<sup>18</sup> But little—if anything—was made of the race of

14. The term “pushbacks” is regularly used to describe the forceful prevention of migrant and refugee access to Europe via the Mediterranean, but “pushbacks” is a euphemism that could more realistically be replaced by “drownings” and “returns to Libyan territory where African migrants risk enslavement and even death.” Niamh Keady-Tabbal and Itamar Mann convincingly suggest the term “pushbacks” is a euphemism, among other things, for torture. Niamh Keady-Tabbal & Itamar Mann, “Pushbacks” as Euphemism, EJIL: TALK! (Apr. 14, 2021), <https://www.ejiltalk.org/pushbacks-as-euphemism/> [<https://perma.cc/4X8X-CTFQ>]. The Global Legal Action Network has made the legal case in support. See “Drift-Backs” and Torture on the Aegean, GLOB. LEGAL ACTION NETWORK, <https://www.glanlaw.org/aegean-push-backs> [<https://perma.cc/KJ5A-ZEZW>] (last visited Dec. 26, 2021).

15. See Benjamin Bathke, *When Helping Hurts—Libya’s Controversial Coast Guard, Europe’s Go-To Partner to Stem Migration*, INFOMIGRANTS (Nov. 12, 2019), <https://www.infomigrants.net/en/post/18196/when-helping-hurts-libya-s-controversial-coast-guard-europe-s-go-to-partner-to-stem-migration> [<https://perma.cc/8C3F-24JW>].

16. See, e.g., Giuffrida, *supra* note 12 (“Italy’s interior minister, Marco Minniti, defended the deal [with Libya to prevent migration], saying: ‘The alternative cannot be to resign ourselves to the impossibility of managing migratory flows and hand human traffickers the keys to European democracies.’”); Agence France-Presse, *African Union Calls for Libya ‘Slave Market’ Probe*, VOA (Nov. 17, 2017, 8:57 PM), <https://www.voanews.com/a/egiti-union-calls-libya-slave-market-probe/4122200.html> [<https://perma.cc/2UX6-FPBW>] (“African migrants from nations including Guinea, Senegal, Mali, Niger, Nigeria and Gambia make the dangerous crossing through the Sahara to Libya with hopes of making it over the Mediterranean Sea to Italy. But testimony collected by AFP in recent years has revealed a litany of rights abuses at the hands of gang leaders, human traffickers and the Libyan security forces, while many end up stuck in the unstable north African nation for years. . . . ‘These modern slavery practices must end and the African Union will use all the tools at its disposal,’ [Guinean President and Chairman of the African Union Alpha] Conde added.”).

17. See *Italy Holds Funeral*, *supra* note 12.

18. See Giuffrida, *supra* note 12 (“Italy defended the agreement on Wednesday after it was lambasted by the UN human rights chief, Zeid Ra’ad al-Hussein, as being ‘inhuman’. Rights groups have denounced the policy, saying it exposes returned migrants to Libya’s lawless detention centres with no legal recourse. . . . ‘The suffering of migrants detained in Libya is an outrage to the conscience



these girls and women, and there was no political or legal critique anchored specifically in postcolonial or racial justice concerns.

Analyses such as those I reference above—which are the typical liberal analyses<sup>19</sup>—miss the fundamentally racial nature of the governing border regime and operation of race itself as political and territorial border infrastructure within this regime. I aim to show that for the twenty-six Nigerian girls mentioned above, and many others like them, their death is significantly, though not wholly, attributable to what we should think of as the contemporary system of neocolonial racial borders, which is constructed and legitimated by law. Their deaths are a predictable outcome of a racially exclusionary migration governance regime. And their Blackness is a determinant of their deaths, rather than a correlative or coincidental feature, because of what Blackness has socially, politically, economically, and legally been constructed to mean.

I use the term “race” to refer to “the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”<sup>20</sup> This definition recognizes race as a social construction informed by physical features and lineage not because features and lineage are a function of biological racial variation but because societies invest morphology and ancestry with social meaning.<sup>21</sup> At the same time, race is by no means simply or even mostly about physical attributes such as color. It is centrally about the legal, social, political, and economic meaning of being categorized as Black, white, brown, or any other racial designation.<sup>22</sup> Race brings with it concrete individual and structural material realities. Anibal Quijano noted that race remains the product of centuries-long colonial intervention and exploitation during which “race became the fundamental criterion for the distribution of the world population into ranks, places, and roles in . . . society’s structure of power.”<sup>23</sup> In the colonial context, race structured rights and privileges on hierarchical terms determined by white supremacy. Although formal decolonization has occurred in most of the world, race persists as a *neocolonial* structure that still allocates benefits and privileges to the advantage of some

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of humanity.’ . . . ‘The European Union’s policy of assisting the Libyan coastguard to intercept and return migrants in the Mediterranean [is] inhuman.’” (third alteration in original)).

19. By liberal analyses I mean analyses falling within the broad tradition of liberalism. The literature on “liberalism” is vast, and definitions of liberalism are numerous. For a useful overview of relevant debates, see generally Duncan Bell, *What Is Liberalism?*, 42 *POL. THEORY* 682 (2014). I use the term liberalism to refer to the normative commitment to “securing individual liberty and human dignity through a political cast that typically involves democratic and representative institutions, the guaranty of individual rights of property, and freedom of expression, association, and conscience, all of which are taken to limit the legitimate use of the authority of the state.” UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* 3 (1999).

20. IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10 (10th Anniversary ed. 2006).

21. *See id.*

22. E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 28 *SUR – INT’L J. HUM. RTS.*, Dec. 2018, at 141, 145.

23. Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 *NEPANTLA* 533, 535 (2000).

and the disadvantage of others mainly along the same geopolitical and racial lines that characterized the European colonial project.<sup>24</sup>

Here, I am interested in race as it has emerged, operated, and evolved in the context of European empire, specifically European colonial and neocolonial empire.<sup>25</sup> Even in this context, however, I eschew any approach that treats race as a “discursive monolith” or even as a “static ontology.”<sup>26</sup> Instead, I adopt the approach advanced by Patrick Wolfe, who argues that “race is colonialism speaking, in idioms whose diversity reflects the variety of unequal relationships into which Europeans have co-opted conquered populations.”<sup>27</sup> I should note that my approach is not a totalizing or exhaustive account of race—race is and does many different things in many different places, and although a global analysis of certain racial categories is possible and urgent,<sup>28</sup> Blackness, whiteness, and all other racial categories are also locally constructed and determined in ways that are elided by a global or transnational analysis. Furthermore, even transnationally, there are multiple meanings, histories, and functions of race and even the categories Black and white, which are not encapsulated in my analysis.

Part I of this Article provides the historical origins of racial borders. It provides a brief legal and political genealogy of borders as technology for racial exploitation during European colonialism, with attention to facially neutral legal and policy regimes governing migration and mobility with racialized effects. In Part II, I turn to the postcolonial period to provide an account of the contemporary system of racial borders. I describe how migration, mobility, and asylum regimes continue to deploy facially neutral legal institutions and processes to sustain racialized exclusion. I also describe how race operates as border infrastructure within these frameworks and how liberal legal doctrine is also part of the broader system. In Part III, I explain the nature of the racial injustices perpetrated by the racial borders described in Part II. I illustrate how racial borders facilitate and sustain neocolonial political inequality within neocolonial empire, privileging whiteness in access to effective collective and individual self-determination within

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24. For a recent analysis of race as a neocolonial distributor of resources in the context of global natural resource extraction, see E. Tendayi Achiume (Special Rapporteur), *Global Extractivism and Racial Equality: Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/HRC/41/54 (May 14, 2019).

25. See Bell, *supra* note 4, at 2 (“While imperialism and racism are not necessarily connected — imperialism antedates the development of modern conceptions of race by centuries, and many critics of empire held racist views — they have typically been fused together, especially during the nineteenth and twentieth centuries.”). For an illuminating discussion on the meaning, function, and operation of race in international law as shaped by international law and liberal legal thought, see generally Desautels-Stein, *supra* note 4.

26. PATRICK WOLFE, TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE 3, 27 (2016).

27. *Id.* at 5. In this sense, my focus is race as it was colonially invented and as it emerged in the eighteenth century as a hierarchical mechanism according to which difference was far from neutral but determined rights and one that linked “physical characteristics to cognitive, cultural, . . . moral,” and economic ones. *Id.* at 7.

28. For a helpful discussion of how race—defined both as an idea and as “constitutive of and created by material and structural social relations”—was produced, operates, and should be analyzed transnationally, see Thompson, *supra* note 4, at 139–42.

neocolonial empire. Racial borders are also the site and means of perpetuating historic colonial injustice, thus warranting corrective justice or reparative intervention.

### I. THE HISTORICAL ORIGINS OF RACIAL BORDERS

The purpose of this Part is to provide a brief genealogy of border and migration governance as a means of effecting racialized exclusion and exploitation that was concertedly pursued in the service of European colonialism. Borders and migration governance served the specific function (one among many) of designating and securing the beneficiaries of colonial exploitation on a racial basis, ultimately privileging whiteness over nonwhiteness.<sup>29</sup> Not only were international mobility and migration regimes racially calibrated but also their racial calibration was an essential feature of the economic and political exploitation that characterized colonial intervention.<sup>30</sup> Initially, this was achieved through explicitly racialized mechanisms and institutions of migration governance, but this would eventually give way to a facially race-neutral migration apparatus that nonetheless achieved the desired racialized ends. The regimes described in this Part must be understood as the institutional and legal antecedents of the dominant contemporary regimes governing international mobility and migration, which I turn to in Part II.

European imperialism in the nineteenth century played a crucial role in producing the migration and mobility regimes that we should consider the progenitors of contemporary regimes.<sup>31</sup> I use the term “imperialism” here in a similar fashion to early nineteenth century theorists to call attention to informal empire as an economic project—namely, the expansion of European capitalism and its projection of commercial and investment interests across the globe—whereas colonialism entailed formal empire as a territorial enterprise often fused with the economic ambitions of informal empire.<sup>32</sup> The historical overview provided in this Part

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29. My examples in this Part are drawn primarily from the British Empire, mainly because of the foundational influence it had on the evolution of international law governing migration. For a brief discussion of the French Empire’s history of racialized migration governance, see Mégret, *supra* note 4, at 187–88. For a comprehensive account of its racialized citizenship and nationality, see generally GARY WILDER, *THE FRENCH IMPERIAL NATION-STATE: NEGRITUDE AND COLONIAL HUMANISM BETWEEN THE TWO WORLD WARS* (2005).

30. By racial calibration I mean tailoring based on race to perform a specific function or achieve a specific outcome, which in this case was colonial exploitation. In line with the analysis offered here, Frédéric Mégret has explored the ways in which “the international law of migration is not even much of a conversation about *law*. Instead, race has been the variable hiding in plain sight when it comes to its constitution, the one that provides the key to the weird contingency and non-contingency of its evolution through the ages.” Mégret, *supra* note 4, at 181.

31. As described by Mégret, “[a]ctual patterns of global mobility were shaped first and foremost by logics of empire.” *Id.* at 186.

32. For a discussion of imperialism and colonialism in this sense with the example of how they overlapped in the British East African Protectorate, see James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 *BUFF. L. REV.* 1013, 1015–33 (2007). For a discussion of the different meanings of imperialism and colonialism, see Achiume, *supra* note 1, at 1541–42; sources cited *supra* note 1. For a summary and literature review of the concept of empire in international relations, see Bell, *supra* note 4, at 5–8.

foregrounds how, during this period and through the mid-twentieth century, colonial borders and territories were explicitly racialized in the service of economic imperatives of imperialism.

As late as the mid-nineteenth century, immigration was mostly unrestricted across the British Empire and its settler colonies.<sup>33</sup> But even during this period, large scale international mobility of Europeans and non-Europeans across imperial territories was a function of race and of the economic needs and political desires of metropolitan and settler-colonial nations.<sup>34</sup> With slavery's abolition in the first half of the nineteenth century, the global imperial economy could no longer rely on brutally coerced migration of enslaved Africans for its labor supply.<sup>35</sup> This shift thrust Indians into the role of "the global working class of the British

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33. See MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* 16 (2008). Significant exceptions to this restriction include racial prohibitions on migration and mobility of free Black persons in the South and across other regions of the United States as early as 1786. See, e.g., Michael A. Schoepner, *Black Migrants and Border Regulation in the Early United States*, 11 J. CIV. WAR ERA 317, 318–23 (2021). Several southern states of the United States adopted the Seamen Acts, which restricted the entry of free Black mariners (from northern states or elsewhere) to their territories as early as 1822. See generally Michael Schoepner, *Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South*, 31 LAW & HIST. REV. 559, 562 (2013) (surveying the history of the Seamen Acts, and using them to understand "how the laws 'happened' in the antebellum South"). Another exception is an 1818 Canadian law that banned free Black immigration. Vilna Bashi, *Globalized Anti-Blackness: Transnationalizing Western Immigration Law, Policy, and Practice*, 27 ETHNIC & RACIAL STUD. 584, 585 (2004).

34. The starkest example of the centrality of transnational migration and racialized labor regimes to European empire is arguably the transatlantic enslavement and trade of Africans. As one historian notes: "Between the sixteenth century and the nineteenth some twelve million Africans (of whom about 20 percent died en route) were forcibly taken to the Americas; it was the greatest involuntary migration in history and it established the largest slave empire since Roman times." PTERS BRENDON, *THE DECLINE AND FALL OF THE BRITISH EMPIRE 1781-1997*, at 16 (2007) (footnote omitted). Slavery was profoundly profitable even beyond the settler colonies of the Americas. For example, although the industrial revolution did not depend on slavery, slavery massively injected the British economy with resources that helped fuel its phenomenal economic growth. *Id.* Even after the abolition of slavery, racially stratified labor regimes remained central to European colonial exploitation. European migrants in mostly managerial, skilled, and well-paying jobs, through a web of direct and indirect coercion oversaw the large numbers of unskilled and other laborers under them, who were primarily Africans. Examples include the production of cocoa in the British Gold Coast (Ghana) and groundnut production in Nigeria. See MARJORY HARPER & STEPHEN CONSTANTINE, *MIGRATION AND EMPIRE* 114 (2010). Of note, economic opportunities within the British Empire were not limited to its subjects but extended to incorporate the citizens and subjects of other contemporaneous empires. See generally R. Bayly Winder, *The Lebanese in West Africa*, 4 COMPAR. STUD. SOC'Y & HIST. 296 (1962) (describing a substantial Lebanese middle class in West Africa during British colonial rule). Lebanon was a part of the Ottoman Empire until the Empire's collapse after World War I, after which France acquired direct control of the territory of present-day Lebanon through a League of Nations mandate. See Richard David Barnett, Clovis F. Maksud, Samir G. Khalaf, Paul Kingston, William L. Ochsenwald & Glenn Richard Bugh, *French Mandate*, BRITANNICA, <https://www.britannica.com/place/Lebanon/French-mandate> (last visited Jan. 26, 2022). Goans and Arabs labored alongside Africans even when members of these groups were subject to other imperial projects. See HARPER & CONSTANTINE, *supra*, at 116. In addition, African labor in British colonies also included African migrant labor. See *id.* at 116–17.

35. See Mahmud, *Cheaper than a Slave*, *supra* note 4, at 228 ("The main successor to modern slavery was the institution of indentured labor, that is often portrayed as a bridge between slavery and modern forms of contract labor.").

Empire,<sup>36</sup> as millions were contracted as laborers to work across the British colonies in the Caribbean, Southeast Asia, South Africa, and the Pacific.<sup>37</sup> Millions of Chinese were also recruited to work in the Dutch, Spanish, and British empires. British treaties recognized and protected certain forms of mobility and migration, even for nonwhite people, for the purposes of imperial prosperity.<sup>38</sup> Specifically, recruitment for the British occurred through the Treaty of Nanking,<sup>39</sup> which established qualified freedom of movement for Chinese as an exception to the Chinese emperor's prohibition on emigration.<sup>40</sup> The Burlingame Treaty<sup>41</sup> between China and the United States in 1868 went even further, recognizing "freedom of movement and migration as universal rights: 'the inherent and inalienable right of man to change his home and allegiance and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from one country to the other for purposes of curiosity, of trade or as permanent residents'."<sup>42</sup>

By the late nineteenth century, however, immigration restrictions that would ultimately implement a regime of racial segregation on an international scale emerged, with British self-governing settler colonies leading the charge.<sup>43</sup> Within and across these colonies, conceptions of a universal right to freedom of movement would give way to the more rigorously defended republican discourse, first regarding "the rights of the sovereign [Australian and Californian] male subject to insist on their democratic right to determine who could join their self-governing communities."<sup>44</sup> For much of the nineteenth century "freedom of movement was encouraged in the West by an expanding economy, an unusual compatibility of demographic interests between source and destination countries, Manifest

36. LAKE & REYNOLDS, *supra* note 33, at 23.

37. *Id.* Not all Indians who traveled were indentured laborers. Although much fewer in number, some Indians traveled for business, education, and adventure. *Id.*

38. *See id.* at 24 (explaining how the Treaty of Nanking allowed the British to "hire any kind of Chinese person who may move about in the performance of their work or craft without the slightest obstruction from Chinese officials" (quoting Michael R. Godley, *China's Policy Towards Migrants, 1842–1949*, in *ASIANS IN AUSTRALIA: THE DYNAMICS OF MIGRATION AND SETTLEMENT* 1, 3 (Christine Inglis et al. eds. 1992))).

39. Treaty Between Great Britain and China, 29 Aug. 1842, China-Gr. Brit., 30 BSP 389 (1858) (Gr. Brit.).

40. *See* LAKE & REYNOLDS, *supra* note 33, at 24.

41. Burlingame Treaty, China-U.S., July 28, 1868, 16 Stat. 739.

42. *See* LAKE & REYNOLDS, *supra* note 33, at 26 (citing Burlingame Treaty, *supra* note 41, at art. V). The U.S. Supreme Court in 1889, however, upheld the authority of the U.S. Congress to override the Burlingame Treaty and constrained judicial oversight over the treatment of immigrants in the United States. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609–11 (1889).

43. Historians of borders have provided instructive accounts of the transnational emergence of these regimes. *See generally* LAKE & REYNOLDS, *supra* note 33; EVE LESTER, *MAKING MIGRATION LAW: THE FOREIGNER, SOVEREIGNTY, AND THE CASE OF AUSTRALIA* (2018); ADAM M. MCKEOWN, *MELANCHOLY ORDER: ASIAN MIGRATION AND THE GLOBALIZATION OF BORDERS* (2008).

44. LAKE & REYNOLDS, *supra* note 33, at 26. Lake and Reynolds link this to "contradictions inherent in political liberalism. Individual liberty and freedom of movement were heralded as universal rights, but only Europeans could exercise them." *Id.*

Destiny in the Western Hemisphere, and the predominance of liberal thought conducive to the free circulation of human beings and capital.<sup>45</sup> But by the end of the nineteenth century, the rise of nationalism and protectionism led Western governments, for the first time, to start systematically denying admission to certain classes of aliens on a racial basis.<sup>46</sup> In their seminal book, *Drawing the Global Colour Line*, historians Marilyn Lake and Henry Reynolds argue: “The figure of the ‘white man’, in whose name white men’s countries were forged, was produced in a convergence of imperialism and republican discourse that found political expression in the late nineteenth century in talk of an Anglo-American alliance.”<sup>47</sup> Inspired by the work and thought of W.E.B. Du Bois, Lake and Reynolds chart “the spread of ‘whiteness’ as a transnational form of racial identification, that was, as [Du Bois] noticed, at once global in its power and personal in its meaning, the basis of geo-political alliances and a subjective sense of self.”<sup>48</sup> This racial identity was forged in the context of nineteenth century imperial projects and the mass migrations that attended them.<sup>49</sup> Lake and Reynolds describe an “imagined community of white men” in this period as having bolstered border protection regimes and the doctrine of national sovereignty.<sup>50</sup>

At the level of legal doctrine, the late nineteenth and early twentieth centuries were also the periods in which an absolutist conception of the sovereign right to exclude crystallized<sup>51</sup> and did so legally to legitimate the exclusion of Asians,

45. James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804, 815 (1983).

46. See *id.* at 816.

47. LAKE & REYNOLDS, *supra* note 33, at 8.

48. *Id.* at 3.

49. The authors put these figures for the nineteenth century at about fifty million Chinese, about fifty million Europeans, and about thirty million Indians. *Id.* at 6.

50. *Id.* at 4. In encounters between Europeans and indigenous peoples in North America and Australasia, those of European origin “defined their identit[ies] and rights in racial terms: the right of Anglo-Saxons to self-government and the commitment of white workers to high wages and conditions, [as] against those they saw as undermining their new-found status.” *Id.* at 7.

51. James Nafziger, for example, reviews the territorial principles of the Greek and Roman Empires, as well as the work of classical publicists including Grotius, Vitoria, Pufendorf, and Vattel to conclude that prior to the late nineteenth century “there was little, in principle, to support the absolute exclusion of aliens.” Nafziger, *supra* note 45, at 809–15. The *Chinese Exclusion Case* was emblematic of these developments. See 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”); see also *id.* at 603–04 (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (“The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . .”). For a similar case involving a Japanese immigrant, see *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such

especially from white settler colonies of the British Empire. Eve Lester's doctrinal analysis of early international law reveals how in the works of international legal theorists Grotius, Vitoria, Pufendorf, and Vattel, for example, "the [rights bearing] foreigner was—always and anywhere—a European insider."<sup>52</sup> With European colonial expansion, however "it was the appearance of the foreigner as a racialised (non-European) figure and the desire to regulate her labour that led directly to the emergence of restrictive migration laws and then a common law doctrine of 'absolute sovereignty'."<sup>53</sup>

In a comprehensive historical study of modern borders, Adam McKeown further shows how the most basic principles of contemporary border control were initially developed in the white-settler nations, especially between the 1880s and 1910s, and such control would eventually "become universalized as the foundation of sovereignty and migration control for all states within the [international] system."<sup>54</sup>

In 1790, the United States restricted naturalization to free white men.<sup>55</sup> In 1855, the British self-governing Colony of Victoria, which would later become part of the Federation of Australia, introduced the first immigration restriction in its Chinese Immigration Act,<sup>56</sup> which defined an immigrant "as 'any male adult native of China or its dependencies or any islands in the Chinese Seas or any person born of Chinese parents'."<sup>57</sup> At its modern inception, then, immigration restriction as we know it was racially purposed, and crucially, the economic competition such restrictions sought to curtail was racially specified.<sup>58</sup> Furthermore,

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cases and upon such conditions as it may see fit to prescribe." Nafziger notes the consolidation of this absolutist conception in British courts at the turn of the century. Nafziger, *supra* note 45, at 828–29 (focusing on the 1891 case *Musgrove v. Chun Teeong Toy*, and concluding that it "seems more absolutist and protective of sovereign prerogatives" than the aforementioned U.S. opinions). More recently, Justin Desautels-Stein argues that, influenced by the eugenics movement, "this right to exclude individual people from domestic society was decisively racial—and was the twentieth century update to the nineteenth century's right to exclude peoples from international society." Desautels-Stein, *supra* note 4. Vincent Chetail offers a comprehensive primer of the evolution of the right to exclude in relation to sovereignty in international legal doctrine. See VINCENT CHETAIL, *INTERNATIONAL MIGRATION LAW* 18–51 (2019). Among other things, Chetail's analysis notes nuances between Anglo-American and continental European jurists but concludes that "from the end of the 19th century until the mid-20th century, immigration controls were primarily introduced for racial reasons." *Id.* at 48.

52. LESTER, *supra* note 43, at 78; *see id.* at 51–80.

53. *Id.* at 82.

54. MCKEOWN, *supra* note 43, at 3. McKeown's book makes the powerful case for how "the basic legal and political justifications of modern migration control" had "developed in the context of isolating particular peoples from participation in the modern world." *Id.* at 9.

55. LAKE & REYNOLDS, *supra* note 33, at 19.

56. *An Act to Make Provision for Certain Immigrants 1855* (Vic) (Austl.).

57. LAKE & REYNOLDS, *supra* note 33, at 20 (quoting *An Act to Make Provision for Certain Immigrants 1855* (Vic) art. I). This Act was eventually repealed in 1865 due to pressure from the British, which was motivated by their desire to comply with a new treaty provision. *Id.* at 26.

58. Lake and Reynolds describe the rise of immigration restrictions targeting Chinese as European miners and colonists rallied against Chinese who also sought their fortunes in the Victorian goldfields. *Id.* at 15–45. In this period, Victorian administrators closely followed Californian efforts to implement similar restrictions against Chinese, which were overturned by the U.S. Supreme Court at the time as federally preempted. *See id.* at 17–20.

techniques of racialized border exclusion were perfected in national jurisdictions before being launched transnationally. For example, national segregationist technology such as the literacy test used to disenfranchise Black voters in Mississippi in 1890 would later be transferred from that context to the immigration restriction context to prevent the migration of nonwhite people, first in the United States and then in South Africa (Natal) and other British Dominions.<sup>59</sup>

The late nineteenth and early twentieth centuries were also periods in which the United States, Canada, Australia, New Zealand, and South Africa shared among themselves various technologies that achieved racialized migrant exclusion without running afoul of formal and informal constraints on overtly racist measures.<sup>60</sup> The literacy test, for example, was one such innovation, which in effect, restricted migration and membership possibilities to white people thereby rendering “the imperial non-racial status of British subjects increasingly irrelevant.”<sup>61</sup> Some jurisdictions made the judgment of literacy discretionary such that they ensured the restrictions would not apply in ways that denied illiterate white people seeking entry.<sup>62</sup> Daniel Ghezelbash details how, in addition to literacy tests, settler-colonial nations used landing taxes for “Asiatics,”—passenger-per-ship restrictions targeting specific geographic locations such as China—to exclude on racial bases.<sup>63</sup> Ghezelbash notes that there is “ample evidence” that these different jurisdictions actively sought to learn from each other in perfecting the facially neutral mechanisms for racialized exclusion.<sup>64</sup> This early pursuit of facially race-neutral legal and policy migration governance mechanisms foreshadows their contemporary dominance, and as Ghezelbash notes, is replicated in contemporary governance strategies such as pushbacks and migrant interdictions at sea.<sup>65</sup>

Passports also helped facilitate racialized immigration restrictions.<sup>66</sup> Through passports, nationality emerged as a “privileged axis for state control over

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59. *Id.* at 5 (noting that “[t]he republican origins of the literacy test as an instrument of racial exclusion were significant”).

60. See Daniel Ghezelbash, *Legal Transfers of Restrictive Immigration Laws: A Historical Perspective*, 66 INT’L & COMPAR. L.Q. 235, 238–39 (2017).

61. LAKE & REYNOLDS, *supra* note 33, at 5.

62. Ghezelbash, *supra* note 60, at 247.

63. *Id.* at 239 (describing the 1855 California legislation that imposed a fifty dollar per person landing tax on “Asiatics” arriving to the state by ship, an amount ten times higher when compared to the landing tax for “free white persons”). Radhika Viyas Mongia also highlights how facially neutral migration rules such as the “continuous journey” rule, which required migrants to arrive in Canada on a continuous journey from their country of origin and primarily impacted Indian migrants, were modified to facilitate the discretionary entry of white migrants. Radhika Viyas Mongia, *Race, Nationality, Mobility: A History of the Passport*, 11 PUB. CULTURE 527, 540 (1999). Executive discretion in immigration was and remains a mechanism for fine-tuning the racially disparate impact of facially neutral criteria.

64. Ghezelbash, *supra* note 60, at 243; see also Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 265–66 (2016) (describing adoption of the European literacy test to draw “an imaginary border” between Europe and Asia and legislative debates citing the adoption of the test by South Africa and Australia).

65. See Ghezelbash, *supra* note 60, at 252–55.

66. See Mongia, *supra* note 63, at 528–529.



mobility,” specifically as a means for the liberal exclusion of non-Europeans at a time when explicit reliance on race-based justifications became less tenable than they had been before.<sup>67</sup> Radhika Viyas Mongia shows how it was the relatively modest increase in the numbers of free Indian migrants to Canada that resulted in the introduction of a passport system for Indian migration for the first time.<sup>68</sup> The arrival of about 2,000 Indians in Canada in 1906 generated racial anxiety within Canada, at a time when explicitly racial restrictions on mobility stood in untenable tension with notions of common British subject-hood across the British empire.<sup>69</sup> Therefore, as a means of restricting free Indians from Canada, Canada proposed the introduction of a passport system in 1907, which stated that free Indians would be admitted only if they possessed a passport, but passports would be selectively issued by the colonial Indian administration so as to curtail this form of international migration.<sup>70</sup> Mongia’s work shows how passports, which we today consider neutral machinery of migration governance, functionally emerged in this colonial period as a technology capable of racialized exclusion without explicit reliance on race, as nationality played the mediating function.<sup>71</sup> By the early twentieth century, nationality—a racialized concept introduced into immigration governance by metropolitan and dominion powers—served as means of tethering nonwhite people to their regions and countries of ancestry and ensuring their exclusion from white nations.<sup>72</sup>

The racial stakes implicated by national border governance in the colonial area—and racial equality stakes, in particular—were perhaps most vividly illustrated in the fate of the racial equality clause proposed by the Japanese for inclusion in the founding charter of the League of Nations following the end of World War I. In February 1919, in the lead up to the formation of the League of Nations, Woodrow Wilson joined others in the Anglo–American alliance that presided over the rejection of a proposal by Japan that would have constituted the first

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67. *Id.* (arguing that it is the migration of “free” non-European colonial subjects that creates state monopoly over migration practices, including through the passport, which codifies race as a national attribute while eliminating the need for explicit reference to race as a criterion for exclusion).

68. *See id.* at 533, 536.

69. *Id.*

70. *See id.* at 536.

71. *See id.* at 553–54 (“The passport emerges here as a state document that purports to assign a national identity rather than a racial identity—a mechanism that would conceal race and the racist motivations for controlling mobility in the guise of a reciprocal arrangement between states described as national. Simultaneously . . . the passport generates ‘nationality’ as the intersection between the nation and the state.”).

72. *See id.* at 528 (using the colonial history of Indian exclusion from European settler colonies to show that “the passport not only is a technology *reflecting* certain understandings of race, nation/nationality, and state but was central to *organizing* and *securing* the modern definitions of these categories”); *see also id.* at 546–47 (“And this understanding of nationality, whereby people are tethered to the geographical space of the nation, would, articulated to other discourses, eventually culminate in the passport as the definitive state document authorizing national identity and further curtailing mobility.”). *See generally* Munshi, *supra* note 64, at 271–81 (describing exclusion based on geography as a proxy for racialized exclusion).

international treaty provision prohibiting racial discrimination.<sup>73</sup> Japan's proposal was to include a "racial equality" clause in the League of Nations's foundational treaty that would have required all members of the League of Nations to grant "to all alien nationals of States members of the League equal and just treatment in every respect, making no distinction either in law or in fact, on account of their race or nationality."<sup>74</sup> If adopted, this proposal would have enshrined racial equality and equality between nationals and non-nationals in international law, at least for international migrants who were nationals of the member states of the League of Nations.

Among the concerns motivating the racial equality clause was that the founding treaty of the League of Nations risked entrenching the status quo that "preserved the dominance of the leading Western nations and their control of the world's resources through shutting out foreigners from their 'colonial areas'."<sup>75</sup> Foreigners, in this context, referred to nonwhite people seeking to access these territories or maintain their native ties to colonized territories on terms other than those permissible to white colonial authorities who claimed these territories. Japan proposed that the League of Nations treaty include a provision according to which all bound parties "agree[d] that concerning the treatment and rights to be accorded to aliens in their territories, they [would] not discriminate, either in law or in fact, against any person or persons on account of his or their race or nationality."<sup>76</sup> This formulation makes plain the tight relationship between the categories of race and nationality or at least points to analogous functionality between the two categories as mechanisms for imperial exclusion and differentiation. Unsurprisingly, then, although rooted firmly in Japan's own concerns with discrimination against its nationals in the British and Anglo-American colonial and settler-colonial territories, historians describe how "[s]upporters and opponents alike came to see the proposal for an end to racial discrimination as a universal crusade."<sup>77</sup>

For the settler-colonial nations that ensured the rejection of the racial equality clause, including the United States and especially Australia, the threat of Asian migration was perhaps the most salient concern.<sup>78</sup> However, imperial commitment to white supremacy was also at play in other ways. The British Foreign Secretary at the time, for example, rejected racial equality as an old, outmoded Enlightenment ideal in that he did not see how an African "could be regarded as the equal of a European or an American."<sup>79</sup> The categories "African,"

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73. See Nicholas Wisseman, "Beware the Yellow Peril and Behold the Black Plague": *The Internationalization of American White Supremacy and Its Critiques, Chicago 1919*, 103 J. ILL. ST. HIST. SOC'Y 43, 43 (2010).

74. *Id.* at 45.

75. LAKE & REYNOLDS, *supra* note 33, at 288.

76. *Id.* at 289.

77. *Id.* at 287.

78. See *id.* at 288–302 (describing the negotiations in which Asian migration to the United States (California especially), Australia, and other settler colonies was a principal motivating concern).

79. *Id.* at 292.

“European,” and “American” were, without doubt, racial. Of special interest for international legal scholars, and immigration scholars more broadly, is that opponents of the racial equality clause articulated the concern that this clause “could be construed as giving jurisdiction to an international body over immigration, naturalisation, the franchise, land ownership and marriage,”<sup>80</sup> a move that would pose an existential threat to the sovereignty of the settler-colonial nations. Immigration and naturalization—regimes of racialized control over access to the benefits of colonial exploitation—were regimes to be shielded from external scrutiny, especially scrutiny that might insist on principles of equality and nondiscrimination. As Anam Soomro notes, the Anglo-American alliance sought to remove matters of immigration and racial discrimination from international scrutiny and challenge, and it sought to do so through international legal doctrine, specifically the invention of the doctrine of “domestic jurisdiction.”<sup>81</sup> The interwar period turned out to be a period during which racial governance<sup>82</sup> was deeply embedded in regimes of migration governance.<sup>83</sup>

In conclusion, two points are important to highlight from the historical context provided above. First, border and migration governance regimes were mechanisms for enforcing racialized access to benefits of colonial exploitation and for the production of these benefits to a significant extent. These regimes were thus, to an important extent, functionally related to the ideologies, norms, and institutions of economic and political interconnection at the heart of empire. As a result, legal theory even narrowly concerned with border and migration governance in this historical period and subsequent periods (such as our contemporary one) cannot be complete without some accounting for the extent to which empire shapes borders and migration.<sup>84</sup> Racialized mobility, immobility, inclusion, and exclusion were not incidental or unfortunate by-products of colonial empire but rather

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80. *Id.* at 293; see CHETAIL, *supra* note 51, at 52 (“Since the end of the First World War, immigration has been increasingly considered a matter of domestic jurisdiction (also referred to as ‘reserved domain’), which is by definition not governed by international law. In fact, the very notion of domestic jurisdiction was literally invented by the [United States] with a view to avoiding any interference in its sovereign right to decide the admission of foreigners.”).

81. Anam Soomro, *Speaking of Silences: A Genealogy of Freedom of Movement in International Law* 188 (Ph.D. Dissertation, Freie Universität Berlin) (on file with author). Soomro notes that the domestic jurisdiction clause that was eventually included in the Covenant of the League of Nations was reproduced almost verbatim by United Nations (U.N.) member States in Article 2 of the U.N. Charter in 1945. *Id.* at 191. Soomro’s dissertation, aptly named, elevates the existing literature by detailing the racialized imperial origins of, among other things, the anemic right of freedom of movement in international law.

82. Achiume & Bâli, *supra* note 4, at 1397 (“[R]acial governance refers to the different ways that race creates a means of ordering bodies and territories on a hierarchy according to which imperial exploitation can occur.”).

83. For an analysis of the implementation of segregation on an international scale during the interwar period, see LAKE & REYNOLDS, *supra* note 33, at 310–31.

84. See Mahmud, *Geography and International Law*, *supra* note 4, at 531 (explaining that modern geography emerged “largely, if not mainly, to serve the interests of imperialism in its various aspects including territorial acquisition, economic exploitation, militarism and the practice of class and race domination” (quoting Brian Hudson, *The New Geography and the New Imperialism: 1870-1918*, ANTIPODE, Sept. 1977, at 12, 12)).

imperialy productive technologies for creating and allocating the benefits of empire. The final point to highlight from this history is that it is in this era of formal colonial empire that the racial operation and function of borders was perfected through facially race-neutral legal categories, doctrines, and policies—including citizenship, nationality, and even sovereignty doctrine—as it relates to the right to exclude non-nationals.

## II. THE CONTEMPORARY SYSTEM OF RACIAL BORDERS

In Part II, I turn to contemporary international borders, focusing on those between the First and the Third World, with the aim of foregrounding these borders' persisting racial nature.<sup>85</sup> The color line Du Bois insightfully perceived as the definitive dividing line of the twentieth century,<sup>86</sup> remains in effect in the twenty-first century, embedded in international borders. In this Part, I outline key mechanisms, processes, and institutions through which migration and mobility remain racially allocated, privileging whiteness over nonwhiteness in a contemporary system of racial borders. In other words, I outline the infrastructure of this contemporary system of racial borders, which includes: (1) migration, mobility, and asylum regimes; (2) race itself; and (3) liberal democratic border doctrine. I focus on the borders between the United Kingdom and European Union on the one hand and African nations on the other as fitting examples of the racial nature of neocolonial borders. I include only a few examples of the operation of the racial borders of the United States and instead refer readers to an impressive literature detailing how these borders effect mobility and migration as racial privileges structured to a significant extent by white supremacy.<sup>87</sup> Note that this Part is

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85. National borders within the Third World are also characterized by racialized allocation of migration and mobility. Some of these do so in ways that are the product of European Colonial-Era legacies, such as the racialized xenophobic exclusion of Black Africans from South Africa. Others more directly advance different supremacist imperial projects, such as Hindu nationalist-driven exclusion of Muslim ethnic groups from India. I do not elaborate the operation of racial borders in these other contexts.

86. W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* (5th ed. 1904); see also Munshi, *supra* note 64, at 279 (placing Du Bois on the forefront of grasping the future salience of the global color line).

87. David Cook-Martín and David FitzGerald, for example, have shown that “an examination of immigration and nationality laws throughout the Americas from 1850 to 2000 suggests that racial discrimination has been *more* common in liberal than in illiberal countries of immigration,” and that “[l]iberal states [in the Americas] have had more racialized policies partly *because of their liberalism.*” David Cook-Martín & David FitzGerald, *Liberalism and the Limits of Inclusion: Race and Immigration Law in the Americas, 1850-2000*, 41 J. INTERDISC. HIST. 7, 7, 9 (2010). A significant literature exists analyzing the salience of race in U.S. immigration and naturalization law and policy. See generally Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315 (2003) (analyzing U.S. immigration law’s history of explicitly racialized exclusion and the structural barriers still faced by nonwhite immigrants today, despite the move toward facially race-neutral laws in the 1960s); Jennifer M. Chacón, *Immigration and Race* (unpublished manuscript) (on file with author); Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271 (2020) (noting historical legal distinctions that gave white noncitizens that intended to naturalize privileges that were not available to nonwhite noncitizens including voting and land ownership); LAURA E. GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM 1–18* (2020); Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in *CROSSROADS, DIRECTIONS, AND A NEW*

CRITICAL RACE THEORY 187 (Francisco Valdes et al. eds., 2002) (using a critical race theory lens to identify the relationship between domestic racial subordination and immigration laws in the United States and encouraging further critical race theory engagement within the field of immigration); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (analyzing the United States' history of racialized exclusion through laws governing immigration and naturalization, and arguing that the country's harsh treatment of immigrants reflects how racial minorities within the United States would be treated if not for constitutional protections granted to citizens); Karla McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139, 1149 (2021) (analyzing how "at the intersection of anti-Black racism and immigration status, [U.S.] immigration laws and enforcement policies operate to reinforce structural racism in America"); Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 460–74 (2020) (describing racial and ethnic discrimination in U.S. immigration and naturalization law and policy and the civil rights framing of immigrant justice claims); Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67 (1999) (providing a nuanced account of the 1924 Quota Laws and the ways in which race and national origin were constructed in this period and as a result of this law, as well as the ways in which this facially race-neutral law was designed to exclude nonwhite migrants); Munshi, *supra* note 64, at 250 (tracing immigration law's move, via laws meant to exclude Hindu migrants, from explicit racialized exclusion to "a more discrete policy of geographic segregation" which, despite being racially neutral, continues to affect racialized exclusion); David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 40–42, 40 n.309 (2016) (analyzing the ways in which succeeding waves of immigrants were racialized and had to in some way "become white" to assimilate). Some scholars highlight intersectional structures. See generally Sarah L. Hamilton-Jiang, *Children of a Lesser God: Reconceptualizing Race in Immigration Law*, 15 NW. J.L. & SOC. POL'Y 38, 65–70 (2019) (analyzing how race contributes to the "adultification" of unaccompanied migrant children, who are left to navigate a system built for adults with few special legal protections, and leads to fewer successful claims for visas or asylum); Cristina A. Quiñónez, Comment, *Exposing the American History of Applying Racial Anxieties to Regulate and Devalue Latinx Immigrant Reproductive Rights*, 54 U.S.F. L. REV. 557 (2020) (analyzing the ways in which racial anxieties about migration have had a gendered effect on the reproductive rights of Latina migrants, creating racial borders within the bodies of migrant women); Olivia Salcido & Cecilia Menjívar, *Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona*, 46 LAW & SOC'Y REV. 335 (2012) (taking an intersectional approach to understanding the gendered pathways toward citizenship that Latin American migrants experience). A smaller universe of scholarship has framed its analysis of race and borders in imperial terms. See generally Hannah Gordon, Note, *Cowboys and Indians: Settler Colonialism and the Dog Whistle in U.S. Immigration Policy*, 74 U. MIA. L. REV. 520 (2020) (comparing the treatment of Native Americans in the United States to its treatment of Mexican and Central American migrants to situate U.S. immigration law in the U.S. settler-colonial project); Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUM. 51, 55 (2016) (situating "the history of Indian exclusion from the United States against the backdrop of settler colonialism and decolonization" in order "to widen the nationalist framework of American exceptionalism through which questions about immigration law and policy are often presented"); Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548 (2019) (analyzing contemporary U.S. immigration laws and policies within a settler-colonial framework to locate the U.S. immigration system at the heart of settler colonialism's ongoing project of elimination and subordination of racial Others); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1884–88 (2019) (analyzing the United States' long history of using "self-deportation"—"a variety of state-sponsored coercive removal that assigns some agency to individuals in their own departure"—as an indirect immigration policy, and tracing self-deportation's evolution "from colonial policies meant to obscure the goal of removal and thereby guard settler-tribal diplomatic relations" into a modern policy directed mostly at Mexican and Central American migrants); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002) (analyzing the plenary power doctrine's emergence and application to Native Americans, external colonial subjects of the United States (such as Guam and Puerto Rico, among others), and immigrants and how the

a descriptive account of the racialized operation of the contemporary system of racial borders. That is, I set aside normative assessment of this system for Part III.

#### A. MIGRATION, MOBILITY, AND ASYLUM REGIMES

##### 1. Citizenship, Passports, and Visas

First World citizenship is racially bordered and, in turn, operates as a crucial component of racial bordering.<sup>88</sup> It is racially bordered in the sense that access to and retention of First World citizenship privileges whiteness, even within regimes that have evolved to incorporate nonwhite people as citizens. With respect to access to citizenship, race mediates through bloodline or *jus sanguinis* laws that confer exclusive citizenship privileges.<sup>89</sup> Race also mediates access to citizenship

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plenary power cases continue to be used against these groups to justify the legal subordination of the Other in a way that violates international law).

88. I begin with citizenship here, but racialization extends to the very constitution of the modern nation-state. For an insightful exposition of how the borders of the nation-state were racially constituted under European colonialism through modern geography and international law, see generally Mahmud, *Geography and International Law*, *supra* note 4; Mahmud, *Colonial Cartographies*, *supra* note 4; and Mahmud, *Cheaper than a Slave*, *supra* note 4.

89. *Jus sanguinis* (acquisition of citizenship through descent) is the primary mechanism for conferring citizenship in the European Union and the world more broadly, as compared with *jus soli* (acquisition of citizenship through birth in the territory of a country). See Maria Margarita Mentzelopoulou & Costica Dumbrava, *Acquisition and Loss of Citizenship in EU Member States*, EUR. PARLIAMENTARY RSCH. SERV. 2 (July 2018), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS\\_BRI\(2018\)625116\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf) [<https://perma.cc/HH3X-W2WB>] (“The vast majority of people in Europe (and the world) acquire citizenship at birth, most often through *jus sanguinis*. No country in the EU grants automatic and unconditional citizenship to children born in their territories to foreign citizens. The most common condition for *jus soli* is that parents should have resided in the country for a certain period of time before the child’s birth. Five EU countries have such rules of conditional *jus soli*. . . . In seven EU countries children born in the country to foreign citizens can acquire citizenship at birth if at least one of their parents was also born in the country (double *jus soli*).”).

Extensive scholarship has highlighted the ethnonationalist and racial implications of these laws. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2137 (2014) (arguing that “a primary and overlooked explanation for the development and durability of gender-asymmetrical *jus sanguinis* citizenship law [in the United States] was the felt need of judges, administrators, and legislators to further the racially nativist policies that were central to American nationality law until 1965” (footnote omitted)); Muneer I. Ahmad, *Beyond Earned Citizenship*, 38 IMMIGR. & NAT’Y L. REV. 617, 655–56 (2017) (“[A] regime of *jus sanguinis* in the absence of *jus soli* citizenship tends toward ethnonationalism, because it entrenches the citizenship claims of those ethnic groups already incorporated into the nation. *Jus sanguinis* is status-preserving rather than status-creating, and as Shachar has shown, treats citizenship as a form of inheritance.” (footnote omitted)); Costica Dumbrava, *Bloodlines and Belonging: Time to Abandon Ius Sanguinis?*, in DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP 73, 73–75 (Rainer Bauböck ed., 2018); Gillian R. Chadwick, *Legitimizing the Transnational Family*, 42 HARV. J.L. & GENDER 257, 266–69 (2019) (surveying critiques of *jus sanguinis* in the United States and European contexts). But see Rainer Bauböck & Ius Filiationis, *A Defence of Citizenship by Descent*, in DEBATING TRANSFORMATIONS OF NATIONAL CITIZENSHIP, *supra*, at 83, 87 (“What is morally arbitrary is not that states use these fundamental features of personal identity to determine membership in political communities, but that in our world citizenship provides individuals with hugely unequal sets of opportunities. This is not an inherent feature of birthright citizenship but of the global economic and political (dis)order.”); Ahmad, *supra*, at 655 (listing common justifications for *jus sanguinis*, such as “preventing statelessness, fostering normative notions of family, ensuring care and protection of children, and promoting intergenerational development of the political community,” as well as “mere

through the racialized mobility and migration restrictions I describe in more detail below. Even to the extent that *jus soli* access to citizenship is available in the First World, it is only available to those who can territorially access First World nations. In this way, racially exclusive territorial access through racialized migration governance also restricts *jus soli* citizenship on a racial basis. With respect to lack or loss of citizenship, this too, is a racialized phenomenon—the United Nations High Commissioner for Refugees estimates that seventy-five percent of the known global stateless population are minorities.<sup>90</sup> The growing prevalence of racialized citizenship-stripping policies across the First World, particularly in the last two decades, points to the persistence of the preferential status of whiteness over nonwhiteness for First World citizenship, and this preference is achieved often as the result of facially race-neutral legal and policy provisions.<sup>91</sup>

Conversely, citizenship also contributes to racially differentiated migration and mobility and to a great extent does so through visa policies. Although the subject of limited international migration scholarship, visa policies constitute “the central instrument of mobility restriction and control concerning the vast majority of cross-border movements.”<sup>92</sup> As a result of visa regimes composed of national immigration laws and bilateral and multilateral treaties, possession of a particular passport not only gives you certain rights as a citizen of your own country but also confers a specific status within what some term the “global mobility regime.”<sup>93</sup> Visas affect migration almost as much as they affect mobility, even though differences in mobility attributable to visa policies are arguably most pronounced in the regulation of short-term visits. Visa-waiver regimes that confer visa-free travel on certain nationalities typically apply for short-term visits rather than permanent migration, but researchers note that “short-term mobility is

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convenience,” but observing that “none of these are merit-based arguments” (footnotes omitted). For a recent discussion and literature review of racialized citizenship, see Foster & Baker, *supra* note 4, at 92–97.

90. U.N. HIGH COMM’R FOR REFUGEES, “THIS IS OUR HOME”: STATELESS MINORITIES AND THEIR SEARCH FOR CITIZENSHIP 1 (2017), [https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR\\_EN\\_2017IBELONG\\_Report\\_ePub.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR_EN_2017IBELONG_Report_ePub.pdf) [<https://perma.cc/YUT6-AENE>].

91. See INST. ON STATELESSNESS & INCLUSION, THE WORLD’S STATELESS: DEPRIVATION OF NATIONALITY 12, 211–22 (2020), <https://perma.cc/5FD9-SDDP> (describing the resurgence in the instrumentalization and expansion of citizen-stripping and denaturalization laws enacted under the guise of antiterrorism in countries including the United Kingdom, Denmark, the Netherlands, and Belgium); OPEN SOC’Y JUST. INITIATIVE, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED STATES 10–11 (2019), <https://www.justiceinitiative.org/uploads/e05c542e-0db4-40cc-a3ed-2d73abcf37f/unmaking-americans-insecure-citizenship-in-the-united-states-report-20190916.pdf> [<https://perma.cc/762L-XA6E>] (providing a mixed quantitative and qualitative analysis of denaturalization cases in the United States filed during the Trump Administration that demonstrates a significant increase in such cases, which are characterized by “selective targeting based on national origin, as a proxy for race, ethnicity, and religion” and result in “a disproportionate number of cases filed against visible minorities”).

92. Steffen Mau, Fabian Gülzau, Lena Laube & Natascha Zaun, *The Global Mobility Divide: How Visa Policies Have Evolved over Time*, 41 J. ETHNIC & MIGRATION STUD. 1192, 1194 (2015).

93. *Id.* at 1195.

closely linked to migration.”<sup>94</sup> Most migration begins as short-term travel, and short-term mobility is also a central pathway for irregular migration as a result of overstays.<sup>95</sup> This means that ease of migration is closely tied to ease of short-term mobility, which in turn is closely governed by visas. Passport nationality, and thus citizenship, are determinative because they dictate the application of visa restrictions.

Consider the European Union’s Schengen visa regime, which is regulated by treaty.<sup>96</sup> The European Union’s Visa Regulation maintains two lists of countries: one widely (and at its inception officially) referred to as the Black list containing countries whose nationals require visas to enter and another, the White list, with countries whose nationals do not need a visa.<sup>97</sup> A range of factors determine the list to which a given country belongs,<sup>98</sup> but the ultimate effect of the categorization is that the nationals on the Black list are presumptively undesirable, and those on the White list are presumptively desirable.<sup>99</sup> Nationals of Black listed countries face a structural bar to short-term mobility, which they must overcome on a costly, individualized basis through processes mostly insulated from foundational, liberal due process rights let alone substantive equality protections.

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94. *Id.* at 1196.

95. *See id.* Several studies show, for example, that “the majority of irregular [migrants] present in the OECD today entered their country legally but overstayed their visa.” *Id.*

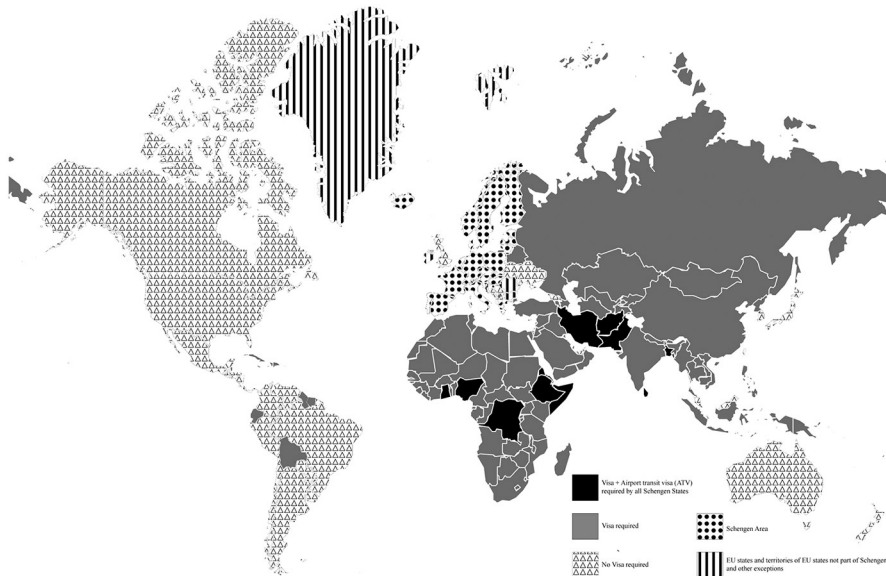
96. For detailed analysis of the Schengen visa regime, see Didier Bigo & Elspeth Guild, *Policing at a Distance: Schengen Visa Policies*, in *CONTROLLING FRONTIERS: FREE MOVEMENT INTO AND WITHIN EUROPE* 233, 241–43 (Didier Bigo & Elspeth Guild eds., 2005) and VIOLETA MORENO-LAX, *ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW* 81–116 (2017).

97. Amade M’charek, Katharina Schramm & David Skinner, *Topologies of Race: Doing Territory, Population and Identity in Europe*, 39 *SCI. TECH. & HUM. VALUES* 468, 473 (2014) (“Responding to concerns about the racist connotations of the original terminology, the EU changed the wording from Black/White list to Positive/Negative list . . .”).

98. According to the governing regulation, the criteria for determining visa requirements of third-country nationals include “illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the [EU]’s external relations with the relevant third countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.” Commission Regulation 2018/1806, art. 1, 2018 O.J. (L 303) 39, 43 (EU).

99. *See* RYSZARD CHOLEWINSKI, *IMMIGR. L. PRACS.’ ASS’N, BORDERS AND DISCRIMINATION IN THE EUROPEAN UNION* 21 (2002). Cholewinski aptly notes that the visa lists amount to a system of national profiling, according to which nationals on the “black visa list” must on an individual basis work to overcome their presumptive exclusion. *See id.* at ii.



**Table 1: Schengen Area Visa Policy<sup>100</sup>**

In their study of the Schengen visa regime, Didier Bigo and Elspeth Guild note that for nationals on the Black list, this visa system shifts the border of the European Union to the consulates in the nationals' home countries where they must receive travel authorization prior to even embarking on any journey.<sup>101</sup> According to an official interviewed for their study, this relocation of the border is a central control strategy, which aims “to dry up flows from the source.”<sup>102</sup> Despite the appearance of a centralized system, the issuance of a Schengen visa is determined by the internal national consulate rules and local practices, but across the board, nationals from countries on the Black list bear the burden of explaining why they are “an exception in comparison with fellow nationals who are, by definition, threats or risks to the European Union.”<sup>103</sup> Individual consulate officials often determine visa application outcomes, and visa refusals are not necessarily accompanied by justifications or reasons.<sup>104</sup>

100. *Visa Policy*, EUR. COMM'N, [https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/visa-policy\\_en](https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/visa-policy_en) [<https://perma.cc/6XRH-8ZQH>] (last visited Jan. 26, 2022). Table 1 is based on a map provided in the previous citation; Table 1 has been adapted for grayscale, and a legend has been added based on the original map's data.

101. Bigo & Guild, *supra* note 96, at 239.

102. *Id.* at 241.

103. *Id.* at 249–50.

104. *See id.* at 250–51. To comply with Article 47 of the Charter of Fundamental Rights of the European Union, “Member States,” per the Court of Justice of the European Union’s (CJEU) ruling in a 2017 case, must make available judicial appeal at some stage in the visa refusal appeal process. *See* Case C-403/16, *El Hassani v. Zagrancicznych*, ECLI:EU:C:2017:960, ¶ 42 (Dec. 13, 2017). Yet despite the CJEU’s ruling in *El Hassani*, commentators have pointed out that the EU legislature “left to the Member States the task of deciding the nature and specific conditions of the remedies available to visa

The sorting effected by the Schengen visa regime differentiates based on nationality, but its effect is racialized.<sup>105</sup> It mainly excludes the predominantly nonwhite world from Schengen while including the predominantly white world.<sup>106</sup> In 2002, all of Africa was on the visa Black list.<sup>107</sup> Today, this has mostly remained unchanged. The only African nations on the White list are Mauritius and Seychelles.<sup>108</sup> Almost all of Asia is on the Black list, whereas all of North America and most of Latin America are on the White list.<sup>109</sup> And although nationals on the Black list may overcome their presumptive exclusion through successful application for a visa, there is good reason to believe that the process for overcoming this presumptive exclusion is also racially fraught. Visa applications are typically adjudicated through processes that, by law, are characterized

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applicants.” Alžbeta Králová, *Legal Remedies in Asylum and Immigration Law: The Balance Between Effectiveness and Procedural Autonomy?*, 16 CENT. EUR. PUB. ADMIN. REV. 67, 76–77 (2018). Králová notes that the court in *El Hassani* “tried to have [its] cake and eat it too — the ‘right to appeal’ does not equal the right to judicial review and it is up to the Member States . . . how they will arrange the nature of appeal within their remedial systems.” *Id.* at 77. Further, as the court noted, judicial review is only guaranteed “at a certain stage of the proceedings.” *El Hassani*, ECLI:EU:C:2017:960, at ¶ 42.

105. See Mekonnen Tesfahuney, *Mobility, Racism and Geopolitics*, 17 POL. GEOGRAPHY 499, 512–13 (1998).

106. There are some important exceptions. For example, Latin America, which is majority nonwhite, is mostly exempt from the Schengen short-term visa requirement. See *supra* Table 1. This is a product of the specific colonial history between Spain and this region, including the strong political, cultural, and arguably even racial ties that have bound them together. For some, Latin America neatly fits into the category Third World because it is a territory formerly colonized by Europe (or because it fits the range of other associations attributed to the Third World designation—such as economic exploitation and so on). But Latin America’s relationship to both the First and the Third World is far more complex. For many Latin American nations, their independence from European powers preserved internal colonial dynamics that privileged white people at the expense of Indigenous and Black people. See Quijano, *supra* note 23, at 562–64. Spain, unlike other former colonial powers, advocated for visa exemptions for its former colonies in Latin America likely because its immigration regime had evolved to recognize close cultural and ethnic ties with these effective settler colonies, many of which had explicitly tried to “whiten” themselves by aggressively pursuing the immigration of white Europeans to their territories in the past.

107. CHOLEWINSKI, *supra* note 99.

108. See Maarten den Heijer, *Visas and Non-Discrimination*, 20 EUR. J. MIGRATION & L. 470, 484 (2018). The inclusion of these islands is part of a broader trend of small island nations being included on the White list. One scholar attributes this, in part, to European vacationers. See *id.* at 484–85 (“[T]hese islands are popular holiday destinations for Europeans (it was expected that the visa exemption would be reciprocated through visa waiver agreements) and the practical difficulty that in some of these islands, none of the Member States offered consular services.”).

109. Commission Regulation 2018/1806, annex 1, 2018 O.J. (L 303) 39, 51–53 (EU). Bolivia, Belize, Cuba, Ecuador, Guyana, Haiti, Jamaica, and the Dominican Republic are all excluded. *Id.*; see *Who Must Apply for a Schengen Visa*, EUR. COMM’N, [https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/visa-policy/who-must-apply-schengen-visa\\_en](https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/visa-policy/who-must-apply-schengen-visa_en) [https://perma.cc/6AYM-BC36] (last visited Dec. 29, 2021). Cholewinski explains this variation in Latin America in the following way:

[T]he non-imposition of a visa requirement on most of [the South American countries] relates to the special relationship of Spain with those countries, although . . . it would appear that the criteria of illegal immigration and crime overrode this special relationship in respect of Colombia, which was placed on the negative list.

CHOLEWINSKI, *supra* note 99, at 26.

by broad discretion that is barely insulated from both explicit and implicit racially infused decisionmaking. Although the United Kingdom maintained a separate visa regime apart from Schengen even when it was part of the European Union, a study of its visa processing is illustrative.

A 2019 parliamentary report in the United Kingdom found that African citizens who applied for British visas were twice as likely as the average applicant to be denied a visa and nearly seven times more likely than a North American applicant.<sup>110</sup> Although African and North American are not, strictly speaking, “racial categories,” there can be no question that nationals of African countries are predominantly nonwhite (and mostly Black) and those of at least the United States and Canada are predominantly white. Indeed, the report raised concerns about gender and racial discrimination and prejudice in the visa decisionmaking process.<sup>111</sup> Obstacles to approval for African visa applicants included poor quality and inconsistent decisionmaking by visa officers,<sup>112</sup> disregard for individual circumstances,<sup>113</sup> strict (but inconsistent) documentation requirements,<sup>114</sup> and an apparent institutional presumption that African visa applicants—particularly those with limited financial means—intend to violate U.K. immigration laws.<sup>115</sup> The “single most common issue” brought to the report’s authors was the denial of applications because of the “requirement to prove the financial circumstances of

110. PAUL ASQUITH, HENRIETTA BAILEY, DAVID HOPE-JONES, AMBREENA MANJI & NICK WESTCOTT, VISA PROBLEMS FOR AFRICAN VISITORS TO THE UK: A JOINT ALL-PARTY PARLIAMENTARY GROUP REPORT BY THE APPG FOR AFRICA, THE APPG FOR DIASPORA, DEVELOPMENT & MIGRATION AND THE APPG FOR MALAWI 8 n.4 (2019), <https://www.afford-uk.org/wp-content/uploads/2020/01/appg-july-2019-report-on-visa-problems-for-african-visitors-to-the-uk-1.pdf> [<https://perma.cc/2DZ9-KFTB>].

111. *See id.* at 25 (“The grounds on which an application can be rejected are often not clear and can vary enormously, even for a single applicant. This elasticity gives rise to inconsistency, and to decisions that can be considered discriminatory or prejudiced.”).

112. *See id.* at 21 (“The inquiry Chairs believe that it is not the rules in themselves which are problematic but it is the application of these legal requirements which is inconsistent and affects decision quality.”).

113. *See id.* at 22 (“The poor level of accuracy and completeness of the visa issue notes and refusal notices was raised by a number of witnesses and has been a repeated theme in previous inspection reports of the ICBI. This further suggests that due consideration of individual circumstances is not taking place.”).

114. *See id.* at 8, 19 (“The volume and type of documentation required as well as the process is considered particularly demeaning by [African] visitors, who felt that they are treated differently from visitors from other regions.”).

115. *See id.* at 23. The report states:

The inquiry has not seen any compelling evidence to justify an approach which views a lack of affluence as, in itself, reasonable grounds for declining a visa application. It is unclear on what basis financial details are required from the applicant if a visit is fully funded. It is deeply problematic to conflate poverty with presumed criminality without a clear evidence base.

*Id.* at 23–24.

the applicant.<sup>116</sup> Notably, this requirement caused problems even when applicants were fully sponsored by prestigious organizations providing financial surety for these applicants. In other words, even unequivocal evidence of financial means was insufficient to overcome financial suspicion of African applicants and prevent visa denials.<sup>117</sup> Note also that the absence of visa requirements for short-term stays for American, Canadian, and other First World citizens, for example, means that citizens of these countries whose financial means fall below the financial thresholds that apply to African citizens are presumptively entitled to entry to the United Kingdom and the European Union.<sup>118</sup>

EU visa policies are justified in significant part on the need to curb unauthorized migration,<sup>119</sup> and the same is true of the United Kingdom.<sup>120</sup> Yet the most recent data from the U.K. government shows that of those nationalities requiring visas to enter the United Kingdom for short-term visits and for study and work purposes, 96.3% left the country prior to the expiration of their visas.<sup>121</sup> This remarkably high compliance rate excludes “the majority of visitors to the UK—who don’t need a visa (UK and other EU nationals living overseas who visit the UK as well as ‘non-visa’ nationals such as US citizens who don’t normally need a

116. *Id.* at 23. The report states:

Inability to demonstrate that the applicant has sufficient money to pay for the visit is another common reason for rejection. In the evidence received by the inquiry, it was often asserted that this results in systemic prejudice against African applicants. The entry clearance system seems to make little consideration of, or allowances for, the bureaucratic or cultural context .

. . . For example, regular banking is not always readily available, individuals may have multiple jobs or incomes, [and] salary payments may not always follow a strict monthly pattern . . . . Insisting therefore that every small transaction is accounted for becomes an impossible burden.

*Id.* This speaks to an inflexible visa standard or prerequisite that excludes evidence of sufficient means any time the evidence does not conform to the financial metrics characteristic of life in Britain. This makes admission dependence less about whether you have the financial means and more about conformity with the culture of British financial metrics.

117. *Id.*

118. As two other commentators have noted:

The issue of white and black visa lists, of imposition or not of visas seems then to say less about safety and migration imperatives, than about the social construction of more or less shared fears concerning the Other and about the way Europeans seek to construct an image of themselves, a common identity.

Bigo & Guild, *supra* note 96, at 237.

119. See Commission Regulation 2018/1806, art. 1, 2018 O.J. (L 303) 39 (EU); Bigo & Guild, *supra* note 96, at 244.

120. See Will Somerville & Peter William Walsh, *United Kingdom’s Decades-Long Immigration Shift Interrupted by Brexit and the Pandemic*, MIGRATION POL’Y INST. (Aug. 19, 2021), <https://www.migrationpolicy.org/article/united-kingdom-shift-immigration-interrupted-brexit-pandemic> [<https://perma.cc/Z2FV-N8B6>].

121. HOME OFF., SECOND REPORT ON STATISTICS BEING COLLECTED UNDER THE EXIT CHECKS PROGRAMME 11 (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/639621/second-report-on-statistics-being-collected-under-exit-checks.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639621/second-report-on-statistics-being-collected-under-exit-checks.pdf) [<https://perma.cc/P6QG-56P9>].

visa to visit the UK).”<sup>122</sup> Given the conventional wisdom that most unauthorized migration is due to persons who enter the country legally and overstay their permissions and given the high rates of compliance among those required to obtain visas, it stands to reason that visa-exempt nationalities are nontrivially represented in the unauthorized population. Yet, as migration scholar Gurminder Bhambra notes, when the British government adopted its aggressive “hostile environment” policies billed as targeting illegal migration, the government’s policies did not target “the areas of London where the greatest number of visa overstayers reside—that is, areas of white Australian, New Zealand, Canadian migration.”<sup>123</sup> The policies instead targeted Black and other racial and ethnic minority communities, resulting in the deportation of even Black British citizens from the United Kingdom.<sup>124</sup>

With respect to Schengen, Steve Garner’s work explains how between 1985 and 2006, European immigration policy through the European Union and the Schengen zone essentially “render[ed] the conditions of entry and settlement more difficult for those people not racialized as ‘white’” and how this was achieved through facially race-neutral policies combined with political campaigns and media engagement that traded on racialized tropes of existential (non-white) threats to Europe.<sup>125</sup> Garner argues that a central thrust of Schengen’s external borders is to limit nonwhite labor access into and across the Schengen zone.<sup>126</sup> Prior to 1985, European migration policy was significantly shaped by national labor needs, with some European nations such as Britain, France, Belgium, the Netherlands, and Portugal drawing on their former colonies, the former colonies of others, and labor-sending countries such as Turkey.<sup>127</sup> In that period, “immigration was racialized in that it was largely colonial subjects and non-Europeans who found themselves in particular niches of the European economies.”<sup>128</sup> The creation of the European Union and the Schengen zone changed this policy and produced a different form of racialized immigration policy—one that excluded more nonwhite people than prior regimes—which included them on subordinate terms through guest-worker and related migrant-labor regimes.

The European Union’s common visa policy pressured former colonial powers to eliminate any remaining preferential immigration or mobility regimes

122. *Id.*

123. Gurminder K Bhambra, *Turning Citizens into Migrants*, RED PEPPER (Apr. 19, 2018), <https://www.redpepper.org.uk/talking-about-migrants-is-a-dogwhistle-way-of-talking-about-race/> [<https://perma.cc/Q65N-LW5S>].

124. See WENDY WILLIAMS, WINDRUSH LESSONS LEARNED REVIEW 10 (2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876336/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_LoResFinal.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf) [<https://perma.cc/44B5-S8BV>] (documenting the deportation of Black British citizens to the Caribbean due to the overly broad application of the “hostile environment” policies).

125. Steve Garner, *The European Union and the Racialization of Immigration, 1985–2006*, 1 RACE/ETHNICITY: MULTIDISCIPLINARY GLOB. CONTEXTS 61, 61–62, 69 (2007).

126. *Id.* at 65.

127. *Id.* at 77.

128. *Id.*

previously applied to former colonies and instead to prioritize EU mobility and migration, including for labor purposes.<sup>129</sup> Expansion of the European Union to include Eastern European countries opened up the internal so-called low-skilled labor pool, drastically limiting the chances of non-EU nationals accessing visas for low-income work.<sup>130</sup> Freedom of movement within the European Union and Schengen region for non-EU nationals was thus shaped by a labor regime for non-EU nationals that privileges the access of so-called highly skilled professionals over all others.<sup>131</sup> This regime privileges the majority white population of the European Union and disadvantages the majority nonwhite population of the non-European Union,<sup>132</sup> even while relying on the latter to supply labor on exploitative terms, including under conditions of illegality.<sup>133</sup>

Racialized mobility through visa regimes extends beyond Schengen. Visa-free access to the United States is primarily limited to the predominantly white world.<sup>134</sup> Visualizations showing the range of travel for different nationalities starkly illustrate the high levels of freedom of movement of First World nation-state passport holders and the restrictions on Third World nation-state passport holders—especially African, Caribbean, and Asian—preventing similar access to the First World.<sup>135</sup> Notably, “the citizens of Europe, North America and Australia/New Zealand can travel easily around the world.”<sup>136</sup> A 2015 review of visa literature and study of visa-free travel data suggested “a clear pattern of the

129. *See id.* at 74.

130. *Id.* at 66; *see also id.* at 69 (noting that “white Europeans have, on the whole, a major institutional advantage in terms not only of mobility, but access to employment and the perks of citizenship, as well as the lesser ones of ‘denizenship’”).

131. *See id.* at 68.

132. *See id.*

133. The work of Chantal Thomas is illustrative in this regard. *See* Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860, 1884 (2021) [hereinafter Thomas, *Race as a Technology*] (“Immigration controls do not deter migration in a world which is both highly unequal and highly interconnected. Rather, those controls make it more likely that some people’s movements across borders will be unauthorized, and that those people will then be vulnerable to exploitation.”); Chantal Thomas, *Immigration Controls and “Modern-Day Slavery,”* in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 212, 214 (Prabha Kotiswaran ed., 2017) [hereinafter Thomas, *Immigration Controls*] (“[I]mmigration controls remain the single most *formal and legally permitted* basis for discrimination and coercion that contributes to those exploitative conditions.”); Chantal Thomas, *Undocumented Migrant Workers in a Fragmented International Order*, 25 MD. J. INT’L L. 187, 216–20 (2010); *see also* Tayyab Mahmud, *Precarious Existence and Capitalism: A Permanent State of Exception*, 44 SW. L. REV. 699, 721–25 (2015) (arguing that neoliberal economic and migration governance places undocumented migrant workers in a state of “hyper-precarity”).

134. *See Visa Waiver Program*, U.S. DEP’T OF ST., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> [<https://perma.cc/5HEN-4AQ5>] (last visited Dec. 29, 2021) (listing visa-exempt nationalities for travel to the United States).

135. *See, e.g., Global Passport Power Rank 2021*, PASSPORT INDEX, <https://www.passportindex.org/byRank.php> [<https://perma.cc/R98T-JK92>] (last visited Dec. 29, 2021). A significant number of Latin American countries have visa-free access to the European Union, and among Asian countries, Japan, South Korea, and Malaysia enjoy extensive free travel. *See* Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualizing the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452, 458 (2018).

136. Spijkerboer, *supra* note 135.

apparent mobility divide, with the West or North being privileged and the Global South being excluded.”<sup>137</sup> Between 1969 and 2010, the world experienced an overall increase in visa-free travel possibilities and also experienced “an increased stratification of associated mobility rights.”<sup>138</sup> In that period, Organisation for Economic Co-operation and Development (OECD) countries dramatically increased the freedom of movement of their citizens, while non-OECD countries failed to do the same.<sup>139</sup> The exceptions were non-OECD countries with relatively high gross domestic product per capita and those with membership in influential regional bodies, for example the European Union and the Southern Common Market (MERCOSUR).<sup>140</sup> The mobility “winners” were North American, South American, and European countries, and what was most striking to the researchers conducting the study was “the loss of mobility rights by African countries.”<sup>141</sup> To the extent that there is a “[w]all around the West,” visa policy analysis indicates this wall “is primarily a fence of protection against African migrants.”<sup>142</sup>

Third World immobilization exists alongside the hypermobility of the First World, and this hypermobility is at least in part the result of what Thomas Spijkerboer refers to as the “the global mobility infrastructure.”<sup>143</sup> Spijkerboer notes that although the “non-entrée” regime of the First World, underwritten by border externalization, privatization, and securitization, has helped shut the Third World out of the First, a parallel infrastructure has enhanced mobility by making it faster, cheaper, and more accessible—at least for a select group.<sup>144</sup> First World

137. Mau et al., *supra* note 92, at 1201.

138. *Id.* at 1199. For a study highlighting the visa restrictiveness of African and Asian countries specifically, see generally Mathias Czaika, Hein de Haas & María Villares-Varela, *The Global Evolution of Travel Visa Regimes*, 44 *POPULATION & DEV. REV.* 589 (2018). The authors find that Organisation for Economic Co-operation and Development (OECD) countries removed visa barriers among each other but that African and Asian countries have maintained, and even increased, visa barriers against OECD countries. *Id.* at 610. They further argue that visa restrictiveness has not increased globally, but that it has been high since the 1970s, and that “visa liberalization has been to a significant extent an intra-American, intra-European and intra-OECD affair.” *Id.* at 611. That Third World nation-states have visa restrictions in place against First World nation-states does not on its own undercut the claim that First World citizens, and white citizens in particular, retain international mobility and migration privileges on terms that are unjust. As I discuss in greater detail in Part III, my justice claims are *relational* and the kinds of claims that Third World citizens have over First World nation-state borders are different from those that First World citizens have over Third World citizens. See Achiume, *supra* note 1, at 1541–46. Furthermore, the anecdotal evidence and limited studies available suggest that First World citizens are significantly more successful in securing visas to enter the Third World than vice versa, and that whiteness is de facto a privileged migration and mobility status even in places where that is not the case de jure.

139. See Mau et al., *supra* note 92, at 1202.

140. *Id.* at 1203

141. *Id.*

142. *Id.* at 1205.

143. Spijkerboer, *supra*, note 135, at 455.

144. *Id.* at 453, 456–57 (emphasis omitted). The global mobility infrastructure comprises physical developments such as air and seaports and associated transportation vehicles; services such as travel agencies and visa intermediaries; and laws that liberalize international transportation of people. *Id.* at 455. For an overview of the non-entrée regime and scholarship analyzing it, see generally Thomas

control over the global mobility infrastructure itself has become yet another means through which First World nation-states control access to their territories, especially through requiring airlines to adjudicate access to their planes.<sup>145</sup> Airlines are required to prevent embarkation of persons not in possession of visas where required or who may be listed in no-fly databases.<sup>146</sup> Access to the global mobility infrastructure depends greatly on nationality and class as a result of visas whose approval processes establish socioeconomic thresholds in the form of income or property.<sup>147</sup> As Spijkerboer notes, race and gender are also clear determinants of mobility.<sup>148</sup> From access to passport nationality to the visa systems and wider immigration policies of liberal democratic nation-states, First World states embed racial (and gender) privileges in migration and mobility regimes.<sup>149</sup>

## 2. Refugee and Asylum Regimes

International refugee law establishes the most robust carveout of the ability of nation-states to exclude non-nationals in the right of asylum. By doing so, it also creates a regime of international migration—albeit migration that is coerced and motivated specifically by a well-founded fear of persecution based on “race, religion, nationality, membership of a particular social group or political opinion.”<sup>150</sup> The Convention Relating to the Status of Refugees and its Protocol require States

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Gammeltoft-Hansen & Nikolas Feith Tan, *Extraterritorial Migration Control and Deterrence*, in *THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW* 502 (Cathryn Costello et al. eds., 2021) and THOMAS GAMMELTOFT-HANSEN, *ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL* (2011).

145. Spijkerboer, *supra* note 135, at 456; see also GAMMELTOFT-HANSEN, *supra* note 144, at 158–208 (discussing the privatization of migration control, including via airline carrier sanctions).

146. Spijkerboer, *supra* note 135, at 456–57.

147. *Id.* at 457–58.

148. *Id.* at 458.

149. *Id.* at 452–58. For a detailed analysis of how the various skill-based immigration policies of the United States, European Union, United Kingdom, Canada, and Australia contribute to racialized and gendered immigration outcomes, including with regard to access to nationality, see generally Anna Katherine Boucher, *How ‘Skill’ Definition Affects the Diversity of Skilled Immigration Policies*, 46 J. ETHNIC & MIGRATION STUD. 2533 (2020). For an account of past and contemporary denaturalization laws and discrimination in the United Kingdom, see generally Matthew J. Gibney, *Denationalisation and Discrimination*, 46 J. ETHNIC & MIGRATION STUD. 2551 (2020). For examples of Australia’s racially exclusionary border policies, see, for example, Dominic Npoanlari Dagbanja, *The Invisible Border Wall in Australia*, 23 UCLA J. INT’L L. & FOREIGN AFF. 221 (2019). For analysis of racialized immigrant exclusion through visa categories, see generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, LAW & CONTEMP. PROBS., Fall 2009, at 1. For a more global scope, see Achiume, *supra* note 24. There, I identified and reviewed present-day racist and xenophobic ideologies, along with institutionalized laws, policies, and practices, which together have had a racially discriminatory effect on individuals’ and groups’ access to citizenship, nationality, and immigration status. See generally *id.*

150. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137. International human rights law is also a source of important, though qualified, constraints on the right to exclude. See JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* 1–6 (2007); Vincent Chetail, *Moving Towards an Integrated Approach of Refugee Law and Human Rights Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW* 202, 204 (Cathryn Costello et al. eds., 2021) (arguing that international human rights law has “shaped, updated, and enlarged refugee law” to such an extent that the two bodies of law are best understood as offering a “single continuum of protection”).



to grant lawful status to non-nationals in their respective territories who meet the refugee definition and furthermore envision the significant, if not full, incorporation of these refugees, socially, economically, and politically.<sup>151</sup> But the international regime of refugee admission and incorporation is racialized in the sense that race and related categories of ethnicity, national origin, indigeneity, and religion shape access to and the experience of the rights guaranteed by this regime.<sup>152</sup> Asylum doctrine, although formally prohibiting discrimination based on race, is racially exclusive, especially of nonwhite, Third World citizens, both through the scope of the refugee definition and through its application in practice. The international mobility of recognized refugees and of asylum seekers pursuing formal recognition as refugees is effectively constrained on a racial basis, through migration control techniques I describe below. And the granting of refugee status itself, along with enjoyment of the rights and means of incorporation, are shaped by race.<sup>153</sup>

Historically, the Convention restricted the definition of a refugee geographically and temporally to persons fleeing events in Europe before 1951.<sup>154</sup> The combination of these restrictions in effect excluded nonwhite persons from protection through the regime. Although the Protocol to the Convention lifted these restrictions, James Hathaway has explained how the “Eurocentric” definition of a refugee in international law, as well as the international refugee system’s allocation of direct control of refugee status determination, has still resulted in “a two-tiered protection scheme that shields Western states from most Third World asylum seekers.”<sup>155</sup> Recent nationality bans on refugees, such as European and U.S. bans on Syrian refugees,<sup>156</sup> as well as asylum doctrine further tailored to exclude refugees from predominantly nonwhite countries and regions,<sup>157</sup> have

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151. See Convention Relating to the Status of Refugees, *supra* note 150, 189 U.N.T.S. at 164, 166, 170 (establishing requirements related to gainful employment (Chapter III), welfare (Chapter IV), and administrative measures, including naturalization (Chapter V)). These provisions also bind signatories to the Protocol to the Convention according to Article 1(1) of the Protocol. Protocol Relating to the Status of Refugees art. 1(1), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. For analysis of how, under the Convention “all refugees benefit from a number of core rights, [and] additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state,” see JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 154–228 (2005).

152. See generally Achiume, *Race, Refugees, and International Law*, *supra* note 4 (examining the racialized nature of the global refugee regime).

153. For salient examples, see generally Christopher Kyriakides, Dina Taha, Carlo Handy Charles & Rodolfo D. Torres, *Introduction: The Racialized Refugee Regime*, REFUGE, no.1, 2019, at 3 (introducing the special issue of the *Refuge* journal and summarizing its contributions).

154. *Convention and Protocol Relating to the Status of Refugees*, UNHCR 2, <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [<https://perma.cc/C7DG-CKMG>] (last visited Dec. 29, 2021).

155. Hathaway, *supra* note 4, at 144.

156. See, e.g., Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563, 567; Achiume, *Governing Xenophobia*, *supra* note 4, at 381–82.

157. For example, the Trump Administration’s curtailment of asylum for victims of private violence, such as gang violence or domestic violence, was targeted at Central American asylum seekers. In the year after Attorney General Jeff Sessions instituted this policy, “rates of asylum granted to people from El Salvador, Guatemala and Honduras plunged 38 percent.” Katie Benner & Miriam Jordan, *U.S. Ends*

only enhanced the racialized mobility and migration that is the baseline of the global refugee regime. The racialization of borders for refugees and asylum seekers has been compounded by national security discourses that range from the explicit equation of nonwhite migrants and refugees with security threats, especially those from Muslim-majority countries,<sup>158</sup> to more facially neutral-seeming, sovereignty-based logics that nonetheless facilitate racialized exclusion.

A significant literature exists on the securitization of international migration, and several flashpoints related to terrorist attacks in First World countries have reinforced racialized exclusion.

For the many Third World nationals—including refugees—who are unable to overcome the hurdles presented by the Schengen, there are only two options: unauthorized entry and the European Union’s asylum regime—accessed via Europe’s physical frontiers.<sup>159</sup> Apart from racially exclusive doctrine, the international refugee regime has evolved to impose greater immobility on refugees from the Third World through policies designed to make it impossible for these refugees to territorially access the First World.<sup>160</sup> The policies, often referred to as the non-entrée regime, include visa controls, airline carrier sanctions, safe third-country agreements, and other facially race-neutral policies that do the work of

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*Trump Policy Limiting Asylum for Gang and Domestic Violence Survivors*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/06/16/us/politics/asylum-domestic-abuse-gang-violence.html>. These restrictions were later reversed by the Biden Administration. *Id.*

158. A significant literature exists on the securitization of international migration, and several flashpoints related to terrorist attacks in First World countries have reinforced racialized exclusion. For examples from the United States, see Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 611 (2005) (reviewing “evidence indicating that U.S. government targeting of Arabs and Muslims, both aliens and citizens, began long before September 11, 2001,” and examining “the full range of post-9/11 government actions” targeting Arabs and Muslims) and Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1192–96 (2002) (reviewing the United States’ selective immigration enforcement targeting Arab and South Asian Muslims using racial profiling). For an analysis of sovereignty-based national security justifications of migration restrictions among EU countries, see, for example, João Esteve, *Migration Crisis in the EU: Developing a Framework for Analysis of National Security and Defence Strategies*, COMP. MIGRATION STUD. (Oct. 1, 2018), <https://link.springer.com/content/pdf/10.1186/s40878-018-0093-3.pdf> [<https://perma.cc/4KBJ-KRY5>]. For analysis of how emergency as the perceived threat to the nation reinforces racial exclusion through international and European law, see generally Reynolds, *supra* note 4.

159. See, e.g., MORENO-LAX, *supra* note 96, at 115 (“The role of visa requirements in creating risk for protection seekers before they reach the external border [of Schengen] is fundamental, as they render access unsafe and travel only feasible through irregular channels.”). A similar dynamic operates at the borders between the United States and the nations imperially bound to it in the Americas and the Caribbean. See Stephanie Leutert & Caitlyn Yates, *What Are the Legal Pathways for Central Americans to Enter the U.S.?*, LAWFARE (July 17, 2018, 11:00 AM), <https://www.lawfareblog.com/what-are-legal-pathways-central-americans-enter-us> [<https://perma.cc/8NXK-TKDP>] (examining legal options for Central American migrants entering the United States); Matthew Lorenzen, *The Mixed Motives of Unaccompanied Child Migrants from Central America’s Northern Triangle*, 5 J. ON MIGRATION & HUM. SEC. 744, 764 (2017) (finding a prevalence of “mixed-motive” migration that entangles violence with economic need and arguing for a “more flexible policy approach to properly address mixed-motive migration”).

160. See Chimni, *supra* note 4, at 363.

cooperative racialized exclusion.<sup>161</sup> First World nation-states have also perfected migrant and refugee interdiction techniques, which disproportionately target Third World refugees and asylum seekers attempting to access First World shores. They have also pursued third-country agreements relying on countries outside of the First World to prevent refugees and asylum seekers from ever reaching First World land frontiers. These mechanisms for geographically containing nonwhite migrants in the Third World are ever-evolving, as First World states develop new strategies for evading international refugee-protection obligations without technically violating international law.<sup>162</sup>

For European countries, border externalization or the extraterritorial projection of their borders remains central in their arsenal for governing Third World migration including that by refugees.<sup>163</sup> According to the European Border and Coast Guard Agency (Frontex), “there are roughly a dozen non-EU countries through which the vast majority of irregular migrants pass before being detected at the external borders of the EU,” and as a result, bilateral and multilateral agreements with these countries where possible, figure significantly in border control.<sup>164</sup> In 2019, for example, the European Union experienced a decrease in detected illegal border crossings, which it attributed to “determined prevention efforts by Northern African countries.”<sup>165</sup> This externalization imposes European prerogatives on the borders of sovereign Third World countries, resulting in racialized forms of exclusion even from Third World territories to keep Black African migrants and refugees as far away from Europe as possible.<sup>166</sup>

For First World citizens, whether they are motivated to move by economic, political, or humanitarian concerns, permissive visa regimes render much of the First World open to them without the need to resort to asylum regimes. For white

161. For overview of the non-entrée regime and scholarship analyzing it, see generally Gammeltoft-Hansen & Tan, *supra* note 144 and GAMMELTOFT-HANSEN, *supra* note 144. For a more recent exposition of First World exclusion of Third World asylum seekers, see generally DAVID SCOTT FITZGERALD, *REFUGEE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS* (2019).

162. See generally Gammeltoft-Hansen & Hathaway, *supra* note 4 (describing the development of non-entrée policies).

163. See, e.g., FRONTEX, *RISK ANALYSIS FOR 2020*, at 18 (2020), [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2020.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Annual_Risk_Analysis_2020.pdf) [<https://perma.cc/EW8J-MCYJ>] (“[M]ulti- or bilateral agreements [with third countries] can alleviate migratory pressure on select border sections with almost immediate effect.”).

164. *Id.* These countries are Turkey, Ukraine, Belarus, Serbia, Morocco, Albania, Russia, Libya, Bosnia and Herzegovina, Tunisia, Algeria, Moldova, Northern Macedonia, Montenegro, and Senegal. *Id.* at 18–19.

165. *Id.* at 22.

166. Libya is a prime example of the externalization of European borders. Libya has historically served as a nexus of migration through sub-Saharan Africa and into Europe and as a destination for migrants. During and after the Qaddafi regime, a racialized backlash against sub-Saharan African migrants enabled the creation of migration regimes, which sporadically expelled Black migrants from the country and worked to prevent Black migration to Europe. These efforts, triggered by both Libyan imperial histories and the direct interventions of European authorities, were achieved through racially neutral language, but the result was deeply racialized enforcement. In the aftermath of the North Atlantic Treaty Organization intervention, Europe has continued its “racialized regional containment project,” using Libya as a migration buffer. See Achiume & Bâli, *supra* note 4, at 1423, 1428–29.

Third World citizens, *jus sanguinis* regimes similarly open the First World for access. But for many nonwhite Third World citizens, it is the racialized and rapidly shrinking institution of asylum that serves as the only option for First World access.<sup>167</sup> This means that even when First World countries make facially neutral moves to restrict asylum, for example through refugee resettlement and reunification caps, these restrictions are de facto racially exclusive of nonwhite people.

#### B. RACE AS BORDER

My discussion thus far highlights the racialized bordering effect that results from the interplay of nationality-based law and policy with geography and racial demography. But race also operates more directly as territorial border infrastructure. In other words, race forms part of the institutional and physical apparatus determining access to territory, where territory is geographical space that triggers rights in virtue of physical presence in that space. In some respects, to say race is a border is to name a function and meaning of race that is acknowledged and demonstrated through the vast literatures inside and outside legal scholarship on the caste-like properties of race, the ways in which it structurally subordinates groups through their systemically diminished status as human beings.<sup>168</sup> Within U.S. legal scholarship specifically, critical race theorists have articulated the role of law in the operation of race as a means and site of inclusion, exclusion, subordination, and privilege, and much of this work implicitly tracks race as a border.<sup>169</sup> I have highlighted above the racialized bordering of racial proxies in

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167. Note that most Third World migration is within the Third World, and the Third World hosts most refugees, notwithstanding First World complicity in generating some of the biggest and most protracted refugee displacements. See E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, 1 COLUM. HUM. RTS. L. REV. ONLINE 1, 12–13 (2017). Third World citizens seek First World access for myriad reasons ranging from protection from extreme human rights abuses to leisure and vacation travel. For the many who, in popular discourse, are described as “economic migrants”—people who move in search of a better life, especially in relation to economic opportunities—I have argued that they are political agents seeking greater capacity and more equal opportunities for self-determination in the neocolonial metropolises (First World nation-states) that profit from and are complicit in generating Third World economic migration. Achiume, *supra* note 1, at 1567–70.

168. Critical race theorists have long explored this facet of race and law’s role in it, as one of the earliest critical race theory primers illustrates. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995). My aim here is not to conflate race with caste. As a recent debate on the relationship between the two illustrates, this relationship is a complex one. See, e.g., Charisse Burden-Stelly, *Caste Does Not Explain Race*, BOS. REV. (Dec. 14, 2020), <https://bostonreview.net/articles/charisse-burden-stelly-tk/> [<https://perma.cc/D5T2-KQ7W>]; Panashe Chigumadzi, *Who Is Afraid of Race*, BOS. REV. (Mar. 10, 2021), <https://bostonreview.net/articles/panashe-chigumadzi-caste-review-2/> [<https://perma.cc/PP39-RG7C>]. Rather, my point is that race and caste have functional similarities even if they cannot be collapsed into one another. I consider my theorization of race as a border here as introductory and deserving of more nuanced elaboration than is possible within the confines of this Article.

169. Devon Carbado’s work on what he terms “racial naturalization” in the U.S. national context is especially illuminating on race as a mechanism of subordinate political inclusion. Carbado, *supra* note 6, at 637. He elaborates a theory of racial naturalization—the process through which racism naturalizes or produces American subjects, a process structured by law and one that is simultaneously a process of exclusion and inclusion. *Id.* at 637, 651 (stating that “racism [is] itself . . . a technology of

migration governance, and here, I foreground territorial bordering through embodied race, which includes morphology and ancestry.<sup>170</sup> I begin with a historical example before returning to the contemporary.

On July 27, 1919, a Black teenager named Eugene Williams was swimming in Lake Michigan, Chicago—a city that at the time was fraught with racial tension between Black and white people as a result of the Great Migration of African-Americans fleeing the inhumanity of the Jim Crow South.<sup>171</sup> During his swim, Williams inadvertently drifted into a part of the water that was unofficially considered to be a “whites only” part of the lake. Chicago was not formally segregated, but its territory was without a doubt racial—space and rights were informally but effectively demarcated on a racial basis.<sup>172</sup> A white beachgoer outraged by Williams’s act of trespass began throwing rocks at Williams.<sup>173</sup> We might think of this as an act of punishment.<sup>174</sup> But it was also an act of border enforcement. Williams drowned that day. One rumor was that he died from a blow to the head, and another account was that the rock-throwing prevented him from reaching the shore and that this is what ultimately caused his death.<sup>175</sup> The

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naturalization,” and racial naturalization is “a process or experience through which people enter the imagined American community as cognizable racial subjects”); see also Jon E. Fox & Magda Mogilnicka, *Pathological Integration, or, How East Europeans Use Racism to Become British*, 70 BRIT. J. SOCIO. 5, 19 (2019) (“Racism was one tool that East Europeans drew upon to improve the perception, if not the reality, of their integration into the UK.”). Carbadó helpfully distinguishes legal incorporation into the nation as distinct from racial incorporation therein and offers a way of understanding how the two relate. He posits that “[t]o racially belong to America as a nonwhite is to experience racial inequality.” Carbadó, *supra* note 6, at 639. He highlights how race operates as a means of designating or effecting subordinate status within the political hierarchy of the United States. See, e.g., *id.* at 654–55. Carbadó states:

Conceptualizing the color line as an internal border (or a series of borders) provides a way of highlighting the fact that racial identification *is* a form of documentation. How we cross the borders of the color line and where socially we end up are functions of the racial identification we carry.

*Id.* at 653.

170. For more on embodied race and migration, see Alana Lentin, *Race*, in 2 THE SAGE HANDBOOK OF POLITICAL SOCIOLOGY 860, 866 (William Outhwaite & Stephen P. Turner eds., 2018) (“The most unavoidable dimension of race is its attachment to particular bodies. However, . . . these are not arbitrary bodies: the reason Black and non-white (brown) bodies are coded as racially inferior has everything to do with the fact that Black and Brown people were to be found in the territories invaded by Europe from which slaves were also taken. And, as the history of immigration to the ‘West’ reveals, this initial linking of ‘color, hair and bone’ to relative power status endures: Black and Brown migrants continue to be those either locked out of the world’s wealthy countries or occupying positions of relative domination and exploitation within them.” (citation omitted)).

171. Robert Loerzel, *Blood in the Streets*, CHI. MAG. (July 23, 2019, 7:00 AM), <https://www.chicagomag.com/chicago-magazine/august-2019/1919-race-riot/> [<https://perma.cc/U2WT-XVVS>].

172. See *id.*

173. *Id.*

174. Wisseman, *supra* note 73, at 53.

175. Loerzel, *supra* note 171. In the aftermath, several Black witnesses urged a white police officer who was present to arrest the white man responsible for Williams’s death. He refused to do so, and according to one report: “Tensions on the beach escalated and a skirmish ensued when the officer arrested a black man instead.” Claire Barrett, *The Chicago Race Riot of 1919: How the Death of Eugene Williams Shook America*, HISTORYNET (June 2, 2020), <https://www.historynet.com/the-chicago-race->

death of Eugene Williams makes vivid the ways in which race operates as spatial and indeed territorial border infrastructure. Even in the absence of any external physical barrier, and in the absence of any individualized assessment of who he was and what rights he might have had in Lake Michigan—his Blackness—the specific social, political, and legal construction inscribed in the color of his skin operated as a border.<sup>176</sup> His Blackness marked him as a presumptive territorial interloper and operationalized his personal exclusion, which in this case, was achieved through a fatal stoning.

In the contemporary migration context, the embodied race of migrants—the color of their skin, the texture of their hair, and so on—still functions as infrastructure for their territorial exclusion from and subordinate inclusion within the First World. Put differently, setting aside the subordinate status of Third World nationality, nonwhiteness as a neocolonial racial category has territorial bordering properties that are evinced by racial profiling as a cornerstone in immigration enforcement including in the enforcement of First World borders. My examples below are drawn from Europe, but the United States might just as easily be the focus.<sup>177</sup>

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riot-of-1919-how-the-death-of-eugene-williams-shook-america.htm [https://perma.cc/REG7-F97K]. This event triggered six days of protest and racial violence, sometimes referred to as the Chicago Race Riot of 1919—the biggest massacre of Black people by white supremacists across the United States during the Red Summer. *See id.*; Loerzel, *supra* note 171.

176. Ian Haney López has helpfully defined race as “the historically contingent social systems of meaning that attach to elements of morphology and ancestry,” a system that operates along physical, social, and material dimensions. LÓPEZ, *supra* note 20. López stated:

First, race turns on physical features and lines of descent, not because features or lineage themselves are a function of racial variation, but because society has invested these with racial meanings. Second, because the meanings given to certain features and ancestries denote race, it is the social processes of ascribing racialized meanings to faces and forbearers that lie at the heart of racial fabrication. Third, these meaning-systems, while originally only ideas, gain force as they are reproduced in the material conditions of society. The distribution of wealth and poverty turns in part on the actions of social and legal actors who have accepted ideas of race, with the resulting material conditions becoming part of and reinforcement for the contingent meanings understood as race.

*Id.*

177. For example, Devon Carbado notes that immigration raids “within the [United States’] interior . . . suggest that the color line operates both as a fixed checkpoint (at the physical borders of the United States) and as a roving patrol (within the interior).” Carbado, *supra* note 6, at 654. As I discuss in more detail in the text that follows, racial profiling in immigration enforcement is an especially vivid illustration of embodied race as territorial border infrastructure. *See infra* notes 178–91 and accompanying text. U.S. race and immigration scholars have produced a literature spotlighting this example of race as a border, and how U.S. courts have repeatedly upheld the use of race and ethnicity as a means of criminal and immigration law enforcement. For examples of such scholarship, see generally Ashar, *supra* note 158; Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882 (2015); Kristin Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 567 (2008); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v.*

Even though possession of a Schengen visa in principle confers permission to travel within the entire region, researchers note that “skin colour” is among the most powerful border control triggers within Schengen.<sup>178</sup> A rare study of racial profiling in immigration enforcement from within the European Union—focusing on the Dutch agency responsible for intra-Schengen border enforcement within the Netherlands<sup>179</sup>—helps illuminate the concept of race as territorial border infrastructure. In the context of highway stops in the Netherlands, studies have found that among the leading heuristics deployed by immigration enforcement officials to identify potential irregular immigrants is whether, in the officials’ eyes, the individuals driving by “look[ed] Dutch.”<sup>180</sup> Officials in one study equated looking Dutch with whiteness, on the basis that although the Netherlands is a racially and ethnically diverse country,<sup>181</sup> it is predominantly white.<sup>182</sup> This conflation of Dutchness and whiteness is noteworthy given that the nation-state that currently comprises the Kingdom of the Netherlands includes three Caribbean national territories—Aruba, Curaçao, and Sint Maartin—that are predominantly nonwhite.<sup>183</sup> Officers in the study were cognizant of possible allegations of discrimination and racial or ethnic profiling but perceived it as a necessary evil because, as they told the author of the study, “how else would you recognise an irregular immigrant?”<sup>184</sup> As the author of the study notes, appearance—race specifically—functions as a proxy for nationality among immigration officials, and it does so even though the data collected by these enforcement agencies shows that the greatest proportion of drivers stopped were actually Dutch: “[W]hile these individuals were Dutch, most did not fit the officers’ description of a Dutch person, that is, they were not white.”<sup>185</sup>

I mention this study because it offers a granular view of how race as a structure of exclusion operates as a territorial border that attaches to individual bodies,

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United States and the Need for Truly Rebellious Lawyering, 98 GEO. L.J. 1005 (2010); and McKanders, *supra* note 87.

178. Bigo & Guild, *supra* note 96, at 240.

179. Tim (T.J.M.) Dekkers, *Selection in Border Areas: Profiling Immigrants or Crimmigrants?*, 58 HOW. J. CRIME & JUST. 25, 29–30 (2019) (describing the study).

180. *Id.* at 35.

181. Almost a quarter of the Dutch population is “people who were born abroad or who were born in the Netherlands and have at least one parent who was born abroad.” Achime, *supra* note 24, ¶ 6.

182. Dekkers, *supra* note 179, at 35. In a different study on Dutch immigration enforcement, the authors note that “almost all [immigration enforcement] officers we met were white males and perceived non-whiteness as an important indicator of foreignness. In practice this meant that during our observations primarily black or Arab-looking people were stopped.” Jelmer Brouwer, Maartje van der Woude & Joanne van der Leun, *(Cr)immigrant Framing in Border Areas: Decision-Making Processes of Dutch Border Police Officers*, 28 POLICING & SOC’Y 448, 452 (2018).

183. The Kingdom comprises the following countries: the Netherlands, Aruba, Curaçao, and Sint Maarten. The Netherlands, in addition to its European municipalities, also includes three special municipalities in the Caribbean—Bonaire, Sint Eustatius, and Saba. *See One Kingdom—Four Countries*, KINGDOM NETH., <https://www.netherlandsandyou.nl/about-the-kingdom/one-kingdom-four-countries> [<https://perma.cc/KC47-DYYK>] (last visited Dec. 30, 2021).

184. Dekkers, *supra* note 179, at 37.

185. *Id.* at 35. Dekkers notes that “[o]fficers used national stereotypes based on skin colour, facial features, or race, to identify ‘high-risk nationalities’ to combat the crimes associated with those nationalities.” *Id.* at 37.

even in places that self-conceptualize as post-racial liberal bastions.<sup>186</sup> The words of a different Dutch immigration enforcement officer make the point succinctly: “When people ask if we select on the basis of skin colour, then we have to readily admit that. Somebody’s skin colour is for us the first sign of possible illegality.”<sup>187</sup>

Morocco is part of the frontline of the European Union’s extraterritorialized border, and Frontex boasts that in 2019 “Morocco detected more than [27,000] irregular migrants.”<sup>188</sup> How are irregular migrants detected? In practice, European pressure precipitates detection methods and bordering practices that rely heavily on embodied race to “border” effectively. I had the experience of traveling across Morocco from the south of the country to the north on an official United Nations (U.N.) mission and witnessed a vivid manifestation of the bordering function performed by an individual’s embodiment of race.<sup>189</sup> In the south of the country, Black African migrants and refugees had relative freedom of movement. As I traveled north and approached Europe, there were progressively fewer Black Africans in public spaces. Tangiers, the city closest to Europe, exemplified this dynamic, where even Black lawful permanent residents felt unsafe in public. I soon learned of the intensive immigration enforcement operation in place that

186. In a U.N. report on racial equality in the Kingdom of the Netherlands, I describe a Dutch paradox. The Netherlands has a strong formalized commitment to equality, nondiscrimination, and tolerance, and it identifies itself as a racially inclusive nation. At the same time, Dutch political discourse contains deeply entrenched notions of racialized citizenship that excise people of African and Asian descent from national belonging. In other words, the Dutch paradox is that “insistence that equality and tolerance already exist operates as a barrier to achieving this equality and tolerance in fact, because the insistence makes it difficult to mobilize the resources and action necessary to ensure equality, non-discrimination and inclusion for all.” *End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the Kingdom of the Netherlands, The Hague (7 October 2019)*, UHCHR, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25100&LangID=E> [<https://perma.cc/WAB9-SJZ7>]. Gloria Wekker provides a powerful exposition of Dutch colonial amnesia and postcolonial legacies of race in the Kingdom that is crucial for understanding contemporary racial discrimination and injustice there. See generally GLORIA WEKKER, *WHITE INNOCENCE: PARADOXES OF COLONIALISM AND RACE* (2016).

187. Brouwer et al., *supra* note 182, at 453. In the United States, the intersection of anti-Black racial criminalization and immigration enforcement reinforces the bordering properties of race. Karla McKanders describes how when Black immigrants enter the United States, it is their Blackness that functions as their primary identifier, subjecting them to racialized policing practices that mean that “immigrants of African descent are more likely to be detained and deported than other immigrants,” including Latinx immigrants, according to studies based on Department of Homeland Security statistics. McKanders, *supra* note 87, at 1145. On the urgency and complexity of multiracial immigrants rights advocacy, see generally Kevin R. Johnson, *The Case for African American and Latino/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341 (2003).

188. FRONTEx, *supra* note 163, at 21.

189. I conducted this visit in my capacity as U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. For a summary of my findings, including in relation to racial discrimination in border enforcement, see generally *End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the Kingdom of Morocco*, OHCHR (Dec. 21, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24043&LangID=E> [<https://perma.cc/Y9ST-ARUK>].



relied on racial profiling as its means of identifying (and in many cases *determining*) migrants who were unlawfully present and presumed to be journeying to Europe.<sup>190</sup>

Documented and undocumented Black Africans alike were subject to interior immigration enforcement actions that sometimes involved their forceable transportation to the southern border of the country—hundreds of kilometers from their homes in the north. Testimonies of migrants subject to this treatment made plain how their race, and their Blackness specifically—the meaning of the color of their skin, texture of their hair, and so on—marked them as interlopers in spaces and territories designated as white or for white benefit. And in some cases, even legal documentation could not override the presumption of illegality encoded in their Blackness.<sup>191</sup> Among the priorities of Frontex is combatting illegal migration, and as the agency itself concedes, any picture of the extent of illegal migration in the European Union at any given time is the product of both the actual numbers of unlawfully present persons and the amount and nature of the resources deployed to detect these persons.<sup>192</sup> Race emerges as an illegality detection and production mechanism, as border infrastructure relied upon to presumptively exclude, subordinate, and immobilize through nonwhiteness, while presumptively including and facilitating the mobility through whiteness.

Across the European Union, nonwhiteness, which includes religious racialization of Muslims or people perceived as Muslim, is conflated with presumed illegality or outsider status.<sup>193</sup> Garner notes that “people often visually identify

190. As I noted in my official report on this visit, whereas Morocco has been able to impressively steer clear of measures such as routine or prolonged immigration detention, pressure from the European Union has intensified border racialization. *Id.*

191. Another example is racialized migration governance in Libya centrally implicating the European Union. See Achiume & Bâli, *supra* note 4, at 1428–29.

192. See FRONTEX, *supra* note 163, at 13, 20 (providing the example that “[b]etween 1 January and 30 November 2019, Turkey reportedly prevented roughly 84[,000] seaborne, and over 41[,000] landborne departures of migrants towards the EU”).

193. Discrimination on the basis of Muslim identity or perceived Muslim identity is increasingly understood as a form of racism. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1278 (2004) (“[T]he ‘Muslim-looking’ construct is neither religion- nor conduct-based.”); Stephanie E. Berry, *Bringing Muslim Minorities Within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?*, 11 HUM. RTS. L. REV. 423, 443, 446 (2011) (pointing out the “clear connection” between religion and ethnic identity vis-à-vis discrimination against Muslims in Europe); Emmanuel Mauleón, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1332 (2018) (exploring how the intersectional experiences of Black Muslims illustrate “the inherent racialization of religion, and the antiblack origins of American Islamophobia”); Steve Garner & Saher Selod, *The Racialization of Muslims: Empirical Studies of Islamophobia*, 41 CRITICAL SOCIO. 9, 17 (2015) (“[R]egardless of physical appearance, country of origin and economic situation, Muslims are homogenized and degraded by Islamophobic discourse and practices in their everyday lives. In a set of social interactions, they are ‘interpellated’, to use Althusser’s term, solely as Muslims. This interpellation relates dress to visible physical markers, transforming their bodies into racialized Others: Muslims.” (citation omitted)). See generally Saher Selod & David G. Embrick, *Racialization and Muslims: Situating the Muslim Experience in Race Scholarship*, 7 SOCIO. COMPASS 644 (2013) (tracing the racialization of Arabs and of Muslims more broadly). In 2018, the All-Party Parliamentary Group on British Muslims defined Islamophobia as “rooted in racism” and “a type of racism that targets

people of color as ‘asylum-seekers’ or ‘illegal immigrants,’” resulting in even EU citizens who are nonwhite being conflated with outsiders.<sup>194</sup> For nonwhite EU citizens, the operation of race as a border—a means of enforcement of political and even territorial exclusion (or subordinate inclusion)—is especially vivid. They are disproportionately targeted in immigration enforcement through racial profiling<sup>195</sup> and subject to the racialized presumption of illegality and outsider status that is fed by the restricted pathways for legal migration of nonwhite people, and “the constant deployment of symbolic actions [in the European Union that] generates its own ideological and material ‘autonomy.’”<sup>196</sup> In the United Kingdom, where private individuals have gradually been deputized by law as immigration enforcers,<sup>197</sup> these private individuals—at risk of legal penalties—also deploy race as a border. For example, in England, landlords are required to deny rentals to noncitizens not in possession of proof of legal immigration status, and failure to do so can result in a civil penalty<sup>198</sup> and perhaps imprisonment of the landlord.<sup>199</sup> A study found that twenty-seven percent of landlords surveyed reported being reluctant to providing accommodation to people with “foreign accents or names” and that right to rent checks were not being undertaken uniformly but were instead “directed at individuals who appear ‘foreign’.”<sup>200</sup> This sort of racial bordering would affect nonwhite British citizens and noncitizens alike.

Embodied whiteness, by way of contrast, functions as a mechanism of presumptive inclusion rather than exclusion and as a mechanism of mobility facilitation on

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expressions of Muslimness or perceived Muslimness.” ALL PARTY PARLIAMENTARY GRP. ON BRIT. MUSLIMS, ISLAMOPHOBIA DEFINED: THE INQUIRY INTO A WORKING DEFINITION OF ISLAMOPHOBIA 11 (2018), <https://static1.squarespace.com/static/599c3d2febbd1a90cffdd8a9/t/5bfd1ea3352f531a6170ceee/1543315109493/Islamophobia+Defined.pdf> [<https://perma.cc/44BU-QJ88>].

194. Garner, *supra* note 125, at 69.

195. *See id.* at 69–70, 76.

196. *Id.* at 76.

197. *See* E. Tendayi Achiume (Special Rapporteur), *Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on Her Visit to the United Kingdom of Great Britain and Northern Ireland*, ¶ 53, U.N. Doc. A/HRC/41/54/Add.2, annex (May 27, 2019).

198. HOME OFF., RIGHT TO RENT: LANDLORDS’ PENALTIES 6–7 (2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/934469/right-to-rent-landlords-v7.0-gov-uk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934469/right-to-rent-landlords-v7.0-gov-uk.pdf) [<https://perma.cc/3V7W-MA56>].

199. *Right to Rent Resources*, NAT’L RESIDENTIAL LANDLORDS ASS’N, <https://www.nrla.org.uk/resources/pre-tenancy/right-to-rent> [<https://perma.cc/HX9L-WEMJ>] (last updated Aug. 26, 2021).

200. SAIRA GRANT & CHARLOTTE PEEL, JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS, “NO PASSPORT EQUALS NO HOME”: AN INDEPENDENT EVALUATION OF THE ‘RIGHT TO RENT’ SCHEME 11 (2015), [https://jcw.org.uk/sites/default/files/documets/No%20Passport%20Equals%20No%20Home%20Right%20to%20Rent%20Independent%20Evaluation\\_0.pdf](https://jcw.org.uk/sites/default/files/documets/No%20Passport%20Equals%20No%20Home%20Right%20to%20Rent%20Independent%20Evaluation_0.pdf) [<https://perma.cc/8FYG-E5VK>].

the international stage.<sup>201</sup> For white people not in possession of immigration authorization, their whiteness can override their “illegality.”<sup>202</sup> The Dutch racial profiling examples above, although highlighting nonwhiteness as a mechanism of territorial bordering, also implicitly reveal whiteness as embodied presumptive territorial access. The privileges of whiteness are by no means absolute—it is not an impenetrable shield from exclusion or exploitation. Indeed, the meaning of whiteness is not itself uncontested within Europe, and where economic exploitation is structurally facilitated through immigration regimes either by conferring illegality that results in precarious labor conditions or through exploitative visa categories, it has a blurring effect on who counts as white. Nationalities and individuals subject to the structural economic exploitation through immigration law are racially produced as nonwhite or at least as questionably white in Europe, even if they are unquestionably European.<sup>203</sup> That said, there can be no doubt that

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201. Max Andrucki, for example, contends that “we cannot speak of ‘whiteness’ without reference to the actual bodies of white people and how, in particular, those bodies are shaped through spatial practice.” Max J. Andrucki, *The Visa Whiteness Machine: Transnational Motility in Post-Apartheid South Africa*, 10 *ETHNICITIES* 358, 360 (2010). He describes whiteness as “an embodied and material accomplishment” and argues that a characteristic of embodied whiteness today is the “capacity to move across borders,” which “is linked both to earlier histories of movement and the current globalizing era.” *Id.*

202. For example, in her study, Elzbieta Gozdziaik notes: “Europeans constitute a considerable number of undocumented migrants seeking better life and opportunities in the United States.” Elzbieta M. Gozdziaik, *Illegal Europeans: Transient Between Two Societies*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 254, 254 (David W. Haines & Karen E. Rosenblum eds., 1999). She notes that the figure was approximately 234,300 at that time, with the most represented nationalities being Polish and Irish. *Id.* She explains the exploitation and precarity these migrants experience as a result of their undocumented status, but she notes that “inconspicuousness enables undocumented Europeans to carry on reasonably satisfactorily” and clarifies that this inconspicuousness is a product of their whiteness. *Id.* at 254, 261. Contrast the experiences of white undocumented migrants to that of Black and Latinx migrants in the United States whose race magnifies their likelihood of deportation. See McKanders, *supra* note 87, at 1145.

203. See Angéla Kóczé, *Race, Migration and Neoliberalism: Distorted Notions of Romani Migration in European Public Discourses*, 24 *SOC. IDENTITIES* 459, 470 (2018) (linking anti-Roma migration policies to neoliberal structures, particularly neoliberal capitalism, which reify the “binary between the ideal neoliberal citizen and those abject ‘non-citizens’ who inhabit the illegalized ‘nomad camp’” with particular emphasis on how Romani migrants are racialized as inherently threatening to white citizens); Nira Yuval-Davis, Georgie Wemyss & Kathryn Cassidy, *Introduction to the Special Issue: Racialized Bordering Discourses on European Roma*, 40 *ETHNIC & RACIAL STUD.* 1047, 1047–49, 1051–54 (2017) (illustrating how both macro-level political processes and micro-level discursive practices operated as “borderings,” which reified Roma people’s status as racially distinct “Others”); Jon E. Fox, Laura Moroşanu & Eszter Szilassy, *The Racialization of the New European Migration to the UK*, 46 *SOCIO.* 680, 691 (2012) (comparing the discursive racialization of Romanians and Hungarians in the United Kingdom and concluding that the more stringent immigration restrictions on Romanians facilitated their racialization and their alienation from whiteness to an extent unexperienced by Hungarian migrants); Anikó Imre, *Whiteness in Post-Socialist Eastern Europe: The Time of the Gypsies, the End of Race*, in *POSTCOLONIAL WHITENESS: A CRITICAL READER ON RACE AND EMPIRE* 79, 80 (Alfred J. López ed., 2005) (arguing first that discourses of colonization, race, and whiteness are ingrained in East European societies, despite their purported distance from colonialism, and second that the racialization of Roma through cultural stereotypes is one mechanism whereby racism and imperialism has influenced the fabric of East European nations).

whiteness is a presumptively superior status to nonwhiteness where most, even if not all, international migration and mobility is concerned.

Through the persisting salience of bloodline in calibrating the borders between the First and the Third World through visa regimes, we see a different facet of race as territorial border infrastructure. Again, the United Kingdom is vividly illustrative. U.K. visa restrictions do not affect all African nationals equally. Africans of European ancestry, who are at this stage almost entirely de facto white, can use their bloodlines to circumvent restrictions that apply to their Black conationals. For example, a 2010 study mapped the visa regimes that “facilitate access of white South Africans to the UK and Europe.”<sup>204</sup> The author of this study identified a number of visa categories available to South Africans based on the historical colonial relationship between South Africa and the United Kingdom.<sup>205</sup> One example is the U.K. Ancestry Visa that is available to South Africans with a grandparent, and in some cases a great-grandparent, born in the United Kingdom, which grants the bearer five years of work authorization with a pathway to citizenship.<sup>206</sup> Further, under this visa, British nationality is available to South Africans with at least one British parent.<sup>207</sup> The U.K. Ancestry Visa remains restricted to Commonwealth citizens who can prove that one of their grandparents was born in the United Kingdom, the Channel Islands, or the Isle of Man.<sup>208</sup> Africa’s formerly settled British colonies including South Africa, Zimbabwe, and Kenya all have citizens with grandparents and great-grandparents born in the United Kingdom, and almost all of these qualifying citizens are likely to be white.<sup>209</sup> This means, in effect, that the benefit of the Ancestral Visa is allocated on a racial basis. The justification of this differential access to the United Kingdom can be divorced neither from empire (past and present) nor from the meaning of race as a structure of imperial privilege, as I expand upon in Part III.

### C. RACIAL BORDER DOCTRINE IN INTERNATIONAL LAW

From the rejection of the racial equality clause from the treaty of the League of Nations to the present day, international law has granted states capacious discretion to engage in racialized national exclusion and migration and mobility control. Historically, the evolution of sovereignty doctrine toward a more absolutist conception of the right to exclude non-nationals was driven by racist colonial ambitions, as canvassed in Part I. Today, sovereignty-based justifications remain

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204. Andrucki, *supra* note 201, at 359 (“I draw on interview data to argue that whiteness can be understood as a material racial formation through its contingent co-constitution, at a variety of scales, with mobilities both past and present, or what I call the ‘visa whiteness machine.’”).

205. *Id.* at 363.

206. *Id.*

207. *Id.* at 363–64. Andrucki estimates that this category applies to about 600,000 South Africans. *Id.*

208. *UK Ancestry Visa*, GOV.UK, <https://www.gov.uk/ancestry-visa> [<https://perma.cc/8SQS-MQTD>] (last visited Dec. 31, 2021).

209. See EL-ENANY, *supra* note 4, at 4. (“In 1971 a person born in Britain was most likely (98%) to be white.”).

legal shields that enable racial conduct and policy<sup>210</sup> that would, in many jurisdictions, amount to prohibited discrimination if the conduct or policy were not laundered through the categories of nationality.<sup>211</sup> The provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) make this plain.<sup>212</sup>

ICERD offers the most comprehensive antiracial discrimination framework at the international level. It defines prohibited racial discrimination broadly to include:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>213</sup>

But subsequent provisions narrow this definition in two important respects. First, ICERD does not apply to “distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and non-citizens.”<sup>214</sup> Second, nothing in ICERD “may be interpreted as affecting in any way the legal provisions of

210. See, e.g., LESTER, *supra* note 43, at 15, 19 (“[K]ey international human rights instruments have, with Australia’s insistence, integrated many of the same legitimising assumptions that are embodied in the idea of ‘absolute sovereignty[.]’ [which came out of the white Australia policy].”).

211. Although the concepts of nationality and citizenship are often used interchangeably, the two are technically distinct (if overlapping) under international law. Although the difference between the two is now “vanishingly small,” nationality refers to the link tying an individual to a state for international purposes, and citizenship is a concept oriented inwardly, defined by national or municipal law and denoting the rights of political membership. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 695 n.6 (2011). Traditionally, international law has typically reserved the regulation of nationality and citizenship to the domestic jurisdiction of states, and although international law has increasingly placed some constraints on this regulation, the extent to which it prohibits racial discrimination, let alone racial injustice, in the conferral and withdrawal of citizenship and nationality remains heavily contested. For a review of international regulation of nationality and citizenship historically and the shifts in public international legal doctrine toward a nascent international law of citizenship, see generally *id.* On the application of international law to racial discrimination in nationality laws, and on the scope of Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), see generally Foster & Baker, *supra* note 4. There is a fair amount of consensus that international law prohibits arbitrary deprivation of nationality, where arbitrary deprivation includes deprivation on the basis race or ethnicity. *Id.* at 100–02; see also INST. ON STATELESSNESS & INCLUSION, *supra* note 91, at 156 (emphasizing that the “[a]rbitrary deprivation of nationality is prohibited in international law”). But although the right to a nationality is characterized in legal scholarship as an ascendant international norm, international doctrine and the regional human rights doctrine prohibiting racial discrimination has preserved wide latitude for racialized exclusion from and through nationality (and citizenship) status. See Spiro, *supra*, at 694–95; Foster & Baker, *supra* note 4, at 99.

212. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

213. *Id.* at art. 1(1), 660 U.N.T.S. at 216 (emphasis added). Article 5 also requires states to prohibit and eliminate racial discrimination in enjoyment of the right to nationality, “without distinction as to race, colour, or national or ethnic origin.” *Id.* at art. 5, 660 U.N.T.S. at 220.

214. *Id.* at art. 1(2), 660 U.N.T.S. at 216. The Committee on the Elimination of Racial Discrimination (CERD) has articulated firm constraints on the citizenship carveout, CERD General Recommendation

States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.<sup>215</sup> The citizenship and nationality carveouts to the otherwise robust prohibition on racial discrimination were advanced by First and Third World countries but for different reasons.<sup>216</sup> For First World countries, for example the United Kingdom, France, and Italy, concerns included retaining special means of naturalization for former nationals and their descendants.<sup>217</sup> Such exceptions would be especially valuable for preserving the means of naturalizing returning colonial and colonizing migrants and their descendants alongside restrictions for formerly colonized persons with advancing decolonization. Third World states feared restrictions that would prevent them from undoing the dominance of nationals of former colonial powers in their territories.<sup>218</sup> First World nation-states sought to use sovereignty to preserve the racially segregated colonial order on their own terms, and Third World nation-states sought to use sovereignty to undo colonial relations in their newly independent states.<sup>219</sup>

By reserving the regulation of nationality primarily to the domestic jurisdiction of nation-states and maintaining ambiguities in the extent to which states' racialized exclusion of non-nationals is prohibited, states have crafted international law to serve as a permissive doctrinal baseline for national legal schemes of racialized exclusion of non-nationals. Within domestic liberal-democratic legal frameworks, nationality within immigration regimes remains a mostly bulletproof

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30, but these constraints remain controversial among states. *See* Comm. on the Elimination of Racial Discrimination, Off. of the High Comm'r for Hum. Rts., CERD General Recommendation XXX on Discrimination Against Non-Citizens (Oct. 1, 2002), <https://www.refworld.org/docid/45139e084.html> [<https://perma.cc/KNU6-TY5H>]. Elsewhere, I have argued for a narrow interpretation of the citizenship carveout, but my point here is that ICERD nonetheless forms a part of the canon of liberal sheltering of racial injustice through border and migration regimes. *See* Achiume, *Governing Xenophobia*, *supra* note 4, at 357 & n.81; E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. J. INT'L L. 323, 327–28, 354 n.141 (2014).

215. ICERD, *supra* note 212, at art. 1(3), 660 U.N.T.S. at 216. Foster and Baker use the peremptory norm of racial discrimination to support a narrow reading of Article 1(3). *See* Foster & Baker, *supra* note 4, at 140.

216. Notwithstanding this alignment, the drafting history of ICERD Articles 1(2) and 1(3) is fairly convoluted and reveals a diversity of perspectives on whether and how to address nationality, citizenship, and national origin in the treaty. And although a number of First and Third World states supported the citizenship and nationality carveouts, others did not. In fact, a mixture of First and Third World states also variously opposed and supported inclusion of national origin in Article 1(1). The relevant debates occurred first in the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/SR.406–07, 410–12, 414, 425, 427; then in the Commission on Human Rights, E/CN.4/874, E/CN.4/SR.784–86, E/CN.4/SR.802–05, 807–10; and finally in the U.N. Third Committee of the General Assembly, A/C.3/SR.1299, 1301, 1304–07. *See* Memorandum from Rob Viano to E. Tendayi Achiume, Alicia Miñana Chair in Law, UCLA Sch. of L. (July 6, 2021) (on file with author) (listing the sources to the U.N. documents).

217. *See* Foster & Baker, *supra* note 4, at 111–12.

218. *See id.* at 111.

219. For an illuminating analysis of the *travaux préparatoire* of ICERD Article 1(3), *see id.* at 107–14.

mechanism for racialized exclusion and differentiation.<sup>220</sup> The U.K. Equality Act, for example, prohibits direct and indirect discrimination based on race, which it defines broadly to include color, nationality, ethnic, or national origin.<sup>221</sup> Indirect discrimination includes a provision, criterion, or practice that “puts, or would put, persons with whom [a person] shares [a protected characteristic] at a particular disadvantage when compared with persons with whom [they do] not share it.”<sup>222</sup> On its face, such a provision would seem to offer a starting point for legally challenging immigration and naturalization regimes that via nationality or national origin result in racialized exclusion. But the Equality Act includes a clause that shields race discrimination on the bases of nationality, ethnic, or national origin when the conduct or provision is pursuant to the U.K.’s immigration acts.<sup>223</sup>

The Race Equality Directive—which applies to “all persons, as regards both the public and the private sectors” within the European Union—prohibits direct and indirect discrimination based on racial or ethnic origin.<sup>224</sup> But the Directive also explicitly states:

[It] does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country [non-EU] nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.<sup>225</sup>

Notably, nationality discrimination is prohibited in relation to EU Member States’ nationals,<sup>226</sup> but this prohibition does not extend to treatment of non-EU nationals.<sup>227</sup>

220. For references to immigration scholarship that has mapped this dynamic in the laws of the United States, see *supra* note 87. The pioneering work of scholars such as Kevin R. Johnson makes it difficult to deny that immigration law, policy, and enforcement in the United States are both fundamentally racialized and deeply insulated from legal challenges. Other scholars have highlighted the insidious effects of “immigration exceptionalism” or “border exceptionalism” and have noted that official law, policy, and conduct governing immigrants have been insulated from fundamental liberal constitutional protections, including equality, on sovereignty grounds. See, e.g., Kerry Abrams, *Essay, Plenary Power Preemption*, 99 VA. L. REV. 601, 615, 640 (2013); Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 129 (2010); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3–4 (1998); Kevin R. Johnson, *Keynote to Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws*, 48 SW. L. REV. 463, 465 (2019).

221. Equality Act 2010, c. 15, §§ 4, 9(1), 13, 19 (UK).

222. *Id.* § 19(2)(b).

223. See *id.* § 17, sch. 3.

224. Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, arts. 2(1), 3(1), 2000 O.J. (L 180) 24 (EC).

225. *Id.* art. 3(2).

226. See Consolidated Version of the Treaty on the Functioning of the European Union art. 18, Oct. 26, 2012, 2012 O.J. (C 326) 56 (EU).

227. See, e.g., Joined Cases C-22/08 & C-23/08, *Vatsouras v. Arbeitsgemeinschaft (ARGE) Nürnberg* 900, 2009 E.C.R. I-4609, I-4627.

The European Court of Human Rights case, *Abdulaziz v. United Kingdom*, offers a striking example of the excessive tolerance of the European human rights system for nationality and national origin discrimination, even when the underlying racialized and colonial motivations of immigration law and policy are part of the judicial record and the racialized and colonial outcomes of the law are similarly uncontested.<sup>228</sup> The *Abdulaziz* judgment combined the cases of three women who challenged British immigration law that imposed greater restrictions on non-patrial women seeking to have their foreign-national husbands migrate to the United Kingdom than it did on patrials and nonpatrial men seeking to have their foreign-national wives migrate to the United Kingdom.<sup>229</sup> The complainants alleged that this differential treatment between, on the one hand, nonpatrial women and, on the other hand, patrial women and nonpatrial men constituted racial and sex discrimination respectively.<sup>230</sup> The U.K. government justified its differential treatment on the basis that it sought to protect the domestic labor market from competition from nonpatrial men.<sup>231</sup>

The court ruled that the restrictions constituted sex discrimination because “the advancement of the equality of the sexes is . . . a major goal in the member States of the Council of Europe,” and the government had failed to provide sufficiently compelling reasons for the differentiation between sexes.<sup>232</sup> But it reached a different conclusion with respect to race discrimination. A minority of the commission that adjudicated the case prior to the court’s determination highlighted that the legislative history of the respective immigration provisions showed that they had been intended to “lower the number of coloured immigrants” by imposing restrictions that targeted the predominantly nonwhite, “New Commonwealth.”<sup>233</sup> But notwithstanding this legislative history and that the British government’s ostensible efforts to protect the domestic labor market favored persons of white racial or ethnic origin (patrials) over nonwhite people (non-patrials), the court found no race discrimination.<sup>234</sup> It did so on the grounds that it regarded the exceptions that benefitted patrials “as being exceptions designed for the benefit of persons having *close links* with the United Kingdom.”<sup>235</sup>

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228. *Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81 (May 28, 1985), <http://hudoc.echr.coe.int/eng?i=001-57416> [<https://perma.cc/R7Z8-WVBT>]. For a discussion of the nationality-based discrimination case law of the European Court of Human Rights, see generally de Vries & Spijkerboer, *supra* note 4. On the low success rate of international human rights and European human rights nondiscrimination claims involving migration control, see generally Colm Ó Cinnéide, *Why Challenging Discrimination at Borders Is Challenging (and Often Futile)*, 115 *AJIL UNBOUND* 362 (2021).

229. See *Abdulaziz*, App. Nos. 9214/80, 9473/81 & 9474/81, ¶¶ 1, 10, 14. Recall that the “patrial” category was established under the Immigration Act 1971 and comprised citizens of the British Islands by birth or those who were children or grandchildren of such citizens, a category that as mentioned above was predominantly white. *Id.* ¶ 14.

230. See *id.* ¶ 10.

231. See *id.* ¶ 75.

232. *Id.* ¶¶ 78–79, 83.

233. *Id.* ¶ 84.

234. *Id.* ¶ 85.

235. *Id.* (emphasis added).



Implicit in the court's reasoning is that the blood ties of ancestry are legally legitimate and worthy of protection, irrespective of their racial motives or effects. Also implicit here is that colonial or imperial links not underwritten by blood ties (those of nonpatrials) do not meet the threshold required for legal protection.<sup>236</sup> Mrs. Abdulaziz, for example, was subject to British empire her entire life: she was of Indian origin but born in Malawi in 1948 (when it was a part of the British colonial empire); and she moved to the United Kingdom in 1977, where she was lawfully admitted and granted residence as nonpatrial, British Commonwealth citizen.<sup>237</sup> Colonial British subjection, however, was deemed an insufficiently "close link," just as, for that matter, racial equality was implicitly deemed by the court as not qualifying a "major goal" of the Council of Europe in the way that sex equality was.<sup>238</sup>

As Spijkerboer notes, those denied access to the global mobility infrastructure have no means of holding excluding states accountable for their exclusion, such as through visa denials, and related consequences, including as a result of the limited reach of jurisdiction in applicable international human rights and refugee doctrine.<sup>239</sup> For example, European human rights law seems not to apply to the those subject to the EU–Turkey deal,<sup>240</sup> through which Europe ensures that Syrian refugee access to Europe is severely restricted, even at the cost of Syrian lives. As a more general matter, access to the global mobility infrastructure comes with international legal and other protections that are simply not available to those denied access. Legal international mobility and migration—which are accessible on a differential basis including based on race—grant access to qualitatively stronger substantive legal and procedural protections within the First World<sup>241</sup> than the protections available to those who are foreclosed from the

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236. In her analysis of European Court of Justice jurisprudence that challenged the patrial category under the Immigration Act 1971, Nadine El-Enany similarly highlights that "the court accepted partiality, that is, a connection to whiteness, as being the legitimate basis for belonging in Britain, and by implication, in the [European Economic Community]." EL-ENANY, *supra* note 4, at 196. El-Enany correctly identifies European courts as complicit in legitimizing the colonially appropriative effects of immigration and nationality laws. *See id.*

237. *Abdulaziz*, App. Nos. 9214/80, 9473/81 & 9474/81, ¶ 39. Nonpatrial Commonwealth citizens required special leave to enter and reside in the United Kingdom, whereas patrial Commonwealth citizens were free from immigration controls because, according to the court citing the underlying legislation, "[t]he status of 'patrial' was intended to designate Commonwealth citizens who 'belonged' to the United Kingdom." *Id.* ¶ 14.

238. Note that following the *Biao v. Denmark* decision, in which the European Court of Human Rights found a Danish family reunification policy to be prohibited indirect racial discrimination, at least one scholar has speculated that this case raises the possibility for a different jurisprudential trajectory that would tackle certain forms of structural racial discrimination in European immigration regimes. *See Biao v. Denmark*, App. No. 38590/10 (May 24, 2016), <http://hudoc.echr.coe.int/eng?i=001-163115> [<https://perma.cc/6YWB-KZ4M>]; Mathias Möschel, *The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain*, 80 MOD. L. REV. 121, 131 (2017).

239. *See Spijkerboer*, *supra* note 135, at 464–65. *See generally* GAMMELTOFT-HANSEN, *supra* note 144.

240. *See Spijkerboer*, *supra* note 135, at 465.

241. *See id.* at 465–66.

global mobility infrastructure but are nonetheless subject to the military, political, and economic coercive power of the First World.

Cumulatively, then, the liberal bunkers for racial discrimination within border and migration regimes seem to suggest racialized exclusion and subordinate inclusion are at best tolerable and at worst necessary features of First World borders and the broader liberal international order. The various international and regional antiracial discrimination legal instruments, with their citizenship and nationality carveouts, might essentially be seen as liberal confessions that racial discrimination and racial subordination in empire will reside in borders with minimal interference.<sup>242</sup>

### III. NEOCOLONIAL RACIAL BORDER INJUSTICE

Part II mapped the racially disparate allocation of migration and mobility, including through legal and policy regimes widely presumed to be race-neutral. In this Part, my aim is to provide an account of the nature of the injustice perpetrated by what I have termed the contemporary system of racial borders. Few will disagree that contemporary mobility and migration regimes produce racially differentiated outcomes in effect, but as the legal analysis above reflects, the official liberal legal position broadly accommodates racial borders. Furthermore, although the explicit ethnonationalist border policies of right-wing regimes typically garner broad condemnation, visa policies and other more mundane features of the contemporary system of racial borders are defended as legitimate and even existential entitlements of sovereign nation-states.<sup>243</sup>

A common means of describing and justifying the geographic patterns of exclusion that characterize visa regimes such as the Schengen regime is that the exclusion is economic rather than racial, where economic and racial divisions are treated as independent and severable. On this view, visa restrictions are about wealthy countries' legitimate interests in protecting their national wealth by excluding citizens of poorer nations, and any racial patterning that may result from this logic of exclusion is incidental and maybe even unfortunate but

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242. Thanks are due to Karin de Vries, who shared this astute observation during a workshop on race, migration, and international law.

243. I would argue that the predominant liberal view, for example, of the Schengen regime as race-neutral is captured in an article by Maarten den Heijer. See Maarten den Heijer, *Visas and Non-Discrimination*, 20 EUR. J. MIGRATION & L. 470, 474 (2018) (arguing that "the EU's current rules and decision-making on issuing or lifting a visa obligation for a particular group of nationals displays neither direct nor indirect signs of discrimination"). Den Heijer primarily focuses on how the subsequent amendments to the "white" and "black" lists have proceeded according to "a system of review that is based on non-discriminatory benchmarks and objective data and statistics," though he concedes that the opaque initial creation of the visa list could have been based on impermissible discrimination. *Id.* at 480, 488. Under his view, den Heijer asserts that visa decisions are properly made based on "geopolitical and economic self-interest" and concludes that, although racial or religious discriminatory effect is impermissible, "[t]hat does not mean, however, that immigration policy may not be organised on the basis of nationality." *Id.* at 486, 488.

ultimately justifiable.<sup>244</sup> A positivist and even liberal international legal account of the borders of European countries within the European Union and African countries within the African Union, for example, is that each regional bloc comprises equally independent nation-states, each with unilateral control over its borders and migration policy, control anchored in the sovereign right to collective self-determination accorded to all nation-states equally. This right to exclude includes the right to exclude for reasons to do with economic protection or other legitimate facets of protecting the rights of collective self-determination held by all nation-states.<sup>245</sup>

But liberal accounts such as these are ethically and politically misleading, even if they correctly articulate extant international sovereignty doctrine. They belie that EU countries (and the First World) remain “neocolonially” bound to African countries (and the Third World more broadly) in ways that mean that the structural racialized exclusion of the contemporary system of racial borders produces unethical racialized political inequality. The contemporary system of racial borders also facilitates racialized economic exploitation and political subordination, and thus, remains a cornerstone of maintaining neocolonial interconnection. That is, borders not only perpetuate political inequality on a racial basis but are also essential technology for preserving racialized neocolonial interconnection, which benefits the First World at the expense of the Third. And finally, racial borders are also the site of unremedied historic injustice that warrants corrective justice intervention.

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244. I focus on economic self-preservation justifications for maintaining mobility and migration regimes that are racial in effect, because I view these as currently enjoying greater legitimacy than arguments that posit cultural preservation arguments. Concerns that Third World migrants are “overwhelming the system” and collapsing the capacities of First World nations to adhere to the economic dimensions of their social contracts with their own citizens have greater liberal traction than arguments that Third World migrants are existential cultural pollutants of some kind. This is not to say that cultural preservation arguments are neither salient nor powerful, and in Europe, for example, they continue to justify some of the most outrageous forms of racial governance and exclusion, especially of Muslims. *See, e.g.*, E. Tendayi Achiume, Balakrishnan Rajagopal & Fernand de Varennes (Special Rapporteurs), Mandates of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context; and the Special Rapporteur on Minority Issues, at 1–2, 4 U.N. Doc. UA DNK 3/2020 (Oct. 16, 2020) (drawing attention to the Danish government’s “[g]hetto [p]ackage” laws, which target neighborhoods with predominantly “non-Western” residents with discriminatory measures such as enhanced criminal penalties). As Etienne Balibar has noted, for example, contemporary First World racism has centered on immigration, becoming a “racism without races” in which the “dominant theme is not biological heredity but the insurmountability of cultural differences, a racism which, at first sight, does not postulate the superiority of certain groups or peoples in relation to others but ‘only’ the harmfulness of abolishing frontiers, the incompatibility of life-styles and traditions.” Etienne Balibar, *Is There a ‘Neo-Racism’?*, in *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 17, 21 (Chris Turner trans., Verso Books 1991) (1988).

245. *See* Achiume, *supra* note 1, at 1524.

## A. RACIALIZED POLITICAL INEQUALITY

In *Migration as Decolonization*, I argue that contemporary national borders are neocolonial borders, a critique I targeted especially at the borders of First World nation-states.<sup>246</sup> I briefly recapitulate the core of that argument and its basis here<sup>247</sup> because my account of the nature of injustice perpetrated by the contemporary system of racial borders builds upon my earlier critique of borders in that article. The ethical legitimacy of the primarily unilateral right of nation-states to exclude non-nationals is to a great extent premised on the right to collective self-determination, and this right is most powerfully held by nation-states, which international law declares to be formally independent and equal. Third World Approaches to International Law scholars and other critical scholars have long maintained that formal decolonization, where it occurred, failed to lay the foundation for the genuine political and economic autonomy that is necessary for effective sovereignty. The result is that the contemporary “postcolonial” order is in fact one characterized by neocolonial empire. Neocolonial empire keeps former colonies as a group (the Third World) politically and economically bound to former colonial powers (the First World) in ways that generate cosovereign bonds among Third and First World persons. In other words, the demos of neocolonial empire are Third *and* First World persons, and democratic legitimacy considerations require that all members of this demos have an equal right to a say in the governance of their shared vehicle(s) of collective self-determination.<sup>248</sup> In neocolonial empires, these vehicles are mainly First World nation-states, and as a matter of ethics then, First World nation-states have no right to unilaterally exclude Third World citizens from their political or territorial borders. This account renders the extant border and migration regimes of First World nation-states sites of neocolonial injustice because they enforce the political inequality of empire.

A fundamental claim of *Migration as Decolonization* is thus the political inequality of First World nation-state borders. The contemporary system of racial borders renders this political inequality a racialized injustice, which is to say, one that is experienced on a racial basis. Consider, for example, the racialized political inequality achieved through passport privilege as a function of citizenship. Citizenship acquisition in the vast majority of nation-states is primarily transmitted at birth either through parentage (*jus sanguinis*) or one’s territorial location at time of birth (*jus soli*).<sup>249</sup> Intervening in global justice debates, Ayelet Shachar has focused attention on the birthright citizenship as a legal and political institution that functions as “a state-sponsored apparatus for handing down from generation to generation the invaluable security and opportunity that attach to [national]

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246. See *id.* at 1547–66. For a scathing neocolonial critique of Third World national borders in Africa specifically, see generally Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113 (1995).

247. For a more detailed version of this argument, see Achiume, *supra* note 1, at 1547–73.

248. For an elaboration of and support for this argument, see *id.*

249. AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 4 (2009).

membership . . . . It also allows members of well-off polities an enclave in which to preserve their accumulated wealth and power through time.”<sup>250</sup> Citizenship is a property regime that determines access to resources, benefits, decisionmaking processes, and other things for property rights bearers (or citizens).<sup>251</sup> Shachar notes that across much of the world, nation-states rely “on birthright transmission of entitlement in the assignment of the valuable good of *political membership*” such that “citizenship laws assigning political membership by birthright play a crucial role in the distribution of basic social conditions and life opportunities on a global scale.”<sup>252</sup> Shachar’s motivating concern is the moral arbitrariness of the basis on which the vast majority of the global population (ninety-seven percent) acquires political membership or citizenship—the leading mechanism of inter-generational national wealth transfer—which is by circumstances of birth.<sup>253</sup>

Consider also that “more than two thirds of total inequality is due to [or determined by] location,” which is in turn heavily determined by citizenship<sup>254</sup> as well as the immigration possibilities it entails. As noted by Branko Milanovic, “the remarkable thing is that a very large chunk of our income will be determined by only one variable, which generally we acquire at birth: citizenship.”<sup>255</sup> Milanovic further notes, as Shachar does, that citizenship is a mechanism through which rich countries transmit accumulated wealth from one generation to another.<sup>256</sup> Whereas most countries place restrictions in the form of various redistributive taxes on the intergenerational family-wealth transfers of their own citizens, the transmission of collectively acquired wealth of nations is transmitted intergenerationally among citizens to the exclusion of noncitizens with no similar restrictions or redistributive considerations.<sup>257</sup>

Shachar’s concern is a valid one. I supplement it with another, which is the colonial and neocolonial racial inequality and injustice that arises from birthright transmission of entitlement to political membership and the access to accumulated national wealth that comes along with it. Alongside its global effects as a “distributor, or denier, of security and opportunity,”<sup>258</sup> First World citizenship is a racialized distributor of the benefits of collective self-determination and

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250. *Id.* at 2. Shachar calls attention to “the crucial role played by existing legal regimes for allocating entitlement to political membership (according to birthright) in restricting access to well off polities and sustaining the privilege of inherited entitlement.” *Id.* at 3; *see also id.* at 10 (elaborating the global distributive justice dimensions of citizenship).

251. *See id.* at 7.

252. *Id.* at 3.

253. *Id.* at 11.

254. Branko Milanovic, *Global Income Inequality in Numbers: In History and Now*, 4 *GLOB. POL’Y* 198, 204 (2013) (“[M]ore than 50 per cent of one’s income depends on the average income of the country where a person lives or was born (the two things being the same for 97 per cent of world population).”). Milanovic further notes that as a result, migration functions as a significant income boosting strategy. *Id.* at 207.

255. *Id.* at 205.

256. *Id.* at 207.

257. *See id.*

258. SHACHAR, *supra* note 249, at 5.

neocolonial advantage within neocolonial empire.<sup>259</sup> Through the prevalence of racial border institutions such as *jus sanguinis* parentage citizenship, the citizenship of First World nation-states is, in effect, predominantly white property.<sup>260</sup> Describing First World citizenship as white property fuses the insights of Shachar (citizenship as property)<sup>261</sup> with those of Cheryl Harris (whiteness as property)<sup>262</sup> to call attention to the embeddedness of white property interests in the most fundamental regime of rights allocation in liberal political order—the nation-state. If, indeed, First World citizenship is predominantly white property, migration governance regimes that allocate mobility and incorporation privileges based on First World passport nationality play a significant role in maintaining and protecting the racialized transmission of First World national wealth. As I highlight below, such wealth is both colonially and “neocolonially” constituted.

Although there are arguably more cosmopolitan arguments for why *de facto* racialized national exclusion is unethical on account of the inherent dignity of all human beings, here I advance a relational account of justice based principally on liberal democratic communitarian principles that supply the ethical scaffolding for contemporary sovereignty doctrine. Racial borders, irrespective of whether they are underwritten with racist intent, subject politically equal and interconnected persons—Third World and First World citizens—to different structures, treatment, and possibilities for self-determination on a racial basis. And persisting neocolonial interconnection means that the contemporary system of racial borders is as unjust in many of the same ways that rendered Jim Crow in the American South, apartheid in South Africa, and other colonial regimes of racial segregation unjust.

It is not enough only to surface the racial nature of the political injustice of neocolonial borders. Rather, the contemporary system of racial borders manifests the crucial role of migration governance in facilitating racial governance. Borders remain central to racial exploitation and more broadly to the hierarchical ordering of bodies and territories for purposes of imperial exploitation.<sup>263</sup> Critical scholars

259. See Achiume, *supra* note 1, at 1530–31, 1554–57.

260. I use the qualifying term “predominantly” because there are other mechanisms of citizenship acquisition that do not directly rely on parentage for access and because there are nontrivial numbers of First World citizens who are not white.

261. See SHACHAR, *supra* note 249, at 8 (“As a collectively generated good that creates a complex set of legal entitlements and obligations among various social actors, citizenship offers an excellent example of more contemporary interpretations of property as a web of social and political relations imbued with obligations to promote the public good and not just to satisfy individual preferences.”).

262. In her seminal article, Cheryl Harris explains how “Whiteness — the right to white identity as embraced by the law — is property if by property one means all of a person’s legal rights.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1726 (1993). She further explains that “[w]hen the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.” *Id.* at 1731.

263. See Achiume & Bâli, *supra* note 4, at 1397 (“[R]acial governance refers to the different ways that race creates a means of ordering bodies and territories on a hierarchy according to which imperial exploitation can occur.”). According to Justin Desautels-Stein, the right to exclude individuals is the

have instructively theorized race as imperial technology—a mechanism for extracting value from bodies and regions on unjust and often fatal terms.<sup>264</sup>

In Part I, I outlined the ways in which migration governance was central to racial governance, and the intensity of racialized migration and mobility exclusion and control varied according to the labor and natural resource extraction needs of these colonial hegemony alongside the racial identities in which these imperial nation-states and settler colonies were invested. Border institutions and migration and mobility governance regimes continue to provide legally insulated and widely accepted cover for racialized exploitation of Third World peoples and persons for the benefit of First World nation-states, their corporations, and their citizens.<sup>265</sup>

Charles Mills theorizes racial privilege as a form of political domination<sup>266</sup> and racism as a political system—“a particular power structure of formal or informal rule, socioeconomic privilege, and norms for the differential distribution of material wealth and opportunities, benefits and burdens, rights and duties.”<sup>267</sup> Furthermore, Mills argues that conceptually, “racism (or . . . global white supremacy) is *itself* a political system.”<sup>268</sup> The logic of this system is “the differential privileging of . . . whites as a group with respect to . . . nonwhites as a group, the exploitation of their bodies, land, and resources, and the denial of equal socioeconomic opportunities to them.”<sup>269</sup> Crucially, Mills articulates white supremacy as an analytically distinctive *global* project—a racial project that operates within and through empire and based on other social categories apart from race<sup>270</sup>—but

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modern site of international law’s racial ideology, through which relations of domination are justified using race-neutral means. Desautels-Stein, *supra* note 4.

264. Chantal Thomas, for example, offers an account of race as a technology of global economic governance. See generally Thomas, *Race as a Technology*, *supra* note 133. Thomas also provides a useful literature review of scholarship establishing “that racial differentiation [has] constituted a crucially important mechanism for accumulating profit and for structuring global networks of production, for example by justifying practices of forced labor and by pressing populations and territories into service in the production of cheap raw materials and of markets.” *Id.* at 1874.

265. For an analysis and literature review of scholarship on racialized colonial and neocolonial extraction and exploitation, including through borders, see Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 J.L. & POL. ECON. 109, 112–15 (2020). For an account of border imperialism that includes the ways in which “[m]igrant workers provide liberal capitalist interests with cheapened labor without altering the racial order through permanent immigration,” see HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 133 (2021). Further, immigration restrictions are the most significant legal determinant of what has come to be termed “modern-day slavery.” Thomas, *Immigration Controls*, *supra* note 133, at 214, 218. As Justin Desautels-Stein argues, “the right to exclude . . . sustain[s] racial hierarchy right up to the present.” Desautels-Stein, *supra* note 4, at 1561.

266. CHARLES W. MILLS, THE RACIAL CONTRACT 1–2 (1997).

267. *Id.* at 3.

268. *Id.* at 3; see also *id.* at 7 (arguing that “white supremacy can illuminatingly be theorized as based on a ‘contract’ between whites, a Racial Contract”).

269. *Id.* at 11.

270. *Id.* at 19–21 (arguing that “colonization of the Americas, 1492 to the 1830s, and the occupation of Asia, Africa, and the Pacific, 1730s to the period after World War II” should be seen as distinct and interdependent histories during which an us-versus-them opposition plays out through “multiple overlapping dimensions: Europeans versus non-Europeans (geography), civilized versus wild/savage/

one that requires independent analysis in part based on the explanatory power of race. For Mills, global white supremacy is a contemporary “transnational white polity, a virtual community of people linked by their citizenship in Europe at home and abroad (Europe proper, the colonial greater Europe, and the ‘fragments’ of Euro-America, Euro-Australia, etc.), and constituted in opposition to their indigenous subjects.”<sup>271</sup>

Mills’s theorization of white supremacy as an explanatory and normative theory, although absent from international legal scholarship on migration governance, offers an essential perspective for understanding and assessing contemporary migration and border governance dynamics. Mills theorizes white supremacy as a system that, irrespective of “the ill will/good will, racist/antiracist feelings of particular individuals,” continues to achieve a “globally color-coded distribution of wealth and poverty.”<sup>272</sup> First World borders remain pivotal white supremacist institutions, in the structural and political meaning that Charles Mills attributes to white supremacy. They are central to sustaining the globally color-coded distribution to which Mills refers.

#### B. UNREMEDIED HISTORIC RACIAL INJUSTICE

The racialized political inequality argument above emphasizes ongoing political interconnection and subordination. A related injustice of the contemporary system of racial borders is that it perpetuates a historic injustice rooted in the constitutive debt that First World nation-states owe Third World persons—a debt that is racial in nature and that is sustained in part by migration and mobility controls. By constitutive debt, I mean that the culture, politics, and economic wealth of First World nations were consolidated or built to a significant extent based on colonial extraction.<sup>273</sup> This colonial extraction relied significantly on

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barbarians (culture), Christians versus heathens (religion). But they all eventually coalesced into the basic opposition of white versus nonwhite”); *see also id.* at 21–31 (supporting this analysis).

271. *Id.* at 29.

272. *Id.* at 36. The systems operate transnationally, but also *intranationally*. *See id.* at 37. And as Mills emphasizes, the claim is not that “all whites are better off than all nonwhites, but that, as a statistical generalization, the objective life chances of whites are significantly better.” *Id.*

273. For more on the constitutive debt owed to Africans, see generally RODNEY, *supra* note 5 (arguing that Africa developed Europe while Europe exploited and underdeveloped Africa); JOSEPH E. INIKORI, *AFRICANS AND THE INDUSTRIAL REVOLUTION IN ENGLAND: A STUDY IN INTERNATIONAL TRADE AND ECONOMIC DEVELOPMENT* 362–404 (2002) (tracing how the provision of raw materials from Africa and by African laborers in the Americas facilitated England’s industrial growth); John H. Morrow Jr., *Black Africans in World War II: The Soldiers’ Stories*, 632 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13 (2010) (noting the extensive contribution of African colonial subjects to European military campaigns during World War II); Pascal Blanchard, Sandrine Lemaire, Nicolas Bancel & Dominic Thomas, *Introduction: The Creation of a Colonial Culture in France, from the Colonial Era to the “Memory Wars.”* in *COLONIAL CULTURE IN FRANCE SINCE THE REVOLUTION* 1 (Pascal Blanchard et al. eds., 2014) (surveying the development of French colonial culture, with particular focus on how French colonialism in Africa shaped French identity, daily life, politics, and discourse); Matthew G. Stanard, “*Made in Congo?*”: *On the Question of Colonial Culture in Belgium*, 88 REVUE BELGE DE PHILOLOGIE ET D’HISTOIRE 1301, 1301–02 (2010) (surveying literature regarding colonialism in Congo and its influence on Belgian culture); and Peo Hansen & Stefan Jonsson, *Another Colonialism: Africa in the History of European Integration*, 27 J. HIST. SOCIO. 442, 454 (2014) (arguing that “most of the visions, movements



racialization, which is to say that constructing the Third World as nonwhite was essential to its underdevelopment, and constructing the First World as white was key to securing its development.<sup>274</sup> When pressed on the basis for using race as a proxy for nationality in immigration enforcement, a Dutch immigration enforcement official explained:

Look, we did not invent the visa requirement for Africa. That by chance it is black people that come from there is not our fault, that is what we have to control, if there had been living only white people that had visa requirements we would have been checking white people.<sup>275</sup>

But I argue here that so-called poorer nations, including the African nations that Europe and other parts of the First World seek to exclude, are not coincidentally nonwhite. Their racialization as nonwhite was central to their colonial impoverishment and remains central to their neocolonial impoverishment. Although countries on the Schengen Black lists are low-income countries, with many experiencing political instability, their low-income status and politically instability causally implicate many of the core Schengen countries and the United Kingdom.<sup>276</sup> Furthermore, such low-income status and political instability was achieved through their racialization as nonwhite.<sup>277</sup>

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and concrete institutional arrangements working toward European integration in the postwar period placed Africa's incorporation into the European enterprise as a central objective").

274. Using the work of Franz Fanon, for example, Robert Knox explains the connection between race and class under colonialism, which recalls the discussion of race as structure above: "[I]n the colonial context', race served a role in structuring the distribution of the political and economic benefits of imperialist exploitation. It was by virtue of their race that white settlers gained access to the material benefits of colonial capitalism." Robert Knox, *Valuing Race? Stretched Marxism and the Logic of Imperialism*, 4 LONDON REV. INT'L L. 81, 104 (2016) (footnote omitted); see also Gurminder K. Bhambra, *Brexit, Trump, and 'Methodological Whiteness': On the Misrecognition of Race and Class*, 68 BRIT. J. SOCIO. S214, S277 (2017) ("Class is not the operation of a race-neutral economic system, but part of an economic system which is deeply racialized. . . . The problem, for the most part, rests in an association of class with structural inequality embedded in the economic system and race as merely pointing to social divisions. As such, class is presumed to be more significant than race and to provide a universal category for inclusive action, in contrast to a supposedly divisive focus on race. However, this analysis fails to acknowledge the ways in which race has been fundamental to the configuration of the modern world and is integral to the very configuration of socio-economic inequalities in the present.").

275. Brouwer et al., *supra* note 182, at 453.

276. See Anghie, *supra* note 5, at 748–49; Daron Acemoglu & James A. Robinson, *The Economic Impact of Colonialism*, in 1 THE LONG ECONOMIC AND POLITICAL SHADOW OF HISTORY 81 (Stelios Michalopoulos & Elias Papaioannou eds., 2017); Mutua, *supra* note 246, at 1126–34. See generally RODNEY, *supra* note 5.

277. See Quijano, *supra* note 23, at 534–35; Mutua, *supra* note 246, at 1127–30; Thomas, *Race as a Technology*, *supra* note 133, at 1863 ("The process has remained an ongoing one, as generations of scholars have sought to articulate a global paradigm of race relations at once starkly visible—one need only look at the plain correlation between skin pigmentation and economic inequality both within and across societies—and at the same time endlessly protean, internally contradictory, and everchanging in its particular manifestations."); Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIA. L. REV. 1219, 1219–20 (1999) ("Traces of racialized discursive structures and institutional practices forged in the context of Europe's colonial encounter remain visible in post-colonial terrains, where many a public policy and legal regime are animated by racialized categories and classifications.").

Decolonization included no meaningful reparations for colonial exploitation and brutality (in addition to failing to fully sever the channels of Third World exploitation that defined colonialism).<sup>278</sup> Instead, decolonization included racialized First World border closures, as the neocolonial evolution of Britain's borders illustrates.<sup>279</sup> Prior to 1962, British subjects were free from British immigration control irrespective of where in the British Empire they were born.<sup>280</sup> This policy was partly sustained by a Commonwealth ideology according to which all British subjects were formally equal irrespective of race, and this doctrine of solidarity held for as long as free movement to metropolitan Britain was from its "old" or "white" dominions (Australia, New Zealand, and Canada).<sup>281</sup> With the changing racial composition of Commonwealth migrants came racialized border closure.<sup>282</sup> After World War II, migration from the Third to the First World increased in part due to labor shortages. Britain addressed its labor shortages with immigrant labor from Poland, European Volunteer Workers, and the "new" Commonwealth territories in the Caribbean, Indian subcontinent, and Africa.<sup>283</sup> New Commonwealth migration to metropolitan Britain outpaced the rest and precipitated much debate and controversy regarding who ought to be considered a citizen and what rights and privileges this citizenship would entail.<sup>284</sup> The result was a series of laws that "placed strict limitations on non-white, non-European immigration from the new Commonwealth (former colonies other than Australia, New Zealand, and Canada)."<sup>285</sup>

This "rising tide" of "colored" immigration produced anti-immigrant rhetoric in Britain (that is pervasive again today) regarding the socioeconomic strain that limited restrictions on immigration would impose on the nation.<sup>286</sup> This rhetoric bolstered the adoption of the Commonwealth Immigrants Act 1962,<sup>287</sup> which limited immigration by Commonwealth passport holders to skilled individuals or those tied to specific employers who had secured approval for their employment and, for the first time, made Commonwealth citizens deportable.<sup>288</sup> Parliamentary

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278. See Achiume, *supra* note 1, at 1543–44. See generally SIBA N'ZATIOLA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996) (describing the failure of international law to adequately ensure African self-determination during decolonization).

279. Nadine El-Enany's recent book incisively details this racialized evolution. See generally EL-ENANY, *supra* note 4.

280. Roxanne Lynn Doty, *Sovereignty and the Nation: Constructing the Boundaries of National Identity*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 121, 131 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

281. *Id.*

282. See *id.* at 131–33. See generally RANDALL HANSEN, CITIZENSHIP AND IMMIGRATION IN POST-WAR BRITAIN: THE INSTITUTIONAL ORIGINS OF A MULTICULTURAL NATION (2000) (arguing that Britain's postwar migration policy was racist in effect).

283. Doty, *supra* note 280, at 130.

284. *Id.* at 130–31.

285. *Id.* at 131.

286. See *id.* See generally HANSEN, *supra* note 282.

287. Commonwealth Immigrants Act 1962, 10 & 11 Eliz. 2 c. 21 (UK).

288. Doty, *supra* note 280, at 131–32.

opposition maintained that the Act was evidently, though not explicitly, racist.<sup>289</sup> One Labor Party member described the Act as “bare-faced, open race discrimination” and noted that “the net effect of the Bill [was] that a negligible number of white people [would] be kept out and almost all those kept out by the Bill [would] be coloured people.”<sup>290</sup> It is worth highlighting that at this historical juncture, the blanket imposition of visa restrictions targeted at specific nationalities was understood and named for what it actually was—a means of racialized exclusion through a facially neutral category (nationality) that disparately affected non-white people, even if it applied in principle to white people as well. Furthermore, the imposition of visa restrictions with employment-related exemptions was also understood as an expression of racialized anxiety, not as an expression of race-neutral, economic, or class anxiety.<sup>291</sup>

Initially, the 1962 Act did not affect the United Kingdom and its colonies (as it did former colonies forming part of the Commonwealth). But, this too changed with the emerging concern that Asians in Kenya holding British passports would flee to Britain in large numbers.<sup>292</sup> This concern led to the Commonwealth Immigrants Act 1968,<sup>293</sup> which stripped British passport holders in East Africa “of the automatic right to enter and settle in Britain unless they had a connection to Britain by birth, naturalization, or descent.”<sup>294</sup> The Immigration Act 1971<sup>295</sup> imposed further restrictions on Commonwealth migration along mostly racial lines. The 1971 Act ended the distinction between “alien[s]” and Commonwealth citizens created by earlier legislation.<sup>296</sup> Additionally, the 1971 Act imposed further restrictions on Commonwealth citizens but permitted the entry of people in a category termed “patrials”—those whose parents or grandparents were born in the United Kingdom.<sup>297</sup> Patrials were eligible for U.K. passports, could vote, run for office, and were entitled to the same benefits to the European Community (an EU predecessor) as U.K. nationals.<sup>298</sup> Crucially, “[t]he vast majority who fell within [the partial] category were white.”<sup>299</sup> The 1971 Act introduced geographic and nationality-based exclusion that principally kept out nonwhite people from

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289. *See id.* at 137–39 (explaining that right-wing anti-immigrant discourse fixated on three aspects of immigration: the perceived overwhelming scale of an immigrant influx, immigrants as a public health risk, and immigrants as a wellspring of criminality).

290. Doty, *supra* note 280, at 132.

291. *Id.* (“[T]he coded language was recognized by the opposition Labour Party. ‘To use the words we hear so often, ‘the social strains and stresses,’ in simpler and rather cruder language, that phrase really means colour prejudice.’”).

292. *See, e.g., 1968: More Kenyan Asians Flee to Britain*, BBC, [http://news.bbc.co.uk/onthisday/hi/dates/stories/february/4/newsid\\_2738000/2738629.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/february/4/newsid_2738000/2738629.stm) [<https://perma.cc/D9SD-GPZ2>] (last visited Jan. 1, 2022).

293. Commonwealth Immigrants Act 1968, c. 9 (UK).

294. Doty, *supra* note 280, at 132.

295. Immigration Act 1971, c. 77 (UK).

296. Doty, *supra* note 280, at 132–33.

297. HANSEN, *supra* note 282, at 33.

298. Doty, *supra* note 280, at 133.

299. *Id.*

Britain's former colonial empire and also instituted a descent exception<sup>300</sup>—an overwhelmingly racialized escape valve that secured the rights and privileges of mobility and migration to persons of British ancestry, a predominantly white ancestry. Thus, notwithstanding the history of free and assisted British colonial emigration described above where metropolitan Britain and its white settler colonies reaped the full benefit of Third World subordination, “[t]oday, the UK operates one of the strictest migration policies in the Western world.”<sup>301</sup> These strict restrictions on migration were formalized beginning in the 1970s,<sup>302</sup> and similar shifts had already occurred across other Western European states.<sup>303</sup>

In light of this history, Nadine El-Enany aptly argues that Britain's borders “articulated and policed via immigration laws, maintain the global racial order established by colonialism, whereby colonised peoples are dispossessed of land and resources.”<sup>304</sup> El-Enany conceptualizes the immigration reforms that have racially bordered Britain as “act[s] of appropriation, a final seizure of the wealth and infrastructure secured through centuries of colonial conquest.”<sup>305</sup> When El-Enany characterizes British citizenship, immigration, and asylum law as structures that maintain a racially and colonially ordered Britain, structures that operationalize racialized access to imperial spoils, I read El-Enany as offering a compelling and concrete case study of the operation of neocolonial racial borders and highlighting the historic injustice they implement. Although El-Enany focuses on the United Kingdom, others have argued the case for permissive

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300. *See id.* at 132–33.

301. HANSEN, *supra* note 282, at 20.

302. *Id.* at 23.

303. *Id.* at 27. Randall Hansen has argued that restriction of Commonwealth migration to Britain did not occur sooner in part due to an institutionalized commitment within the British government to an indivisible British subjecthood. But this notion of indivisible subjecthood only lasted as long as Commonwealth migrants were predominantly European. As non-European Commonwealth migration to Britain matched and then surpassed European Commonwealth migration to the same, indivisible subjecthood became untenable, and Third World immigration restrictions tightened. *Id.* at 29.

304. EL-ENANY, *supra* note 4, at 3; *see id.* at 5 (“It is through immigration law’s policing of access to colonial spoils that the racial project of capitalist accumulation is maintained, a project which I argue is legitimised through judicial rulings in immigration and asylum cases.”). El-Enany powerfully highlights how immigration laws maintain colonialism’s global racial order according to which racialized (nonwhite) populations “are disproportionately deprived of access to resources, healthcare, safety and opportunity,” through the racialized exclusions from national benefits effected through immigration and rights restrictions associated with noncitizen status. *Id.* at 4–5, 13.

305. *Id.* at 5. El-Enany centers Britain’s status as an imperial nation-state, whose wealth and the making of its “modern state infrastructure, including its welfare state, was dependent on resources acquired through colonial conquest” and on profits from the enslavements of Africans. *Id.* at 1–2. Britain as the nation-state exists today, then, should be thought of as the spoils of empire, and it is against this backdrop that its immigration laws and policies (including visa policies and the like), form “part of an attempt to control access to the spoils of empire which are located in Britain.” *Id.* at 2. Highlighting the postcolonial British immigration reforms described above through which Britain privileged whiteness in its national incorporation and mobility (immigration) governance frameworks, El-Enany notes the role of borders in maintaining racialized access to imperial spoils, or what I have described as the benefits of neocolonial empire. El-Enany’s book also outlines how “European colonial powers came together in the post-war era to create a protectionist bloc to ensure that the spoils of European colonialism remained the domain of white Europeans.” *Id.* at 175; *see id.* at 175–218.

migration policies as reparations for the imperial debt owed by the United States to the Central American countries and have highlighted the role of race both in U.S. imperial exploitation and bordering practices.<sup>306</sup>

In sum, the historical record surfaces an unremedied historical injustice that contemporary borders sustain and that ought to be engaged with within the framework of reparative or corrective justice that genuine decolonization entails.<sup>307</sup> As Sherally Munshi insightfully observes:

National boundaries would provide a spatial solution to the problem that decolonization might have unleashed upon the new world order—the free movement of peoples from the colonial peripheries to the metropolitan centers. That is, as empires began to crumble into nation-states, as imperial hierarchies began to dissolve into the supposed equality among independent nation-states, the emerging international system of nation-states would play a critical role in preserving the distributional legacies of European imperialism. . . . [N]ational independence—defined as the right to self-rule in one’s territory—was hardly compensation for the *material* crimes of imperialism—generally the transfer of wealth from the colonies to Europe. Insofar as the abstract equality among sovereign nations consisted in the mutual rights of territorial exclusion, the emerging international system of nation-states would continue to preserve the inequalities of the imperial era.<sup>308</sup>

#### CONCLUSION

[I]t is crucial that we recognize that the hegemony of one experience of travel can make it impossible to articulate another experience or for it to be heard. From certain standpoints, to travel is to encounter the terrorizing force of white supremacy. To tell my “travel” stories, I must name the movement from racially segregated southern community, from rural black Baptist origin, to

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306. Joseph Nevins has made the case for migration as reparations with respect to the “imperial debt” owed by the United States to Honduras, for example, and highlights the deep and unjust interconnection that binds the two countries in a relationship that is functionally neocolonial. Joseph Nevins, *Migration as Reparations*, in *OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT* 129, 130 (Reece Jones ed., 2019). Laura Gómez has made a similar argument for Latin America more broadly, also based on corrective justice for U.S. colonial and imperial intervention. See GÓMEZ, *supra* note 87, at 19–61.

307. The historical record also helps denaturalize the neutrality of nationality-based restrictions and rightfully casts suspicion upon them because of their *effect* and *function*, irrespective of ostensible claims about their intended purpose. Recall the history outlined in the prior Part, showing that geographic-based immigration restrictions have racially purposed antecedents. Sherally Munshi’s work, focusing on the United States, traces legislative innovations in the early twentieth century that used geographic origin as a facially neutral means to achieve the racialized exclusion of Indians. See Munshi, *supra* note 64, at 271–81 (analyzing the justifications for and adoption of legislation banning immigration from the “Asiatic Barred Zone,” which was “defined in terms of geographic coordinates,” and noting that “[o]nce the law was enacted . . . immigration officials enforced the geographic zone provisions selectively, re-inscribing distinctions of race”). Munshi astutely points out that the erasure of the era of Indian exclusion from dominant U.S. immigration narratives “evidences the degree to which conceptions of nationality and invented notions of territorial belonging have become natural or self-evident, rendering immigrant exclusion and the relative immobility of racialized populations, in turn, an apparently natural or neutral phenomenon.” *Id.* at 250.

308. Munshi, *supra* note 87, at 69.

prestigious white university settings. I must be able to speak about what it is like to be leaving Italy after I have given a talk on racism and feminism, hosted by the parliament, only to stand for hours while I am interrogated by white officials who do not have to respond when I enquire as to why the questions they ask me are different from those asked the white people in line before me. Thinking only that I must endure this public questioning, the stares of those around me, because my skin is black, I am startled when I am asked if I speak Arabic, when I am told that women like me receive presents from men without knowing what those presents are. Reminded of another time when I was stripped searched by French officials, who were stopping black people to make sure we were not illegal immigrants and/or terrorists . . . . To travel, I must always move through fear, confront terror. It helps to be able to link this individual experience to the collective journeying of black people, to the Middle Passage, to the mass migration of southern black folks to northern cities in the early part of the 20th century.<sup>309</sup>

For many people racialized as nonwhite, the experience of racial borders—systems of racialized exclusion and race itself as a border—is all too familiar. The epigraph above, in which bell hooks narrates a personal experience with racial borders, tells a version of a story that might well have been told by one of the twenty-six Nigerian girls I mention in the Introduction if they had survived their encounters with racial borders. Indeed, the racialized and gendered terror that hooks describes is personally resonant. Notwithstanding the nontrivial privilege I enjoy as an academic at an elite, First World institution (and even during my tenure as an independent expert for the U.N.), I share hooks's terror because of the numerous humiliating experiences characteristic of many travels through the First World in my own Black, bordered body. Certainly, hooks's formative experiences of race, gender, and borders coming from the American South and from travel to Europe are markedly different from the experiences and circumstances of the twenty-six Nigerian girls. Yet, notwithstanding the many differences that divide bell hooks and the Nigerian girls, my point has been to argue that a throughline—a transnational system of racial borders that privileges whiteness—exists that connects their respective experiences.

To recapitulate the core claims of this Article, I have aimed to make the following points. I have argued that contemporary international borders, with particular focus on the borders of First World nation-states, are racial borders. I have defined racial borders as political and territorial border regimes that disparately curtail movement (mobility) and political incorporation (membership) on a racial basis. Racial borders sustain international migration and mobility as racial privileges, especially privileges of whiteness. I identify the infrastructure of the contemporary system of racial borders as including migration, mobility, and asylum legal and policy regimes in which facially neutral institutions, policies, and practices reliably result in racialized exclusion and border doctrines that entrench rather

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309. BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 174 (1992).

than disrupt this racialized exclusion. Furthermore, the infrastructure of the contemporary system of racial borders includes the operation of race itself as territorial and political border infrastructure. Both dimensions of racial borders—racialized exclusion through facially neutral means and race as border infrastructure—have historical antecedents. Indeed, the genealogy of contemporary international border doctrine and practice shows the European colonial origins of racial subordination and exploitation through border governance. Racialized mobility, immobility, inclusion, and exclusion were not incidental or unfortunate by-products of colonial empire. Rather, they were imperially productive technologies for creating and allocating the benefits of empire, and they remain so today. As Adam McKeown notes, liberal democratic ideals and practices of self-rule were also the basis for exclusionary policies such that “[m]odern border controls are not a remnant of an ‘illiberal’ political tradition, but a product of self-conscious pioneers of political freedoms and self-rule.”<sup>310</sup>

I have also argued that the contemporary system of racial borders effect neocolonial racial injustice in numerous ways. I have previously made the case that First World nation-states have no right to exclude Third World citizens because the latter form part of the demos of neocolonial empire and the former constitute the only real, effective vehicles of collective self-determination in that empire. I have further argued that racial borders enforce and produce racial, political inequality in neocolonial empire, privileging whiteness in the pathways to effective collective and individual self-determination in neocolonial empire. Put differently, racialized mobility, migration regimes, and race-as-border infrastructure are a crucial axis of First World exploitation of Third World citizens. At the same time, this axis of exploitation effects political inequality between nonwhite and white people subject to neocolonial empire. Racial borders are thus racist, whether they are underwritten by racist intent. Furthermore, racial borders are the site of unremedied historic injustice; they helped create, and they now preserve, the racialized constitutive debt owed to the Third World by the First.

I do not claim to provide an exhaustive account of the way race operates through and alongside borders. By focusing on the white supremacy of neocolonial borders, I do not mean to imply that this system of racial ordering and this imperial formation are the only ones of contemporary salience. I do believe, however, that they are of unique significance for understanding the borders of our international orders because of how fundamentally European colonialism and white supremacy have shaped *all* contemporary national borders through international legal doctrine and governance mechanisms.<sup>311</sup>

If we think of the concept of race functionally at a high level of abstraction, it is reasonable to think that any time two or more communities demarcate borders

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310. MCKEOWN, *supra* note 43, at 7.

311. Notwithstanding the salience of other prior and contemporaneous empires, Duncan Bell reminds us that “[t]he modern architecture of global governance—including international law and numerous international organisations—was forged in [the European] imperial world system,” which by 1914 in principle controlled eighty-four percent of the planet’s landmass. Bell, *supra* note 4, at 3.

that meaningfully allocate rights between or among their members, something “race”-like will emerge, by which I mean some system for determining and identifying structurally and at the individual level who is entitled to fundamental rights and resources. Views will differ on the ethical valence of this “racial” property of immigration regimes among those who accept that it is indeed an inherent feature of immigration regimes. For some, the racial nature of borders is legitimate. For others, it may be a justifiable, or at least tolerable, by-product of a greater good such as cohesive, self-determining, national, political communities. Still, the racial nature of borders may be an untenable injustice. My analysis has aimed to make the case that neocolonial racial borders fall into this last category—that is, they are racial in a *racist* sense—because they preserve for the First World the ill-gotten gains of colonial exploitation for which reparations were never achieved, and these borders enact contemporary injustices along neocolonial lines.

A significant implication of casting racial borders as functions or products of empire is that to do so lays bare the level at which intervention is required to achieve justice. The problem of racial borders is not merely or even fundamentally an immigration law problem. It is a problem that goes to the core of neocolonial empire and its terms of political and economic interconnection. Genuine border justice may require both the abolition of the extant international liberal order that entrenches unequal sovereign interconnection at the foundational level—sovereignty doctrine—and its replacement with an entirely different political and economic theory of what it means for political communities to interdepend on equitable terms.<sup>312</sup> But it is decidedly not the ambition of this Article to take on the prescriptive project of radical reimagination. Its diagnostic and analytical ambitions are sufficient as necessary precursors to any attempts to reimagine and recreate borders on more racially just and equitable terms. This work is urgent as international, regional, and national policymakers; institutions; and migrants-rights activists continue to debate and reform border governance, especially as they start to do so in contexts that increasingly demand racial reckoning. Such reckoning must begin from a place that acknowledges that the racial injustice of borders is embedded at the core of liberal border regimes.

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312. See Achiume, *supra* note 1, at 1551. As Natsu Taylor Saito powerfully argues, racial justice must be a decolonial project, and this is also true where borders are concerned. See NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 201–14 (2020).