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## Foreword

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# FOREWORD

William Covington<sup>†</sup>

It is my privilege to introduce the *Washington International Law Journal's* winter quarter symposium. This publication presents six articles exploring past and present injustices, their operation, and possible solutions. What makes this issue special is its range. This special issue begins with Erika George, Jena Martin, and Tara Van Ho sharing their dialog dissecting Business and Human Rights. Dongsheng Zang takes the reader through the racist actions of Victorian liberalism during the British colonial rule over Hong Kong. Nicci Arete attacks what has become a destructive barrier to the practice of law—the bar examination. The articles are thought provoking and especially relevant in a world reawakened to recognizing and addressing the exploitations imposed and maintained on historically marginalized groups.

As a 71-year-old African-American teaching professor who experienced de jure segregation, I find renewed hope in the recent global movements for social justice. I also find it ironic that once again the United States is serving as a catalyst for international change. Nobel Peace Prize winner John Hume, a leader (50+ years ago) of non-violent protests in Northern Ireland said: “Martin Luther King was very much our inspiration.”<sup>1</sup> Perhaps in the future, the same shall be said about Ahmaud Arbery, Breonna Taylor, and George Floyd.

I urge readers to deeply consider what the term “Global Reckoning” means to you. Is it a call to action? Is it an incentive for self-reflection? Is it a demand to examine our institutions? Or is it all of the above, and perhaps more? These articles can help answer these questions.

*Day of Reckoning* — the time when one is called to account for one's actions, to pay one's debts, or to fulfill one's promises or obligations.<sup>2</sup> The United States and the world are facing a period of

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<sup>1</sup> See Niall O'Dowd, *How Martin Luther King Inspired a Northern Ireland Uprising*, IRISH CENTRAL (Jan. 18, 2021), <https://www.irishcentral.com/opinion/niallodowd/how-martin-luther-king-inspired-north-uprising>; Charlotte O'Sullivan, *Martin Luther King, Jr. and the Freedom Struggle of Northern Ireland*, ANARRES PROJECT (Apr. 4, 2018), <http://www.anarresproject.org/martin-luther-king-jr-and-the-freedom-struggle-of-northern-ireland>.

<sup>2</sup> *Day of Reckoning*, DICTIONARY.COM, <https://www.dictionary.com/browse/day-of-reckoning> (last visited Mar. 25, 2021).

reckoning over white supremacy, structural racism, and race-based inequities. The summer of 2020 will be remembered for the demonstrations following the murders of Ahmaud Arbery, Breonna Taylor, George Floyd, and countless others.<sup>3</sup> Between May 25 and November 18, 2020, protests arose in more than 4,446 cities worldwide, including in all the United States territories and states, and Washington, D.C., as well as internationally in more than 60 countries. Although most of the global demonstrations were linked to the racial injustice issues raised in the United States, other historically marginalized communities raised their own issues and concerns as well.<sup>4</sup> For example:

- **United Kingdom.** George Floyd’s killing sparked protests in London, where police officers are four times more likely to use force against Black people than white people.<sup>5</sup> These protests spread across the country.<sup>6</sup>
- **France.** French protests marked the four-year anniversary of Adama Traoré’s death while in police custody with a new ‘Adama’ generation of activists.<sup>7</sup> This new generation of activists crosses traditional class and racial lines and continues to grow the movement to stamp out racial injustice in France.<sup>8</sup>
- **Belgium.** Belgians saw their own struggles reflected in the United States’ demonstrations and were inspired to protest too.<sup>9</sup> “As a black person, the killing of Floyd touched me because it could have

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<sup>3</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (Mar. 18, 2021).

<sup>4</sup> Borzou Daragahi, *Why the George Floyd Protests Went Global*, ATLANTIC COUNCIL (June 10, 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/george-floyd-protests-world-racism/>.

<sup>5</sup> Levi Jouavel, *George Floyd Death: Why US Protests Resonate in the UK*, BBC (June 2, 2020), <https://www.bbc.com/news/newsbeat-52877803>.

<sup>6</sup> *Id.*

<sup>7</sup> *French Protests Give Rise to New ‘Adama’ Generation of Anti-racism Activists*, FRANCE 24 (July 18, 2020), <https://www.france24.com/en/20200718-french-protests-give-rise-to-new-adama-generation-of-anti-racism-activists>.

<sup>8</sup> *Id.*

<sup>9</sup> Barbara Moens, *Thousands Protest Racism in Brussels as U.S. Movement Sweeps Europe*, POLITICO (June 7, 2020), <https://www.politico.com/news/2020/06/07/thousands-protest-racism-in-brussels-as-us-movement-sweeps-europe-306081>.

been someone of my family,” said 22-year-old student Rachel Buyse.<sup>10</sup> “We also face inequalities here in Belgium.”<sup>11</sup> There are Belgian stories similar to those told about American police violence, such as the police killing a 19-year-old of Moroccan descent in Brussels, who was allegedly fleeing from a police check.<sup>12</sup>

- **Australia.** Thousands in Australia participated in Black Lives Matter and pro-refugee protests and marches, with refugee advocates in Sydney defying a court order prohibiting public assembly.<sup>13</sup>
- **Indonesia.** Indigenous groups in many countries have been inspired by the Black Lives Matter movement.<sup>14</sup> While activists have been calling attention to systemic racism in these countries historically, their messages have often fallen on deaf ears.<sup>15</sup> In some of these places, such as Indonesia, the Black Lives Matter and global anti-racism movements have generated new momentum for their work.<sup>16</sup>
- **Colombia.** In June 2020, demonstrations spread across Colombia as well. A police officer in Puerto Tejada allegedly beat a young Black man named Anderson Arboleda to death in May for breaking pandemic rules.<sup>17</sup> Activists called for justice for

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

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Australia Protests: Thousands Take Part in Black Lives Matter and Pro-refugee Events Amid Covid-19 Warnings*, GUARDIAN (June 13, 2020), <https://www.theguardian.com/world/2020/jun/13/australia-protests-thousands-take-part-in-black-lives-matter-and-pro-refugee-events-amid-health-warnings>.

<sup>14</sup> Tasha Wibawa, *Black Lives Matter Protests Spark Reminder of 'Deeply Rooted' Racial Injustice Towards West Papuans*, ABC NEWS (June 11, 2020), <https://www.abc.net.au/news/2020-06-12/black-lives-matter-protests-debate-over-racism-papuans-indonesia/12331580>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Ashley Westerman et al., *In 2020, Protests Spread Across the Globe With a Similar Message: Black Lives Matter*, NPR (Dec. 30, 2020), <https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt>.

Arboleda and other young Afro-Latino men killed by police.<sup>18</sup>

- **Nigeria.** In Nigeria, people responded to police violence with both peaceful demonstrations and riots, demanding police reform and abolition of Nigeria’s Special Anti-Robbery Squad (SARS).<sup>19</sup> In October 2020, demands for abolition reached record participation, inspiring African American Black Lives Matter protesters to demonstrate in support.<sup>20</sup>

The articles in this special-edition issue cover underlying human rights concerns with an international nature and multiplicity that cannot be overlooked. According to Matthew Countryman, Professor of Afro-American studies at the University of Michigan:

It is as if the dam has broken, and the many currents of the American protest tradition—not just the anti-racist tradition, but the anti-corporate and anti-war protest traditions; women’s, LGBTQ and student movements; movements for workers’ rights and economic justice—have all come together in a massive river of outrage and sorrow, exhilaration and hope.<sup>21</sup>

Throughout the United States’ history, hallmarks of American democracy—opportunity, freedom, and prosperity—have been largely reserved for “white people” through the intentional exclusion and oppression of “non-white people.” The deep racial and ethnic inequities that exist today in the United States and elsewhere are a direct result of structural racism: the historical and contemporary policies, practices,

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<sup>18</sup> *Id.*

<sup>19</sup> Jordan Hales, *BLM, End SARS Protests Unite Black Americans & Nigerians in Global Fight for Equality*, NBC NEWS SAN DIEGO (Nov. 17, 2020), <https://www.nbcsandiego.com/news/local/black-lives-matter-end-sars-protests-unite-americans-and-nigerians-in-global-fight-for-equality/2447420>.

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

<sup>21</sup> Matthew Countryman, *2020 Uprisings, Unprecedented in Scope, Join a Long River of Struggle in America*, CONVERSATION (June 7, 2020), <https://theconversation.com/2020-uprisings-unprecedented-in-scope-join-a-long-river-of-struggle-in-america-139853>.

and norms that create and maintain majority-group supremacy.<sup>22</sup> In the United States, some root causes that led to this reckoning include:

- **Wealth.** According to the Pew Research Center’s 2016 Social and Demographic Trends, “[t]he income of households headed by Blacks has persistently lagged behind that of white households since the U.S. Census Bureau began collecting these data in the late 1960s. In 2014, median black household income was about \$43,300, while white household income was about \$71,300. By comparison, 20 years prior, black household income was about \$37,800 compared with \$63,600 among white households.”<sup>23</sup>
- **Interactions with the police.** Police violence is a leading cause of death for young men in the United States. About 1 in every 1,000 Black men can expect to be killed by law enforcement.<sup>24</sup> This risk of being killed peaks between the ages of 20 and 35 for all people, irrespective of race.<sup>25</sup> Black and Native people are significantly more likely than whites to be killed by the police.<sup>26</sup> Likewise, Latino men also face a higher likelihood of being killed by police than white men.<sup>27</sup>
- **Housing.** Despite the economic and political gains that Black people in the United States have achieved since the passage of the Civil Rights Act, significant disparities still exist between Black and white people in terms of access to homeownership, quality education, and employment, among other assets.<sup>28</sup>

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<sup>22</sup> See *Structural Racism in America*, URBAN INSTITUTE, <https://www.urban.org/features/structural-racism-america> (last visited Mar. 25, 2021) (presenting information on structural racism and a collection of writings on the subject).

<sup>23</sup> ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART 21 (Pew Research Center, 2016).

<sup>24</sup> Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-ethnicity, and Sex*, PNAS (Aug. 20, 2019), <https://www.pnas.org/content/116/34/16793>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Michela Zonta, *Racial Disparities in Home Appreciation*, CENTER FOR AMERICAN PROGRESS (July 15, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/>.

These disparities are reflected in persisting residential segregation and a racially segmented housing market—and they have significant implications for Black economic mobility.<sup>29</sup> Segregation, disparate access to credit and homeownership, and the consistent devaluation of homes in Black neighborhoods combine to constrict Black people’s ability to build equity and accumulate wealth through homeownership.<sup>30</sup>

What of the attempts to address these inequities? There is “Grow with Google: Black Women Lead,” an initiative to train 100,000 Black women in digital skills by 2022.<sup>31</sup> The State of Oregon earmarked \$62 million in COVID-19 relief for Black residents,<sup>32</sup> and the City of Evanston is the first city in the United States to fund reparations, committing \$10 million over the next decade in an attempt to repay Black residents for the wrongs and accumulated losses incurred by generations of racism.<sup>33</sup> Others say this rejuvenated push to resolve the United States’ racial problem is “just the latest manifestation of a struggle that will continue until the wealth gap between white people and black people is addressed.”<sup>34</sup> The authors in this special-edition issue examine local, national, and international laws, identify problems and offer potential solutions to these societal inequities.

In a dialogical piece titled *Reckoning: A Dialogue About Racism, Anti-Racists, and Business and Human Rights*, Erika George, Jena Martin, and Tara Van Ho, dissect Business and Human Rights (BHR) and its usefulness as a tool to confront private actors’ human

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Melonie Parker, *Digital Skills Training for 100,000 Black Women*, KEYWORD (Feb. 12, 2021), <https://blog.google/outreach-initiatives/grow-with-google/black-women-lead/>.

<sup>32</sup> John Eligon, *A Covid-19 Relief Fund Was Only for Black Residents. Then Came the Lawsuits.*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/2021/01/03/us/oregon-cares-fund-lawsuit.html>.

<sup>33</sup> Ashley Brown et al., *How the 1st US City to Fund Reparations for Black Residents is Making Amends*, ABC NEWS (Mar. 1, 2021), <https://abcnews.go.com/US/1st-us-city-fund-reparations-black-residents-making/story?id=76118463>.

<sup>34</sup> Greg Robb, *The Only Way to Truly Solve the Race Problem in America Is to Narrow the Wealth Gap, Black Economists Say*, MARKET WATCH (June 19, 2020), <https://www.marketwatch.com/story/the-only-way-to-truly-solve-the-race-problem-in-america-is-to-narrow-the-wealth-gap-black-economists-say-2020-06-06>.

rights violations.<sup>35</sup> The authors ask, “whether the BHR framework is, by its nature a tool to advance an anti-racist agenda.”

The authors take readers on an analytical journey looking at the meanings of race, racism, critical race theory and their possible application to BHR. Underlying the dialogue is a question: can tools formed within the context of a capitalist environment be used to dismantle its racist structures? No uniform conclusion is reached, but the dialogical approach is insightful and ripe for future scholarship.

In the United States, holding individuals accountable for their actions has been a tool used by the federal government and advocacy groups. The 150-year-old Ku Klux Klan Act is now being employed against former President Trump, his attorney Rudy Giuliani, and individual insurrectionists.<sup>36</sup>

Likewise, in this issue, Marina Aksenova in *Corporate Complicity in International Criminal Law: Potential Responsibility of European Arms Dealers for Crimes Committed in Yemen*, discusses the Rome Statute, the International Criminal Court, and its potential use to impose criminal responsibility on corporate officials. Professor Aksenova specifically focuses on European arms traders supplying weapons to the United Arab Emirates/Saudi-led coalition currently engaged in Yemen.

Professor Aksenova focuses on two provisions that could be applicable to individual actors: 1) Article 25(3)(c), which establishes liability when the accused, “for the purpose of facilitating” the commission of a crime, “aids, abets or otherwise assists” in its commission, and 2) Article 25(3)(d), which criminalizes knowingly contributing to the commission of a crime by a group acting with a common purpose. The author dissects the section’s language and shares its potential applicability. She goes on to describe possible disparities and gaps in how the Article is written that might serve as means of imposing liability on corporate officials for gross human rights violations.

After signing the Civil Rights Act of 1964 in response to human rights violations against Black people, President Johnson reportedly turned to his press secretary and lamented that Democrats

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<sup>35</sup> See Human Rights Council Res. 17/4, U.N. Doc. A/HRC/17/31 (June 16, 2011) (commonly referred to as the Guiding Principles on Business and Human Rights).

<sup>36</sup> Erick Trickey, *The 150-year-old Ku Klux Klan Act Being Used Against Trump in Capitol Attack*, WASH. POST (Feb. 18, 2021), <https://www.washingtonpost.com/history/2021/02/18/ku-klux-klan-act-capitol-attack/>.

“have lost the South for a generation.”<sup>37</sup> The split between Democrats and Dixiecrats<sup>38</sup> is part of a history of political fracturing over race. Professor Dongsheng Zang describes a similar splintering in *Race and Representation: The Legislative Council in Hong Kong during the Reign of Queen Victoria*.

Professor Zang’s article describes the clash between two schools of Victorian liberalism. The abolition movement favored central control over Britain’s colonies, the “free traders,” called for greater colonial autonomy. The author illustrates how race was the uniting factor between these two schools of Victorian liberalism. Professor Zang persuasively argues that race was also the determining factor in what the British officials considered responsible government to be.

While the clash between the two sides did not lead to outcomes like the Republican Party’s development of a successful “southern strategy,”<sup>39</sup> the negative implications fell heavily on people of color within Britain’s colonies. Professor Zang shares how colonial administrators and intellectuals formed a consensus that democracy was not and should not be universal; rather it was limited to the “Anglo-British race.” Exceptionally powerful is the author’s use of primary sources, like Joseph Chamberlin, Colonial Secretary who stated: “I believe that the British race is the greatest of governing races that the world has ever seen . . . we are a great governing race, predestined by our defects, as well as by our virtues, to spread over the habitable globe, and to enter into relations with all the countries of the earth . . . the whole idea of government by popular representation . . . is generally inconsistent with the religion, natural laws, and usages of the people of tropical clime.” Professor Zang illustrates how the belief in white supremacy drove critical government decision making to the extreme disadvantage of people of color.

Three brilliant law students have contributed to this invaluable legal volume as well. Nicci Arete critiques gatekeeping in her article, *The Bar Exam’s Contribution to Systemic Inequalities in Access to Justice Around the World*. Much like the literacy tests in southern states

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<sup>37</sup> *The Long Goodbye*, ECONOMIST (Nov. 11, 2020),

<https://www.economist.com/united-states/2010/11/11/the-long-goodbye>.

<sup>38</sup> *Dixiecrat*, DICTIONARY.COM, <https://www.dictionary.com/browse/Dixiecrat> (last visited Mar. 27, 2021).

<sup>39</sup> *See generally* JOSEPH A. AISTRUP, *THE SOUTHERN STRATEGY REVISITED* (1996) (the Southern Strategy refers to the tactics of Republican politicians, beginning with Richard Nixon, who sought to realign the political affiliation of white southerners who typically supported the Democratic party).

ostensibly used to ensure “an educated and informed electorate,”<sup>40</sup> while actually serving as a tool to deny the franchise to Black Americans, the author argues that the bar exam—in seeking to identify competent candidates—denies access to justice for historically marginalized communities.

Just as it can be asked what is an “educated and informed electorate?” Arete asserts that those supporting the bar exam’s usage failed to define “competence.” An examination taken without access to books or the internet under strict time deadlines seems only to test the candidate’s ability to cram a wide range of topics and rules into memory. This is not “competence.”

In her article, Arete connects the bar exam to the small number of attorneys of color, the inability of many marginalized people to secure legal services, and law school pedagogy. Just as literacy tests were eventually done away with, this author asks readers to think about whether the bar exam should also be consigned to the dustbin.

Sydney Bay in *Criminalization is Not the Only Way: Guatemala’s Law Against Femicide and Other Forms of Violence Against Women and the Rates of Femicide in Guatemala*, and *American Judicial Rejectionism and the Domestic Court’s Undermining of International Human Rights Law and Policy After Human Rights Violations Have Occurred in the State*, by Jessika Gonzalez, take readers on in-depth analyses of failures in laws designed to help marginalized communities.

Bay discusses the Decree Against Femicide and Other Forms of Violence Against Women, and how after 12 years, levels of violence against women have not decreased. The author describes how the government established specialized courts, provided resources for victims of violence, and set up an “alert system” for missing women. But like white American communities’ massive resistance to school desegregation, subsequent court decisions and the unavailability of resources have served to undermine the decree’s purpose.<sup>41</sup>

The COVID-19 crisis has compounded the problems by closing courts and pushing back hearings. However, we are not left without hope. The author shares how health care workers, lower courts, and the actions of Guatemalan women through street demonstrations

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<sup>40</sup> *Literacy Tests*, SMITHSONIAN, <https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/literacy-tests> (last visited Mar. 25, 2021).

<sup>41</sup> *The Southern Manifesto and “Massive Resistance” to Brown*, LDF, <https://naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/> (last visited Mar. 25, 2021).

and activism have given voice to those who have lived in fear. The article concludes by asserting that advocacy and activism, like the advocacy and activism we are seeing around the world, are needed to truly end violence against Guatemalan women.

Black Americans have sought protection from rights violations by petitioning the United Nations.<sup>42</sup> Both W.E.B. Dubois and Malcom X unsuccessfully sought international protection for Black Americans.<sup>43</sup> Gonzalez shares how the judicially created qualified immunity doctrine further undermines international legal protections. The author analyzes the immunity against international treaty protections, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Gonzalez exposes “a new form of American rejectionism powered by its use of the qualified immunity doctrine.” She highlights two major problems: 1) the effective nullification of the treaty making process, and 2) the perpetuation of a system where domestic courts are unaccountable to international law ratified and enforced by the legislative and executive branches. These problems, Gonzalez spotlights, make it more difficult to bring claims against law enforcement officials.

A solution the author describes is reforming what are known as Reservations, Understandings and Declarations (RUDs). The United States Senate can make RUDs, provide a clarification, or craft a declaration regarding the effect of the treaty. Reforming RUDs so as not to restrict the domestic impact of international treaties is a proposal Gonzalez feels can restore rights unfairly taken by the United States Supreme Court.

This special-edition issue of the *Journal* and its contents are well timed. I believe these articles will cause the reader to delve deeply about the global reckoning we are collectively experiencing. The authors help frame the problems, potential solutions, and the meaning of justice. It is an honor to be associated with this publication. I hope you enjoy reading it as much as I have.

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<sup>42</sup> Jamil Dakwar, *W.E.B. Du Bois's Historic U.N. Petition Continues to Inspire Human Rights Advocacy*, ACLU (Oct. 25, 2017), <https://www.aclu.org/blog/human-rights/human-rights-and-racial-justice/web-du-boiss-historic-un-petition-continues>.

<sup>43</sup> *Malcolm X Seeks U.N. Negro Debate*, N.Y. TIMES, Aug. 13, 1964, at 22, <https://www.nytimes.com/1964/08/13/archives/malcolm-x-seeks-un-negro-debate-he-asks-african-states-to-cite-us.html>.