

To respond to the enduring need for a reckoning with racism in New Zealand through legal scholarship and praxis, this article grapples with the question: how can we adopt a Critical Race Theory (CRT) framework that is located within, and appropriate for, the New Zealand context? Our central thesis is that scholars and activists seeking to apply a CRT framework or conduct a CRT analysis in New Zealand should be mindful of the particular circumstances of the settler-colonising state imposed by the Crown. To assist with this mindfulness, we propose five guiding principles for CRT scholarship and praxis in New Zealand, which are all non-prescriptive and subject to critique and further development. To illustrate the usefulness of this framework, we undertake a critical reappraisal of the 1980 *Tifaga v Department of Labour* case. As we show, it is important to approach this case against the backdrop of the dawn raids and state-fuelled racism against Pacific peoples.

Critical Race Theory and the Law in New Zealand

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Prologue

Mele, a second-year Tongan law student, is sitting in her criminal-law lecture when the lecturer asks the class to discuss with the person sitting next to them whether they think the outcome was correct in the *Tifaga* decision.¹ During this exercise, Mele overhears a conversation between two Pākehā students sitting in the row in front of her.

‘I think that the *Tifaga* decision was fair. The judge was right; the offender should have been saving his money so that he could go back home when his visa expired. He knew the law when he came. No one is above the law. That’s what the rule of law is all about, right?’

‘Yeah, we even see it today. There’s so many immigrants coming over, taking up jobs and expecting sympathy when they get caught overstaying their visas. I don’t understand why they can’t just apply to stay here the legal way. It’s totally unfair to everyone who does. I guess it’s good that we have judges to sort this stuff out fairly, though’.

Mele feels her heart drop and her face go red. She wants to interject and explain why they are wrong, but words fail

1 As Tauiwi, we pay our respects to mana whenua past, present, and future of Ngāti Whātua o Ōrākei as the enduring kaitiaki and custodians of the whenua that we work and write upon.

her. How can she explain to them that the *Tifaga* decision was wrong, and that the whole immigration and criminal-justice system is not only unfair but *racist*? How can she prove this racism with stories of how members of her family have been deported due to circumstances beyond their control? How can she explain to them about the enduring impact of the dawn raids era on New Zealand’s immigration and criminal laws today?

Overwhelmed with sadness and anger, Mele sits in silence and is unable to focus or think about anything else for the rest of the day.

Introduction

It has been well established by Māori and other scholars, and advocates of colour, that the settler-colonising state of so-called ‘New Zealand’ is fundamentally racist.² However, despite this broad consensus, Mele’s experience in the vignette above illustrates how people—namely law students, legal scholars, and lawyers—can often struggle to express or articulate exactly *how* the legal system in New Zealand *is* racist.

In our view, this struggle is due to a widespread unwillingness, or inability, to engage in conversations about race and racism in New Zealand, which is evident within all spaces in the law—from law schools to

2 See Moana Jackson, ‘Understanding Racism in this Country,’ *E-Tangata*, 25 February 2018; Ani Mikaere, ‘The Treaty of Waitangi and Recognition of Tikanga Māori,’ in *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, eds. Michael Belgrave, Merata Kawharu, and David Williams (Auckland: Oxford University Press, 2005); Margaret Mutu, “‘To Honour the Treaty, We Must First Settle Colonisation’” (Moana Jackson 2015): The Long Road from Colonial Devastation to Balance, Peace and Harmony,’ *Journal of the Royal Society of New Zealand* 49, no. 1 (October 2019): 4–18; Papaarangi Reid and Bridget Robson, ‘Understanding Health Inequities,’ in *Hauora: Māori Standards of Health IV: A Study of the Years 2000–2005*, eds. Bridget Robson and Ricci Harris (Wellington: Te Rōpū Rangahau Hauora a Eru Pōmare, 2007).

courtrooms.³ In our view, the grave consequence of the lack of meaningful discourses on race and the law is that racist systems, laws, and institutions are able to continue and thrive unchallenged.

In contrast, in the United States a scholarly movement and critical legal framework has emerged over the past four decades that has empowered Black, Indigenous, and Communities of Colour to work in solidarity to generate scholarship and activist praxis that reckons with racism in the legal system and beyond.⁴ This movement is known as Critical Race Theory (CRT), which arose in the United States in the late 1980s and continues to be a powerful force of resistance in 2021. Not only has CRT inspired a rich and diverse body of legal scholarship across different areas of law, it has also inspired scholars in a number of other disciplines to challenge and work towards overcoming racism and imagine new possibilities for resistance and liberation.

Therefore, in responding to the enduring need for a reckoning with racism in legal scholarship and praxis in New Zealand, this article grapples with the following question: how can we adopt a CRT framework that is

3 Max Harris, 'Racism and White Defensiveness in Aotearoa: A Pākehā Perspective,' *E-Tangata*, 10 June 2018. Harris argues that one of the barriers to conversations about race is 'white defensiveness', which refers to 'anxiety, closing-down, and insecurity among white people and white-dominated institutions when racism is raised'. See also: Ani Mikaere, 'Racism in Contemporary Aotearoa: A Pākehā Problem,' in *Colonising Myths—Māori Realities: He Rukuruku Whakaaro* (Wellington: Huia Publishers, 2011), 19: 'New Zealand students are all products of an overwhelmingly monocultural and racist education system . . . Pākehā students, on the whole, expect to see themselves reflected in all their educational experiences. . . . They consider the knowledge of "others" to be less important than their own "real" knowledge, and regard the perspectives of such groups to be at best, interesting, at worst, worthless'. As regards courtrooms, see Te Uepū Hāpai i te Ora, Safe and Effective Justice Advisory Group, 'Tukurū! Tukurū! Move Together: Transforming our Criminal Justice System,' 2019, 45. The advisory group recommends more effective training in the judicial sector to challenge unconscious racism and bias following Māori, Pacific, migrant, and refugee communities sharing experiences of cultural blindness and a lack of cultural competency among the judiciary.

4 When using this term 'communities of colour' in the Aotearoa context, we are referring to those persons who are non-Indigenous and non-White (Pākehā), collectively racialised as 'Other' due to their migrant and/or immigrant status.

located within and appropriate to the specific context of New Zealand as a settler-colonising state?

This article proceeds as follows. We begin with a brief history of CRT in the US and its journey as a domestic and global movement to date. We then consider if and how we can locate CRT in New Zealand, and the various tensions and questions that arise from such considerations. With these tensions and questions in mind, we propose five guiding principles for understanding or applying CRT in New Zealand: (1) dismantle settler-colonial thinking, laws, and politics; (2) acknowledge positionality; (3) privilege Indigenous knowledges, storytelling, and lived experiences of Māori and other groups of colour; (4) draw on the praxis of anti-racism and decolonial activism; and (5) de-centre coloniality and imagine new possibilities. To illustrate the viability and power of this framework, the final part of the article applies these principles to critique key aspects of the *Tifaga v Department of Labour* case.⁵

While originating from the legal academy, we note that CRT is not at all confined to the law and has extended over a number of different disciplines in the US and beyond. However, for the purposes of this article we focus primarily on CRT scholarship and praxis relating to New Zealand's legal system, while also recognising the work of New Zealand-based scholars who adopt a CRT framework in their respective disciplines, including public health and global studies.⁶

We want to make clear that we use 'New Zealand', as opposed to 'Aotearoa', deliberately. We do not believe the two are interchangeable. Our discussion (and critique) is levelled at the laws, policies and structures of the settler-colonising state (New Zealand), that continues its illegitimate sovereign prerogative over Aotearoa.

5 *Tifaga v Department of Labour*. 1980. 2 NZLR 235.

6 See Patrick S. Thomsen, 'Transnational Interest Convergence and Global Korea at the Edge of Race and Queer Experiences: A Talanoa with Gay Men in Seoul,' *Du Bois Review* 17, no. 2 (2020): 411–428.

Introduction to CRT

According to the architects of CRT, the movement arose in the United States as a ‘left intervention into race discourse and race intervention into left discourse’.⁷ In other words, CRT emerged in the late 1980s and early 1990s because two major intellectual movements were failing to examine and address the relationship between race, power, and the law.⁸

In terms of CRT’s ‘left intervention into race discourse’, the architects of CRT were dissatisfied with the liberal civil-rights tradition and ‘the liberal vision of achieving racial justice through legal reform’.⁹ The inadequacies of this vision became evident in the late 1970s, when liberal ‘traditional civil rights lawyers found themselves fighting, and losing, rearguard attacks on the limited victories they had only just achieved in the previous decade’, and an ‘increasingly conservative judiciary made it clear that the age of ever expanding progressive law reform was over’.¹⁰

It is this failure that led to one of the two historical moments that are recognised today as sparking the CRT movement: the student protests at Harvard Law School (HLS) in the early 1980s. These protests came about in 1980, when Professor Derrick Bell, the school’s first Black tenured professor, left HLS after it refused to appoint or grant tenure to any Black female applicants.¹¹ Student activists, especially Black students, demanded that HLS hire another person of colour to take Bell’s place and teach the race-focused courses he had introduced—with the students undertaking protests, demonstrations, rallies, and sit-ins (including a takeover of the Dean’s Office).¹² The liberal White administration replied saying that

7 Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995), xix.

8 Khiara Bridges, *Critical Race Theory: A Primer* (Minnesota: Foundation Press, 2018), 22.

9 Crenshaw et al., *Critical Race Theory*, xvii.

10 Crenshaw et al., *Critical Race Theory*, xvii.

11 Bridges, *Critical Race Theory*, 23.

12 Crenshaw et al., *Critical Race Theory*, xx.

there were no qualified Black scholars who merited Harvard's interest, that student's should prefer an excellent White professor over a mediocre Black one, and that race-focused courses were not needed due to race being discussed in other courses on constitutional and employment law.¹³ Rather than permanently appoint a person of colour, the administration hired Jack Greenberg, a White man, and Julius Chambers, a Black man, to teach a mini-course on civil-rights litigation. Student protesters ended up boycotting the mini-course and organised 'The Alternative Course', a student-led continuation of Bell's course taught by scholars of colour from other schools.¹⁴

In terms of the 'race intervention into left discourse', the forebears of the CRT movement were disappointed with how the leading movement of leftist legal thinkers, Critical Legal Studies (CLS), appeared to be largely disinterested in racial justice.¹⁵ This was unsurprising given that the CLS movement was made up of mostly White men who were united by an interest in 'Marxian and neo-Marxian social theory, phenomenology, semiotics, structuralism, post-structuralism and the deconstructive techniques of postmodern literary criticism', rather than an interest in disrupting racial hierarchy and White supremacy.¹⁶

CRT's 'race intervention' is exemplified by the second historical moment that formalised it as a movement: the annual CLS conference in

13 By 'White' we draw on the work of Enid Trucios-Haynes to describe the socially constructed identity of persons who receive the most benefit from the system of White privilege which exists in New Zealand, and has been described as a 'package of unearned assets . . . an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear and blank checks,' Barbara J. Flagg cited in Enid Trucios-Haynes, 'Why "Race Matters": LatCrit Theory and Latina/o Racial Identity,' *Berkeley La Raza Law Journal* 12, no. 1 (2000): 1. Trucios-Haynes also cites Paulette M. Caldwell: 'White identity also includes the benefit of not having to notice one's privilege. . . . This use of the term "White" also recognizes the history of White racial identity that has at times been expansive as a form of assimilation for White ethnic groups'.

14 Crenshaw et al., *Critical Race Theory*, xx.

15 Elizabeth Iglesias cited in Bridges, *Critical Race Theory*, 9.

16 Bridges, *Critical Race Theory*, 28.

1987. Prior to the conference, the architects of CRT had been pushing CLS scholars, also known as ‘crits’, to use the theoretical tools at their disposal to examine questions of race and work towards anti-racist goals. In response, the organisers of the annual CLS conference decided to make race the focus and invited several CRT architects to present 29 papers on issues of race. This conference and the symposium edition that followed are considered to be ‘the final step in the preliminary development of CRT as a distinctively progressive critique of legal discourse on race’.¹⁷

However, despite being willing to have the 1987 conference focus on race, the crits were largely unwilling to allow race-centred critiques to be a part of the CLS movement. As the architects note, many of the crits had ‘an abiding scepticism, if not outright disdain, toward any theoretical or political project organized around the concept of race’.¹⁸ It is this rejection that led 24 scholars of colour to go to the University of Wisconsin in 1989 for a summer workshop to pursue the race-centred project that many crits thought was unfitting and unworthy of the CLS banner. It was at this workshop that Kimberlé Crenshaw formally gave the movement its own banner: ‘critical race theory’.¹⁹ While these CRT summer workshops only continued until 1997, we outline below how the CRT movement has since grown and become ever more important.

Overview of CRT’s analytical tools and key concepts

While it is impossible to distil a diverse and rich movement like CRT into a single universally agreed-upon definition, Richard Delgado, one of the architects of CRT, broadly defines it as ‘a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power’.²⁰ It is beyond the scope of this article to comprehensively list and detail all of the tools and core concepts that CRT

17 Bridges, *Critical Race Theory*, 28.

18 Bridges, *Critical Race Theory*, 29.

19 Bridges, *Critical Race Theory*, 29.

20 Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2017), 3.

scholars have developed over the years. Nonetheless, a brief and incomplete outline is provided below.

True to its left-interventionist roots, one of the hallmark tools of CRT is to advance radical critiques of such liberal concepts as the incrementalist approach to civil-rights and racial justice, integration, affirmative action, and notions of ‘colourblindness’ and meritocracy.²¹ Instead, CRT advances race-conscious approaches to social transformation, placing more faith in political organising rather than law- and rights-based remedies.²² One formative example comes from Linda Greene, who critiqued three US Supreme Court decisions in 1989 to argue that the Supreme Court will continue to restrict anti-discrimination claims for people of colour, who are better off pursuing other avenues of social change.²³

As Bell notes, CRT scholarship and praxis is ‘characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity’.²⁴ This unapologetic use of storytelling or counter-storytelling illuminates and privileges lived experiences of racial oppression as a legitimate form of knowledge production.²⁵ Among many compelling uses of storytelling is Margaret Montoya’s ‘Máscaras, Trenzadas, y Greñas: (Un)Masking the Self While (Un)Braiding Latina Stories and Legal Discourse’, in which she weaves poignant stories of her family, childhood, and career to critique how the US legal-

21 Derrick Bell, ‘Who’s Afraid of Critical Race Theory?’ *University of Illinois Law Review* (1995): 893–910; Neil Gotanda, ‘A Critique of “Our Constitution is Color-Blind,”’ in *Critical Race Theory*, eds. Crenshaw et al; Richard Delgado and Jean Stefancic, ‘Critical Race Theory: An Annotated Bibliography,’ *Virginia Law Review* 79 (1993): 461–516.

22 See Linda Greene, ‘Race in the 21st Century: Equality through Law,’ in *Critical Race Theory*, eds. Crenshaw et al., 292–301.

23 Greene, ‘Race in the 21st Century,’ 300.

24 Bell, ‘Who’s Afraid of Critical Race Theory?’ 899.

25 Delgado and Stefancic, ‘Critical Race Theory: An Annotated Bibliography,’ 462.

education and legal system discriminates against Latinas.²⁶

Another key mode of analysis for CRT scholars and advocates is historical revisionism, in which CRT scholars revisit key historical moments to explore, among other things, ‘the role of conquest, colonialism, economic exploitation, or White self-interest in driving legal relations between the majority group and minority communities of colour’.²⁷ Bell proposed the notion of ‘interest convergence’ as a guiding principle for this type of analysis:

The interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions. This convergence is far more important for gaining relief than the degree of harm suffered by blacks or the character of proof offered to prove that harm . . . even when the interest convergence principle results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites.²⁸

Bell formulated this principle in response to one of the most celebrated victories of the civil-rights movement, *Brown v Board of Education*, arguing it came about due to the government’s concern with maintaining positive foreign relations rather than because of any meaningful commitment to reducing White supremacy and anti-Black racism in the US.²⁹

CRT scholars have also employed critiques of White privilege, or

26 Margaret E. Montoya, ‘Máscaras, Trenzas, y Greñas: (Un)Masking the Self While (Un)Braiding Latina Stories and Legal Discourse,’ in *Critical Race Theory: The Cutting Edge* eds. Jean Stefancic and Richard Delgado (Philadelphia: Temple University Press, 2013), 660–667.

27 Jean Stefancic and Richard Delgado, ‘Critical Understandings of the Social Science Underpinnings of Race and Racism,’ in *Critical Race Theory: The Cutting Edge*, 123.

28 Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (New York: Oxford University Press, 2004), 69.

29 Bell, *Silent Covenants*.

White racial privilege, in their analyses.³⁰ Drawing on the work of Peggy McIntosh, leading CRT scholars like Devon Carbado and Mitu Gulati argue that recognition of White privilege ‘is nothing more than a claim about the existence of discrimination. . . . To the extent that race discrimination is a current social problem, there will be victims and beneficiaries of this discrimination. The former are disadvantaged; the latter are privileged’.³¹ Key White-privilege analyses have come from leading CRT scholar Khiara M. Bridges, who has examined the arrests and prosecutions of Black women for using opioids during their pregnancies in comparison to those of White women.³²

Another well-known focus of CRT scholarship and praxis is looking at how marginalised racial groups can either be essentialised or not due to White supremacy. As Delgado and Stefancic note, many CRT scholars are concerned ‘with the appropriate unit for analysis’, asking themselves questions like: ‘What is the black community, or the community of color? Does it exist? . . . Is the black community one, or many, communities? Do middle- and working-class African-Americans have different interests and needs? Do all oppressed peoples have something in common?’³³ For example, Lisa C. Ikemoto has demonstrated how the racial identities of African-Americans and Korean-Americans were essentialised in the mainstream framing of the terrible events of 1992 in Los Angeles, in order to construct African-American identity in opposition to Korean-American identity and obscure the true cause of the events which was the system of

30 John A. Powell, ‘Whites Will Be Whites: The Failure to Interrogate Racial Privilege,’ *University of San Francisco Law Review* 34 (2000): 419–464. Powell notes that they prefer to use the terms ‘White racial privilege’ or ‘White supremacy’.

31 Devon Carbado and Mitu Gulati, ‘The Law and Economics of Critical Race Theory,’ *Yale Law Journal* 112 (2003): 1777.

32 Khiara M. Bridges, ‘Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy,’ *Harvard Law Review* 133 (2019): 770–851.

33 Jean Stefancic and Richard Delgado, ‘Essentialism and Anti-essentialism,’ in *Critical Race Theory*, eds. Jean Stefancic and Richard Delgado, 387.

‘white-over-colored-supremacy’ that pit ‘two outsider groups against one another’.³⁴

Undoubtedly, the most well-known and mainstream CRT tool or concept is intersectionality. Stemming from two of Crenshaw’s influential articles in 1989 and 1990, as Bridges remarks, ‘intersectionality changed the way that academics in a variety of disciplines, practitioners, government actors, and activists all over the world think and talk about the experiences of multiple subordinated individuals and groups’.³⁵ While many definitions and articulations of the term have been offered, it can be understood as referring to ‘the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power’.³⁶ Crenshaw and others have also stated that intersectionality conceives of categories ‘not as distinct but as always permeated by other categories, fluid and changing, always in the process of creating and being created by dynamics of power’.³⁷ Bridges adds that intersectionality ‘should be understood as a challenge to anti-essentialism and its will to discard categorical thinking completely’.³⁸

According to Bridges, Critical Race Feminism (CRF) offers a veritable ‘anthology of intersectionality’, a body of work that deploys Crenshaw’s theoretical intervention to analyse the lives of women of colour in the

34 Lisa C. Ikemoto, ‘Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”’ *Southern California Law Review* 66 (1992): 1581.

35 Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics,’ *University of Chicago Legal Forum* (1989): 139; ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,’ *Stanford Law Review* 43 (1991): 1241; Bridges, *Critical Race Theory*, 233.

36 Kathy Davis, ‘Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful,’ *Feminist Theory* 9 (2008): 68.

37 Sumi Cho, Kimberlé Crenshaw, and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis,’ *Signs* 38 (2013): 795.

38 Bridges, *Critical Race Theory*, 237.

US and international contexts.³⁹ Leading CRF scholar Adrien Katherine Wing describes CRF as being concerned with how existing legal paradigms ‘under US, foreign, and international law have permitted women of colour to fall between the cracks—becoming literally and figuratively voiceless and invisible. [CRF] attempts to not only identify and theorise about those cracks in the legal regime, but to formulate relevant solutions as well’.⁴⁰

CRT’s criticisms, shortcomings, and interventionist offshoots

CRT has been subject to a range of criticisms since its inception. Early criticisms came from the likes of Richard Posner, a former Seventh Circuit judge, who wrote in 1997 that CRT scholars are ‘lunatics’ who come across as ‘whiners and wolf-criers’, as ‘labile and intellectually limited’, and as ‘divisive’.⁴¹ As Bridges notes, probably the most ‘contentious’ aspect of CRT has been the movement’s use of storytelling, with various criticisms claiming that storytelling relies on emotion rather than reason, that the normative position of stories can be unclear, that it can be difficult to discern whether stories convey a typical or generally shared lived experience, and

39 Bridges, *Critical Race Theory*, 116, noting that ‘if CRF is an anthology of intersectional feminism—and if intersectional feminism is CRT—then CRF is CRT. Thinking of CRF and CRT as separate might do an injustice to intersectionality’s location within CRT.’

40 Adrien Katherine Wing, ‘Global Critical Race Feminism: Legal Reform for the Twenty-First Century,’ *De Jure* 34 (2001): 447. One apt example of CRF’s global scope is Wing’s study of polygamy laws across Zimbabwe, South Africa, the UK, and the US and their varying impacts on Black women in those jurisdictions: ‘Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century,’ *Journal of Contemporary Legal Issues* 11 (2000): 811–880.

41 Richard Posner, ‘The Skin Trade,’ *The New Republic* 217, no. 15 (1997): 40.

that stories can be difficult to critique in academic dialogue.⁴² Criticisms have also been made in response to claims by CRT scholars that scholars of colour possess a ‘unique voice of color’ distinct from those of White people, and in response to CRT’s critiques of the liberal concept of merit as being racially biased.⁴³ While it is beyond the scope of this article to delve deeper into these critiques, there are other criticisms, or identified shortcomings, of early CRT that warrant examination.

The first is that CRT, particularly in its earlier years, deployed a Black–White paradigm of race in the US.⁴⁴ While many non-Black scholars, such as Richard Delgado, Mari Matsuda, Gerald Torres, and Neil Gotanda helped to build CRT, the experiences of Asian, Indigenous, and Latinx people with race and racial power were obscured.⁴⁵ However, despite a number of contributions by non-Black scholars over the past decade, James Gathii, a leading Third World Approaches to International Law scholar, has

42 Bridges, *Critical Race Theory*, 58, 71–72; Douglas E. Litowitz, ‘Some Critical Thoughts on Critical Race Theory,’ *Notre Dame Law Review* 72 (1997): 522; Kathryn Abrams, ‘Hearing the Call of Stories,’ *California Law Review* 79 (1991): 995; Daniel Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law*, (New York: Oxford University Press, 1997), 12. Here, the authors argue that ‘[A]ny criticism of the stories is inevitably seen as a personal attack on the storyteller. . . . [Conversations] can become sidetracked from discussing the merits of the message itself’.

43 Matsuda cited in Bridges, *Critical Race Theory*, 73. In response to criticisms that their ‘voices of color’ claim undermines class differences, Matsuda argues that: ‘A minority perspective cuts across class lines. . . . There is something about color that doesn’t wash off as easily as class’; Randall L. Kennedy, ‘Racial Critiques of Legal Academia,’ *Harvard Law Review* 102 (1989): 1801. Kennedy argues that CRT scholars must substantiate their claims that scholars of colour merited the same opportunities as white scholars. Bridges notes that CRT scholars countered this demand by arguing that Kennedy ‘misses the point’, as standards of merit are inherently biased and the burden of proof should not be on scholars of color to prove that traditional standards of merit that exclude them are valid: Bridges, *Critical Race Theory*, 73.

44 Bridges, *Critical Race Theory*, 73.

45 Bridges, *Critical Race Theory*, 83.

recently noted that ‘CRT scholarship has not generally included indigenous perspectives’.⁴⁶

Another perceived, rather than real, shortcoming of early CRT was that it promoted the myth of ‘Black exceptionalism’, or that in applying the Black–White paradigm CRT knowingly obscured the experiences of non-Black-non-White racial groups on the basis of Black people’s experiences being central to understanding every other racial group’s experiences in the US.⁴⁷ As Bridges notes, however, the majority of progressive thinkers on race today actually reject Black exceptionalism, and the architects of CRT most likely did not endorse such an idea either.⁴⁸ Nevertheless, this perception around early CRT’s Black exceptionalism and the Black–White paradigm spurred an intervention from Latinx scholars of colour, known as LatCrit, which can be characterised as ‘a movement to articulate the particularities of Latina/o perspectives and experiences within the regime of White supremacy’.⁴⁹ While there is some disagreement about whether LatCrit is a branch within CRT or its own distinct movement existing alongside it, it is widely agreed that LatCrit was an intervention that addressed the failure of early CRT to address the unique racial subordination of Latinx people.⁵⁰

It is unsurprising that the shortcomings of CRT outlined above led marginalised scholars of colour to develop their own movements, including but not limited to: APACrit, QueerCrit, TribalCrit, ClassCrit, and DisCrit.⁵¹ While it is not possible to outline all of these rich movements in depth, we agree with Bridges that it is better to think of these other movements as ‘genres within CRT’, rather than ‘distinct intellectual

46 James Thuo Gathii, ‘Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other,’ *UCLA Law Review* 67 (2021): 1637.

47 Bridges, *Critical Race Theory*, 88.

48 Bridges, *Critical Race Theory*, 89.

49 Elizabeth M. Iglesias, ‘Identity, Democracy, Communicative Power: Inter/National Labor Rights and the Evolution of LatCrit Theory and Community,’ *University of Miami Law Review* 53 (1999): 622.

50 Bridges, *Critical Race Theory*, 83.

51 Bridges, *Critical Race Theory*, 83.

formations and scholarly movements'.⁵² This is not only on the grounds that CRT can 'evolve' and 'rectify the oversights and omissions that were part of the theory at its inception', as Bridges reasons, but also due to the fact that the various analytical tools and concepts that the CRT movement have developed remain foundational to the scholarship and praxis of other crit offshoots.⁵³

CRT in 2021

The CRT movement has grown significantly since its inception in the late 1980s. This is evidenced in a number of factors, including the offshoots described above, CRT's presence in US law schools and across other disciplines in the academy, and the fact that CRT 'has travelled far outside the borders of the United States'.⁵⁴ However, the growth, relevance, and impact of CRT had never become so apparent as it did in September 2020, when President Donald Trump signed an executive order prohibiting federal contractors from conducting racial-sensitivity training, emphasising his desire to stop 'efforts to indoctrinate government employees with divisive and harmful sex- and race-based ideologies such as CRT'.⁵⁵

This executive order followed the mass racial-justice protests provoked by the murder of George Floyd by Minneapolis police on 25 May 2020, which resulted in an unprecedented reckoning with racism in the US and increased discourse around the need for CRT and other racial-justice education initiatives. This resulted in a Fox News story portraying CRT as a 'boogeyman' and a threat to American values, which ultimately drove the former president's order and public condemnation of CRT.⁵⁶ Despite the change in administration, at the time of writing GOP legislators have been

52 Bridges, *Critical Race Theory*, 101.

53 Bridges, *Critical Race Theory*, 101.

54 E. Tendayi Achiume and Asli Bali, 'Race and Empire: Legal Theory Within, Through, and Across National Borders,' *UCLA Law Review* 67 (2021): 1390.

55 Fabiola Cineas, 'Critical race theory, and Trump's war on it, explained,' *Vox*, 24 September 2020.

56 Fabiola Cineas, 'What the hysteria over critical race theory is really all about,' *Vox*, 24 June 2021.

drafting and passing bills to ban anti-racist teachings in public schools, with ten having passed through state legislators as of 24 June 2021.⁵⁷ Like many instances of Trumpian racism, the backlash against CRT went global—with right-wing politicians in Australia and the UK also taking action to ban CRT in schools.⁵⁸

In terms of how this backlash impacts the CRT movement and how we should respond, Crenshaw offers the following:

[The ban] is a backlash effort to reverse the racial reckoning unlike any we've seen in our lifetime. . . . they can't say we're for racism. They can't say that Dererk Chauvan should've killed George Floyd with his hand in his pocket looking like he was completely without a care in the world. They couldn't say that, so they looked around and found a strange sounding theory that they could put all of their grievances and resentments in, and mobilised people behind this boogeyman, and if our side can't really understand what's going on, it's going to work, it's worked in the past, it worked to end reconstruction and it can work to end this reckoning too.⁵⁹

Given that the murder of George Floyd and the global resurgence of the Black Lives Matter movement also led to a racial reckoning in New Zealand, we heed Crenshaw's urgent call for CRT scholars to ensure that this racial reckoning does not go to waste, and now turn to the question of how CRT can be located in New Zealand.

Can we locate CRT in New Zealand, and if so, how?

The question of how CRT can be located in New Zealand is laden with

57 Fabiola Cineas, 'What the hysteria.'

58 Leticia Anderson and Kathomi Gatwiri, 'The Senate has voted to reject critical race theory from the national curriculum. What is it, and why does it matter?' *The Conversation*, 22 June 2021; Sally Weale, 'Education experts counter government attack on critical race theory,' *The Guardian*, 13 November 2020.

59 MSNBC, 'Creator of Term "Critical Race Theory" Kimberlé Crenshaw Explains What It Really Is,' *You Tube*, 22 June 2021.

tensions and possibilities. In this section, we want to further contextualise CRT within New Zealand as a settler-colonising state.⁶⁰ CRT is not a singular perspective but rather a continued field of academic inquiry.⁶¹ It foregrounds the lived experiences of marginalised folk (mostly Black, Indigenous, and Communities of Colour), interrogating how the law functions under the logic of White supremacy. Importantly, CRT is not immutable. It can, and should, be adapted to specific racialised contexts. This is evident in the growth of various CRT ‘off-shoots’ in recent decades, a growth that is demonstrative of its relevance across disciplines and racial realities. In writing this piece, we first questioned who are *we*, as *Tauiwi* of colour, to propose a potential theoretical framework to critique race/ism in New Zealand?⁶² Some self-reflexivity is important in unpacking this first tension around how we can locate CRT in this country.

We are two emerging Pasifika scholars writing from within the academy.⁶³ Many (justified) critiques are levelled at academics writing from the comforts of the ivory tower, cushioned in their privilege from the realities of those working to survive the very system(s) that scholars discuss. For us, then, it is the bare minimum to orient our teaching and scholarship toward the conscious unmasking, exposing, and dismantling of racism within our legal system(s). We need to contextualise how racial dynamics operate in New Zealand. Race is a social construct, rather than a biological reality, but it nevertheless ‘mediates every aspect of our lives’.⁶⁴ It is a persistent

60 We use ‘settler-colonising,’ as opposed to ‘settler-colonial’ to acknowledge that colonisation as an ongoing, pervasive structure rather than a historic relic.

61 See Liz W Faber (@LizWFFab), ‘Critical Race Theory is a field of academic inquiry not a unified belief or concept...’ Twitter post, 3 May 2021.

62 We adopt *Tauiwi* to acknowledge that Pacific peoples are guests on Indigenous land. While the term ‘settler’ most often applies to *Pākehā*, we acknowledge that our presence in Aotearoa involves a form of ‘settlement’ process that can, and does, legitimise the settler-colonising state.

63 Dylan is Sāmoan and Litia is Fijian, Tongan, and *Pākehā*.

64 Ian Haney López, ‘Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice,’ *Harvard Civil Rights-Civil Liberties Law Review* 29 (1994): 3.

factor in the organisation of our social relations.⁶⁵ The late Derrick Bell coined the term ‘racial realism’ to describe how Indigenous, Black, and Communities of Colour ‘remain economically, politically, and socially subordinated’ despite formal ‘equality’ before the law.⁶⁶ However, a CRT analysis must go beyond simplistic definitions of race/ism and grapple with how Indigenous peoples and communities of colour are *racialised* within the settler-colonial matrix. By definition, racialisation is ‘the historically contingent social construction of “races” and the attribution to them of particular (although not necessarily fixed) characteristics—[it] provides the basis for settler colonial strategies of elimination, subjugation, exploitation, and manipulation’.⁶⁷ Further:

Racialisation as we know it is a product of colonial expansion, on this [North American] continent and globally. While racism and colonialism are distinct phenomena, they are geologically inseparable. As a result, the ways in which ‘race’ has been constructed, and the presumptions of racial hierarchy that flow from that construction, have always been at the core of the American settler colonial narrative.⁶⁸

One could substitute ‘American’ for New Zealand and the argument still stands. In our view, ‘New Zealand’ remains unwilling to confront race/ism with any discursive rigour. Our national ego is buoyed by claims of being ‘better than’ the likes of Australia and the US, legitimising a collective amnesia around the nation’s deeply racist past and present. As Moana Jackson observes:

If racism is ever recognised, it is either seen as an individual aberration rather than a systemic fact, an exception to the rule of a benevolent ‘settlement’, rather than an acceptance of the fact that in the end colonisation was

65 Natsu Taylor Saito, *Settler Colonialism, Race and the Law: Why Structural Racism Persists* (New York: New York University Press, 2020), 30.

66 See Derrick Bell, ‘Racial Realism,’ *Connecticut Law Review* 24 (1992): 363–379.

67 Saito, *Settler Colonialism*, 134.

68 Saito, *Settler Colonialism*, 30.

constructed on the racist belief that so-called White, civilised people in Europe were innately superior and therefore had the right to dispossess non-White ‘uncivilised’ peoples who were inferior. Space and bodies were key to that dangerous and violent belief.⁶⁹

The (colonial) origin story forces us to confront the fact that ‘clean, green New Zealand’ remains ensconced within a White-supremacist logic. Collective denial of this history means valuable time is wasted contesting and/or refuting racism’s very existence and, as a result, mainstream race discourse is diluted into deceptively benign terms like ‘unconscious bias’ and ‘prejudice’, defanging any radical potential for transformative change.

This leads to the second tension of whether we must deploy CRT to articulate our racialised experiences in New Zealand. Can testimonials of racism, however articulated, be heard, understood, and valued in legal critique irrespective of whether they are couched in theory? As much as we would like to answer in the affirmative, the reality is that simply declaring that a system/person/institution is ‘racist’ in contemporary legal discourse is unthinkable. This is not only because the term creates great discomfort and offence to White people, but also because such language runs contrary to typical Western liberal norms that insulate White people from discomfort and offence.⁷⁰ As CRT scholars highlight, the law has been especially effective in smuggling White-supremacist logic under the cloak of ‘equality’, ‘objectivity’, and ‘colour-blindness’.⁷¹ To declare a law or institution as racist is to risk an onslaught of racial gaslighting (‘Really? Are you sure it’s a race issue? But the law doesn’t specify any race?’). As a discipline that revels in structure and inductive reasoning, any critique without a jurisprudential foundation is often side-lined for ‘lacking academic rigour’. Therefore, notwithstanding its flaws, CRT can be strategically leveraged to illuminate how the law creates and maintains racialised subordination.

The third tension in applying CRT in a New Zealand context arises

69 Moana Jackson, ‘Space, Race, Bodies – A Conference Theme, A Timely Reminder,’ *Sites: New Series* 14 (2017): 7.

70 See Harris, ‘Racism and White Defensiveness in Aotearoa.’

71 Delgado and Stefancic, ‘Critical Race Theory: An Annotated Bibliography,’ 462.

from it being a field of inquiry borne from the intellectual labour and lived experiences of Black, Latinx, and Asian scholars in the US. The sociological meanings attached to race and racism are myriad and also historically and geographically specific. There is a fine line between appreciation and appropriation, and there is a real danger of co-opting critique(s) that apply to the lived experiences of a specific group. The CRT framework(s) used in Black-specific contexts (and those of other marginalised identities, such as Latinx folk) cannot be wholesale applied to New Zealand. As Arama Rata and Faisal Al-Asaad identify, ‘indigenous peoples and communities of colour are racialised and oppressed differently by settler colonial states such that our political projects are incommensurable but not incompatible’.⁷² However, we do believe that there needs to be more robust discussion about New Zealand’s pervasive anti-Blackness, including within and by Indigenous peoples and non-Black communities of colour. As Pasifika, we take guidance from our Tuākana in the Polynesian Panther Party (PPP) who, inspired by the radical politics of the Black Panther Party, adapted the Panthers’ 10-point platform to fit the circumstances of newly migrated Pasifika to New Zealand, while also remaining in continued solidarity with Tangata Whenua. Although the PPP’s work was predominantly activist based, their nuanced application of Bobby Seale and Huey P. Newton’s legacy of ‘radical intercommunalism’ is an apt reminder to engage in cross-racial solidarity scholarship and praxis with love, respect, and reciprocity, and not in an extractive and self-serving manner.

For example, although Māori and Pasifika are marginalised across all legal and socio-economic indices, we must differentiate how each group is racialised within the settler-colonial paradigm in order to dismantle structural racism’s colonial foundations. In short, Māori are racialised within the settler origin story that subsumed Indigenous peoples into a ‘territorial wilderness’, rendering them as subhuman ‘beasts’ and ‘savages’

72 Arama Rata and Faisal Al-Asaad, ‘Whakawhanaungatanga as a Māori Approach to Indigenous-Settler of Colour Relationship Building,’ *New Zealand Population Review* 45 (2019): 213.

ripe for expulsion and disappearance (literally and conceptually).⁷³ This justified the colonisers' civilizing mission, allowing them to exert territorial dominion over 'lawless land'.⁷⁴ Comparatively, Pasifika are racialised as a foreign 'Other', exploited as a disposable, low-cost labour pool. Their 'otherness' is mediated through colonial and imperial dynamics that situate them as perpetual 'outsiders' to (White) New Zealand, but also 'valuable' insofar as they contribute to the construction and maintenance of settler society.⁷⁵

As guests on Indigenous land, communities of colour must reckon with the fact that failing to interrogate their/our role in legitimising the settler-colonising state renders us complicit in the continued dispossession of Indigenous peoples from their land base. We take heed of Chickasaw professor Jodi A. Byrd's observation that 'while racialization and colonization have worked simultaneously to other and abject entire peoples, their conflation serves to further reinscribe the original colonial injury'.⁷⁶ Natsu Taylor Saito expands on this, contending that 'immigrants not only enrich and empower the settler class but also come to see themselves as having a vested interest in the occupation of Indigenous lands. Simultaneously, however, settler prerogative ensures the continued racialized subordination of all peoples of color'.⁷⁷ Thus, race, racism, and racialisation operate as 'functions of colonialism' and must be unpacked in any CRT analysis.⁷⁸

In proposing a CRT framework, we are not attempting to supplant Indigenous frameworks/theories/methodologies for understanding how the law maintains racial power. Rather we believe that CRT, with an emphasis on how peoples are racialised under settler-colonialism, is a complementary framework for exploring race and the law in New Zealand.

73 Saito, *Settler Colonialism*, 58.

74 See Robin Cooke, *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Wellington: Reed, 1969).

75 See Sean Mallon, Kolokesa Mahina-Tuai, and Damon Salesa, *Tangata o le Moana: New Zealand and the People of the Pacific* (Wellington: Te Papa Press, 2012).

76 See Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011).

77 Saito, *Settler Colonialism*, 113.

78 Saito, *Settler Colonialism*, 134.

Towards a CRT framework for New Zealand: five guiding principles

There is no one way to deploy a CRT analysis. Part of CRT's relevance and evolution since its inception in the 1980s is its flexible application to myriad socio-legal issues across jurisdictions. The absence of a prescriptive methodology has prevented it from devolving into a trite 'tick-box' exercise that overlooks the nuances of race/ism within social realities. Therefore, drawing on the work of Makau Mutua, who provided three objectives of another critical movement, Third World Approaches to International Law,⁷⁹ we offer the following interrelated guiding principles when deploying an explicit CRT analysis to issues of race/ism in New Zealand:

1. Dismantle settler-colonial thinking, laws, and politics.
2. Acknowledge positionality.
3. Privilege Indigenous knowledges, storytelling, and lived experiences.
4. Draw on the praxis of anti-racist and decolonial activism.
5. De-centre coloniality and imagine new possibilities.

These five principles are not at all prescriptive or exhaustive, and should not be taken as a mandatory list of requirements or considerations for CRT scholars from New Zealand to mechanically apply. Rather, they are intended to guide scholars and advocates who may be struggling to locate CRT or apply a CRT lens in New Zealand. We strongly encourage and welcome further discussion, critique, and development by others. We briefly outline the five principles below.

First, dismantling settler-colonial thinking, laws, and politics is to interrogate the law as a medium for the creation and perpetuation of a racialised hierarchy in the settler-colonising state, and its various norms and institutions that subordinate Māori and communities of colour compared to White people. Settler colonialism cannot be refracted solely through the

⁷⁹ Makau Mutua, 'What is TWAIL?' *Proceedings of the ASIL Annual Meeting 94* (2000): 31–38.

prism of race and racialisation—it must be addressed as a question in and of itself.⁸⁰ Saito posits that ‘if racial hierarchy is rooted in, and was essential to, the establishment of the United States as a settler colonial state and those foundational colonial relationships of power and privilege persist, then racism can be meaningfully eliminated only in conjunction with decolonization’.⁸¹ The same can be said of New Zealand. In our view, this means ensuring that all CRT scholarship and praxis explicitly advocates for the irreducibility of Indigenous sovereignty and honours te Tiriti o Waitangi. No critique or proposal for change advanced in CRT scholarship or praxis should undermine Te Tiriti nor accept the permanence and continued existence of the settler-colonising state.

In terms of what honouring Te Tiriti means and looks like in our legal system, Matike Mai Aotearoa, The Independent Working Group on Constitutional Transformation, have done groundbreaking work in reimagining our constitutional arrangements with te Tiriti at the centre in their 2016 report *He Whakaaro Here Whakaumu Mō Aotearoa*.⁸² Further, the Declaration Working Group on a plan to realise the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in Aotearoa drew heavily on the work of Matike Mai to create *He Puapua*, a report which provides a robust roadmap for how the New Zealand Government can realise its obligations under te Tiriti and the UNDRIP through constitutional transformation by 2040.⁸³ While it is beyond the scope of this article to outline the ideas of these reports, they both provide broad guidance to CRT scholars in New Zealand as to the overarching legal and political goals that anti-racist scholars and advocates can work towards.

Unfortunately, most CRT scholarship in the US from non-Indigenous

80 Rata and Al-Asaad, ‘Whakawhanaungatanga,’ 215.

81 Saito, *Settler Colonialism*, 7, emphasis in original.

82 Matike Mai Aotearoa, *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa—The Independent Working Group on Constitutional Transformation* (Auckland: National Iwi Chairs Forum and Te Wānanga o Waipapa, 2016).

83 Claire Charters et al., ‘He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand,’ Wellington, 2019.

scholars has not reckoned with settler-colonialism and the genocide of Native Americans. Amadahy and Lawrence grapple with this issue in discussing the relationship between Indigenous and Black people in Canada. They insist that ‘this erasure is neither deliberate nor accidental—it flows inevitably from a theoretical framework that separates racism from colonialism and genocide, and grants priority to racism failing to separate racism and colonialism’.⁸⁴ For example, while Harris’s pioneering *Whiteness as Property* argues that Whiteness as a tangible and intangible property interest operates to deny Black and Native Americans the same interests, there is an unfortunate implicit assumption that the experiences of both Black and Native Americans with White supremacy are one and the same.⁸⁵ Therefore, when adopting CRT tools, we argue that one cannot afford to make the same mistakes and we must make a conscious effort to dismantle settler-colonial thinking and honour te Tiriti in our scholarship and praxis.

Second, legal writing has traditionally eschewed the need for researchers and authors to appropriately position themselves in their work. Often, the law has assumed a role akin to an omniscient, ‘eye of God’ narrator existing everywhere and nowhere simultaneously. It is face-less, race-less, gender-less, place-less, and class-less, thereby maintaining the discipline’s obsession with claims to ‘objectivity’ and ‘equality’. As law students, we are taught that our work should be devoid of any evil ‘I’ sentiments—I think, I feel, I believe, I assume—as though severing subjectivity(s) earns legitimacy. This has allowed legal research to gaze upon historically marginalised communities with impunity, talking to them, about them, and for them in a selfish power-play masquerading as ‘unbiased’. As Chickasaw scholar Eber Hampton writes:

Emotionless, passionless, abstract, intellectual research is a goddamn lie, it does not exist. It is a lie to ourselves and to other people. Humans—

84 Zainab Amadahy and Bonita Lawrence, ‘Indigenous Peoples and Black People in Canada: Settlers or Allies?’ in *Breaching the Colonial Contract: Anti-Colonialism in the US and Canada*, ed. Arlo Kempf (Netherlands: Springer Netherlands, 2009), 118.

85 Cheryl I. Harris, ‘Whiteness as Property,’ *Harvard Law Review* 106 (1992): 1707–1791.

feeling, living, breathing, thinking humans—do research. When we try to cut ourselves off at the neck and pretend an objectivity that does not exist in the human world, we become dangerous, to ourselves first, and then to the people around us.⁸⁶

CRT scholars have, to varying degrees, called upon scholars to explicitly acknowledge their position in relation to their research. If the aim of CRT is to interrogate the racialised foundations of the law (and its conceptual, theoretical, and methodological elements therein), researchers must be reflexive and assess the ‘who’, ‘why’, and ‘how’ of their work. This may include, but is not limited to, a critical understanding of how one’s race(s), class, age, gender, sexual orientation, citizenship status, education, and geography impact one’s critique. Identities (and one’s positionality) are not immutable. We must continually and consciously re-examine ourselves. Some questions to guide a reflexivity ‘statement’ might include the following: Who am I? What identities do I hold? How did I come to this work? What is my research motivation(s)? What am I hoping to learn? Who am I in conversation with? Who am I choosing to cite? Is my critique/analysis generative or extractive? What is my positioning in relation to the participants/communities/people I intend to discuss? What are my potential blind spots? Are there any power dynamics imbued in this relationship? How might that dynamic(s) be addressed in this research? Does this research replicate and/or reproduce any power imbalance(s)? Am I talking about, rather than in collaboration with, certain folk? To what extent is my gaze dominating the research?

In short, to be critical of systems we must first acknowledge our own position within them. CRT scholars have frequently foregrounded their research with narratives of how they came to the work and their relationship to the subject(s) in question—be it personal, cultural, familial, experiential, and so on. The possibilities of what a positionality ‘statement’ might entail are infinite. Some are short statements. Some are poems.

86 Eber Hampton, ‘Memory Comes Before Knowledge: Research May Improve if Researchers Remember Their Motives,’ *Canadian Journal of Native Education* 21 (1995): 52.

Some are stories. Some are sprawling narratives. Some are photographs. Some are conversations. Encouraging and enabling CRT scholars in New Zealand to cite their positionality is an important step in developing this legal scholarship.

Third, to effectively dismantle settler-colonial thinking, laws, and politics, CRT scholarship and praxis in New Zealand needs to draw on scholarship, policy, and politics that privilege the Indigenous knowledges, storytelling practices, and lived experiences of Māori and Communities of Colour. By Indigenous knowledges, we refer broadly to the Indigenous knowledges, frameworks, methodologies, histories, art, languages, values, and principles of Tangata Whenua, as well as those of other Communities of Colour in New Zealand, where relevant. Specifically, we posit that there needs to be a focus on adopting these Indigenous knowledges, storytelling practices, and lived experiences in CRT scholarship and praxis to articulate how the law is racist and fails Māori and other Communities of Colour in New Zealand as well.

Thankfully, there is a growing wealth of literature that can guide these efforts. In addition to foundational texts on decolonial research and praxis in Aotearoa and the wider Moana by Moana Jackson, Epeli Hau'ofa, Haunani-Kay Trask, Konai Helu Thaman, and others, Linda Tuhiwai Smith's pioneering *Decolonising Methodologies: Research and Indigenous Peoples* provides timeless guidance to all scholars and activists committed to anti-racist and decolonial futures.⁸⁷ Smith even notes how CRT is consistent with, and like, other methodologies, including Kaupapa Māori research:

Participatory action research, Kaupapa Maori research, oral histories,

87 Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2012). See also: Moana Jackson, 'Research and the Colonisation of Maori Knowledge,' *He Pukenga Korero* 4 (2013); Epeli Hau'ofa, 'Our Sea of Islands,' in *A New Oceania: Rediscovering Our Sea of Islands*, eds. Epeli Hau'ofa, Eric Waddell, and Vijay Naidu (Suva: University of the South Pacific, 1993); Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Honolulu: University of Hawaii Press, 1999); Konai Helu Thaman, 'Decolonizing Pacific Studies: Indigenous Perspectives, Knowledge, and Wisdom in Higher Education,' *The Contemporary Pacific* 15 (2003): 1–17.

critical race theory and testimony are just some examples of methodologies that have been created as research tools that work with marginalized communities, that facilitate the expression of marginalized voices, and that attempt to re-present the experience of marginalization in genuine and authentic ways.⁸⁸

However, despite this broad consistency, as Gathii remarks ‘CRT scholarship has not generally included indigenous perspectives’.⁸⁹ CRT in New Zealand cannot afford to make the same mistake. Fortunately, there are existing bodies of critical Indigenous scholarship focused on dismantling settler-colonial thinking, laws, and politics for CRT scholars to work from.

While there are clear synergies between CRT and critical Indigenous theories like Kaupapa Māori theories, we acknowledge that it is not our place to state that critical Indigenous scholarship falls under the CRT umbrella without explicit indication from these scholars themselves. This critical Indigenous scholarship includes, but is in no way limited to, *He Whakaaro Here Whakaumu Mō Aotearoa*, *He Puapua*, and the work of the scholars already mentioned in this article, all of which sit among a vast and growing number of contributions across a range of different disciplines and contexts to date.⁹⁰

88 Smith, *Decolonising Methodologies*, 326.

89 Gathii, ‘Writing Race and Identity in a Global Context,’ 1637.

90 Some key contributions include: Rangimarie Mahuika, ‘Kaupapa Māori Theory is Critical and Anti-colonial,’ *MAI Review* 3 (2008): 1–16; Leonie Pihama, ‘Kaupapa Māori Theory: Transforming Theory in Aotearoa,’ *He Pukenga Korero* 9 (2012); Ocean Ripeka Mercier, ‘Indigenous Knowledge and Science. A New Representation of the Interface Between Indigenous and Eurocentric Ways of Knowing,’ *He Pukenga Korero* 8 (2013); Elana Curtis, ‘Indigenous Positioning in Health Research: The Importance of Kaupapa Māori Theory-informed Practice,’ *AlterNative: An International Journal of Indigenous Peoples* 12 (2016): 396–410; Tina Ngata, *Kia Mau: Resisting Colonial Fictions* (Wellington: Tina Ngata, 2019); Mark Hickford and Carwyn Jones eds. *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (New York: Routledge, 2019); Gordon Christie, ‘Indigenous Legal Theory: Some Initial Consideration,’ in *Indigenous Peoples and the Law: Comparative and Critical Perspectives* eds. Benjamin Richardson, Shin Imai, and Kent McNeil (Portland: Hart Publishing, 2009); Karl Upston-Hooper, ‘Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi,’ *VUW Law Review* 28 (1998): 683–717.

Fourth, across the globe, the work of anti-racist and decolonial activists has advanced transformative changes to racial-equity laws, policies, and structures through strategic mobilising and organising at a grass-roots level. CRT scholars are frequently involved in anti-racist and decolonial projects outside of the academy and often centre activist calls to action and/or manifestos in their scholarship. This dissolves the ‘theory/praxis’ binary and ensures that progressive, anti-racist organising foregrounds the lived experiences, narratives, and testimonials of those at the coalface of social issues. Activism is critical by its very nature, and activist groups are unbridled in their demands for their respective agenda(s). The latter material, be it written, verbal, visual, or aural, will enrich a CRT analysis and demonstrate how issues of race, racism, and other intersections are navigated ‘on the ground’. This is not to suggest that scholars must ideologically align with the activism(s) in question, or that such advocacy is immune from critique. Rather, inclusion, where relevant and appropriate, should inform a core component of a CRT discussion.

Fifth, we also posit that CRT scholarship and praxis ought to imagine, construct, and present alternatives to the settler-colonising state and its various norms and institutions. This means going beyond critique and dismantling to imagine, explore, draft, propose, and organise new possibilities and ideas for laws, policy, politics, praxis, and movements that seek to eradicate the conditions of racial subordination. Imagining and creating is a practice and way of being that is common to many Black, Indigenous, and Peoples of Colour in the US and beyond, and Indigenous peoples of Te-Moana-nui-a-Kiwa. For CRT and racial-justice scholars and activists in the US, the words of Robin D. G. Kelley are an enduring source of inspiration for imagining new possibilities: ‘the catalyst for political engagement has rarely been misery, poverty, or oppression. People are drawn to social movements because of hope: their dreams of a new world radically different from the one they inherited. Our imagination may be the most revolutionary tool available to us’.⁹¹ For us in New Zealand and in

91 Robin D. G. Kelley, *Freedom Dreams: The Black Radical Imagination* (Boston, Beacon Press, 2002), np.

the wider Te Moana-nui-a-Kiwa, imagining new possibilities is a vital task. We can take inspiration here from Jackson, who imagines a new Aotearoa animated by the following values:

The value of place—the need to promote good relationships with and ensure the protection of Papatūānuku.

The value of tikanga—the core ideals that describe the ‘ought to be’ of living in Aotearoa and the particular place of Māori within that tikanga.

The value of community—the need to facilitate good relationships between all peoples.

The value of belonging—the need for everyone to have a sense of belonging.

The value of balance—the need to maintain harmony in all relationships, including in the exercise of constitutional authority.

The value of conciliation—the need to guarantee a conciliatory and consensual democracy.

Jackson holds that these values are ‘prerequisites for constitutional transformation’ and are ‘interrelated parts of a wider ethic of restoration’.⁹² To help illustrate how these guiding principles can inform CRT in action in New Zealand, we will now offer a critique of the *Tifaga v Department of Labour* case of 1980, approaching the case against the backdrop of the dawn raids and state-fuelled racism against Pacific peoples.

CRT in action: sketch of a critique of Tifaga v Department of Labour

Mr Iakopo Tifaga left Sāmoa to come to New Zealand in 1974 on a

92 Moana Jackson, ‘Decolonisation and the Stories in the Land,’ in *Imagining Decolonisation* (Wellington: BWB, 2020), 52.

temporary entry permit issued under the Immigration Act 1964 (the Act).⁹³ He was imprisoned for committing an offence that was not specified in the judgement, and on 28 July 1978 he was given notice that his permit was being revoked and that he had to leave New Zealand in 21 days. He failed to do so and was charged with overstaying his permit under section 14(6) of the Act.⁹⁴ Section 14(6) was an offence of strict liability, which means that it does not matter if there was no *mens rea* (mental element) or intent to commit the offence. The mere fact that it was committed is sufficient for conviction.

However, one of the defences available to Mr Tifaga was the defence of impossibility, which follows that a person may be acquitted of the charge if, due to circumstances entirely beyond their control, it was truly impossible for them to not commit the offence.⁹⁵ Mr Tifaga argued this defence on the grounds that he had insufficient funds between the receipt of notice and its expiry to fund a plane ticket home, and that there were no other practical means of leaving the country. Mr Tifaga only had \$10 cash when he received the revocation notice on the eve of his prison release. He unsuccessfully tried to gain employment during the period of the notice and he sought a refund of his tax. As a result, he had only \$70 cash available on the last day of the notice, and an airfare to Sāmoa cost some \$330. He then requested an extension of his permit so he could pay for his airfare, or if Immigration New Zealand could pay; both requests were denied.⁹⁶

In rejecting the defence of impossibility, the court found that a lack of finances was an irrelevant consideration in failing the obligations under his permit, and that he should have maintained sufficient funds in his bank account during his time in New Zealand. The court held that ‘he had chosen not to have sufficient funds available to meet the outward fare, and there was no evidence that it had been impossible for him to maintain

93 *Immigration Act 1964*.

94 *Tifaga v Department of Labour*, 237.

95 *Tifaga v Department of Labour*, 245.

96 *Tifaga v Department of Labour*, 240.

a reserve for that purpose'.⁹⁷ He was therefore criminally responsible for failing to leave.

A CRT analysis

This case, despite its age, remains a key authority on the criminal defence of impossibility in New Zealand. Accordingly, we both came across this decision in our criminal law course in 2014. We analysed the decisions, as most law students are trained to do, with our brains geared towards template exam notes: What are the facts? What is the issue(s)? What was held? How could this apply to a new fact problem if you were a lawyer? In short, a CRT discussion eluded us, although it was not lost on either of us that this was but one of the few occasions where Pacific peoples were mentioned in the context of our legal education, alas most times as criminal defendants. Any sense of injustice or racial bias also eludes existing legal scholarship on the *Tifaga* case, where legal scholars covering the case have opted to make strictly doctrinal observations on how the case developed the defence of impossibility, rather than challenge whether the court's rejection of Mr Tifaga's circumstances was unjust and discriminatory.⁹⁸ Therefore, it is important to explore how a CRT lens could be applied to this case. Although section 14(6) of the Immigration Act 1964 has been repealed and it is no longer a strict liability criminal offence to overstay a temporary visa, we posit that it is still important to reckon with how the criminal defence of impossibility is shaped in terms of how the realities facing Pacific peoples, including Pacific migrants, are taken into account.⁹⁹

Turning to our guiding principles outlined above, the centre of our

⁹⁷ *Tifaga v Department of Labour*, 235.

⁹⁸ See John Fisher, 'Voluntariness—The Missing Link,' *Auckland University Law Review* 6 (1988): 1–13; Margaret Briggs, 'Impossibility: Unknown and Unknowable Laws,' *Otago Law Review* 8 (1996): 539–553; Gerald Orchard, 'Quasi-absolute Liability Under the Immigration Act 1964,' *NZLJ* 66 (1986); Andrew Simester, 'On the So-called Requirement for Voluntary Action,' *Buffalo Criminal Law Review* 1 (1997): 403–430.

⁹⁹ See *Immigration Act 2009*. Under this Act, there is now a more comprehensive process for deportation and removal orders (Part 6), appealing these orders (Part 7), and fining offences for refusing these orders (section 344).

critique must be on ‘dismantling settler-colonial thinking, laws, and politics’. Without this guiding principle, Pacific Taiwi like ourselves would have likely launched into a critique of the racism of the court’s decision, without first orienting this critique in terms of the relationship that Pacific peoples have with Māori as Tangata Whenua, and moreover how this informs the relationship that Pacific peoples have had with the settler-colonising state’s immigration system.

To understand this relationship between Pacific migrants and Māori outside of the settler-colonising paradigm, we draw on Jackson, who centers whakapapa and whanaungatanga when discussing this kinship:

One of the worst things that colonisation did to our people was make us forget that we are Pacific peoples. So for generations ‘Pacific Islanders’ did not include Māori, ‘Pacific Islanders’ were those people over there . . . and so that created division where history and whakapapa had once bound us together. . . . I would hope that as our people gain more confidence in who we are as belonging to this land, that we would also be able to re-strengthen our ties with our whanaunga in the Pacific. They’ve never been completely severed, but they have been put under strain.¹⁰⁰

In further grappling with this ‘strain’, we also draw on the formative work of Alice Te Punga Somerville, who argues that ‘as long as Maori and Pasifika communities insist that their primary relationship is with the New Zealand nation-state, relationships between these communities will struggle to function beyond the narrow parameters that the state provides’.¹⁰¹ Here, Te Punga Somerville illuminates how Pacific peoples in New Zealand tend to centre their relationships and existence in New Zealand in allegiance to the Crown, rather than with their Indigenous Māori whanaunga who are the true kaitiaki of the land.

Therefore, in naming and resisting this form of settler-colonial

100 Moana Jackson, ‘A kōrero with Moana Jackson—Te Tiriti Based Futures 2020 Webinar,’ *You Tube*, 21 March 2020.

101 Alice Te Punga Somerville, *Once Were Pacific: Māori Connections to Oceania* (Minneapolis: University of Minnesota Press, 2012), 175.

thinking, our CRT critique is grounded in the understanding that the current immigration system is illegitimate, as it is a product of the illegitimate settler-colonising state. It follows that the overarching goal for Pacific peoples in New Zealand, beyond *Tifaga* and deportation orders, is a just legal system centred on Te Tiriti o Waitangi—a system in which the ‘ties’ between us and Māori whanaunga can be reimaged and re-strengthened, as called for by Jackson. This orientation allows us to advocate for the interests of Pacific peoples in New Zealand without unintentionally reinforcing the settler-colonising state as the paramount authority able to determine our place in this country.

Turning to the second guiding principle, which is to acknowledge positionality, we are cognisant of the fact that although we are Pacific peoples with aiga and famili who have been subject to unjust deportation orders, our current positions as tertiary-educated academics born in the 1990s means that our analysis lacks the direct lived experience of Pacific migrant realities in the 1980s. Further, our ideas about what is possible or ‘impossible’ for Mr Tifaga, while arguably more informed than that of the Court of Appeal, are still coloured by our own privilege as people who have never been subject to deportation orders. Moreover, our positionality also means that our analysis lacks the appropriate Indigenous Māori and Pacific knowledges and conceptual tools to interrogate the *Tifaga* decision beyond those offered to us by CRT.¹⁰² This highlights the importance of interdisciplinary collaborations with people who do possess this knowledge.

In terms of the tools that CRT does offer us, we find race-conscious historical revisionism to be of particular use. It is important to revise the accepted history of the *Tifaga* case as simply being an example of an objective and fair decision about the defence of impossibility. Rather, it should be seen as a case that illustrates the racism that was encouraged and facilitated by the New Zealand Government against Pacific migrants in the 1970s. As Karlo Mila records, from 1974–1976 the New Zealand Government

102 Here, we specify Māori and Pacific Indigenous knowledges to indicate that they are both potentially important when examining issues facing Pacific peoples in New Zealand. We also acknowledge that not all Pacific peoples identify as Indigenous.

targeted Pacific migrants as illegal immigrants.¹⁰³ These Pacific migrants had earlier been lured by the government to fulfil labour shortages and were implicitly encouraged to overstay their visas with relaxed enforcement by immigration. However, following the economic downturn of 1973 they were scapegoated by the New Zealand Government and blamed for rising unemployment and costs of living for Pākehā.¹⁰⁴ Part of this scapegoating involved the infamous dawn raids, which involved police raiding the homes of Pacific families at dawn, demanding to see their documents and deporting anyone who had overstayed their visa. The police also engaged in aggressive racial profiling, targeting anyone, including Māori, who they thought did not look like ‘New Zealanders’. As Graeme Lay says, ‘xenophobic feelings were fomented by the National Government during the latter half of that decade and the word “Islander” came to assume a pejorative aspect’.¹⁰⁵

While the dawn raids ended in 1977 due to effective Pasifika-led activism, we consider the anti-Pacific sentiment drummed up by the dawn raids to be evident in the Tifaga decision. While there is no overt or explicit racism against Pacific peoples, ingrained in the court’s view of Mr Tifaga’s circumstances is a lack of compassion and humanity for his financial difficulties. While the court was able to recognise that he only had \$70 for a \$330 flight, rather than viewing both this shortfall and his genuine efforts to work for more money as a sign of genuine poverty, the court decided to render Mr Tifaga’s poverty as a choice that he knowingly made, supposedly to evade deportation. At no point did the court express sympathy for Mr Tifaga’s circumstances. Instead, there was a harsh judgement, seemingly bolstered by a palpable disdain for his inability to save or obtain an extra \$260 to leave New Zealand. We argue that the court’s punitive approach to interpreting Mr Tifaga’s financial hardship was undoubtedly and unavoidably influenced by popularised stereotypes

103 Karlo Mila, ‘Deconstructing the Big Brown Tails/Tales: Pasifika Peoples in Aotearoa New Zealand,’ in *A Land of Milk and Honey? Making Sense of Aotearoa New Zealand*, eds. Avril Bell et al (Auckland: Auckland University Press, 2017).

104 Mila, ‘Deconstructing the Big Brown Tails/Tales.’

105 Graeme Lay, *Pacific New Zealand* (Auckland: David Ling Publishing, 1996), 13.

of Pacific peoples, which positions them as threats and burdens to New Zealand society. In this way, it was a continuation of the racist sentiment that Pacific peoples deserved and deserve to be deported, regardless of their circumstances. While mainstream Western legal norms posit that judges are objective, apolitical, and simply unaffected by the media and wider social and cultural forces, we argue that this pretence of objectivity is harmful and that institutional racism in the judiciary was and still is very present today. This racism is evident in the court's failure to critically engage with the wider socioeconomic factors that could have explained why Mr Tifaga only had \$70, such as the widespread unemployment, low wages, high costs of living, familial obligations, or other extenuating circumstances that Mr Tifaga and other Pacific migrants faced in the 1970s and 1980s.¹⁰⁶

Further, we note that the *Tifaga* decision coincides with a number of other anti-Pacific racist immigration laws at the time, including the *Lesa v Attorney-General* litigation, in which a Sāmoan woman, Falema'i Lesa, was convicted for overstaying her temporary permit.¹⁰⁷ In 1982, Lesa successfully appealed her conviction to the Privy Council in the United Kingdom, which ruled that Lesā, like other Sāmoans born between 1920 and 1948, had New Zealand citizenship under New Zealand legislation.¹⁰⁸ However, rather than accept the Privy Council's decision, the Muldoon-led government swiftly enacted the Citizenship (Western Samoa) Act 1982, which effectively rescinded and annulled any citizenship claims by Sāmoans living in Sāmoa in retrospect. Lesā herself (who is named in the Act) was granted New Zealand citizenship. As Graeme Edgeler notes, the 1982 Act is one of the most 'racist' Acts still in force today, and it must be viewed in light of the anti-Pacific sentiments of the 1970s and 1980s.

It was 1982. Muldoon was Prime Minister, and his government decided they just didn't want a whole bunch of new New Zealanders with automatic rights to come here. After all, he'd won an election by campaigning against

106 Lopez, 'Institutional Racism.'

107 *Lesa v Attorney-General*. 1982. 1 NZLR 165.

108 *Lesa v Attorney-General*.

Pacific immigration, and had greatly expanded the dawn raids started under Norman Kirk. Partly pragmatic, but clearly racist, and more clearly so with the passage of time.¹⁰⁹

A CRT analysis of this decision, drawing on race-conscious revisionist traditions, can produce important insights that traditional legal analyses are not able to. It is safe to say that due to the lack of such CRT-driven insights in legal scholarship and praxis, most law students, academics, lawyers, and judges have come to learn and believe that *Tifaga* is a fair and just decision, and that its articulation of the defence of impossibility is an example of sound legal doctrine being developed by judges. However, the race-conscious historical revisionism above, while brief and incomplete, shows how CRT can help to explain to law students, academics, lawyers, and judges how this is far from the case.¹¹⁰

We now consider the two final guiding principles together, which hold that a CRT analysis should draw on the praxis of anti-racist and decolonial activism, and also strive to imagine new possibilities for liberation that do not assume or strengthen the settler-colonising state. One of the hopes behind our offering a CRT analysis of *Tifaga* is that such analyses will influence future judges considering the case and the defence of impossibility—that they will note how misguided the court was in its understanding of Mr Tifaga’s circumstances, and that the court’s view of the case was too narrow and should no longer be applied. Another hope is that the *Tifaga* decision is recorded in the ‘history books’ as a legal manifestation of the anti-Pacific racism that permeated the 1970s and 1980s. With the New Zealand Government’s recent formal apology for the dawn raids, the need for this record of the law is timely—especially given the government’s promised ‘gesture’ to provide an ‘historic account’ of the dawn raids, and of

109 Graeme Edgeler, ‘The Citizenship (Western Samoa) Act is New Zealand’s most racist immigration law. Why is it still on the books?’ *The Spinoff*, 7 February 2017.

110 While it is beyond the scope of this article, we note that it is also important for further CRT analysis of this decision to delve into a White privilege analysis of the *Tifaga* decision, in particular the interpretations of wealthy Pākehā judges as to how a Pacific migrant had ‘chosen not to have sufficient funds’ for their airfare.

their impact on Pacific peoples, that can be taught in primary, secondary, and tertiary education.¹¹¹ In needing to think beyond education-based measures, there is also potential for this critique of the *Tifaga* decision to support more ambitious calls for amnesty to be granted to all people overstaying their visas, as part of a wider overhaul of New Zealand's racist immigration system that Pacific advocates and the Green Party of Aotearoa New Zealand have been calling for.¹¹²

The above sketch of a CRT critique of *Tifaga* demonstrates how a CRT analysis located in New Zealand can take the tools of CRT scholars and activists in the US and apply them to the specific circumstances of the settler-colonising state of New Zealand. The sketch has raised a number of important insights, such as the need to critique the racism of *Tifaga* without severing sacred relational ties between Māori and Pacific peoples in New Zealand and a number of possibilities for change. However, the guiding principles have also allowed us to elucidate important gaps or shortcomings in our analysis, such as the lack of Indigenous Māori and Pacific knowledges, storytelling, and lived experiences that can be used to strengthen our critiques of the racism evident in the court's decision. Therefore, these guiding principles encourage us to seek further collaboration across disciplines, and with activists and organising groups beyond the academy, in order for CRT analysis to reach its fullest potential here.

Conclusion

[T]he racism which was always fundamental in Europe's dispossession of Indigenous Peoples has been perhaps its most redefined and denied reality. Frantz Fanon's comment that '. . . In reality a colonial country is a racist country' has been a discomfiting truth applied to others more than a lens

111 Jacinda Ardern, 'Speech to Dawn Raids Apology,' *The Beehive*, 1 August 2021.

112 Steve Kilgallon, 'A Dawn Raids apology is worthless without an overstayer amnesty, says "Tongan Robin Hood,"' *Stuff*, 19 June 2021; Teanau Tuiono and Ricardo Menéndez March, 'Greens call for amnesty programme in open letter to immigration minister,' *The Green Party of Aotearoa New Zealand*, 29 April 2021.

through which to understand and acknowledge what has happened here.¹¹³

New Zealand lacks a meaningful discourse on race and racism in the law and beyond. Even the word itself, ‘racism’, is tactically avoided, diluted to political euphemisms like ‘unconscious bias’ and ‘individual prejudice’. While racism is flexible in its cruelty, it is specific in its terms. Locating the dreaded ‘R’ word within its settler-colonising paradigm is a precondition to any real interrogation of the racialised violence embedded in our social reality. For scholars of colour engaging in CRT analyses (in the law or any other discipline), the constant work of naming, interrogating, and calling out racist power imbalances both in our personal and professional lives can be mentally and emotionally exhausting. While interrogating White supremacy is a core tenet of a CRT analysis, we must be careful not to become entrapped in a colonial thought-prison. Asking ourselves and each other how we can centre community, love, joy, and imagination is equally integral, if not more so, to our collective liberation. Ideally, the goal of CRT is its own obsolescence. While we do not anticipate racism will dissolve in our lifetimes, it is not an inescapable reality. But so long as racial inequity persists there will remain the need for Critical Race Theory.

Afterword

Seven years later, Mele has returned to law school but now as a lecturer teaching criminal law herself. It is time for her to teach *Tifaga*, but before outlining the facts of the case she says: ‘*Tifaga* is one of the key authorities on the criminal defence of impossibility, but I’m not going to teach you the case the way most other law lecturers would. I’m going to teach you how this decision was racist. But first let me tell you a little bit about critical race theory’. Mele then pauses to look out to the sea of second-year law students and notices two Pākehā students shifting in their seats, clearly uncomfortable. Unphased, she looks over at the rows of Pacific

113 Jackson, ‘Space, Race, Bodies,’ 7.

students above them and gives them a small smile. They see her, and more importantly, she sees them.