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# Excerpt of Law and Anti-Blackness

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*Excerpt of* **Law and Anti-Blackness**

*Michele Goodwin*

Professor Michele Goodwin's essay here (and the article from which it came, to be published in full in our Winter issue) explicitly identifies the development of American law as a project of cementing racial caste. This piece is a call for conversation and asks us all to consider: "How has the failure to acknowledge and address the carnage and prurience of America's racial origin story impacted life today?" For 26 volumes, we have attempted to answer that question. In publishing this story in this issue, we are excited to be joined by our peers in that effort.

# MICHIGAN JOURNAL OF RACE & LAW

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# *EXCERPT OF* LAW AND ANTI-BLACKNESS

*Michele Goodwin*★

*Editor's Note: this Essay is a brief excerpt from a longer piece which will be published in the Michigan Journal of Race & Law Winter 2021 Issue.*

During the spring and summer of 2020, as COVID-19 rapidly spread throughout the United States, infecting and killing thousands of Americans including children,[1] the enduring colorline manifested. As of this publication, more than 326,000 Americans have died due to the virus. Those disproportionately harmed in the U.S have been Indigenous, Black, and Latinx communities.[2] Even while pundits claimed children were safe from the virus, Black and Latinx children suffered and died horrific deaths.[3] The patterns of implicit and explicit racism in medical

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1. *See* Ed Yong, *How the Pandemic Defeated America*, ATLANTIC, Aug. 4, 2020, https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/ [https://perma.cc/7CYE-7D92] (discussing that "few countries have been as severely hit as the United States, which has just 4 percent of the world's population but a quarter of its confirmed COVID-19 cases and deaths."); AM. ACAD. OF PEDIATRICS & CHILDREN'S HOSP. ASS'N, CHILDREN AND COVID-19: STATE DATA REPORT (Nov. 12, 2020), https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/ (sharing data on COVID-19 infections in children on a weekly basis).

2. *See* CDC, *Health Equity Considerations and Racial and Ethnic Minority Groups*, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html [https://perma.cc/Y9PP-N3NS] (last updated July 24, 2020) (finding "increasing evidence that some racial and ethnic minority groups are being disproportionately affected by COVID-19.").

3. *See, e.g.*, William Wan, *Coronavirus Kills Far More Hispanic and Black Children than White Youths, CDC Study Finds*, WASH. POST (Sept. 15, 2020, 1:00 PM), https://www.washingtonpost.com/health/2020/09/15/covid-deaths-hispanic-black-children/ ("Of the children and teens killed, 45 percent were Hispanic, 29 Black and 4 percent American Indian."); Gabrielle Chung, *Florida's Youngest Coronavirus Victim Identified as 9-year-old Kimora "Kimmie" Lynum*, PEOPLE (July 27, 2020, 6:42 PM), https://people.com/health/florida-youngest-coronavirus-victim-identified-as-9-year-old-girl-with-kimora-kimmie-lynum-no-preexisting-health-issues/ [https://perma.cc/FUJ8-XYE7] ("Kimora "Kimmie" Lynum [a nine-year-old African American girl] passed away from coronavirus complications after she went down for a nap on July 17." She went to the hospital feeling ill and with a 103 fever, but was never tested for coronavirus until af-

care combined with social determinants in health meant not even the children's youth nor institutions of public health could save them.[4] Their deaths served as stark reminders of lingering vulnerability and invisibility. Taking seriously that COVID-19 has exposed preexisting institutional and infrastructural vulnerabilities and inequality in the U.S,[5] this Essay turns to what stratifies and divides the nation.

That is, in 2020, it also became unquestionably apparent that the pandemic was not all that ails the United States. Systemic racism, white supremacy, and anti-Blackness crystallized in the murders of Ahmaud Aubrey, an unarmed jogger, stalked and killed by Gregory and Travis McMichael in a rural Georgia town;[6] Breonna Taylor, an essential healthcare provider, fatally shot by several Louisville, Kentucky police officers;[7] and George Floyd, lynched in daylight as a Minneapolis, Minnesota officer straddled his neck, pressing a knee onto it for nearly nine minutes as crowds gasped and watched in horror.[8] Weeks later, Jacob

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ter her death.); Jasmin Barmore, *5-year-old with Rare Complications Becomes First Michigan Child to Die of COVID-19,* DETROIT NEWS (Apr. 20, 2020, 7:45 PM), https://www.detroitnews.com/story/news/local/detroit-city/2020/04/19/5-year-old-first-michigan-child-dies-coronavirus/5163094002 [https://perma.cc/K99W-MGED] (Skylar Herbert, a five-year-old African American girl, "tested positive for COVID-19 in March and later developed a rare form of meningitis and brain swelling." She passed away in April "after spending two weeks on a ventilator.").

4. *See* Wan, *supra* note 3 (highlighting "underlying social disparities that minority children are more likely to experience than their White peers: crowded living conditions, food and housing insecurity, parents who are essential workers and cannot work from home, wealth and education gaps and difficulty accessing health care because of a lack of family resources including insurance, child care, transportation or sick leave.").

5. *See* CDC, *supra* note 2 (explaining that "discrimination exists in systems meant to protect well-being or health. . . . Discrimination, which includes racism, can lead to chronic and toxic stress and shapes social and economic factors that put some people from racial and ethnic minority groups at increased risk for COVID-19.").

6. *See* Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery,* N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html ("On Sunday, Feb. 23, shortly after 1 p.m., [Mr. Arbery] was killed in a neighborhood a short jog from his home after being confronted by a white man and his son.").

7. *See* Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death,* N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/article/breonna-taylor-police.html (reporting "[t]he death of Breonna Taylor, a Black medical worker who was shot and killed by Louisville police officers in March during a botched raid on her apartment . . . .").

8. *See* Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody,* N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html ("On May 25, Minneapolis police officers arrested George Floyd . . . . Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.").

Blake, an unarmed father, would be shot seven times, in close range while his children watched, in Kenosha, Wisconsin.[9]

What exactly do these fractures reveal about society and law in the United States? Is there a descriptive story to tell with a normative analog? If so, what can we learn from it? Are there lessons for the present to be derived from attention to this past? Has the strange promise of a post-racial United States materialized after the two-term presidency of its first Black president, Barack Obama?

The fractures to which this Essay speaks were brought into stark relief in 2020. They revealed unaddressed racial trauma; an American history mired in the terrorism of Black people, spanning slavery and post-reconstruction; and ultimately centuries of unhealed wounds.[10] 2020 was calamitous and chaotic at best, bringing an increasing death toll from COVID-19;[11] the untimely death of Justice Ruth Bader Ginsburg;[12] and political turmoil leading to the general election[13] and the challenge of the

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9. *See* Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Jan. 5, 2020), https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html ("Jacob Blake, a 29-year-old Black man, was left partly paralyzed after a white police officer shot him seven times in the back outside an apartment complex in Kenosha, Wis., on Aug. 23 . . . . in front of three of Mr. Blake's children.").

10. *See, e.g.*, Lillian Comas-Díaz, Gordon Nagayama Hall & Helen A. Neville, *Racial Trauma: Theory, Research, and Healing: Introduction to the Special Issue*, 74 AM. PSYCHOLOG. 1 (2019) (explaining that "[r]acism and ethnoviolence can be life threatening to [People of Color and Indigenous individuals], due to their exposure to racial microaggressions, vicarious traumatization, and the invisibility of racial trauma's historical roots. Cumulative racial trauma can leave scars for those who are dehumanized."); Alia E. Dastagir, *George Floyd Video Adds to Trauma: 'When Is the Last Time You Saw a White Person Killed Online?'*, USA TODAY (May 29, 2020, 6:40 AM), https://www.usatoday.com/story/news/nation/2020/05/28/george-floyd-ahmaud-arbery-covid-emotional-toll-hits-black-families/5270216002/ [https://perma.cc/AC5H-JGSX] (quoting Alisha Moreland-Capuia, executive director of Oregon Health & Science University's Avel Gordly Center for Healing: "The persistent pandemic is racism. That's the pandemic. Recent deaths of individuals of color and the deleterious impact of COVID-19 on communities of color stems all the way from 1776.").

11. *See* Joe Murphy & Corky Siemaszko, *U.S. Surpasses 250,000 Coronavirus Deaths as Virus Mortality Rate Surges*, NBC NEWS (Nov. 18, 2020, 3:26 PM), https://www.nbcnews.com/news/us-news/u-s-surpasses-250-000-coronavirus-deaths-virus-mortality-rate-n1248109 [https://perma.cc/29K3-R8D5].

12. *See* Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies At 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/8BH3-22G4].

13. *See, e.g.*, Quint Forgey, Zach Montellaro & Caitlin Oprysko, *Trump Refuses to Back Down on Suggestion of Election Delay*, POLITICO (July 30, 2020, 7:27 PM), https://www.politico.com/news/2020/07/30/trump-suggests-delaying-2020-election-387902 [https://perma.cc/NR8S-GY6M] (reporting that "President Donald Trump . . . refused to back down from his suggestion earlier in the day that the November general

results, including by President Donald Trump, who claimed on social media,[14] in the news, and through litigation that the 2020 presidential election was steeped in fraud and that he rightfully had won.[15]

2020 revealed strife and racial tensions that manifested in protest in the United States, yet it also beckoned for truth, reckoning, and reconciliation. The strange confluence of events in 2020 urges the acknowledgment of an origin story that places slavery, Jim Crow, and contemporary racism in proper discussion and contexts alongside the more popular, traditional American narratives that center revolutionary spirit of white Americans who fought against the British to stake a claim for their equality and dignity.[16] Long divorced from that historical, political, and legal discourse is acknowledgment of the purposeful and enduring harms cast upon Black Americans to justify the capitalism derived by slavery and the post-Reconstruction era scapegoating of the newly "freed."[17] In other

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election be postponed, repeating unsubstantiated predictions of widespread voter fraud amid the coronavirus pandemic . . . .").

14. Daniel Dale, *Fact Checking Trump's Barrage of Lies Over the Weekend*, CNN (Nov. 16, 2020, 6:16 PM), https://www.cnn.com/2020/11/16/politics/fact-check-trump-rigged-election-dominion-georgia-pennsylvania/index.html [https://perma.cc/8GEN-8LM6] ("'I WON THE ELECTION!' President Donald Trump tweeted just before midnight on Sunday night. Trump did not win the election. So this was a fitting conclusion to his lie-filled weekend barrage of tweets, in which he continued to invent imaginary evidence in support of his attempt to deny Joe Biden's victory."); Amanda Seitz, David Klepper & Barbara Ortutay, *False Claims of Voting Fraud, Pushed by Trump, Thrive Online*, AP NEWS (Nov. 10, 2020), https://apnews.com/article/election-2020-joe-biden-donald-trump-politics-media-1bf96bf3910bdcbe0f125958357c8f1a (noting that "Trump . . . has continued his assault on the U.S. vote in more than 40 Facebook and Twitter posts since Election Day.").

15. *See generally*, Jake Horton, *US Election 2020: What Legal Challenges Remain for Trump?*, BBC NEWS (Dec. 23, 2020), https://www.bbc.com/news/election-us-2020-54724960 [https://perma.cc/FK94-V5EC] (explaining that "President Trump is continuing to pursue legal challenges to the US election results, despite state electors having formally nominated Joe Biden as the next president.").

16. *See, e.g.*, Gordon S. Wood, *How the American Revolution Worked Against Blacks, Indians and Women*, N.Y. TIMES (Sept. 6, 2016), https://www.nytimes.com/2016/09/11/books/review/alan-taylor-american-revolutions.html (reviewing *American Revolutions: A Continental History, 1750-1804* by Alan Taylor: "he aims to desacralize the Revolution, to explode popular myths about it and to rip aside the mantle of nobility, dignity and heroism that he believes has too long covered up its sordid and bloody reality . . . . Southerners . . . engaged in the Revolution principally to protect their property in enslaved Africans.").

17. *See, e.g.*, CalvinJohn Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350, 353-54 (2016) (writing that "[t]he criminalization of Blackness allowed for White supremacy to use Black bodies as their scapegoat for all problems, real or fictional.").

words, there are racialized traumas and terrorism yet to be fully accounted for in the stories we tell ourselves.

For example, from a historical perspective, what message must people tell themselves to justify the intergenerational kidnapping and trafficking of children, women, and men across international borders and throughout the United States? How does a society come to tolerate children on the auction block, bid upon as if field animals? What narratives must the auctioneers tell to encourage bidders and secure a lucrative offer for the traders in human flesh? How do individuals come to justify their participation in the cruel enterprise, including enslaving, renting, leasing, and selling their own offspring, born from frequent though unacknowledged debasement of enslaved women?

How has the failure to acknowledge and address the carnage and prurience of America's racial origin story impacted life today? What social conditioning made possible the separate and unequal society of the 20th century? A nation marked by white Christians bombing Black Christian churches and the homes of Black ministers and clergy? What lives in the soul of a nation to justify school segregation? Housing segregation? Voter suppression? The heavy iron shackles that controlled the movements of enslaved Blacks were replaced in "freedom" by invisible chains and restraints that demarcated social and legal hierarchies protected by law. Today, what makes possible a police officer's strangulation of an unarmed Black man, while colleagues look on? In short, one hundred and fifty years after the ratification of the Fifteenth Amendment, the third and final of the Reconstruction Amendments,[18] the stain and vestiges of slavery in the United States remain.

This Essay addresses a thin slice of the American stain. Its value derives from the conversation it attempts to foster related to reckoning, reconciliation, and redemption. As the 1930s Federal Writers' Project attempted to illuminate and make sense of slavery through its *Born in Slavery: Slave Narratives From 1936-1938,* so too this project seeks to uncover and name law's role in fomenting racial caste. This excerpt, Part I, included here, addresses pathos and hate, the creation of race and otherness through legislating reproduction—literal and figurative.

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18. Ex parte Virginia, 100 U. S. 339, 361 (1870) (explaining that the Reconstruction Amendments, "were primarily designed to give freedom to persons of the African race, prevent their future enslavement, make them citizens, prevent discriminating State legislation against their rights as freemen, and secure to them the ballot. The generality of the language used necessarily extends some of their provisions to all persons of every race and color; but, in construing the amendments and giving effect to them, the occasion of their adoption and the purposes they were designed to attain should be always borne in mind.").

## PART I: PATHOS AND HATE: CREATING RACE AND OTHERNESS

In 1903, W.E.B. DuBois published *The Souls of Black Folks,* recounting that the notion of freedom for Black people "was simply unthinkable, the maddest of experiments,"[19] because Black people were classed as "man and ox together."[20] As part of the Southern strategy, white men "fought with desperate energy to perpetuate this slavery under which the black masses. . . .had writhed and shivered."[21] The Northern allies proved complicated, according to DuBois, as they stood to use newly freed Black people as "a club for driving the recalcitrant South back into loyalty."[22] DuBois presciently predicted over a century ago that the problems of the United States would be the colorline. That is, the struggle with its white supremacy, desperate cleave to racial hierarchy, and inability to rid itself of caste.

In 1855, a decade prior to the Thirteenth Amendment's ratification Frederick Douglass, known as one of the nation's leading abolitionists and an escapee from the bondages of slavery himself, wrote, "Not only is slavery on trial, but unfortunately, the enslaved people are also on trial."[23] He explained, "It is alleged, that they are, naturally, inferior; that they are *so low* in the scale of humanity, and so utterly stupid, that they are unconscious of their wrongs, and do not apprehend their rights."[24] This American racial colorline established the boundaries of citizenship and naturalization.

Placed in its proper context, the American commitment and perhaps addiction to its racial ideology of a caste system[25] should be understood as an uninterrupted continuum since the earliest European and later U.S. ships arrived on the North American shores, carrying cargo of kidnapped and trafficked Africans. Isabel Wilkerson now adds to this canon of thought on the American caste system in *Caste: The Origins of Our Discontents,* contributing in popular form to the academic and scholarly accounts race, caste, and enduring hierarchy and white supremacy in the United States.[26]

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19. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 27 (1903).

20. *Id.* at 28.

21. *Id.*

22. *Id. See also,* W.E.B. DUBOIS, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played*, *in* THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880, 128-81 (1956).

23. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM vii (1855).

24. *Id.*

25. *See, e.g.* ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 115-17 (2020) (discussing purity versus pollution).

26. *Id.*

Racial caste has long been the euphemistic elephant in the room and the American dividing line, demarking power, freedom, and self-governing. To properly undertake the examination of racial caste in the United States requires engaging beyond law, reaching to the fields and tools of sociology, ethnography, and anthropology to unpack not only law's racial trap undisguised by legislation such as Fugitive Slave Acts or myriad cases, but also the lasting—even haunting—social, cultural, and rhetorical norms and mores.

Essential to any caste is the establishment of a rank and order among the people stratified. In the United States, this took the form of establishing white supremacy through law, whereby whiteness accorded privileges and rights not available to Black people, most apparently, but far from exclusively freedom and citizenship.[27] In several distinct ways, law served a vital purpose in creating racial caste and hierarchy. Law undergirded and legalized the lucrative enterprise of American chattel slavery. That is, laws in the United States set the conditions that kidnapped and trafficked human chattel from Africa would never or rarely rise above their legally designated, subordinate status.

First, matrilineality designated that all children born of enslaved women would by law inherit the status of their mothers. This proved important in denying the multiracial offspring of white plantation owners independence and freedom. Second, rules of hypodescent, mandated that anyone with any African biological heritage would always be legally designated as Black, and therefore legally inferior. Later, a third legal provision would provide another guardrail against the infiltration of whiteness and the preserving of the racial order through marriage—namely antimiscegenation laws. Finally, a fourth, twentieth century legal movement—eugenics—would protect the racial caste system from white people unfit for whiteness.

### A. *Matrilineality*

First, given widespread sexual predation against enslaved Black women,[28] the initial laws creating the racial caste system related to matrilineality. Sexual violence against Black women and girls was rampant in slaveholding families, even if rendered invisible by historians. However, researchers of human genetics offer a sobering account. Rapes against

27. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration,* 104 CORNELL L. REV. 899, 929-33 (2019).

28. Steven J. Micheletti, Kasia Bryc, Samantha G. Ancona Esselmann, William A. Freyman, Meghan E. Moreno, G. David Poznik, Anjali J. Shastri, 23andMe Research Team, Sandra Beleza & Joanna L. Mountain, *Genetic Consequences of the Transatlantic Slave Trade in the Americas*, 107 AM. J. HUM. GENETICS 265 (2020).

Black women by white men were so common in the United States that white men "contributed three times more to the modern-day gene pool of people of African descent than European women did."[29]

Thus, establishing whether the offspring of a white man and enslaved Black woman was free or enslaved was a matter of political urgency and importance—not only as it related to slavery, but also to racial caste. Early American law provided unmistakable clarity. In 1662, the Virginia Grand Assembly enacted one of its first "slave laws" to settle this point. Lawmakers wrote, "Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be slave or free, be it therefore enacted and declared by this present Grand Assembly, that all children born in this country shall be held bond or free only according to the condition of the mother."[30]

As defined, matrilineality served multiple purposes. It shielded white men from legal and financial obligations to their Black offspring. Such laws meant that Black children of white fathers could never establish paternity, freedom, citizenship, and inheritance rights. Such laws exploited Black women's sexual vulnerability to the predations of white men. Slavery perversely incentivized white male slaveholders sexual assaults on their enslaved property as Black women lacked rights and could not lay claim to their offspring nor spare them from enslavement. Black women and their offspring were all considered the property of the persons who "owned" them.[31]

### B. *Hypodescent*

The second means of ordering America's racial caste system was its establishment of hypodescent through the race-delineating "one drop" rule. Such laws mandated that any African ancestry defined a person as "negro" or "colored" (each of these terms signifying those who would today be referred to as Black). Like matrilineality, hypodescent aided in establishing and furthering Black second-class citizenship under law. Even more, hypodescent or *one drop* codes bolstered another element of the racial caste system and white supremacy. By law, one could not exit out of what was legally a lowly status of Blackness, even after multiple generations. And these matters were not confined to the dusty archives of the seventeenth, eighteenth, or nineteenth centuries.

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29. Christine Kenneally, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html.

30. WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, Vol. 11, at 170, 260, 266, 270 (Richmond, Va, 1809-23).

31. *See, e.g.,* Gonor v. Gonor, 11 Rob. 526 (La. 1845).

In 1984, lawyers for Susie Guillory Phipps filed a suit on her behalf to change her racial designation of "colored" to "white" on her birth certificate.[32] Phipps, the 50-year-old great-great-great-great-granddaughter of an enslaved Black woman and her owner, fit the Louisiana classification of Black, which designated Blackness by "any traceable amount."[33] This meant that even though Phipps was 1/128th Black, by Louisiana law, she was still legally Black. As such, Louisiana classified her as "colored," on her birth certificate.

The state defended its law, claiming that if Ms. Phipps prevailed, the state could be overwhelmed with individuals filing similar claims, forcing the state to oppose each case and undertake genealogical research.[34] Of course, the state could simply have decided *not to litigate such cases or perform genealogical research on its citizens*. Phipps lost her legal battle "to have declared unconstitutional a state law classifying as 'colored' anyone with as little as one thirty-second black ancestry."[35]

As in the case of Ms. Phipps,[36] even African descendants fitting the further delineated racial classifications of "mullato,"[37] "quadroon,"[38] "octoroon" or "hexadecaroons"[39] and beyond were denied the racial classification of "white" and the rights that attended it. Lightness in skin color was not sufficient in a claim for whiteness.[40] These laws sought to express that multiple generations of white forebearers could not cure the stain of African ancestry in the United States.[41]

Accounting for the legalized cruelties and humiliations inflicted on Black people, the incentives to pass as white were not insignificant.[42] Passing for white could relieve an individual from the legal, social, economic, and even health burdens associated with being Black. Famously, after a near-fatal car accident where he suffered the loss of an eye, the famed entertainer, Sammy Davis, Jr. was treated at the San Bernardino

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32. *Woman Seeks Change in Racial Designation,* N.Y. TIMES, Nov. 23, 1984, at A28.

33. *Id.*

34. *Id.*

35. *Id.*

36. Based on Louisiana law, Ms. Phipps arguably met the perverse racial caste status of "octaicosahectaroon" (1/128th Black).

37. Having a status of Black based on one Black parent.

38. Having the status of Black based on one Black grandparent.

39. Having the status of Black based on one Black great grandparent.

40. This exposes not only the rigid complexities of white supremacy, but also confounding ironies.

41. As a pragmatic matter, absent a genealogical search, someone like Ms. Phipps could "pass" or live as white so long as she or he did not draw suspicion.

42. Historically, passing refers to Black individuals significantly fair in complexion to successfully live or work as white. *See, e.g.,* ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE (2014).

County Hospital; it was the only hospital that would admit Black people when more elite medical centers would not. Neither his fame or wealth, or amiability allowed him to transcend the racial caste system.

If "passing" were an option, lawmakers cleverly constructed disincentives to dissuade attempts to breach the colorline. For example, living fraudulently as a white person, or deceiving someone about being white could result in legal punishment or penalty. In the sobering divorce case, *Rhinelander v. Rhinelander,*[43] Leonard "Kip" Rhinelander, son of a wealthy, socially elite, New York family, was pressured by his parents to annul his marriage to Alice Jones, a "light" complected chambermaid and mixed-race Black woman. Professor Angela Onwuachi-Willig provides a detailed account of this important case, including the strategies deployed by both the plaintiff Leonard, and his wife as the defendant.[44] Leonard's lawyers argued that Kip was unaware of Alice's racial status, even though he had lived with her family, engaged in sexual intercourse with her prior to their marriage, and later consummated the marriage.[45]

*Had Alice committed fraud against Kip Rhinelander by deceiving him of her racial identity?* If she had, Kip would be entitled to an annulment of the marriage. To answer this question, the court ordered Mrs. Rhinelander to disrobe in front of the all-white male jury and judge.[46]

> The defendant . . . then withdrew to the lavatory adjoining the jury room and, after a short time, again entered the jury room. The defendant, who was weeping, had on her underwear and a long coat. At Mr. Davis' direction she let down the coat, so that the upper portion of her body, as far down as the breast, was exposed. She then, again at Mr. Davis' direction, covered the upper part of her body and showed to the jury her bare legs, up as far as her knees. The Court, counsel, the jury and the plaintiff then re-entered the court room.[47]

Following this, Alice's lawyer asked Leonard, whether his wife's body "is the same shade as when you saw her in the Marie Antoinette with all of her clothing removed?"[48]

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43. Rhinelander v. Rhinelander, 219 A.D. 189 (N.Y. App. Div. 1927).

44. Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *As a Formative Lesson on Race, Identity, Marriage and Family,* 95 CAL. L. REV. 2393 (2007).

45. *Id.*

46. *Id.* at 2429.

47. *Id.* (citing the Transcript of Record at 696, Rhinelander v. Rhinelander, 219 A.D. 189 (N.Y. App. Div. 1927)). *See also,* ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY (2013).

48. ONWUACHI-WILLIG, *supra* note 44, at 2429.

Ultimately, Leonard's attempt to annul the marriage failed, precisely because he had not been deceived, the jury found her racial identity to be obvious by the color of her breasts and legs.[49] Even while the case was hailed in the Black press as a victory for Alice,[50] it nevertheless was a powerful reminder of racial caste and the legal risks associated with breaching the boundaries of race, even in New York. As one could not exit the racial subordinate status of being Black, a person of any African ancestry could never—save fraud—claim whiteness and access the rights and privileges associated with that status. This was race segregation based not on housing, education, or employment, but one's DNA.

### C. *Anti-miscegenation Laws*

A third set of laws whereby lawmakers sought to "degrade the social and political status of African Americans and support white supremacy," can be found in anti-miscegenation laws.[51] By criminalizing and otherwise prohibiting interracial marriage, such as barring the distribution of marriage licenses or the solemnization of such unions, legislatures further fortified the racial caste system. Anti-miscegenation laws were broad in scope. In Virginia, it was illegal to leave the state to marry; it was a felony "if any white person intermarry with a colored person"; and a state provision voided "all marriages between 'a white person and a colored person' without any judicial proceeding."[52] Like matrilineality and hypodescent laws, these provisions responded to nativist fears associate with "blurred . . . . lines between what many [whites] understood to be a naturally superior white race and a naturally inferior black race."[53] According to Carlos A. Ball, "[a]s long as there was a clear distinction between the two racial categories—in other words, as long as the two categories could

49. Rhinelander v. Rhinelander, 219 A.D. 189 (N.Y. App. Div. 1927).

50. *See, e.g., Rising Above Prejudice*, NEW YORK AMSTERDAM NEWS, Dec. 9, 1925, at 16 ("jurors have rendered a great service to womanhood in general and Negro womanhood in particular").

51. *See, e.g.,* Amber D. Moulton, *Closing the "Floodgate of Impurity": Moral Reform, Antislavery, and Interracial Marriage in Antebellum Massachusetts,* 3 J. CIVIL WAR ERA 2 (2013); *see also,* Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages,* 76 FORDHAM L. REV. 2733, 2733 (2008) (explaining "[i]t is not possible, in other words, to understand fully the historical roots and purposes of anti-miscegenation laws without an assessment of the role that concerns related to interracial children played in their enactment and enforcement."); *See* Karen Woods Weierman, "*For the Better Government of Servants and Slaves": The Law of Slavery and Miscegenation,* 24 Legal Stud. F. 133, 134 (2000) (explaining how race and sex were treated as interconnected and interdependent concerns).

52. *See* Loving v. Virginia, 388 U.S. 1, 3-5 (1967).

53. Ball, *supra* note 51, at 2734.

be thought to be mutually exclusive—then the hierarchical racial regimes represented first by slavery, and later by legal segregation, could be more effectively defended."[54]

Often lawmakers defended the necessity and urgency to adopt such laws in religious terms and on the basis of preserving moral order. Indeed, courts upheld such laws on that basis.[55] As the Supreme Court took notice in *Loving v. Virginia,* the trial judge that convicted and sentenced Mildred Jeter, a Black woman and Richard, a white man, for violating Virginia's "Racial Integrity Act of 1924," which was enacted during a "period of extreme nativism . . . . follow[ing] the end of the First World War."[56]

At their sentencing for violating the Virginia statutes barring interracial marriage, the trial court expressed:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[57]

In this case, police raided the couple's home, while they were sleeping, and arrested Mildred, who was pregnant at the time, incarcerating her for several days. The couple was legally married in Washington, D.C., and they displayed their marriage certificate in their home. Nevertheless, a local grand jury issued an indictment "charging the Lovings with violating Virginia's ban on interracial marriages," and weeks later the couple "pleaded guilty to the charge and were sentenced to one year in jail."[58] The sentencing judge suspended their sentence for a "period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years."[59]

Four years later, in 1964, the Lovings filed motions to vacate the judgment and to have the opinion set aside on the basis that the Virginia law violated the Fourteenth Amendment. A state trial judge denied their motions. The couple faced a cruel ultimatum: live outside of the state in marital union but away from their families, or return as a couple, risking incarceration and the state ignoring their marital union. Their fate as a couple was further complicated by the fact that Virginia was not the only

54. *Id.*
55. *See* Loving v. Virginia, 388 U.S. 1, 3 (1967).
56. *Id.* at 6.
57. *Id.* at 3.
58. *Id.*
59. *Id.*

state to ban or refuse to recognize interracial marriages. The couple appealed once more. Thereafter, the state's highest court, the Supreme Court of Appeals, "upheld the constitutionality of the antimiscegenation statutes" affirmed their convictions and modified their sentences.[60]

The Lovings successfully petitioned their case to the United States Supreme Court, arguing the Virginia law violated both equal protection under the law and substantive due process.[61] At the time of their litigation in 1967, sixteen states prohibited and punished "marriages on the basis of racial classification."[62] Among the arguments put forth by Virginia to defend its racial purity law, including "that the state's legitimate purposes were 'to preserve the racial integrity of its citizens' and to prevent 'the corruption of blood,' . . . . [and] 'the obliteration of racial pride,'" was that the law applied equally to both the white husband and Black wife.[63]

Citing *McLaughlin v State of Florida,*[64] Virginia argued that "the meaning of the Equal Protection Clause . . . is only that state penal laws containing interracial element as a part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree."[65] This legal strategy stretched the meaning of the Court's rulings in *Railway Express Agency*[66] (involving a statute "discriminating between the kinds of advertising which may be displayed on trucks in New York City")[67] and *Allied Stores of Ohio,*[68] (addressing "an exemption in Ohio's ad valorem tax for merchandise owned by a non-resident in a storage warehouse").[69] Neither case involved racial discrimination laws. Handing down its landmark decision, striking down the Virginia laws and by extension all others that proscribed interracial marriage, the Court stated:

> There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the

60. *Id.* at 3-4.
61. *Id.* at 4.
62. *Id.* at 6.
63. *Id.* at 7.
64. 379 U.S. 184 (1964).
65. Loving v. Virginia, 388 U.S. 1, 7-8 (1967).
66. Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).
67. *Loving*, 388 U.S. at 8.
68. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959).
69. *Loving*, 388 U.S. at 8.

> vital personal rights essential to the orderly pursuit of happiness by free men.[70]

Many, though not all, anti-miscegenation laws were enacted after the abolition of slavery just as confederate monuments were erected across the United States as symbols of white supremacy and to protect the racial order during Jim Crow.[71] Anti-miscegenation or "anti-amalgamation" laws predating slavery's abolition, were consistent with proslavery policies within states. States in the North as well as the South adopted such laws. Neither slavery nor the racial caste system were geographically confined to southern states. To the contrary, just as slavery was operational in northern territories and states, including New York,[72] Connecticut, [73] and Pennsylvania,[74] so too were laws denying interracial marriages.[75]

Northerners "were not unmindful of the danger racial equality posed to national union" as well as the importance of maintaining slavery.[76] For example, in 1705, colonial lawmakers in Massachusetts enacted an anti-miscegenation law based significantly on Virginia's existing law.[77] As in Virginia, there, "the development of miscegenation law was directly related to the growth of slavery."[78] In fact, "Massachusetts was also the first colony explicitly to authorize slavery by law."[79]

And, "[u]ntil February 1843, when the state legislature repealed a statute that banned marriages between whites and 'Negroes, Indians, or

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70. *Id.* at 12.

71. Kathy Eyre, *Mississippi Still Far From Accepting Interracial Marriage,* AP NEWS (Nov. 28, 1987), https://apnews.com/article/d57930264fd39578c14f3f64f2cec4e8#:~:text=Mississippi%20voters%20repealed%20by%20a,3; ARK. STAT. ANN. § 55-104 (1947), *reprinted in* STATES' LAWS ON RACE AND COLOR 44 (Pauli Murray ed., 1950); DEL. CODE ch. 85, § 3485 (1935), *reprinted in id.* at 52; KY. REV. STAT. § 391.110 (1948), *reprinted in id.* at 168; LA. CIV. CODE art. 94 (1947), *reprinted in id.* at 190; MD. CODE art. 27, § 445 (1939), *reprinted in id.* at 207-08; TEX. PEN. CODE, art. 492 (1947), *reprinted in id.* at 452; W. VA. CODE ANN. § 4697 (1943), *reprinted in id.* at 511.

72. Adele Oltman, *The Hidden History of Slavery In New York*, NATION (Oct. 24, 2005), https://www.thenation.com/article/hidden-history-slavery-new-york/.

73. EDGAR J. MCMANUS, BLACK BONDAGE IN THE NORTH 169-70 (1973) ("Connecticut's lawmakers were extremely cautious about moving against slavery. Negroes were more numerous in the state than in the rest of New England combined, and racial anxieties were correspondingly more acute.").

74. GARY B. NASH & JEAN R. SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH 55 (1991).

75. *See, e.g.,* Moulton, *supra* note 51, at 5-7.

76. *Id.* at 6.

77. Weierman, *supra* note 51, at 146.

78. *Id.* at 144.

79. *Id.* at 145.

Mulattos,' interracial couples in Massachusetts found their unions declared null and void, their children were classed as illegitimate, and any official who solemnized an interracial union could be fined."[80] Despite the law's repeal, interracial intimacy remained unsettled in Massachusetts. In 1913, the Massachusetts legislature adopted a law that prevented couples from a marriage safe harbor or sanctuary in their state if denied a marriage license elsewhere.[81] In essence, after the repeal of the Massachusetts anti-miscegenation law, only interracial couples who were citizens of that state could marry there.

Rhode Island,[82] Maine,[83] Illinois,[84] Iowa,[85] Kansas,[86] Maine,[87] Michigan,[88] Pennsylvania,[89] and Ohio[90] are among the northern states that enacted laws banning interracial marriage. Six states found interracial marriage so abhorrent that they ratified their constitutions to bar such unions.[91] These states included Alabama,[92] Florida,[93] Mississippi,[94] North Carolina,[95] South Carolina,[96] and Tennessee.[97] And, though the Supreme

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80. *See e.g.,* Moulton, *supra* note 51, at 2.

81. MASS. GEN. LAWS ch. 207, § 11 (1913); Zebulon Miletsky, *The Dilemma of Interracial Marriage: The Boston NAACP and the National Equal Rights League, 1912-1927*, 44 HISTORICAL J. MASS. 137, 140 (2016); AMBER D. MOULTON, THE FIGHT FOR INTERRACIAL MARRIAGE RIGHTS IN ANTEBELLUM MASSACHUSETTS (2015).

82. Act of Mar. 23, 1881, 1881 R.I. Pub. Laws 108 (repealing ban on interracial marriage).

83. Act of Mar. 12, 1883, 1883 Me. Laws 167 (repealing ban on interracial marriage).

84. Act of Jan. 17, 1829, 1832 Ill. Laws 465 (banning interracial marriage).

85. Act of Jan. 6, 1840, 1839 Iowa Acts 42 (banning interracial marriage).

86. *Compare* 1855 Kan. Sess. Laws c. 108 § 3 (banning interracial marriage), *with* 1857 Kan. Sess. Laws c. 49 (omitting language banning interracial marriages).

87. Act of Mar. 12, 1883, 1883 Me. Laws 167 (repealing ban on interracial marriage).

88. 1883 Mich. Pub. Acts 16, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 407 230 (amending an 1871 statute to validate interracial marriage contracts).

89. 1725 Pa. Laws 145 (prohibiting ministers from approving interracial marriages).

90. 1861 Ohio Laws 6 (prohibiting interracial marriage).

91. James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 DUKE B.J. 26, 31 (1951).

92. ALA. CONST. art. IV, § 102 (annulled 2000); Ala. Code tit. 14, § 360 (1958), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 246.

93. FLA. CONST. art. XVI, § 24, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 77; FLA. STAT. § 741.11 (1941), *reprinted in id*. at 83.

94. MISS. CONST. art. XIV, § 263 (repealed 1987); MISS. CODE ANN. § 459 (1942), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 246; Eyre, *supra* note 71.

95. N.C. CONST. art. XIV, § 8, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 329; N.C. GEN. STAT. § 14-181 (1953) (repealed 1973).

96. S.C. CONST. art. III, § 33 (repealed 1999), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 407; S.C. CODE § 8571 (1942), *reprinted in id*. at 417.

Court's ruling in *Loving v. Virginia* ultimately struck down all such laws, effectively making it legal to marry someone of a different race, states continued to delay repealing statutes and constitutional amendments banning interracial marriage. It was only in 1987 that "Mississippi voters repealed by a narrow 52 percent to 48 percent margin the state's 1890 constitutional ban on interracial marriage."[98] As stunning as that may seem, "Mississippi didn't grant its first marriage license to an interracial couple until 1970, under a federal judge's order."[99]

One matter in common among *all* the states that banned interracial marriages is that they *all* prohibited "Negro-white marriages."[100] Some states barred Asian-white unions[101] and still others banned Indigenous-white unions.[102] Commonly, geography dictated these laws.[103] No state barred interracial marriages and excluded Black-white marriages from their discriminatory policies.

That forty-one states prohibited interracial marriage at one point in time gives a sense of the scope and scale of states' efforts to proscribe interracial marriage and preserve white racial purity. The broad enactment of anti-miscegenation legislation expressed the accepted view that maintaining the primacy and purity of whiteness necessitated a collective effort. It required mass compliance and comprehensive adherence to maintain the herd immunity of whiteness. As such, more than law mattered. Social compliance and adherence mattered. Even while hypodescent legislation provided a sturdy buffer against Black people exiting their status, anti-miscegenation laws spoke explicitly of the stunning contempt in which Black people were held.

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97. TENN. CONST. art. XI, § 14 (repealed 1978); TENN. CODE ANN. § 8409 (1934), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 71, at 438.

98. Eyre, *supra* note 71.

99. *Id.*

100. Browning, *supra* note 91, at 31.

101. *See, e.g.*, Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities,* 41 L. & SOC'Y R. 587, 587 (2007) (explaining that in 1861, "Nevada became the first state to pass a law specifically barring marriages between whites and Asians. Over the course of the next century, until the 1967 Supreme Court decision *Loving v. Virginia* declared anti-miscegenation laws unconstitutional, an additional 14 states came to ban marriages between whites and Asians.").

102. Browning, *supra* note 91, at 31.

103. Sohoni, *supra* note 101, at 587 (explaining that "[t]he first states to pass anti-miscegenation statutes against Asians were located primarily in the West, but over the next hundred years states in the Midwest, South, and East also enacted such laws.").

### D. *Eugenics*

The guarding of racial purity intensified during post-Reconstruction in the United States, so much so that it began to impact whether white Americans were permitted to control their reproduction intra-racially. In 1927, more than twenty years after the first eugenics law was enacted in Indiana, the United States Supreme Court issued the landmark decision of *Buck v. Bell*, upholding the constitutionality of Virginia's Eugenical Sterilization Act.[104] In an 8-1 decision, the Court ruled the constitutional authority to impose vaccine mandates is broad enough to compel the forced sterilization of women and men deemed socially unfit.[105] Writing for the majority, Justice Oliver Wendell Holmes issued a haunting condemnation of vulnerable white women, declaring "three generations of imbeciles are enough."[106]

The case centered on Carrie Buck, whom Justice Holmes described as "a feeble-minded white woman."[107] He claimed that she was the "daughter of a feeble-minded mother"[108] and "the mother of an illegitimate feeble-minded child."[109] Notwithstanding the inaccuracies of these statements, even if they were true, *should the state possess such authority as to dictate who should be able to parent?*

The state presented evidence that the Court found persuasive. One evaluation of Carrie's "fitness" came from Harry H. Laughlin, who, although not a physician (and though he never examined her),[110] was a distinguished leader in the eugenics movement, serving as superintendent of the Eugenics Record Office of the Department of Genetics at the Carnegie Institute and the "eugenics expert" to various congressional committees, including the Committee on Immigration and Naturalization.[111]

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104. Buck v. Bell, 274 U.S. 200, 207 (1927).

105. *See id*. (upholding a Virginia law which required the sterilization of incompetent persons). Carrie Buck, a victim of rape at age sixteen, bore a child out of wedlock. The state of Virginia claimed that Buck possessed low social character and intelligence; it predicted that were she to have more children they would be born of inferior intelligence. She and others like her were collected by public health officials to be sterilized. However, years after the case, Holmes and public health officials in Virginia were proven wrong, Buck's daughter, Vivian, was a successful student—well above average.

106. *Buck,* 274 US at 207.

107. *Id*. at 205.

108. *Id*.

109. *Id*.

110. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 51 (1985).

111. *Harry H. Laughlin*, PICKLER MEM'L LIBR., TRUMAN STATE UNIV., http://library.truman.edu/manuscripts/laughlinbio.asp [https://perma.cc/LC57-Y224] (last visited Jan. 8, 2021).

In Carrie Buck's case, her poverty, perceived intellectual shortcomings, teenage pregnancy (the result of a rape), and family history of alcoholism were invoked to justify the state's reprisal and her sterilization.[112] The Court found:

> It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[113]

In the wake of the Supreme Court declaring the Virginia eugenics law constitutional, more than sixty thousand Americans were convicted of social unfitness and surrendered to public health officials for compulsory sterilizations.[114] Eugenics further guarded white racial purity, by policing and restricting undesirable white people from "continuing their kind."[115] Compulsory sterilization laws reflected the cruel and inhumane lengths to which white elites dared go in order to refine and preserve whiteness.

After all, at the heart of eugenics laws was a political and legal commitment to surveillance, government intrusion, reprisal, and retribution to discourage not only vice, but also sex, single parenting, and reproduction among the socially undesirable. At their core, these policies were rooted in social judgments about the poor and served to further shape social and legal understandings about whiteness.

## CONCLUSION:

To understand racial ordering in the United States, one should begin by the examining the law and studying closely of judicial opinions, legislation, and legal ordinances. That is, rather than considering racist law some strange anomaly, one should understand that racial caste and

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112. *See, e.g.*, NPR's Hidden Brain and Stephen Jay Gould, Carrie Buck's Daughter, 2 CONST. COMMENTARY 331, 332 (1985), https://conservancy.umn.edu/bitstream/handle/11299/164572/02_02_Gould.pdf.

113. *Buck*, 274 U.S. at 207 (1927) (ruling "the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes").

114. Kim Severson, *Thousands Sterilized, a State Weighs Restitution,* N.Y. TIMES, Dec. 9, 2011, at A1.

115. *Buck,* 274 U.S. at 207 (1927) at 207.

ordering in the United States were purposefully created and maintained by law and legal institutions. Indeed, slavery itself was not only an economic institution, but also one of law.

Importantly, the creation of racial caste in the United States was achieved through the regulation of women's bodies and sex. Legislation governing matrilineality, laws related to hypodescent, bans on interracial marriage, and eugenics—namely the forced sterilization of people viewed as unfit for the American ideal reinforced caste and racial hierarchies. The results were not only peculiar—such as hypodescent laws—but also cruel.

Today, the endurance of racial caste could not be maintained without the structures and forces of law. Vertical, racial hierarchies reshaped law such that it reduced the impact of Reconstruction Amendments for more than a century, sadly, rendering them virtually meaningless, replacing equal protection with "separate but equal" and voting rights with expanded, dubious requirements and restrictions. Even the Thirteenth Amendment's abolition of slavery is punctuated by a Punishment Clause, which legalizes slavery in the United States so long as an individual has been convicted of a crime. The Punishment Clause provided the foundation on which southerners committed to slavery could and did expand coerced labor. It has yet to be repealed.