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LAW AND ANTI-BLACKNESS

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The Lottery[1] is a short story that describes a fictional, bucolic small town in the United States. The townspeople seem lovely and perhaps even thoughtful about each other, until once per year when their cleansing happens. This is when they stone a member of their community to death. The decision as to who is stoned is rather arbitrary—not based on crime, harm to another, past misdeeds, current troubles or threats of future harm. No. It is the random black dot on a piece of paper that seals Tessie Hutchinson's fate.

No part of the lottery should make sense, even though the townspeople at an earlier time believed that stoning a member of their community each year would contribute to a strong harvest. Surely at some point the illogic of this should slip away. Even if killing a mother, son, or daughter brings a strong corn crop, *is the corn yield worth it?* Apparently, they think so.

As Shirley Jackson writes, "[t]he people had done it so many times that they only half listened to the directions; most of them were quiet, wetting their lips, not looking around."[2] Everyone participates, even the small children—one child, "little Davy Hutchinson" is given a few pebbles. Barely aware of life itself, the little boy will become complicit in a practice laid out before him. He too will take part in the process that ends in his mother's death. He, like the town's other children, are predestined to believe the lottery is the natural order of things.

The child will learn to smell the stench of fear in the air, taste the anxious sweat that drips from his brow onto his lip as he one day will choose a stone. This will become familiar. Selecting the scapegoat on which to direct his anger, fear, and hope will be normal. This is the social order. The lottery does not simply choose its victims. It predestines the entitled. It protects this way of life.

★★★★★

During the spring and summer of 2020, as COVID-19 rapidly spread throughout the United States, infecting and killing thousands of

1. Shirley Jackson, *The Lottery*, NEW YORKER (June 18, 1948), https://www.newyorker.com/magazine/1948/06/26/the-lottery [https://perma.cc/8QGT-N4FU].

2. *Id.*

Americans, including children,[3] the enduring color line manifested. As of this publication, more than 500,000 Americans have died due to the virus. Those disproportionately harmed in the U.S. have been Indigenous, Black, and Latinx communities.[4] Even while pundits claimed children were safe from the virus, Black and Latinx children suffered and died horrific deaths.[5] The patterns of implicit and explicit racism in medical care combined with social determinants in health meant not even the children's youth nor institutions of public health could save them.[6] Their deaths served as stark reminders of lingering vulnerability and invisibility.

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3. *See* Ed Yong, *How the Pandemic Defeated America*, ATLANTIC (Aug. 4, 2020), https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/ (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-LEVEL DATA REPORT (May 10, 2021), https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/ [https://perma.cc/3YJ5-K9FK] (finding "3,854,791 total child COVID-19 cases reported, and children represented 14% . . . of all cases . . . . Children were 0.00%-0.21% of all COVID-19 deaths" and "[i]n states reporting, 0.00%-0.03% of all child COVID-19 cases resulted in death.").

4. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, HEALTH EQUITY CONSIDERATIONS AND RACIAL AND ETHNIC MINORITY GROUPS (last updated Apr. 19, 2021) , https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html [https://perma.cc/8B7G-MBUS] (finding that racial and ethnic minority populations are disproportionately represented among essential workers and are, accordingly, disproportionately affected by COVID-19).

5. *See, e.g.*, William Wan, *Coronavirus Kills Far More Hispanic and Black Children than White Youths, CDC Study Finds*, WASH. POST (Sept. 15, 2020, 4:00 PM), https://www.washingtonpost.com/health/2020/09/15/covid-deaths-hispanic-black-children/ [https://perma.cc/497Z-T3XR] ("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/EED2-8JRY] ("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 after her death.); Jasmin Barmore, *5-year-old with Rare Complication 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/DP58-75RZ] (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.").

6. *See* Wan, *supra* note 5 (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").

Taking seriously that COVID-19 has exposed preexisting institutional and infrastructural vulnerabilities and inequality in the United States,[7] this Article 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;[8] Breonna Taylor, an essential healthcare provider, fatally shot by several Louisville, Kentucky police officers;[9] and George Floyd, lynched in broad daylight as a Minneapolis, Minnesota officer straddled his neck, pressing a knee onto it for over nine minutes as crowds gasped and watched in horror.[10] Weeks later, Jacob

7. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 4 (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.").

8. *See* Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Apr. 29, 2021), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html [https://perma.cc/XE3V-JWJP] ("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.").

9. *See* Richard A. Oppel, Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 16, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/9JNR-WWZV] (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").

10. Death by lynching conveys the historic violence connected to anti-Blackness. Some lynchings were in trees, some on poles, some off of bridges, and in Emmet Till's case with a cotton gin tied around his neck, and tossed in the Tallahatchie River. Some were carried out by law enforcement and many involved private citizens. Some were conducted by mobs, while others were facilitated by individuals. Some were in cities and others in rural pastures. Some related to purported crimes and many did not. Emmet Till was lynched for a supposed whistle at a white woman. Of the lynched, some were women, some were men. Some were children. And even some were toddlers.

The terror and trauma associated with the killing, described in the media as the asphyxiation, included Mr. Floyd calling for his mother and pleading that he could not breathe. For my research on Mr. Floyd's murder, I interviewed Dr. George Woods, the past president of the International Academy of Law and Mental Health who emphasized that what occurred to Mr. Floyd was in fact a lynching. He described the important elements of a lynching, including its purposeful or otherwise infliction of terror on Black Americans. Lynchings were not only acts of aggression against individuals, but they were also acts that conveyed threats and intimidation to other Black people who might "forget their place" or "step out of line." In this case, Dr. Woods, and other Black thought-leaders have drawn parallels that may not be exact to the 1920s and 1930s, but are adjusted to the times in which we live. The act was public, violent, and did traumatize Black people around the country and world. *See e.g.*, WITHOUT SANCTUARY, https://withoutsanctuary.org/[https://perma.cc/4DT5-4V6F]; Equal Justice Initiative,

Blake, an unarmed father, would be shot seven times at close range while his children watched, in Kenosha, Wisconsin.[11]

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 Article 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.[12] 2020 brought about an aggressive pandemic marked by an increasing death toll month by month from COVID-19.[13] 2020 also marked the untimely

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Lynching in America: Confronting the Legacy of Racial Terror (3d Edition, 2017), https://eji.org/wp-content/uploads/2020/09/lynching-in-america-3d-ed-091620.pdf [https://perma.cc/B58V-UWNS]; *see also*, Evan Hill et. al, *How George Floyd Was Killed In Police Custody*, N.Y. TIMES (Apr. 6, 2021), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/2QST-PXMJ] ("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.").

11. *See* Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html [https://perma.cc/9AQ8-52PN] ("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.").

12. *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. PSYCHOL. 1, 1 (2019), https://psycnet.apa.org/fulltext/2019-01033-001.pdf [https://perma.cc/EXT7-WGYT] (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 trauma-tization, 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/GWG4-ZVPX] (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.").

13. *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/JXV4-BCDD].

death of Justice Ruth Bader Ginsburg[14] and political turmoil leading up to the general election.[15] Until the end, the year unfolded with chaos and consternation, including the challenge of the presidential election results, namely by former President Donald Trump, who claimed on social media,[16] in the news, and through more than sixty lawsuits that fraud mired the 2020 presidential election and that he rightfully had won.[17] By January 2021, the *Washington Post* reported that the president made a total of 30,573 false or misleading claims over four years, including "503 false or misleading claims as he barnstormed across the country in a desperate effort to win reelection."[18]

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 white supremacy, nationalism, and racism in proper discussion and con-

14. *See* Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies At 87*, NAT'L PUB. RADIO (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/BY4H-HEZD].

15. *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/67XU-LPK7] (reporting that "President Donald Trump . . . refused to back down from his suggestion earlier in the day that the November general election be postponed, repeating unsubstantiated predictions of widespread voter fraud amid the coronavirus pandemic").

16. 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/WCR7-G9YY] ("'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 [https://perma.cc/4YAS-2GUM] (noting that "Trump . . . has continued his assault on the U.S. vote in more than 40 Facebook and Twitter posts since Election Day").

17. *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/MJ93-JHBJ] (explaining, for example, that "[i]n Georgia, an attempt was made to stop the count in Chatham County, alleging problems with ballot processing - but the lawsuit was rejected by a judge who said there was 'no evidence' of improper ballot mixing.").

18. Glenn Kessler, Salvador Rizzo, & Meg Kelly, *Trump's False of Misleading Claims Total 30,573 over 4 Years*, WASH. POST (Jan. 24, 2021), https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/.

texts 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.[19] Long divorced from that historical, political, and legal discourse is acknowledgment of the purposeful and enduring harms cast upon Indigenous peoples and Black Americans to justify colonialism, the capitalism derived by slavery, and the post-Reconstruction era scapegoating of the newly "freed."[20] In other 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 they were field chattels? What narratives must the auctioneers tell to encourage bidders and secure lucrative offers 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

19. *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 [https://perma.cc/P5EN-5SBN] (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").

20. *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), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5004736/ [https://perma.cc/58B2-MXWE] (writing that "[t]he criminalization of Blackness allowed for White supremacy to use Black bodies as their scapegoat for all problems, real or fictional").

ratification of the Fifteenth Amendment, the third and final of the Reconstruction Amendments,[21] the stain and vestiges of slavery in the United States remain.

This Article 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 division and caste. Part I turns to pathos and hate, creating race and otherness through legislating reproduction—literal and figurative. Part II turns to the Thirteenth Amendment. It argues that the preservation of slavery endured through its transformation. That the amendment makes no room for equality further establishes the racial caste system. Part III then examines the making of racial division and caste through state legislation and local ordinances, exposing the sophistry of *separate but equal*. Part IV turns to the effects of these laws and how they shaped cultural norms. As demonstrated in Parts I-IV, the racial divide and caste system traumatizes its victims, while also undermining the promise of constitutional equality, civil liberties, and civil rights.

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,"[22] because Black people were classed as "man and ox together."[23] 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."[24] 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

21. Ex parte Virginia, 100 U.S. 339, 360 (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.").

22. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 28 (5th ed. 1904).

23. *Id*.

24. *Id*. at 28-29.

back into loyalty."[25] DuBois presciently predicted over a century ago that the problems of the United States would be the color line. 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."[26] 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."[27] This American racial color line established the boundaries of citizenship and naturalization.

Placed in its proper context, the American commitment—perhaps addiction—to its racial ideology of a caste system[28] 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.[29]

Racial hierarchy has long been the euphemistic elephant in the room and the American dividing line, demarking power, freedom, and self-governance. 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

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25. *Id.* at 29; *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).

26. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM vii (Celine Noel & Wanda Gunther eds., Univ. N.C. at Chapel Hill electronic ed., 2001) (1855).

27. *Id.* (emphasis added).

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

29. *Id.*

exclusively, freedom and citizenship.[30] 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,[31] 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 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."[32]

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

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

31. 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, 266-73 (2020).

32. 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 [https://perma.cc/Z9LR-BX4A].

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."[33]

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.[34]

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.

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.[35] 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."[36] 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.

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33. WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, (1662-1682) Vol. 11, at 170, 260, 266, 270 (Richmond, Va, 1809-23).

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

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

36. *Id.*

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.[37] 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."[38]

As in the case of Ms. Phipps,[39] even African descendants fitting the further delineated racial classifications of "mullato,"[40] "quadroon,"[41] "octoroon" or "hexadecaroons"[42] 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.[43] These laws sought to express that multiple generations of white forbearers could not cure the stain of African ancestry in the United States.[44]

Accounting for the legalized cruelties and humiliations inflicted on Black people, the incentives to pass as white were not insignificant.[45] 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 County Hospital; it was the only nearby hospital that would admit Black people when more elite medical centers would not. Neither his fame, wealth, nor amiability allowed him to transcend the racial caste system.

If "passing" were an option, lawmakers cleverly constructed disincentives to dissuade attempts to breach the color line. 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,*[46] Leonard "Kip" Rhinelander, son of a

37. *Id*.

38. *Id*.

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

40. Having the status of Black based on one Black parent.

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

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

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

44. 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.

45. 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).

46. Rhinelander v. Rhinelander, 157 N.E. 838 (N.Y.), *aff'g* 219 N.Y.S. 548 (N.Y. App. Div. 1927).

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 Leonard, the plaintiff, and his wife, the defendant.[47] 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.[48]

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.[49]

> 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.[50]

Following this, Alice's lawyer asked Leonard whether his wife's body was "the same shade as when [he] saw her in the Marie Antoinette with all of her clothing removed?"[51]

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.[52] Even while the case was hailed in the Black press as a victory for Alice,[53] it nevertheless was a

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47. *See generally* 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).

48. *Id*. at 2395, 2408-09.

49. *Id*. at 2429.

50. *Id*. (citing the Transcript of Record at 696, Rhinelander v. Rhinelander, 219 N.Y.S. 548 (N.Y. App. Div.), *aff'd* 157 N.E. 838 (N.Y. 1927)); *see also* ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY (2013).

51. Onwuachi-Willig, *supra* note 47, at 2429.

52. *Id*. (citing the Transcript of Record at 696, Rhinelander v. Rhinelander, 219 N.Y.S. 548 (N.Y. App. Div.), *aff'd* 157 N.E. 838 (N.Y. 1927)).

53. *See, e.g.*, *Rising Above Prejudice*, N.Y. AMSTERDAM NEWS, Dec. 9, 1925, at 16 ("[J]urors have rendered a great service to womanhood in general and Negro womanhood in particular.").

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.[54] 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."[55] 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."[56] 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 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."[57]

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.[58] As the Supreme Court took

54. *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, 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"); *and see* Karen Woods Weierman, *"For the Better Government of Servants and Slaves": The Law of Slavery and Miscegenation*, 24 LEGAL STUD. F. 133, 133-34 (2000) (explaining how race and sex were treated as interconnected and interdependent concerns).

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

56. Ball, *supra* note 54, at 2734.

57. *Id*.

58. *See Loving*, 388 U.S. at 3.

notice in *Loving v. Virginia*, the trial judge 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."[59]

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.[60]

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."[61] 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."[62]

Four years later, in 1964, the Lovings filed motions to vacate the judgment and to have the sentence 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 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.[63]

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.[64] At the time of their litigation

59. *Id.* at 6.
60. *Id.* at 3.
61. *Id.* at 2-3.
62. *Id.* at 3.
63. *Id.* at 3–4.
64. *Id.* at 2.

in 1967, sixteen states prohibited and punished "marriages on the basis of racial classification."[65] 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.[66]

Citing *Pace v. Alabama*,[67] 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."[68] This legal strategy stretched the meaning of the Court's rulings in *Railwsay Express Agency*[69] (involving a statute "discriminating between the kinds of advertising which may be displayed on trucks in New York City")[70] and *Allied Stores of Ohio*[71] (addressing "an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse").[72] 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 vital personal rights essential to the orderly pursuit of happiness by free men.[73]

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 racial order and hierarchy during Jim Crow.[74] Anti-miscegenation or "anti-

65. *Id*. at 6.

66. *Id*. at 7-8.

67. *Id*. at 10 (citing Pace v. Alabama, 106 U.S. 583 (1883)).

68. *Id*. at 7–8.

69. *Id*. at 8 (citing Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949)).

70. *Id*.

71. *Id*. at 9 (citing Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)).

72. *Id*.

73. *Id*. at 12.

74. Kathy Eyre, *Mississippi Still Far From Accepting Interracial Marriage*, AP NEWS (Nov. 28, 1987), https://apnews.com/article/d57930264fd39578c14f3f64f2cec4e8; ARK. CODE

amalgamation" laws predated slavery's abolition and 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,[75] Connecticut,[76] and Pennsylvania,[77] so too were laws denying interracial marriages.[78]

Northerners "were not unmindful of the danger racial equality posed to national union" as well as the importance of maintaining slavery.[79] For example, in 1705, colonial lawmakers in Massachusetts enacted an anti-miscegenation law based significantly on Virginia's existing law.[80] As in Virginia, "the development of miscegenation law was directly related to the growth of slavery."[81] In fact, "Massachusetts was also the first colony explicitly to authorize slavery by law."[82]

And, "[u]ntil February 1843, when the state legislature repealed a statute that banned marriages between whites and 'Negroes, Indians, or 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."[83] 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.[84] In essence, after the repeal of the Massachu-

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ANN. § 55-104 (1947), *reprinted in* STATES' LAWS ON RACE AND COLOR 44 (Pauli Murray ed., 1950); DEL. REV. CODE Ch. 85, § 3485 (1935), *reprinted in id.* at 72; KY. REV. STAT. § 402.020 (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. PENAL CODE, art. 492 (1947), *reprinted in id.* at 452; W. VA. CODE ANN. § 4697 (1943), *reprinted in id.* at 511.

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

76. 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.").

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

78. *See, e.g.*, Moulton, *supra* note 54, at 5-7.

79. *Id.* at 6.

80. Weierman, *supra* note 54, at 146.

81. *Id.* at 144.

82. *Id.* at 145.

83. *See e.g.*, Moulton, *supra* note 54, at 2.

84. *See* MASS. GEN. LAWS ANN. ch. 207, § 11 (1913); *see also* Zebulon Miletsky, *The Dilemma of Interracial Marriage: The Boston NAACP and the National Equal Rights League,*

setts anti-miscegenation law, only interracial couples who were citizens of that state could marry there.

Rhode Island,[85] Illinois,[86] Iowa,[87] Kansas,[88] Maine,[89] Michigan,[90] Pennsylvania,[91] and Ohio[92] are among the northern states that enacted laws banning interracial marriage. Alabama,[93] Florida,[94] Mississippi,[95] North Carolina,[96] South Carolina,[97] and Tennessee[98] found interracial marriage so abhorrent that they ratified their constitutions to bar such unions.[99] And, though the Supreme 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."[100] As stunning as that may seem, "Mississippi didn't grant its first

1912-1927, 44 HIST. J. MASS. 137, 140 (2016); *and see* AMBER D. MOULTON, THE FIGHT FOR INTERRACIAL MARRIAGE RIGHTS IN ANTEBELLUM MASSACHUSETTS (2015).

85. Act of Mar. 23, 1881, ch. 846, 1881 R.I. Pub. Laws 108 (repealing ban on interracial marriage).

86. Act of Jan. 17, 1829, sec. 3, 1832 Ill. Laws 465 (banning interracial marriage).

87. Act of Jan. 6, 1840, ch. 25, 1839 Iowa Acts 42 (banning interracial marriage).

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

89. Act of Mar. 12, 1883, ch. 203, 1883 Me. Laws 167 (repealing ban on interracial marriage).

90. 1883 Mich. Pub. Acts 16, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 230 (amending an 1871 statute to validate interracial marriage contracts).

91. 1725 Pa. Laws 145 (prohibiting ministers from approving interracial marriages).

92. 1861 Ohio Laws 6 (prohibiting interracial marriage).

93. ALA. CONST. art. IV, § 102 (annulled 2000); ALA. CODE tit. 14, § 360 (1958), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 246.

94. FLA. CONST. art. XVI, § 24, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 77; FLA. STAT. § 741.11 (1941), *reprinted in id*. at 83.

95. MISS. CONST. art. XIV, § 263 (repealed 1987); MISS. CODE ANN. § 459 (1942), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 246; Eyre, *supra* note 74.

96. N.C. CONST. art. XIV, § 8, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 329; N.C. GEN. STAT. § 14-181 (1953) (repealed 1973).

97. S.C. CONST. art. III, § 33 (repealed 1999), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 407; S.C. CODE § 8571 (1942), *reprinted in id*. at 417.

98. TENN. CONST. art. XI, § 14 (repealed 1978); TENN. CODE ANN. § 8409 (1934), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 74, at 438.

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

100. Eyre, *supra* note 74.

marriage license to an interracial couple until 1970, under a federal judge's order."[101]

One matter in common among *all* the states that banned interracial marriages is that they *all* prohibited "Negro-white marriages."[102] Some states barred Asian-white unions[103] and still others banned Indigenous-white unions.[104] Commonly, geography dictated these laws.[105] No state barring interracial marriages excluded Black-white unions 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.

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.[106] 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

101. *Id*.

102. Browning, *supra* note 99, at 31.

103. *See, e.g.*, Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 L. & SOC'Y REV. 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.").

104. Browning, *supra* note 99, at 31.

105. *See* Sohoni, *supra* note 103, 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.").

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

unfit.[107] Writing for the majority, Justice Oliver Wendell Holmes issued a haunting condemnation of vulnerable white women, declaring "three generations of imbeciles are enough."[108]

The case centered on Carrie Buck, whom Justice Holmes described as "a feeble-minded white woman."[109] He claimed that she was the "daughter of a feeble-minded mother"[110] and "the mother of an illegitimate feeble-minded child."[111] Notwithstanding the troubling 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),[112] 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.[113]

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.[114] 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

107. *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.

108. *Buck*, 274 US at 207.

109. *Id.* at 205.

110. *Id.*

111. *Id.*

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

113. *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).

114. *See, e.g.*, Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT 331, 334-35 (1985), https://conservancy.umn.edu/bitstream/handle/11299/164572/02_02_Gould.pdf [https://perma.cc/NC6D-V8AJ].

> crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[115]

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.[116] Eugenics further guarded white racial purity, by policing and restricting undesirable white people from "continuing their kind."[117] Compulsory sterilization laws reflected the cruel and inhumane lengths to which white elites dared to go in order to refine and preserve whiteness.

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 examining the law and studying closely judicial opinions, legislation, and legal ordinances. That is, rather than considering racist law some strange anomaly, one should understand that racial caste and 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.

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

116. Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES (Dec. 9, 2011), at A1, https://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html [https://perma.cc/56MU-P9QZ].

117. *Buck*, 274 U.S. at 207.

PART II: THE ENDURANCE AND PRESERVATION OF SLAVERY THROUGH TRANSFORMATION

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[118]

The racial caste system is an ecosystem founded on legal and social tenets of racial hierarchy and dominance. A belief in white supremacy and Black inferiority is the foundation of racial caste. For those whose lives had previously been physically tethered to slavery, myriad post-Reconstruction laws further fastened them to an inferior status where there was little or no relief from the Supreme Court. The American racial caste system became the nightmare that never ceased at abolition's dawn. As Justice Douglas concurred in 1968 in *Jones v. Mayer Co.*,[119] "[s]ome badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men."[120] *What explains this?*

Taking seriously Justice Douglas's observation that "[c]ases which have come to this Court depict a spectacle of slavery unwilling to die,"[121] Part II turns to the archives of American law to make visible law's role in fomenting racial caste in the United States. As such, it renders visible overlooked legal history relevant to the maintenance and transformation of slavery's badges, namely in the Constitution's Thirteenth Amendment. As prior work argues, neither the values undergirding the Thirteenth Amendment nor the practice of slavery ended at its abolition. [122] Rather, slavery persists through its transformation; it endures and evolves. This dynamic is what scholar Reva Siegel describes as "preservation-through-transformation."[123]

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118. U.S. Const. amend. XIII.

119. Jones v. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

120. *Id*.

121. *Id*.

122. Goodwin, *supra* note 30, at 908.

123. On the question of slavery, she wrote, "White Americans who emphatically opposed slavery regularly disagreed about what it would mean to emancipate African-Americans. Some defined freedom from slavery as equality in civil rights; others insisted that emancipating African-Americans from slavery entailed equality in civil and political rights; but most white Americans who opposed slavery did not think its abolition required giving African-Americans equality in 'social rights.'" *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-20 (1997).

Part II argues that the racial caste system is further exemplified by the Thirteenth Amendment's punishment clause, the debate about the law, and the prohibition on one form of slavery while sanctioning and preserving others. In the immediate wake of the Thirteenth Amendment's ratification, this included the reappropriation and transformation of Black labor through Black Codes, crop liens, lifetime labor, debt peonage, and apprenticeship provisions. Today, this includes prison labor that tethers America's overwhelming consumption of mass incarceration.[124]

A. *The Debate: Equality That Was Never Meant to Be*

In the United States, those at the lower rungs of society achieve social caste not only by birth status but also by laws, practices, and conditions that seek to denigrate, humiliate, embarrass, cause suffering, and otherwise interfere with dignity interests. Like the castes in other societies—such as India, famous for rendering a whole set of people "untouchable" or what became of Germany during the rise of Adolf Hitler, the Third Reich, and the Nazi occupation of government and society—so too America's practices of racial caste persist beyond slavery's abolition, Reconstruction, and Jim Crow.[125]

Perhaps no better evidence of slavery's persistence beyond the Thirteenth Amendment is the law itself. The amendment codifies the persistence of slavery through its punishment clause. This clause, often overlooked by legal academics and therefore barely engaged in law schools, explicitly permits "slavery" and "involuntary servitude" as "punishment for crime," where the person has "been duly convicted."[126] At the time of its drafting, senators from slaveholding states vigilantly negotiated for a compromise to permit slavery's continuance under ratified conditions. As the punishment clause has never been repealed, the institution has survived—largely unseen—by those least affected. It remains a deleterious plague that continues to infect our democracy.

The author of the punishment clause, Senator John Brooks Henderson, an outspoken Missouri slave owner, favored adopting a constitutional amendment abolishing slavery that contained a punishment exception

124. Michele Goodwin, *We Can't Be Free Until We Fully Abolish Slavery*, APPEAL (Oct. 7, 2020), https://theappeal.org/authors/michele-bratcher-goodwin/; Kiera Feldman, *California Kept Prison Factories Open. Inmates Worked for Pennies An Hour As COVID-19 Spread*, L.A. TIMES (Oct. 11, 2020), https://www.latimes.com/california/story/2020-10-11/california-prison-factories-inmates-covid-19.

125. *See, e.g.*, PAULI MURRAY, STATES LAWS ON RACE AND COLOR (1951).

126. U.S. CONST. amend. XIII.

similar to The Northwest Ordinance of 1787.[127] That law prohibited slavery in the new western territory except "in the punishment of crimes whereof the party shall have been duly convicted."[128] Opposition to this language and efforts to introduce an even more explicit abolition of slavery that elevated the human rights of all persons proved futile.

For example, Senator Charles Sumner, a widely respected abolitionist, objected to the Punishment Clause and proposed an amendment based on France's Declaration of the Rights of Man and of the Citizen that asserted the equality of all men. His amendment stated:

> All persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States and the jurisdictions thereof.[129]

Drawing from international law, he argued, "the constitutional charter of August 1830, at the installation of Louis Philippe as king, with La Fayette by his side, contains the articles . . . placing the declaration of *equality before the law* in the front."[130] Senator Sumner pointed to the fact that "this article has been adopted in the charters of Belgium, Italy, Greece; so it is now a well-known expression of a commanding principle of human rights."[131] According to Sumner, "equality before the law" manifested "precision to that idea of human rights which is enumerated in our Declaration of Independence."[132]

Senators vehemently opposed to ending slavery rejected the principles outlined by Sumner. Senator Lazarus Powell spoke at length denouncing the notion that Black people were anything but property.[133] He rebuffed the idea that "it was ever designed by the founders of [the United States] that the Constitution of the United States should be so amended as to destroy property."[134] He argued, "I do not believe it is the province of the Federal Government to say what is or what is not

127. Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 990 (2009).

128. NORTHWEST ORDINANCE, art. 6 (1787).

129. CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864).

130. *Id.* (emphasis in the original).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

property."[135] The province of government, according to Powell, is to "guard, protect, and secure, rather than to destroy."[136]

In his complete rejection of a constitutional amendment to abolish slavery, Powell called it illogical, comparing the government's abolition of slavery to the federal government regulating "every domestic matter in the States."[137] Powell warned that if an amendment to abolish slavery were to succeed, Congress might next interfere with matters of "parent and child, husband and wife, and guardian and ward."[138] Notably, existing laws and social practices made the domestic sphere hostile for women. Marital rape was legal[139] and domestic violence a matter of private regard.[140]

In *State v. Oliver*, a North Carolina court advised that while its position had evolved: "We may assume that the old doctrine, that a husband had a right to whip his wife, provided he use a switch no larger than his thumb, is not law in North Carolina."[141] Still "if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[142] This was the common view. In *Abbott v. Abbott*, the court denied Mrs. Abbott the opportunity to recover for injuries sustained after a brutal beating by her husband, which required hospitalization.[143] The court explained the "husband and wife are one person."[144]

In the view of those committed to the South's enterprise, its defeat in the Civil War did little to elevate the humanity or social status of Black people. For those who clung to the economic profitability and cap-

135. *Id*.

136. *Id*.

137. *Id*.

138. *Id*.

139. In 1736, Sir Matthew Hale's highly acclaimed treatise, *Historia Placitorum Coronae, History of the Pleas of the Crown*, maintained that it was impossible for a woman to be raped by her husband. Hale proclaimed that a "husband cannot be guilty of rape" because marriage conveys unconditional consent, whereby wives have entered a binding contract and "hath given up herself in this kind unto her husband, which she cannot retract." No prior English common law articulated this standard, but Hale's new rule found broad support among parliamentarians and subsequently influenced legal developments in the British colonies and in the United States. Nearly every state legislature enacted laws that shielded husbands from criminal punishment for raping their wives (and sometimes even girlfriends). In 1993, North Carolina was the last state to rescind the marital rape exemption. SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736).

140. *Id*.

141. State v. Oliver, 70 N.C. 60, 62 (1874).

142. *Id*.

143. 67 Me. 304 (1877).

144. *Id*. at 305.

italism of human slavery, the rationales for human kidnapping, trafficking, and bondage persisted. One means of keeping the ideology of slavery alive was to create the chattel in Black people. That is, slavery thrived on the notion that Black people were no different in spirit, mind, or comportment than common field stock. A belief in the humanity of enslaved persons, such as that promoted by Senator Sumner, contradicted the view proffered by Powell (that Black people lacked human status). To make himself perfectly clear, Senator Powell cautioned that if the federal government were to "strike down property in slaves, it certainly would have the right to strike down property in horses."[145]

In debate, Senator Sumner argued against both a lengthier amendment with the punishment clause and the revised, condensed form that currently stands. He doubted the wisdom in reproducing the "Jeffersonian ordinance" because the language was inconducive to the challenge before the government of constitutionally abolishing slavery in the wake of the Civil War.[146] Simply put, the language of the ordinance was "inapplicable" to the matter at hand.[147] He reminded Senate colleagues, "slavery in our day is something distinct, perfectly well known, requiring no words of distinction outside itself" and queried, why therefore add the punishment clause?[148] Not only was the language surplusage, but also it introduced "doubt" as to the Senate's intent to end slavery.

With uncanny omniscience, Senator Sumner warned, "We should consider well that the language that we adopt here in this Chamber today will in all probability be adopted by the House . . . Once having passed this body, it is substantially beyond correction."[149] His urge for caution likely reflected a keen understanding of the various forms of slavery. He understood the great lengths those invested in slavery would pursue to secure its continuance.

From the outset, southern lawmakers, plantation owners (sometimes one in the same), as well as northerners profiting from slavery, scored victories in Congress,[150] state legislatures,[151] and in courts to maintain slav-

145. CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864).

146. *Id*. at 1488 (explaining, "[t]here was a reason" and "habit in certain parts of the country to convict persons or doom them as slaves for life as a punishment for crime, and it was not proposed to prohibit this habit").

147. *Id*.

148. *Id*.

149. *Id*.

150. *See* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864); Act of Apr. 7, 1820, ch. 19, 3 Stat. 544; Act of Mar. 6, 1820, ch. 22, 3 Stat. 545; *Records of Joint Committees of Congress, Record Group 128, 1789-1989*, NAT'L ARCHIVES (Aug. 15, 2016), https://www.archives.gov/research/guide-fed-records/groups/128.html (admitting Missouri to the Union as a "slave state," to preserve their balance of power in the federal government. "Be it enacted

ery.[152] American Slaveholders violated domestic and international laws in furtherance of their trade.[153] Meanwhile, in European cities, boycotts ensued on certain American goods, in protest of slavery.[154] Even though the 1807 Act Prohibiting Importation of Slaves made the continued kidnapping and importation of Africans illegal, the law was too frequently ignored.[155] Likely not lost on Senator Sumner was the cold reality that despite the 1807 Act, "cargoes of negroes [were] imported from Africa" regularly, according to journalists.[156] In 1860, mere years before Sumner took to the Senate Chambers to argue for the equality of Black peoples, the *New York Times* reported:

> Several cargoes of negroes have, it is notorious, been imported from Africa within the last year, and have been distributed through the interior with greater or less publicity. The perpetrators of the offence have been well known; in fact, so far from concealing their share in it, have gloried in it. We have not yet heard of the conviction and punishment of one of them. The Federal officials have either winked at the crime,

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by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of that portion of the Missouri territory included within the boundaries herein after designated, be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the Union, upon an equal footing with the original states, in all respects whatsoever . . . .").

151. See Michael E. Ruane, *Freedom and Slavery, The 'Central Paradox of American History*, WASH. POST (Apr. 30, 2019), https://www.washingtonpost.com/local/freedom-and-slavery-the-central-paradox-of-american-history/2019/04/30/16063754-2e3a-11e9-813a-0ab2f17e305b_story.html ("In October 1705, Virginia passed a law stating that if a master happened to kill a slave who was undergoing "correction," it was not a crime. Indeed, the act would be viewed as if it had never happened.").

152. *See generally* Dred Scott v. Sanford, 60 U.S. 393, 407 (1857); United States v. Booth, 59 U.S. 476 (1856); Prigg v. Pennsylvania, 41 U.S. 539 (1842).

153. For example, Congress enacted the 1807 Act Prohibiting Importation of Slaves. Act Prohibiting Importation of Slaves of 1807, Pub. L. No. 9-222, Stat. 426. However, as an 1860 *New York Times* article reported, "[t]he laws are on the statute-book, and anybody who likes to obey them may do so; but any one [sic] who does not like to obey them need not." *The Slave Trade and the Election*, N.Y. TIMES, Sept. 19, 1860, at 4.

154. Jason Rodrigues, *Lincoln's Great Debt to Manchester*, GUARDIAN (Feb. 4, 2013, 6:15 AM), https://www.theguardian.com/theguardian/from-the-archive-blog/2013/feb/04/lincoln-oscars-manchester-cotton-abraham ("But in 1862, Lancashire mill workers, at great personal sacrifice, took a principled stand by refusing to touch raw cotton picked by US slaves.").

155. Act Prohibiting Importation of Slaves of 1807, Pub. L. No. 9-222, Stat. 426 (1807); *The Slave Trade and the Election*, *supra* note 153.

156. *The Slave Trade and the Election*, *supra* note 153.

> or pursued it with such laxity that they might better have suffered it to pass altogether unnoticed.[157]

Those invested in slavery, including in the North, used violence as a means of intimidation and as a threat to maintain the institution.[158] Famously, Pennsylvania Hall was burned down by an anti-abolitionist mob.[159] In Boston, pro-slavery mobs frequently and violently interrupted meetings sponsored by abolitionists who threatened the business interests of wealthy Bostonians whose textile mills processed slave-produced goods from the South.[160] As a response to their reporting on the conditions of American slavery, early American press outlets, including *The Liberator,* managed by the abolitionist William Lloyd Garrison, regularly faced attacks.[161]

The Negro History Bulletin reported on the mobs that threatened abolitionists. A 1944 article chronicled the various death threats, smashing of printing presses, and broad attempts (and successful efforts) to undermine freedom of the press.[162] Very likely, these incidents were not unfamiliar to abolitionists like Senator Sumner. For example, Elijah P. Lovejoy, a Presbyterian minister from Maine, was ultimately murdered defending his press.[163]

> In 1837, a slave was accused of a serious crime and tried in the "Lynch Court" by a man named Judge Lawless. The slave was found guilty and sentenced to be burned alive. Lovejoy protested in his newspaper to no avail; and when he persisted after the slave had been executed, a mob broke in his office and smashed his printing press. He was driven out of St. Louis and moved about twenty miles up the river to Alton, Illinois where he started a similar paper known as The Alton Observer. His press was destroyed two more times, and he finally met a violent death while defending his press against a third Alton mob.[164]

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157. *Id*.

158. *See Pennsylvania Hall 1838*, PBS, https://www.pbs.org/wgbh/aia/part4/4p2938.html.

159. *Id*.

160. William Lloyd Garrison & James Brown Yerrinton, LIBERATOR NEWSPAPER, January 3, 1835, https://ark.digitalcommonwealth.org/ark:/50959/9w032w563 (accessed November 23, 2020).

161. *Id*.; *see also*, William Lawless Jones, *Mob Violence Against Abolitionists in The South*, 7 NEGRO HIST. BULL. 134 (March 1944).

162. W. Sherman Savage, *A Defense of the Freedom of the Press*, 8 NEGRO HIST. BULL. 31, 31–33, 41–43 (Nov. 1944).

163. Jones, *supra* note 161, at 137.

164. *Id*.

If not for strange social and political resistance to unpacking America's history of enslavement, it would appear almost obvious that advocates of slavery embraced and shrewdly deployed violence, mastering not only tools of brawn, but also political and economic power. Their political influence, and pressure to maintain an iron grip on chattel slavery, proved successful. As history records, this included their advocacy for the Congressional enactment of Fugitive Slave laws of 1793[165] and 1850, which not only returned many who had escaped from slavery, but also contributed to the kidnapping of free or freed persons into slavery.[166]

Notably, Senator Sumner's determination to incorporate language that "all persons are equal" into the Thirteenth Amendment failed. He firmly corrected Senator Howard, who persisted in describing the Sumner amendment as emphasizing "freedom" rather than "equality." Several times, Senator Sumner responded, "it is equal," to which Senator Howard replied, the distinction between being free and being equal is "immaterial," and "utterly insignificant."[167] However, the difference between the language of freedom versus equality in the Thirteenth Amendment was no less important than what colonists fought for against the British or drafted into the Declaration of Independence.

The debate about equality, freedom, and the Punishment Clause in the Thirteenth Amendment reveals two concerns. First, even senators opposed to slavery indicated discomfort with the concept of Black people being equal in stature and law to white people. Second, equality baked into the Constitution interfered with patriarchal norms and power relationships between men and women, husbands and wives. Senator Howard spoke to the anticipated dangers: "I suppose before the law a woman

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165. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864). Section 4's penalty clause was drafted to impose significant penalties such as to dissuade even the staunchest abolitionist from providing aid to persons fleeing slavery:

> That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given and declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any Court proper to try the same, saving moreover to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them.

Id.; *see also* Prigg v. Pennsylvania, 41 U.S. 539 (1842); RICHARD BELL, STOLEN: FIVE FREE BOYS KIDNAPPED INTO SLAVERY AND THEIR ASTONISHING ODYSSEY HOME (2019).

166. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

167. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864).

would be as free as a man. A wife would be equal to her husband and as free as her husband before the law."[168] In essence, early attempts to establish Black people's equality under the law suffered because of the threat of dislodging male dominance domestically and the dismantling of a racialized monopoly on power.

Before the debate ended, Senator James Alexander McDougall of California offered an impassioned defense on the importance of equality, explaining, "I shall not be set down in any place by any man as a person who does not love freedom in all its forms."[169] He argued, "I do not believe that from Maine, Vermont, or New Hampshire, or Massachusetts, or Connecticut, or Rhode Island . . . there comes a man who is more attached to the establishment and maintenance of free institutions than I am myself."[170] He was a contemporary of Abraham Lincoln, had practiced law in Illinois, and by historical counts, he and Lincoln were friends. However, on the question of equality or freedom for the formerly enslaved, he made three key arguments worth observing.

First, he offered a warning that Black people might be better off enslaved than free, because of the "vices" and "violence" that might arise in white people objecting to their freedom.[171] He warned that a policy granting freedom "will ingulf [sic] them. It is as simple a truth as has ever been taught by history."[172] Clearly a strange and troubling argument - that Black people should not gain freedom because it might stir anger and violence in white Americans - that nevertheless proved prescient. Interestingly, McDougall did not urge or suggest a political (or criminal) response to this real threat of violence. Ratification of the Thirteenth Amendment ended one form of slavery and transformed it into another.

Under constant surveillance and criminal law traps, conditions of slavery returned for many Black people in the form of convict leasing, peonage, Black Codes, and even refined apprenticeship laws designed to literally kidnap Black children from their parents and hold them in service for up to twenty years. As well, post-Reconstruction witnessed the birth and rise of the Ku Klux Klan; rampant lynching throughout the United States, which included targeting Black women and children; and the introduction of Jim Crow policies.

Second, even as a friend of "freedom" and "equality," Senator McDougall, like others in the non-slaveholding class, believed in the racial caste system embedded in U.S. law and baked into the fabric of our nation. Lauded as a gifted orator, he took the floor warning that "the Af-

168. *Id.*
169. *Id.* at 1490.
170. *Id.*
171. *Id.*
172. *Id.*

rican race and the Europeans are different."[173] He claimed "it as a fact established by science that the eighth generation of the mixed race formed by the union of the African and European cannot continue their species."[174] Rich with eugenics imagery and citing no evidence, he appealed to fellow senators, "quadroons have few children; with octoroons reproduction is impossible."[175] According to him, "it establishes as a law of nature that the African has no proper relation to the European, Caucasian blood."[176]

Third, to the extent that the seeds of the racial caste system grew deeply in southern soil, so too did its roots reach the aquifers in the north. Even while Black people found safe harbors in certain northern towns, racism and white supremacy also persisted in northern colonies, territories, and states. According to Senator McDougall, the formerly enslaved would be destined to life in the South, "where they belong,"[177] and not necessarily in the north where those of his class built their lives. According to McDougall, "nature" may well "revolt" at Black people's freedom and equality.[178] He along with Senators Davis, Hendricks, Powell, Riddle, and Saulsbury voted against the Thirteenth Amendment.[179]

B. *Preservation of Slavery Through Transformation: Making Convicts of Freed People*

There is no denying the articulated opposition to slavery in legislatures, courts, and society generally in the United States. Yet, despite "repeated condemnation of slavery," such united opposition to the practice "may instead function to exonerate practices contested in the present, none of which looks so unremittingly 'evil' by contrast."[180] Thus, if the first American history of slavery preceded 1865, the second wave began at the dawn of the Thirteenth Amendment's ratification.

The Thirteenth Amendment's final version emerged from the Senate Judiciary Committee with Senator Henderson's language, permitting both involuntary servitude and perpetual slavery as constitutionally sanctioned punishments for committing crimes. By the end of 1865, Southern states enacted numerous "Black Codes," criminal laws that *only* ap-

173. *Id*.
174. *Id*.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*.
179. *Id*.
180. *See* Siegel, *supra* note 123, at 1113.

plied to "Blacks and Mullatoes."[181] As Herbert Hill explained, "proliferation of infamous Black Codes and Jim Crow laws conspired to deliver newly freed blacks to the statutory status of nonslaves but not to the equal rights of American citizenship; they were still the bondsmen of subjugation and exploitation."[182] In other words, the Thirteenth Amendment's textual abolition of slavery did not reach the lived conditions of Black people. Southerners could in fact, as they did, oppose slavery and practice it at the same time under a new guise sanctioned by Congress under the Punishment Clause.

As Part II.B briefly demonstrates in this Article, and as chronicled in greater detail elsewhere,[183] although Black peoples' previous condition of servitude was textually abolished by the 1865 ratification of the Thirteenth Amendment, the vestiges of slavery lingered and transformed, buttressed by law, further instantiating racial inequality. History offers two accounts regarding the abolition of American slavery. The first is that with the December 19, 1865 ratification of the Thirteenth Amendment, slavery in the United States ended, opening a new period of reconstructing the Union. This version of legal history is, for the most part, what law professors teach their students and largely forms social, political, and academic understanding in the United States.[184]

Others believe President Lincoln's wartime Emancipation Proclamation Act liberated all Black people. This is an enduring error in the popular annals of slavery. Those who take this view fail to understand that states conciliatory toward and willing to join the Union were not obliged to end slavery in their territories.[185] Without Congressional action at the conclusion of the Civil War, those states would be permitted to legally enforce slavery and continue life as before. As most Americans understand it, either through the Emancipation Proclamation or the Thirteenth Amendment, slavery ended. Simply put, this theory that slavery died with Lincoln's Emancipation Proclamation is an error.

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181. *See* Goodwin, *supra* note 30, at 937; *see, e.g.*, HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 13-15 (1985).

182. *See, e.g.*, HILL, *supra* note 181, at 13–15.

183. *See* Goodwin, *supra* note 30, at 933–51.

184. Angela F. Chan, *America Never Abolished Slavery*, HUFFINGTON POST (May 2, 2015), https://www.huffingtonpost.com/angela-f-chan/america-never-abolished-slavery-b_6777420.html ("This past Black History Month, millions of students were told the story of how America abolished slavery 150 years ago with ratification of the 13th Amendment.").

185. ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 36 (2004); MICHAEL VORENBERG, FINAL FREEDOM, THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 47 (2001) (as a wartime measure, slavery would not be prohibited after the war).

Another view is that slavery never ended. Rather, it transformed as new means to exploit Black labor emerged, evolving perhaps several times.[186] As I have previously stated, this reading of slavery is more complicated and likely confounding to some; after all, the Thirteenth Amendment served as a vehicle for freedom. For example, after 1865, no Black child in the United States could be born into slavery nor designated the property of her parents' "master." Even as some Black people may have labored in the same fields as before—perhaps under the direction of people who previously claimed ownership of them—at least from a federal policy perspective, pay was expected and often resulted. Moreover, by the plain language of the Thirteenth Amendment, Black people who were not convicted of crimes were "free" persons. For these reasons, the story of slavery's end in 1865 seems more than logical and a hopeful reading about the potential of the United States to confront its racial past and extinguish the badges of slavery for good. After all, the goal of the 38th Congress was to abolish slavery, even if equality could not be agreed upon.[187]

The reality, however, is that Southern lawmakers contrived to suspend and undermine the new freedom accorded to the class of previously enslaved Black people before the Thirteenth Amendment's December ratification. Between April 8, 1865, the date of the Senate vote, until and even after ratification in December 1865, southern lawmakers expended great energy innovating myriad laws and provisions to render newly freed Black people vulnerable to the Thirteenth Amendment's Punishment Clause.[188] As such, the bandage of the Thirteenth Amendment was snatched off the wounds of slavery before the scars ever healed.[189]

Southern lawmakers reframed, retooled, and resuscitated slavery, drafting a new blueprint that included designs on criminal statutes, Black Codes,[190] and the introduction of convict renting and leasing, which

186. *See generally* DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (discussing the growth and use of the convict lease system from the American Civil War to World War II); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1630 (2015) (arguing that the "new peonage," reflects reconfiguration of the state judicial systems in the American South, following the Civil War, which ensnared Black people into cyclical coerced labor systems that now reemerge in the myriad ways, including through various court fines and fees.).

187. Cong. Globe, 38th Cong., 1st Sess. 1490 (1864).

188. EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION, 7, 31 (1875).

189. 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, at 128–81 (1956).

190. *See, e.g.*, THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 41 (1965) (addressing the expansive "anti-free-Negro" legislation and extra-legal customs

could span decades for minor offenses.[191] These systems supplied cheap labor to coal mines and railways and drove this expansion of slave labor in the Southern economy.[192] According to William Warren Rogers and Robert David Ward, the new penal codes in effect after ratification of the Thirteenth Amendment contained "infamous 'Black Codes' that discriminated against the newly [freed slaves], and resembled the 'Slave Codes' of antebellum days."[193] They explain,"[m]ost importantly, the new code enabled county courts to hire out vagrants, mostly blacks, to work out their sentences," and as a result, "[w]orking for the county became the punishment for a number of offenses."[194]

> Persons guilty of felonies were sent to the state penitentiary, while the county jails housed those convicted of misdemeanors plus costs. From there the prisoners could be leased for "hard labor" either within the county or elsewhere. The Black Codes . . . remained an accepted and defended mode of punishment and profit.[195]

A commitment to the solidification of the racial caste system is reflected in Black Codes. According to Eric Foner, "[v]irtually all the former Confederate states enacted sweeping vagrancy and labor contract laws, supplemented by 'antienticement' measures punishing anyone offering higher wages to an employee already under contract."[196] Throughout the south, Black Codes were common, calling for "hard labor" and fines for what amounted to existing in southern towns. In 1876, a mere decade following ratification of the Thirteenth Amendment, the Georgia legislature enacted a law that authorized prison officials to lease inmates for twenty years at the price of $500,000.[197] The law unmistakably targeted Black people, even though it did not do so explicitly in the language of

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and practices that thwarted freedom for Black people, reducing them to the status experienced before the Civil War).

191. William Andrew Todd, *Convict Lease System*, NEW GA. ENCYCLOPEDIA: HISTORY AND ARCHAEOLOGY (Dec 12, 2005), William Andrew Todd, *Convict Lease System*, NEW GA. ENCYCLOPEDIA: HISTORY AND ARCHAEOLOGY (Dec 12, 2005) [https://perma.cc/GVJ5-H6VZ].

192. *See, e.g.*, William Warren Rogers & Robert David Ward, *The Convict Lease System in Alabama*, *in* THE ROLE OF CONVICT LABOR IN THE INDUSTRIAL DEVELOPMENT OF BIRMINGHAM 1 (1998).

193. *Id*. at 1.

194. *Id*.

195. *Id*.

196. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 200-01 (1988).

197. Todd, *supra* note 191.

the statute. In 1878, Georgia leased out 1,239 prisoners for labor: 1,124 were Black.[198]

In Orlando, Florida, a city ordinance provided "any person or persons who shall stand or gather on any sidewalk in the city of Orlando in such a manner as to obstruct the passage of persons along such sidewalk, shall, upon conviction, be fined in the sum of five dollars or be imprisoned in the calaboose for five days at hard labor."[199] Similarly, in Alabama, lawmakers made it a crime for "free negroes and mulattoes" to assemble in a disorderly manner.[200] Another Alabama code stated that Black people employed by farmers "shall not have the right to sell any corn, rise, [sic] peas, wheat, or other grains, any flour, cotton, fodder, hay, bacon, fresh meat of any kind, poultry of any kind, animal of any kind."[201] This law, although enacted after the Thirteenth Amendment's ratification and the abolition of slavery, referenced "masters" in relation to Black laborers.[202]

Likewise, Mississippi legislators established a series of Black Codes associated with vagrancy. They imposed inordinate fines of $150 for the equivalent of what today would be misdemeanor violations.[203] If the fines could not be paid, the Mississippi codes provided that:

> [A]ll fines and forfeitures collected under the provisions of this act shall be paid into the county treasury for general county purposes; and in case any freedman, free Negro, or mulatto shall fail for five days after the imposition of any fine or forfeiture upon him or her for violation of any of the provisions of this act to pay the same, that it shall be, and is hereby made, the duty of the sheriff of the proper county to hire out said freedman, free Negro, or mulatto to any person who will, for the shortest period of service, pay said fine or forfeiture and all costs.[204]

Children were not spared the racial caste system. Even though they were born free, they too could be reduced to slavery before reaching puberty. According to Douglas Blackmon, "[i]n the immediate wake of emancipation, the Alabama legislature swiftly passed a measure under which the orphans of freed slaves, or the children of blacks deemed inad-

198. Fletcher M. Green, *Some Aspects of the Convict Lease System in the Southern States*, 31 ESSAYS S. HIST. 120 (1949).

199. Carter v. State, 22 Fla. 553, 558 (Fla. 1886).

200. Withers v. Coyles, 36 Ala. 320, 326 (Ala. Sup. Ct. 1860).

201. MCPHERSON, *supra* note 188, at 35.

202. *Id*.

203. *Id*.

204. *Id*.

equate parents, were to be 'apprenticed' to their former masters."[205] Binding out children exemplified the perversely transformed apprenticeship laws.

Children and young adults were not spared the fines, penalties, and hard labor. In Florida, a law mandated "every free negro over twelve years old, who should fail to have a guardian, should be fined and committed to jail until the fine should be paid."[206] This law also provided that any person who purchased from or sold to any free "negro or mulatto" without the written consent of the selected guardian, would be punished with a fine.[207]

Profits were made all around, including by unscrupulous prison wardens who negotiated special deals with coal mining executives, supplying the bodies of Black teenagers who landed in prison because they could not afford to pay fines for walking down a street or standing on a corner.[208] The wardens would lease these children for up to 20 years—if they survived that long—to the tycoons of the nation's most profitable industries.[209]

The goal and result of the Punishment Clause was the retrenchment of slavery and it did much more. Southern lawmakers curated slavery's expansion on southern tenant plantations. According to economist Nancy Virts, tax records showed the number of plantations in select Louisiana parishes increased by 286 percent between 1860 and 1880.[210] Similarly, rather than attenuation after the abolition of slavery, southern plantations increased in size, resulting in greater wealth production. During the early years of Jim Crow, tenant plantations increased their size (in acreage) in Alabama, Georgia, Louisiana, Mississippi, and South Carolina from 19 to 24 percent.[211]

Lawmakers and local officials policed enforcement of crop liens and innovated new slave provisions consistent with the constitutionality of

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205. *See* DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53 (2008).

206. *Budd v. Long*, 13 Fla. 288, 311 (Fla. 1869).

207. *Id.*

208. *See, e.g.*, Rogers & Ward, *supra* note 192.

209. *Id. See also*, BLACKMON, *supra* note 205, at 96–97 ("The private guards who staffed the slave labor mines and camps were vulgar, untrained, and often inebriated. Placed under the complete control of the companies and businessmen who acquired them, the laborers suffered intense physical abuse and the deprivation of food, clothing, medical care, and other basic human needs.").

210. Nancy Virts, *The Efficiency of Southern Tenant Plantations 1900-1945*, 51 J. ECON. HIST. 385 (1991) (citing ROGER SHUGG, ORIGINS OF CLASS STRUGGLE IN LOUISIANA 239-41 (1966)).

211. Joseph Reid, *White Land, Black Labor, and Agricultural Stagnation: The Causes and Effects of Sharecropping in the Postbellum South*, 16 EXPLORATIONS ECON. HIST. 31 (1979).

the Thirteenth Amendment, such as lifetime labor. Debt peonage evolved into a new form of bondage.[212] Southern lawmakers persisted in the fomentation of a racial caste system sufficiently durable to withstand the new constitutional provision designed to arm Black people with freedom. This speaks to their creativity in amassing odious laws. Slavery's reinvigoration after the Thirteenth Amendment's ratification reflects the devious means by which southern lawmakers governed and the practices they deployed to subvert the constitutional protections newly gained by Black people. Black Codes reflected southern lawmakers' insincerity in ratifying the Thirteenth Amendment.

Before ratification of the Thirteenth Amendment, abolitionists rallied to the aid of enslaved Black people. They denounced policies and practices that subjected innocent children, women, and men to the worst physical and sexual cruelties. After the Thirteenth Amendment's ratification and inclusion of the Punishment Clause, incarcerated Black children were convicts and criminals—far less worthy of northerners' sympathy—although they were no different than before.

The Thirteenth Amendment's Punishment Clause has never been repealed and continues to evolve. With disparate surveillance, policing, arrests, charges, and prosecutions, Black people disproportionately experience the criminal justice system. Locked in this system, they and others "convicted of a crime" are modern subjects to this clever southern strategy.

CONCLUSION

The United States incarcerates more people than any other nation in the world. Thus, even while the cotton fields of old may no longer be populated by Black laborers from the damp dawn to chilly dusk, other practices reinforcing slavery persist. Today, conditions of slavery persist, especially during COVID-19. The incarcerated "convicts" put out wildfires in California for less than two dollars per hour and sew COVID-19 masks, which they are not provided.[213] In New York, they make the

212. Roger Wallace Shugg, *Survival of the Plantation System in Louisiana*, 3 J.S. HIST. 311, 324 (1937) ("The subordination of freedmen to peonage" aided in the preservation of the plantation system after the Civil War, relegating the newly emancipated and freed Blacks into a slavery-like system).

213. Kiera Feldman, *California Kept Prison Factories Open. Inmates Worked for Pennies an Hour As COVID-19 Spread,* L.A. TIMES (Oct. 11, 2020), https://www.latimes.com/california/story/2020-10-11/california-prison-factories-inmates-covid-19.

hand sanitizer for no, or barely any, pay. In some prisons and jails, people receive no pay or only pennies per hour for their labor. [214]

In Alabama, incarcerated people earn no pay for what are referred to as "non-industry jobs," although work programs facilitated by Alabama aid private industries (making couches, barbecue grills, and other items).[215] Workers in those programs can earn $0.25 to $0.75 per hour, according to data collected by the Prison Policy Initiative in 2017.[216] The same is true for Florida. Arkansas and Georgia don't pay for non-industry nor private industry jobs.[217] States that do pay for "non-industry" jobs do so with the most meager of wages: as little as $0.10 per hour in Arizona[218] or $0.04 in Louisiana.[219] Private industry jobs in these states might fetch under $1.00 per hour.[220] If this sounds like modern day slavery to you, you are right. It is. Today, the "Punishment Clause" is what permits slavery to persist in the United States. Given the demographic patterns of mass incarceration, the racialization of this system cannot be overlooked.

PART III: SOCIAL CASTE, SOCIAL CODE, AND SOCIAL DISTANCE: LEGISLATING INFERIORITY

Parts I and II tell a creation story about the law's role in the fomenting of racial caste in the United States. Part III demonstrates how local ordinances and state-based legislation fueled this ideology and served as an exhilarant on an already raging fire.

Part III makes three contributions. First, it renders discernible and visible America's racial caste system as a legal caste ordering and problem. Of course, law does not operate in a vacuum, nor in the absence of legal actors, including lawyers, prosecutors, legislators, and judges. Law is not self-enforcing, nor does it come to life on its own, independent of people who establish, enforce, and evaluate it. Second, it challenges the idea that

214. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context*, PRISON POLICY INITIATIVE (2018), https://www.prisonpolicy.org/global/2018.html [https://perma.cc/N6S7-42AC]

215. *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html [https://perma.cc/B24R-TMP].

216. *Id*.

217. *Id*.

218. Lauren Castle & Maria Polleta, *Some Prisoners in Arizona Make 10 Centers Per Hour—Should They Get a $3 Minimum Wage?,* AZCENTRAL (Feb. 8, 2020), https://www.azcentral.com/story/news/local/arizona/2020/02/07/arizona-lawmaker-proposes-3-per-hour-minimum-wage-prisoners/4681453002/ [https://perma.cc/86SM-RJUS].

219. *State and Federal Prison Wage Policies and Sourcing Information*, *supra* note 215.

220. *Id*.

the Thirteenth Amendment permanently divested America of the badges of slavery. Here, the contribution is not in highlighting the continued uncompensated labor as described in Part II. Rather, it turns to the emotional and psychological indignities of slavery found in the barriers to full and equal participation in society. Third, Part III shows how the public and private values, principles, and ideals that normalized the kidnaping and trafficking of Africans and later created slaves of men, women, and children, served to rationalize racial caste post-Reconstruction to lingering and enduring effect.

In a seminal legal treatise, *States' Laws On Race and Color*, Dr. Pauli Murray,[221] a predecessor to Justice Ruth Bader Ginsburg at the American Civil Liberties Union (ACLU), placed in stark detail law's complicity in establishing the American racial hierarchy and its explicit ranking of race-based privileges in the post-Reconstruction Era and decades deep into the 20th century. Exhaustively detailed, the treatise chronicles thousands of laws and codes explicitly excluding, segregating, and subordinating Black people based on their politically constructed race—state by state and, in some instances, by city.[222] Collectively, discriminatory state legislation and local regulations and codes stitched together public policy on race in the United States.

In turn, the public policy on race in the United States reinforced and fomented new discriminatory social norms and expectations regarding racial order, including in private spheres, for which the Supreme Court showed dismissive regard for the protections accorded Black people by the Thirteenth and Fourteenth Amendments.[223] In *The Civil Rights Cases,* in an 8-1 opinion, the Court stated:

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221. Murray herself was profoundly affected by the American racial caste system. As a Black woman, she was denied opportunities reserved for men in law. Graduating first in her class from Howard Law School, she was offered a prestigious fellowship at Harvard, which later was rescinded when her sex was discovered. Murray provided key legal analyses and arguments that would later be adopted by Thurgood Marshall, the ACLU, and Ruth Bader Ginsburg in challenges before the Supreme Court to achieve both race and sex equality. *See, e.g.*, Pauli Murray, *The Right to Equal Opportunity in Employment,* 33 CAL. L. REV. 388 (1945); Kathryn Schultz, *The Many Lives of Pauli Murray,* NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray [https://perma.cc/4XLH-GHZT] (describing how even as a student at Howard Law School, Murray urged civil rights pioneers to challenge the "separate" part of *Plessy v. Ferguson's* discriminatory "separate but equal" policy).

222. Thurgood Marshall famously described the Murray treatise as "the Bible for civil rights lawyers." *See* Kenya Downs, *The 'Black, Queer, Feminist' Legal Trailblazer You've Never Heard of,* NPR (Feb. 19, 2015), https://www.npr.org/sections/codeswitch/2015/02/19/387200033/the-black-queer-feminist-legal-trailblazer-youve-never-heard-of. [https://perma.cc/4P7V-A2BK].

223. The Civil Rights Cases, 109 U.S. 3, 31 (1883) ("[W]hen a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes

> There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.[224]

In other words, the denial of accommodations and basic dignities associated with one's personhood simply constituted "mere discrimination."[225] And, "mere discriminations on account of race or color," according to the Supreme Court, "were not . . . badges of slavery" or, for that matter, sufficiently odious to be unconstitutional.[226]

As such, the denial of services to Black people in the private sphere—such as at eateries, department stores, gas stations, hotels, and motels (by law or social preference)[227]—mirrored the hostilities imposed by the government, reflected in numerous racially discriminatory state statutes and local regulations and codes.[228] The hostility toward Black Americans was so ubiquitous that "Coca-Cola machines had 'White Customers Only' printed on them."[229] The racial caste system—an irrational social and legal policy—evolved into *facto viam vitae,* a de facto way of life. Sadly, if white people had no particular reason to discriminate against

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the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.") (Harlan, J., dissenting) *See also Ex parte Virginia,* 100 U. S. 339, 358 (1870) ("Nothing . . . could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure,—than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws.").

224. The Civil Rights Cases, 109 U.S. at 25.

225. *Id.*

226. *Id.*

227. See Candacy Taylor, *The Roots of Route 66,* ATLANTIC (Nov. 3, 2016), https://www.theatlantic.com/politics/archive/2016/11/the-roots-of-route-66/506255 [https://perma.cc/QR7E-KPGE] ("Not only were they shut out of pools and beaches, blacks couldn't eat, sleep, or even get gas at most white-owned businesses. To avoid the humiliation of being turned away, they often traveled with portable toilets, bedding, gas cans, and ice coolers.").

228. *Id.* ("In 1930, 44 out of the 89 counties that lined Route 66 were all-white communities known as 'Sundown Towns'—places that banned blacks from entering city limits after dark. Some posted signs that read, 'Nigger, Don't Let the Sun Set on You Here.'").

229. *Id.*

or hold Black people in contempt, state laws and codes of the 19th and 20th centuries provided reason to do so and demanded it of them.

Murray's treatise copiously documents race-based laws adopted by legislatures throughout the United States. These laws included legislation and ordinances segregating accommodations, imposing racial restrictions in cemeteries, and prohibiting integration in schools.[230] Not only did such laws bar interracial marriages, as described in Part I, they included bans on the interchange of textbooks between "white and colored schools" and imposed segregation in colleges and universities, among other racially discriminatory enactments. Local courts upheld most of these laws, and they were legalized generally in *Plessy v. Ferguson*.[231] In that case, the Supreme Court upheld a Louisiana Act that mandated railways enforce segregated seating and accommodations. According to the Court:

> A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.[232]

Legal race traps were ubiquitous, invasive, and caused suffering related to what one could or could not do.

These laws were radical in their scope and scale. They reflected and were in service to an essential tenet of the racial caste system—the deployment of rigid social stratification defining restrictions where people ate, lived, how they traveled, enjoyed entertainment, social recreation, and more. Even if white people desired building relationships with Black colleagues, friends, or relatives, under state and local statutory provisions and codes, they were prohibited from doing so. State and local lawmakers precluded the probabilities of "race-mixing" in nearly every possibility, except in Black people's service to white people in their states, cities, and towns.

The laws were comprehensively drawn and so highly detailed that, upon reading a few or hundreds, their explicit and implicit aims to preserve and advance white supremacy, reinforce racial stratification and race-based hierarchy, impede interracial connection and intimacy, and create nearly impenetrable barriers to Black peoples' ability to overcome the vestiges of slavery, are inescapably clear. Moreover, even if not ex-

230. *See, e.g.*, MURRAY, *supra* note 125.

231. *Id*. *See also* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896); *Ex parte Virginia*, 100 U.S. 339 (1879) (holding that an indictment against a State officer for excluding Black people from the jury list is sustainable).

232. *Plessy*, 163 U.S. at 543.

plicitly drawn in such statutes and codes, these rules inherently sowed suspicion in the despised class. *After all, why would lawmakers go to such lengths to protect white people from exposure to Black people?* For years, these laws were perceived as race-neutral, constitutional, and therefore invulnerable to legal challenge, largely based on prior Supreme Court jurisprudence.[233]

Local, race-exclusionary ordinances included language barring white people from certain activities such as living in Black neighborhoods and imposed similar restraints on "negros." Lawmakers could stave off criticism by pointing to their codes as *not denying* Black people's ability to ride a local bus; they simply demarcated where the seating could be. Officials could and did argue that they did not deny an education to Black children, rather students learned among their racial kind.[234] Legal challenges to these laws were futile. The centuries-long dignity harms inflicted on Black people had largely not been vindicated in courts, particularly the Supreme Court.[235]

A cursory examination of local ordinances brings the dignity concerns, harms, and evidence of inequality forward. For example, in Atlanta, Georgia, it was illegal for Black barbers to serve "white women or girls."[236] A violation of the law was punishable by a "fine not exceeding $200, or sentence[] to work on the public works of the city."[237] The law left it to the discretion of the local magistrate to impose one or both of the punishments.

A cursory examination of local laws shows the effort and interest of local officials to import and impart the inferiority of Black Americans into law. These ordinances also tell the story of the incessant effort to maintain racial hierarchy by means of law in the United States. These laws mirrored others in cities and towns across the nation. These laws showed a preoccupation with Black people throughout their lives, and through discriminatory burial policies, the racial caste system even followed them to death. The ordinances were vast in scale and scope. This brief sampling represents a broad set of restrictions intended to reinforce America's enduring racial caste system.

A. *Dining*

In Birmingham, Alabama, it was

233. *Id.* at 551–52.

234. Brown v. Board of Education, 347 U.S. 483 (1954).

235. Plessy, 163 U.S. at 551–52 (1896) (stating racially restrictive laws "do[] not conflict with the Thirteenth Amendment"); Dred Scott v. Sandford, 60 U.S. 393 (1857).

236. MURRAY, *supra* note 125, at 627.

237. *Id.*

> unlawful to conduct a restaurant or other place serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher.[238]

Similarly, in Atlanta, Georgia, an ordinance required drastic separate seating accomodations for white and "colored" people; according to the ordinance,

> All persons licensed to conduct a restaurant, shall serve either white people exclusively or colored people exclusively and shall not sell to the two races within the same room or serve the two races anywhere under the same license; the purpose of this section being that each licensee shall serve either one race or the other and that no license shall authorize sale to the two races at or near the same place.[239]

To advance these policies, the iconic signs "for white people only" were mandated, created, and posted.[240]

B. *Housing*

In New Orleans, Louisiana, a local ordinance prohibited "white persons from establishing a home residence in a negro community."[241] It was also illegal for a city engineer to give a building permit to anyone building a house in a white community that would be occupied by a Black person.[242] Discriminatory laws were justified on the basis that they reflected local custom. Pointing to this, a Birmingham code adopted in 1949 related to housing segregation stated, "from the date of the original settlement of this City unto the present time it has been the invariable custom, supported for most of that time by municipal law and universally observed . . . to require white and colored residents to live in separate residential areas."[243]

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238. *Id.* at 615.

239. *Id.* at 627.

240. *Id.* (In another section of the same ordinance, Section 53-604, the city of Atlanta required "[t]he Clerk of the Council in issuing licenses for restaurants shall designate therein the character of the trade authorized to be served under such license, as 'for white people only' or 'for colored people only.'").

241. *Id.* at 634.

242. *Id.*

243. *Id.* at 617.

However, local governments also appealed to fear. Again, in Birmingham, to further legitimize their racially discriminatory laws, local officials established a commission to review its policies. Among its findings, the commission claimed that when white people or Black people established permanent residency among each other, the results were "violence, disturbances of the peace, destruction of property and life . . . almost without exception."[244] The commission's ordinance provides no evidence of such violence, certainly none of Black people harming white people as neighbors.

What history does show is that Alabama had long been cruel in its regard for Black lives. Alabama stands out in a prior work examining the Thirteenth Amendment, the Punishment clause, and post-Reconstruction Black Codes.[245] Alabama lawmakers made it punishable for "free negroes and mulattoes" to assemble in a disorderly manner.[246] Yet another Alabama Black Code made it "unlawful for any freedman, mulatto, or free person of color in [Alabama] to own fire-arms, or carry about his person a pistol or other deadly weapon under a penalty of a fine of $100."[247] Speaking directly to questions of violence and punishment, it was the state that had (prior to the ratification of the Thirteenth Amendment) permitted the whipping and branding of Black people. The state announced a change, enacting "[w]hipping and branding are abolished, as legal punishments, and a new punishment is introduced entitled, 'hard labor for the county.'"[248] Alabama's restrictions on Black people were exhaustive, constraining, denying, and interfering with all manner of freedoms associated with employment, education, housing, sex, family, freedom of association, farming, possessing paperwork to farm and sell goods, and more.

Placing in context Alabama's 1949 ordinance barring interracial housing based on claims of violence, the commission did get one thing right: Black residents commonly regarded Birmingham as "bombingham" for the nightmarish assaults on their lives, their children's lives, and on their places of worship.[249] A Birmingham periodical chronicled some of the horrors inflicted on Black communities through photography.[250] As the accompanying text to their virtual gallery notes, "[v]iolent racists in

244. *Id*.

245. *See, e.g.*, Goodwin, *supra* note 30.

246. Withers v. Coyles, 36 Ala. 320, 326 (Ala. Sup. Ct. 1860).

247. MCPHERSON, *supra* note 188, at 7, 33 (1875).

248. *Id*. at 34.

249. Glenn T. Eskew, *"Bombingham": Black Protest in Postwar Birmingham, Alabama*, 59 HISTORIAN 371, 373 (1997).

250. *See, e.g.*, Jeremy Gray, *Bombingham: Racist Bombings Captured in Chilling Photos*, AL.COM (Feb. 19, 2020), https://www.al.com/news/erry-2018/07/f39190a3553390/bombingham.html [https://perma.cc/4W9B-FJYK].

the late 1940s voiced their disapproval with shouts of dynamite, shattering windows, splintering homes and churches, and, in the course of 20 years, turning the Smithfield neighborhood into 'Dynamite Hill' and the Magic City into 'Bombingham.'"[251]

Rather than seriously investigating, pursuing leads, and charging suspects, local officials failed to protect those harmed by racist violence and left Black families and religious leaders essentially on their own. With such negligent or purposefully unavailing leadership to protect its Black citizens, white individuals and mobs used dynamite as a means of inflicting terror and fear in Black communities. An original caption to a 1948 bombing reads, "Here is the interior of the house at 1100 Center Street, showing effects of the dynamite blast early today on the transom and front porch of the home."[252] Another caption from 1949 reads, "Birmingham Alabama Smithfield Bombing, 1949. Back Porch was Here: A police officer surveyed damage to one of three homes that were blasted in an after-midnight explosion in the North Smithfield section. The back porch was blown off the house."[253] Such news headlines were common in Birmingham.[254]

A familiar feature of such violence was that law enforcement did very little to either protect the lives of Black people or to bring to justice those who committed such crimes. In the 1960s, the world viewed the aftermath of how far white supremacy reached in threatening the lives of Birmingham's Black residents as four little girls were killed and numerous others maimed, permanently paralyzed, rendered blind, and otherwise injured at the 16th Street Baptist Church in Birmingham.[255]

C. *Transportation*

In reviewing archives of race-based discriminatory laws, it is evident that local governments concentrated significant energy on enacting laws related to transportation by taxis, buses, railways, and cars for hire. In Dallas, Houston, Birmingham, Mobile, New Orleans, and elsewhere, local governments commonly mandated restrictive and discriminatory transportation laws. Penalties and fines as punishment for violating the ordinances were common.[256] Some clauses directly involved the police, obligating them to enforce the segregation policy.

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251. *Id*.

252. *Id*.

253. *Id*.

254. *Id*.

255. *Id*.

256. *See* 1881 Tenn. Pub. Acts 211–12 (imposing a fine for refusing segregated accommodations in railway cars); 1889 Tex. Gen. Laws 132–33 (same); 1890 La. Acts 152

In Jacksonville, Florida, it was illegal for Black people and white people to take taxis together.[257] An ordinance mandated that "any police officer" observing individuals violating the law "shall arrest any such person and take him or her from such car and carry him or her to the police station as in case of any other person guilty of disorderly conduct."[258]

Similarly, in Atlanta, it was the "duty of police" to "give special attention" to racial segregation in street cars and "arrest . . . person so violating said laws."[259] Birmingham, Alabama required that any business or operator of a taxicab, jitney, or bus in the city accommodate white people and Black people with separate vehicles or "by clearly indicating or designating by visible markers the area to be occupied by each race in any vehicle in which the two races are permitted to be carried together and by confining each race to occupancy of the area of such vehicle so set apart for it."[260]

D. *Recreation*

In Birmingham, Alabama, a city ordinance barred "any room hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place" from permitting any "theatrical performance, picture exhibition, speech, or educational or entertainment program of any kind whatsoever, unless such" facility had entrances and exits, seating and standing sections "set aside for and assigned to the use of white persons" and that were "distinctly separated" from any that may exist for "the use of negroes."[261] The ordinance mandated the use of "well defined physical barriers" to exclude contact between white people and Black people.[262]

Birmingham also enacted an ordinance titled, "Negroes and White Persons Not to Play Together."[263] This regulation pertained to gambling, pool and billiard rooms, and bowling alleys.[264] The ordinance made it a crime "for a negro and white person to play together or in company with

(same); 1891 Ala. Laws 412 (same); 1904 Md. Laws 186–87 (same); 1904 S.C. Acts 438–39 (imposing a fine for refusing segregated accommodations in a ferry); 1905 Fla. Laws 99–100 (imposing a fine for refusing segregated accommodations in a streetcar).

257. MURRAY, *supra* note 125, at 625.

258. *Id.* at 625.

259. *Id.* at 629.

260. *Id.* at 616–617.

261. *Id.* at 615.

262. *Id.*

263. *Id.*

264. *Id.* at 615–616.

each other in any game of cards or dice, dominoes or checkers."[265] Persons caught violating this regulation could be fined $100 or imprisoned in "the local jail, workhouse, or house of correction or at hard labor" for up to 6 months, "or both fine and imprisonment."[266] Not only were the participants subject to criminal punishment for violating the law, but so too were the owners of such establishments permitting Black people and white people to play together.

Similarly, restrictions were enacted in other cities. In Houston, Texas, city council members established Emancipation Park for Black people. In the same code granting Black people the use of a park with a symbolic name, the local government established that "all other parks in the city now or hereafter existing . . . shall be used exclusively by white people."[267]

Conclusion

Lawmakers craftily baked white supremacy into local ordinances throughout the United States. These laws prioritized pleasure, comfort, and safety for white Americans. In Dallas, Texas, these codes barred Black people from the freedoms to which white people were entitled, applying to "any person of African descent or any person who has any negro blood in his veins of whatsoever quantity."[268] Quite possible, if not likely, state and local lawmakers bent on legalizing white supremacy and racism drafted legislation and local ordinances with the *Plessy* precedent as their blueprint.

By denying basic needs, accommodations, and comforts to Black citizens, lawmakers weaponized the law for a discriminatory agenda, spanning centuries. States collected tax revenue from Black Americans, yet denied them access to the public spaces their tax dollars subsidized, including parks, swimming pools, and other outdoor facilities. Their tax payments contributed to the bricks and mortar for schools that would ultimately serve only white students and deny Black children admission.

This corruption—local officials extracting resources from Black Americans to fund spaces and services exclusively to benefit white people—was yet another, perverse vestige of slavery; Black people laboring and contributing to luxuries they could not enjoy. Individually, any one such restrictive law, denying where one might live, eat, or sleep perpetrated a terrible offense on a class of people. Collectively, these policies showed disdain for the constitutional equality of Black people.

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265. *Id*. at 616.
266. *Id*.
267. *Id*. at 662.
268. *Id*..

PART IV: RACIAL CASTE AND THE FAMILIAR

> Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguises which will enable them to escape its deadly aim. They carry in front the evidence which marks them for persecution. They stand at the extreme point of difference from the Caucasian race, and their African origin can be instantly recognized, though they may be several removes from the typical African race. They may remonstrate like Shylock . . . – Frederick Douglass[269]

Thus far, this Article tells a story about racial caste and hierarchy embedded in law, texts, policies, and positions. As stated earlier, law does not operate in a vacuum, nor is it shaped absent legal actors: judges, politicians, prosecutors, and advocates. Indeed, since the first ships transporting African slaves arrived in what would become the United States, numerous lawmakers, judges, and others were complicit in demarking racial boundaries. However, they are not the point of this Article. This Article's purposeful focus on laws is to demonstrate that the power of racial hierarchy and caste in the United States are systemic, rooted in institutions and infrastructures rather than individuals.

As such, this Article has argued that law created racial caste in the United States. Parts I and II articulated that this process began during the period of Antebellum slavery through the enactment of specific laws and adoption of practices and policies that safeguarded human kidnapping, trafficing, and the denial of personhood to the Africans subjected to such conditions. At the time of the nation's founding, "slavery was legal in every state in the Union."[270] Even though the Thirteenth Amendment was designed to lift Black people from the vestiges of slavery, it was not intended to confer equality. Nor did it. Rather than abolishing racial caste, the Thirteenth Amendment's Punishment Clause further instantiated it. Part III demonstrated the enduring power of legislation to advance racial caste in the United States.

Parts I through III tell a story about the weaponization of law to achieve and fuel the racial caste system in the United States. Part IV turns to the effects of law, providing a cursory surfacing of traumas produced by racial caste. It takes up the challenge to illume the past as a means of

269. Frederick Douglass, *The Color Line,* 132 NORTH AM. REV. 567, 568 (1881).

270. Patrick Rael, *The Distinction Between Slavery and Race in U.S. History*, BLACK PERSPECTIVES (Nov. 27, 2016), https://www.aaihs.org/the-distinction-between-slavery-and-race-in-u-s-history/.

shaping viable, credible pathways for meaningful equality in the future. Subpart A of the Article briefly considers arguments that offer a different origin story than racial caste—one rooted in raw expressions of power associated with capitalism, furthering religious ideology, or the preservation of whiteness rather than anti-Blackness. Subpart B briefly excavates examples of the hidden, largely overlooked effects of racial caste. In closing, Part C advocates for continued investment in reckoning with racial caste and the lessons that might be drawn from it.

A. *Caste, Tolerance, and Intolerance: Origin Stories*

Lawmakers founded America's racial caste system or "race-selfishness" on ideologies of exclusion versus inclusion.[271] In 1897, President Roosevelt wrote, "democracy, with the clear instinct of race selfishness, saw the race foe, and kept out the dangerous alien."[272] The ideology of white supremacy and racial hierarchy operated within and without, drawing internal as well as external boundaries. The vestiges of nationalism survive today in immigration policy.

Castes rely on hierarchy and exclusion, the exaltation and privileging of those at the top and the subordination and often stereotyping of those at the bottom. The enslavement of Black people is foundational to the history of racial caste in the United States. However, overlapping histories and theories as well as temporal political battles both internally and externally problematize this history. For example, some scholars claim that slavery had very little to do with race in its beginnings. Others claim that religion was the key distinction, determining who would and would not be enslaved in the colonies and later states. Another view suggests that racial caste, during eugenics, centered on white Americans and had little to do with Black people. The deployment of science in service of racism and exclusionary policies, including forced sterilization and immigration bans in the late 19th century and for decades forward, undermines the latter proposition.

Given this history, three lines of thought are acknowledged and briefly addressed here.

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271. Pankaj Mishra, *The Religion of Whiteness Becomes A Suicide Cult*, NY TIMES: OPINION (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/opinion/race-politics-whiteness.html (explaining "It is in the motherlands of democracy rather than in fascist Europe that racial hierarchies first defined the modern world. It is also where a last-ditch and potentially calamitous battle to preserve them is being fought today.") Nor was this an enterprise exclusive to the United States. In Canada, the Toronto League for Race Betterment, was part of a movement that employed "ethnic, nativist, and racist labels," which "occasioned little public comment." *See* ANGUS MCLAREN, OUR OWN MASTER RACE: EUGENICS IN CANADA 1885-1945 (1990).

272. *Id.*

1. Theories of Caste and Slavery: Slavery Had Nothing to Do with Race

First, there is the provocative theory that slavery had nothing or very little to do with race. In other words, the foundation of racial caste in the United States—slavery—was not even race-based. This view suggests that "slavery divided the nation; race not so much."[273]

Specifically, if one considers the literal meaning of James Madison's reflections on the Constitutional Convention, the most heated debates were about slavery, but race played no part.[274] According to Patrick Rael, "The framers of the Constitution debated slavery, but not race."[275] He writes, "As James Madison noted, of all the divides between the states, the one that came to drive debates most was that between slave states and those becoming free. . . . They were about the political power of slaveholders, not the rights of those enslaved or degraded by the racial identity ascribed to them."[276]

There are two ways to interpret this theory. The first is that slavery was about galvanizing power, expanding capitalism, and safeguarding the system by securing it in the hands of elite white men. The source of human chattel mattered very little. Hence, the chattel's race was inconsequential to the pursuit of power, wealth, economic stability, and the growth of slavery. Another branch of this argument (that slavery was not about race, but rather power) is that "[w]idespread consensus consigned nearly all blacks to sub-citizen status, even when they were not legal property."[277] In other words, the inequality of Black people was a *foregone conclusion*, whether they were enslaved *or not*. As such, even while Black people were as "important in building northern cities such as New York as they were in producing the cash crops on which the southern economy depended," they were not as important to the debates about their lives as matters of taxation and statehood.[278]

Further, for some northern lawmakers, dissolving the nation's reliance on slavery seemed inevitable well before the Civil War. *The question was how? Should the offspring of enslaved Black women be born free? Obtain freedom at eighteen or twenty-one years of age?* Scholars such as Henry Hartog and James Gigantino refer to this as an "in-between status" for Blacks living in the North—not quite free, and not quite enslaved.[279] The gradual

273. Rael, *supra* note 270.

274. *Id*.

275. *Id*.

276. *Id*.

277. *Id*.

278. *Id*.

279. *See generally* JAMES GIGANTINO, THE RAGGED ROAD TO ABOLITION: SLAVERY AND FREEDOM IN NEW JERSEY, 1775-1865 (University of Pennsylvania Press, 2015);

abolition law of New Jersey, the last enacted by a state, provided that children born to enslaved mothers after July 4, 1804 would obtain emancipation on their twenty-fifth birthday for men and twenty-first birthday for women.[280] Scholars debate whether such efforts were motivated by concerns related to race or simply that slavery no longer benefited the broader political interests and concerns of wealthy elites.

Even if one were to give weight to the view that slavery could exist as a political question without any meaning related to race, history begs a different conclusion both in the North and South. Even as evolved notions of equality emerged among white citizens—for example, voting enfranchisement in the North no longer depended on property ownership—states that adopted such laws excluded "free" Blacks from voting.[281] They qualified these laws by explicitly stating that the new voting rights applied only to "white" qualified voters.[282] As a result, Black people were removed "from the electorate where some had once held franchises. All new free states entering the Union before the Civil War did so without property qualifications for voting, but with explicit constitutional denials of black suffrage."[283] In New Jersey, even after adopting a "gradual emancipation" law, the state enacted a law "to establish the presumption that black people were slaves unless proven free."[284]

2. Theories of Caste and Slavery: Religion Determined Social and Legal Status—Not Race

A second line of thought is that enslavement had as much or more to do with religion than race.[285] According to an important line of research, an original dividing line considered by early white settlers and

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HENDRIK HARTOG, THE TROUBLE WITH MINNA: A CASE OF SLAVERY AND EMANCIPATION IN THE ANTEBELLUM NORTH (2018); *see also* Andrew Diemer, *The Trouble with Minna: A Case of Slavery and Emancipation in the Antebellum North*, 20 CIV. WAR BOOK REV., Summer 2018, at 1.

280. An Act for the Gradual Abolition of Slavery, 1804 N.J. LAWS 252–53, § 1.

281. *See, e.g.*, Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 353 & n.58 (1989) (In the 1820s, many states, including New York, Massachusetts, and New Jersey, held conventions in which they replaced property ownership suffrage requirements with taxpaying qualifications or white manhood suffrage.).

282. *Id.*

283. Rael, *supra* note 270 ("Ohio (1803), Indiana (1816), Illinois (1818), Michigan (1837), Iowa (1846), Wisconsin (1848), California (1850), and Oregon (1859). It was as if whites regardless of class could be welcome in the new America, but only with the sacrifice of blacks' claim on citizenship. Freedom was a great idea; it was just going to be reserved for white people.").

284. Diemer, *supra* note 279.

285. MAROUF ARIF HASIAN, JR., THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT 93-94 (1996).

lawmakers measured Christianity and not skin color.[286] This informed who could be relegated to the conditions of enslavement and who was protected against the possibility of human bondage. Religious considerations marked the boundaries of enslavement in England and its colonies.[287] Thus, in 1677, in *Butts v. Penny*, the Court of the Kings Bench ruled that enslaved Blacks were subject to the rules of merchandise because they were "infidels" and could be considered property for purposes of their owners claiming trover.[288] Similar decisions were reached in *Lowe v. Elton*[289] that same year and later in *Gelly v. Cleve*.[290] In the latter case, the court held that because the enslaved boy was a "heathen," enslavement and recovery for trover were permissible.[291] That is, religious differences served to designate enslaved persons, but when "a small number of free black Christians began to claim political authority, slave owners adapted—they introduced a new language of exclusion based on 'whiteness' rather than Christian status."[292]

For example, "[t]he New England colonies, New Jersey, Pennsylvania, and Maryland were conceived and established 'as plantations of religion.'"[293] Kenneth C. Davis writes, "[f]rom the earliest arrival of Europeans on America's shores, religion has often been a cudgel, used to discriminate, suppress and even kill the foreign, the 'heretic' and the 'unbeliever'—including the 'heathen' natives already here."[294] Intense, pitched battles between colonists of various Protestant sects and Catholics

286. Katharine Gerbner, *Conversion and Race In Colonial Slavery, Immanent Frame*, SOC. SCI. RES. COUNCIL (June 26, 2018), https://tif.ssrc.org/2018/06/26/conversion-and-race-in-colonial-slavery/ [https://perma.cc/W2JN-AAHV].

287. Accordingly, "In 1667, the last of the religious conditions that placed limits on servitude was erased by another Virginia law. This new law deemed it legal to keep enslaved people in bondage even if they converted to Christianity. With this decree, the justification for black servitude changed from a religious status to a designation based on race." *Historical Foundations Of Race*, NAT'L MUSEUM OF AFRICAN AM. HIST. & CULTURE, https://nmaahc.si.edu/learn/talking-about-race/topics/historical-foundations-race [https://perma.cc/4YAD-TPQX] (last visited Nov. 27, 2020).

288. Butts v Penny, (1677) 2 Lev. 201, 3 Keb. 785.

289. *See* JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 513 (1971) (discussing *Lowe v. Elton* (1677)).

290. Gelly v. Cleve, 91 Eng. Rep. 994 (1694).

291. *Id.*; *see also* BAKER, *supra* note 289 at 513 ("The courts held in the seventeenth century that trover would lie for negroes, as if they were chattels, apparently on the ground that they were infidels.").

292. *See* Gerbner, *supra* note 286.

293. *Religion and the Founding of the American Republic*, LIBR. OF CONG., https://www.loc.gov/exhibits/religion/rel01.html [https://perma.cc/T72G-7XVS].

294. Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/ [https://perma.cc/HU4L-6T8R] (last visited Nov. 28, 2020).

served as an example of the force surrounding religion in forming colonies and organizing states. Davis writes, "[w]hile it is true that the vast majority of early-generation Americans were Christian, the pitched battles between various Protestant sects and, more explosively, between Protestants and Catholics, present an unavoidable contradiction to the widely held notion that America is a 'Christian nation.'"[295]

The argument is that Christianity mattered more than race at the founding. A Protestant orthodoxy reigned throughout the colonies and elitism or rank in society aligned according to religion rather than race. Accordingly, enslaved Africans had no rights that white people were bound or obligated to respect because of their *religious identity* rather than their *race*. This view centers on religious intolerance as evidenced through persecutions dating back to the 1600s. For example, "[p]uritans expelled dissenters from their colonies."[296] Quakers were executed, including Mary Dyer.[297] She was hanged on June 1, 1660, in response to her preaching about Quaker principles.[298] There were also extreme punishments associated with blasphemy, breaking sabbath, and being accused of heretical conduct.[299]

Susan Juster writes about the case of Charles Arabella who, after spilling scalding fluid on his feet, called out, "[B]y God," resulting in a conviction for committing blasphemy.[300] British colonies regarded blasphemy as a crime of moral turpitude, and as such, it was a capital offense. In this case, "the court mercifully ordered him to be 'bored through his tongue and fined . . . .' instead of sentencing him to death."[301] He remained in prison for six months and his tongue was bored through three times.[302] Given this history, another view of the racial caste system in the United States—or at least its origins—is that religion served as the original caste system. People were sorted based on religion and not race.

Yet, even if the origins of caste in the United States were rooted in religious caste or Christian caste, ultimately race became its organizing principle. When enslaved Black people sought conversion or baptism, a

295. *Id*.

296. *Religion and the Founding of the American Republic*, LIBR. OF CONGR., https://www.loc.gov/exhibits/religion/rel01-2.html [https://perma.cc/H5SL-2TL4] (last visited Nov. 28, 2020).

297. *Id*.

298. *Id*.

299. *See, e.g.*, Susan Juster, *Heretics, Blasphemers, and Sabbath Breakers: The Prosecution of Religious Crime in Early America, in* CHRIS BENEKE AND CHRISTOPHER S. GRENDA, THE FIRST PREJUDICE: RELIGIOUS TOLERANCE AND INTOLERANCE IN EARLY AMERICA 123-42 (2011).

300. *Id*.

301. *Id*.

302. *Id*.

quandary manifested for Christian white slaveholders—and ultimately for the broader institution of slavery. If conversion meant freedom, enslaved Africans could quickly request baptism and release from bondage, thereby undermining the foundations of slavery. Already, debate ensued regarding whether baptized Black people would be enslaved for life or some shorter period. A law that provided for the latter was repealed, because it threatened to negatively impact the slave trade.[303]

In *Chamberlain v. Harvey*, a slaveholder defended his ownership of a baptized Black man, arguing, "Who would squeeze the sugar from the cane once all slaves had been sprinkled with holy water?"[304] According to historian Marcus W. Jernegan:

> At any rate there arose in the minds of many American colonists the notion that under English law a baptized slave might claim freedom. Conscientious masters thus found themselves in a dilemma: to deny conversion and baptism would retard Christianization; to favor it might cause them the loss of their property. To avoid this dilemma, some of the colonial assemblies altered the religious sanction for slavery and based its validity frankly upon race. While positively denying that conversion or baptism was a sufficient reason for enfranchisement and insisting that all slaves must serve for life . . . .[305]

Colonies resolved this religious conundrum by embracing racial caste and ignoring caste based on religion. For example, "between 1664 and 1706 at least six colonies passed acts affirming" that enslaved persons would serve for life.[306] In 1664, Maryland "declared that all slaves must serve for life in order to prevent damage which masters might sustain if their slaves pretended to be Christians and so pleaded the law of England."[307] Several years later, Maryland updated its laws to clarify that conversion or baptism either before enslavement or after should never "be a cause for manumission."[308] Similarly, a 1677 Virginia law "declared that slaves by birth were not freed when baptized."[309] Thus, even if enslaved Black people

303. *Id.* at 507 ("It is clear, however, that the assemblies in colonies where slaves were most numerous were anxious to remove the doubt respecting the effect of baptism, and at the same time encourage the conversion of slaves.").

304. Chamberlain v. Harvey, 91 Eng. Rep. 994 (1696).

305. Marcus W. Jernegan, *Slavery and Conversion in the American Colonies*, 21 AM. HIST. REV. 504, 506 (1916).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

converted to Christianity, they could not climb out of the bowels of slavery.

3. Theories of Caste and Slavery: Scientific Racism, Not Race-Racism

A third view of caste in the United States centers on eugenics. Even in the 21st century, claims that race is biologically determined persist. In the wake of COVID-19, some pundits query whether the disease manifests in Blacks and Latinx communities at disproportionate rates because of their genetics. Such arguments ignore the political and social constructions of race in the United States and reinscribe—intentionally or not—the historic views that race is biologically determined. As such—according to this line of argument—Blacks are inherently inferior in health and much else because of their genes. Such thinking absolves legal and political institutions from setting the conditions that predetermine health, wealth, and personhood.

This view starts from the premise that racial exclusion was not about the descendants of Africans *per se*. Race at the turn of the 20th century included dozens of categories of white people as well as Asian, Black, and Indigenous Populations. This view of race hierarchy—at least as it relates to the earliest decades of the 20th century and eugenics—is that southern elite whites were more concerned about poor white people "polluting" their gene pools than a race-based caste system based on skin color.[310]

Rather, in 1883, Francis Galton, a cousin of Charles Darwin, advocated that societies should be organized by policies promoting "fitness" and betterment of the collective *human race*.[311] This new science, which he termed *eugenics,* would promote "improving a human population by controlled breeding to increase the occurrence of desirable heritable characteristics."[312] Accordingly, reproduction should be arranged with models similar to animal breeding. That is, European and United States policy

310. What researchers who follow this line of thought have given less consideration to are the ways in which poor white people proved less useful to the Southern aristocracy in the years following the abolition of slavery. Legislation and local ordinances suggest that maintaining white supremacy remained important. Eugenics and sterilizing poor white people were not inconsistent with racial caste. The two were mutually supporting. *See, e.g.*, EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 138 (1995) ("Except for the shade of scientific racism that had always darkened the eugenics movement, Georgia's belated sterilization campaign did not display a particularly racist color.").

311. *See, e.g.*, Steven A. Farber, *U.S. Scientists' Role in the Eugenics Movement (1907-1939): A Contemporary Biologist's Perspective*, 5 ZEBRAFISH 243 (2008).

312. Eugenics, THE NEW OXFORD AMERICAN DICTIONARY 584 (2001).

should promote arranged reproduction that increases the occurrence of heritable characteristics regarded as desirable.[313]

Galton encouraged leaders in Europe and the United States to provide economic and other incentives to support policies that encouraged selective marriages and breeding to weed out undesirable genetic traits and people.[314] Political and economic leaders, "Alexander Graham Bell, Winston Churchill, John Maynard Keynes, and Woodrow Wilson" among them, "accepted the notion that modern societies, as a matter of policy should promote the improvement of the human race through various forms of governmental intervention,[315] which included compulsory sterilization. In the United States, leaders embraced and implemented eugenics policies before they were adopted by the Nazis and Adolf Hitler.[316]

This version of caste—eugenics—also referred to as "scientific racism," spurred states throughout the United States to enact laws that provided for the removal of people perceived as socially, mentally, or physically unfit from the broader society.[317] Homelessness, addiction, poverty, promiscuity, and out-of-wedlock births constituted proof of "unfitness" in states throughout the United States.[318] Identification as suffering from one of these conditions could, and too frequently did, result in civil or criminal incarceration or psychiatric institutionalization in state-run asylums.[319] Carrie Buck, the indigent, unsuccessful petitioner in *Buck v. Bell*,[320] was confined to such an institution. States justified incarceration and forced sterilization of girls, boys, men, and women as a sound strategy to protect the welfare of its citizens from the perceived degeneracy

313. Farber, *supra* note 311, at 243.

314. *See, e.g.*, FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT (Gaven Tredox ed., 2004) (1883).

315. *Id.* ("While initially this desire was manifested as the promotion of selective breeding, it ultimately contributed to the intellectual underpinnings of state-sponsored discrimination, forced sterilization, and genocide.").

316. *See generally* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008).

317. *See generally* Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of ??? Are Enough?,* 30 FLA. ST. U.L. REV. 191, 205, 216 (2003); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court, From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 2–5 (1996).

318. *See generally* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL (2008); *see also* Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 57, 60-61 (2008).

319. *Id.*; *see also* Melanie Fong & Larry O. Johnson, *The Eugenics Movement: Some Insight into the Institutionalization of Racism*, 9 ISSUES IN CRIMINOLOGY 89 (1974).

320. Buck v. Bell, 274 U.S. 200, 205–08 (1927).

rampant among the lower classes. Tens of thousands of poor white Americans were sterilized against their will.[321]

Given this, some scholars argue that eugenics or scientific caste had more to do with intra-racial concerns than extra-racial considerations[322] with Christianity serving as a primary, galvanizing force.[323] Edward Larson quotes southern white physicians who claimed, "[t]he South's 'poor white trash,' . . . is no doubt the product of the physical and mental unfit, left in the wake of the War Between the States," and another who advised a colleague that white people with certain "hereditary traits ought not to be allowed to get married, and men who persist in [degenerate behavior] ought to be confined in reformatory . . . or have their testicles removed, so that it would be impossible for them to propagate."[324] Larson suggests that the leading concern during post Reconstruction was "the deterioration of the Caucasian race."[325] By comparison, he argues this focus on the degeneracy of poor white people was a political preoccupation that worried lawmakers far more than a "threat from the African race."[326]

Discussions and debates about eugenics have intensified in recent years in the wake of genomic research and given advancements in reproductive technologies, but far less attention has been paid to religious leaders who were instrumental in shaping the 20th century eugenics agenda.[327] According to Graham Baker, the American Eugenics Society "de- "developed its outreach to groups of particular eugenic significance by organizing committees dedicated to 'cooperation' with . . . 'Clergymen'.

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321. *See generally* LOMBARDO, *supra* note 316.

322. *See, e.g.*, EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 138 (1995).

323. *See, e.g.*, CHRISTINE ROSEN, PREACHING EUGENICS: RELIGIOUS LEADERS AND THE AM. EUGENICS MOVEMENT (2004).

324. *See e.g.*, LARSON, Supra note 322.

325. *Id*..

326. *Id*.

327. *See, e.g.*, CHRISTINE ROSEN, PREACHING EUGENICS: RELIGIOUS LEADERS AND THE AM. EUGENICS MOVEMENT (2004); *see, e.g.*, LARSON, *supra* note 322 at 2 (arguing that the leading concern post Reconstruction was "the deterioration of the Caucasian race than about any threat from the African race"); According to Graham Baker, the American Eugenics Society "developed its outreach to groups of particular eugenic significance by organizing committees dedicated to 'cooperation' with . . . 'Clergymen'. Alongside these groups there were committees organised around matters of strategy and policy, for example 'selective immigration'. . . ." Graham J. Baker, *Christianity and Eugenics: The Place of Religion in the British Eugenics Education Society and the American Eugenics Society, c. 1907-1940,* 27 SOC. HIST. MED. 281, 294 (2014) [hereinafter Baker, *Christianity and Eugenics*]; Jerry Bergman, *The Church Preaches Eugenics: A History of Church Support for Darwinism and Eugenics,* 20 J. CREATION 54, 58 (2006).

Alongside these groups there were committees organized around matters of strategy and policy, for example 'selective immigration'. . . ."[328]

Finally, even while legislatures and courts constructed the guardrails of white citizenship and reproduction, including implementing horrific eugenics platforms, Black and indigenous people were *not excluded*. A 1977 report prepared by the United Nations estimated that 24 percent of Native American women had been sterilized.[329] This was carried out through various means. For example, the U.S. Indian Health Service adopted policies whereby they enforced compulsory sterilizations:

> The U.S. Indian Health Service (IHS) later applied forced sterilization to American Indian women in the 1960s and 1970s, sterilizing 3,406 Native American women between 1973 and 1976. In 1976, the U.S. General Accounting Office admitted that this took place in at least four of the 12 Indian Health Service regions. The numbers include women in Minnesota as well as 36 women under age 21, despite a court-ordered moratorium on sterilizations of women younger than 21.[330]

Black communities suffered a similar fate. Forced sterilization would become so common and targeted at little girls that it became known as the "Mississippi Appendectomy," as one third of the practices targeted girls under eighteen years old.[331]

4. Theories of Caste and Slavery: Policing the Boundaries of Whiteness

The foregoing theories of caste in the United States offer important historical reference points and guides on intolerance, class, and religion.

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328. Baker, *Christianity and Eugenics*, *supra* note 327; Bergman, *supra* note 327.

329. G.A. Res. 260 (a)(II), The U.N. Convention on War Crimes and Crimes Against Humanity, Including Genocide (Dec. 9, 1948), http://freedomarchives.org/Documents/Finder/DOC44_scans/44.monograph.NASC.systematic.genocide.native.June.1977.pdf [https://perma.cc/6N5Q-J48H].

330. Ellen Kennedy, *On Indigenous Peoples Day, Recalling Forced Sterilizations of Native American Women*, MINNPOST (Oct. 14, 2019), https://www.minnpost.com/community-voices/2019/10/on-indigenous-peoples-day-recalling-forced-sterilizations-of-native-american-women/ [https://perma.cc/YYP5-RCJR]; *see also* Brianna Theobald, *A 1970 Law Led To The Mass Sterilization of Native American Women. That History Still Matters*, TIME (Nov. 27, 2019), https://time.com/5737080/native-american-sterilization-history/ ("Over the six-year period that had followed the passage of the Family Planning Services and Population Research Act of 1970, physicians sterilized perhaps 25% of Native American women of childbearing age, and there is evidence suggesting that the numbers were actually even higher.").

331. *See* Kennedy, *supra* note 330.

In each, racism is minimized or regarded as nonessential to the story of caste in the United States. However, the profundity and enduring character of the racial caste system based on skin color in the United States suggests that even if religion served as an early galvanizing feature of colonial and American social organization, race ideologies based on color trumped those differences. Distinctions and discrimination based on religion gave way to discrimination based on skin color and ethnic origins tied to Africa.[332]

Caste in the United States gave way to the creation and preservation of social, political, and legal order based on skin color hundreds of years ago to enduring effect.[333] Indeed, religion was retooled to support and justify the enslavement of Black people.[334] In *Christian Slavery: Conversion and Race in the Protestant Atlantic World*, Katharine Gerbner writes, "[t]he irony is dark and yet unambiguous: the most self-sacrificing, faithful, and zealous missionaries in the Atlantic world formulated and theorized a powerful and lasting religious ideology for a brutal system of plantation labor."[335] Black people were no more able to climb out of the pits of racial hierarchy through Christianity than they were by overcoming the mathematics of hypodescent, which forever tethered one to the lowest racial caste for having "any negro blood in his veins of whatsoever quantity."[336]

Eugenic practices in the United States further demonstrate racial boundary policing inside of "whiteness," but courts policed them from the outside too, giving further evidence and weight to racial caste in the United States. Legislatures and courts reserved whiteness, which conferred privileges and rights, only for people who appeared white. As the Supreme Court declared in *Ozawa v. United States* in 1922,

> The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.[337]

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332. *See* BAKER, *supra* note 289, at 513.

333. Adam Serwer, *White Nationalism's Deep American Roots*, THE ATLANTIC (Apr. 2019), https://www.theatlantic.com/magazine/archive/2019/04/adam-serwer-madison-grant-white-nationalism/583258/ [https://perma.cc/922M-33EG].

334. Gerbner, *supra* note 286, at 194 ("Protestantism was a stabilizing force that would help to maintain, support, and reform slavery.").

335. *Id*. at 196.

336. *See, e.g.*, MURRAY, *supra* note 125, at 662.

337. Ozawa v. United States, 260 U.S. 178, 195 (1922) (emphasis added).

In that case, the Supreme Court unanimously ruled a Japanese-American man ineligible for citizenship because the legislature intended naturalization in the United States only for "free white persons." One year later, in *United States v. Bhagat Singh Thind*,[338] the Justices unanimously affirmed that a person of Indian Sikh ethnicity did not fit the "common sense" definition of "free white person," despite being anthropologically Aryan and a former World War I Army veteran.[339]

The Supreme Court left no room for doubt that the Naturalization Act of 1906 intended to confer citizenship and whiteness only on people who looked "white." Justice Sutherland wrote the Court's opinion, stating,

> It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either.[340]

Whether America's original caste story is one that roots in policing religion or ethnic origins, the end result is a system galvanized around contemporary understandings of race.

B. *Racial Caste's Operation in Law and Society*

Various forms of violence emanating from racial caste ideology and structure against Black people date back to the earliest trafficking of Black people to the colonies and the emergence of states.[341] On the question of whether a murder of an enslaved Black person was a criminal offense, a typical legislative response explained that it was not:

> [I]f any slave resists his master (or other by his master's order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accounted a felony, but the master (or that other person appointed by the master to punish him) be acquitted from molestation, since it cannot

338. United States v. Bhagat Singh Thind, 261 U.S. 204, 213-15 (1923) (denying citizenship to an Indian man who claimed that his Aryan lineage entitled him to the status of a white man in the United States).

339. *Id*.

340. *Id*. at 209.

341. *See* State v. Mann, 13 N.C. 263, 263 (1829).

> be presumed that premeditated malice (which alone makes murder a felony) should induce any man to destroy his own estate.[342]

If racial caste creates the ordering of people, it also shapes social order through privileging the favored and imposing conditions, constraints, and disparate penalties on the disfavored to maintain the discriminatory structures set in place by law.[343] Historically, slave patrol police enforced social order. Typically, slave patrol police possessed the power to "inflict corporal punishment" and the "power to seize any negro slave who behaves insolently to a patroller" or "suspiciously."[344]

Racial caste violence predates the founding of the United States and continues through the public execution of George Floyd and the killing of Breonna Taylor. As a historic matter, racial violence operated publicly[345] and privately,[346] economically,[347] physically[348] and psychologically,[349]

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342. 11 WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 170, 260, 266, 270 (1809-23).

343. *See* State v. Mann, 13 N.C. at 263-64. In North Carolina, ordinances like the following were not uncommon:

> 1st. Patrols shall be appointed, at least four in each Captain's district.
> 2d. It shall be their duty, for two of their number, at least, to patrol their respective districts once in every week; in failure thereof, they shall be subject to the penalties prescribed by law.
> 3d. They shall have power to inflict corporal punishment, if two be present agreeing thereto.
> 4th. One patroller shall have power to seize any negro slave who behaves insolently to a patroller, or otherwise unlawfully or suspiciously; and hold such slave in custody until he can bring together a requisite number of Patrollers to act in the business.
> 5th. Previous to entering on their duties, Patrols shall call on some acting magistrate, and take the following oath, to wit: "I, A. B. appointed one of the Patrol by the County Court of Rowan, for Captain B's company, do hereby swear, that I will faithfully execute the duties of a Patroller, to the best of my ability, according to law and the regulations of the County Court.

See, e.g., *Patrol Regulations for the County of Rowan,* DOCUMENTING THE AM. SOUTH, https://docsouth.unc.edu/nc/rowan/rowan.html [https://perma.cc/G8EM-YV8E] (last visited Mar. 8, 2021).

344. *Patrol Regulations for the County of Rowan*, *supra* note 343.

345. *See, e.g.*, JAMES ALLEN, WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (1999); WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA, 32-8 (1987).

346. Michael E. Miller, *Cop Accused of Brutally Torturing Black Suspects Costs Chicago 5.5 Million*, WASH. POST (Apr. 15, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/15/closing-the-book-on-jon-burge-chicago-cop-accused-of-brutally-torturing-african-american-suspects/ [https://perma.cc/K2GW-WJDQ].

commercially,[350] and sexually.[351] For example, a North Carolina law, typical of others throughout the South, made it a crime for enslaved Black people to read, write, or learn mathematics. It read:

> *Be it further enacted*, That if any slave shall hereafter teach, or attempt to teach, any other slave to read or write, the use of figures excepted, he or she may be carried before any justice of the peace, and on conviction thereof, shall be sentenced to receive thirty nine lashes on his or her bare back.[352]

Arguably, public and private violence directed at Black people furthered states' interests and prerogatives. At the very least, the threat of unchecked violence against Black people served to limit their freedom, autonomy, privacy, and equality—clear aims of lawmakers. One of the more horrific ways of exercising public and private violence and unleashing terror was through lynching.[353] Lynchings became public spectacles, and perversely public celebrations, where individuals posed for pictures, brought snacks and picnics, and cut away flesh of lynched persons as mementos.

Thus, there were other means of enforcing social order beyond the use of slave patrol police.[354] Neither Black women nor children were

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347. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common,* 95 NW. U.L. REV. 505 (2001); Leah Douglas, *African Americans Have Lost Untold Acres of Land Over the Last Century,* THE NATION (June 26, 2017), https://www.thenation.com/article/archive/african-americans-have-lost-acres/ [https://perma.cc/GZT7-SEM2].

348. All manners of exerting intellect for the benefits of oneself were punishable during the Antebellum period, such as reading and writing. GEN. ASSEMB. OF THE STATE OF N.C., Sess. 1830-31 (1831).

349. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (2017).

350. In the United States, a potent means of manifesting white supremacy over Black people has been through the use of hateful words, such as n**ger and caricatures depicting Black people in negative, stereotypic ways, such as with bulging eyes, large, exaggerated lips and other plays on physicality. One could easily characterize this as a form of psychological violence so deeply normalized and engrained in the American psyche that businesses adopted it as a model for their advertisement, thereby commercializing psychological violence. The lingering aspects of this exploit can be found in product packaging of brands such as "Uncle Ben's" rice, "Mrs. Butterworth's" syrup, or "Aunt Jemima's" pancake mix. *See* M.M. MANRING, SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA (1998).

351. *See, e.g.*, MICHELE GOODWIN, POLICING THE WOMB (2020).

352. GEN. ASSEMB. OF THE STATE OF N.C., *supra* note 348, at 11.

353. EQUAL JUSTICE INITIATIVE, *supra* note 349.

354. *See, e.g.*, MELTON A. MCLAURIN, CELIA A SLAVE GIRL (1993).

spared. Paula Giddings writes about Black women burned at the stake for resisting enslavement.[355] Harriet Jacobs recounts in *Incidents in the Life of a Slave Girl* that white women slaveholders inflicted cruelties as severely as male slaveowners, enforcing whipping, brining, and pickling Black women to enforce order in their households and plantations.[356]

Lawmakers and courts sanctioned violence associated with racial caste. In *State v. Mann*, the North Carolina Supreme Court considered whether shooting and wounding Lydia, a hired enslaved Black woman whom the defendant did not own, but leased, was an actionable offense and concluded it was not.[357]

> Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority. The object is the same—the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner.[358]

As one could not be liable for "battery upon his own slave, or other exercise of authority or force," one could not be liable for shooting and permanently injuring another's.[359] Whether law protected the basic, human, and legal right for an enslaved person to defend herself was generally answered in the negative. In the case of Celia, Robert Newsom, the man who enslaved her, repeatedly raped and beat her as a child starting at age fourteen.[360] She retaliated at age nineteen and was put to death for it, hanged after delivering a stillborn baby, likely the child of Newsom.[361]

Caste-based racial violence inflicts not only physical punishment on the individual but operates to inflict fear and psychological terror on entire communities to maintain social order. Lynchings in the United States

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355. PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 39–46 (1984).

356. *See* HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 59 (L. Maria Child ed. Negro History Press) (1861).

357. State v. Mann, 13 N.C. 263, 263-65 (1829) ("Here the slave had been hired by the Defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner, for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The enquiry here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable.").

358. *Id*.

359. *Id*.

360. MCLAURIN, *supra* note 354, at 20-28.

361. *See, e.g.*, MCLAURIN, *supra* note 354, at 103.

achieved both. In *Trouble in Mind: Black Southerners in the Age of Jim Crow*, Leon Litwak describes how the execution spectacle of lynchings "witnessed by whites would be stamped on the character of the community in a variety of ways."[362] He reports that white children played games whereby they lynched their Black dolls, and at least one case of a white child, Jack McClay, who "play-lynched" his friend after witnessing an actual lynching.[363] The little boy tied a rope around the friend's neck and secured the loose end to a nail on a nearby wall.[364] Fortunately, the nearly lynched child survived.[365] This game became known as "Salisbury."[366]

Like Jack McClay, white children attended lynchings, "hoisted on their parents' shoulders to miss none of the action and accompanying festivities."[367] White women also attended, participating in the entertainments that often accompanied the lynching of Black people. One news account of a lynching attended by 3,000 white people in Rankin County, Mississippi in 1909 describes, "A few were nursing infants who tugged at the mother's breasts, while the mother kept her eyes on the gallows. She didn't want to lose any part of the program she had come miles to see, and to tell to neighbors at home."[368]

The case of Mary Turner exemplifies the tragedy and strategy of using violence as a means of controlling racial caste and enforcing racial order.[369] The case also speaks to the differing ideologies regarding sex and womanhood across racial lines. Black women were subjected to unimaginable depravities. In Turner's case, the act of publicly denouncing her husband's death by lynch mob and seeking criminal justice through law enforcement, resulted in her horrific murder.[370]

Though she was pregnant, a white mob gathered on her and subsequently lynched Mary in retaliation for speaking out—essentially violating her caste status. According to a news report, a "mob of several hun-

362. LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 288 (1998) [hereinafter TROUBLE IN MIND] ("Little separated mob lynchings from public executions, neither the rapidity of the 'justice' rendered nor the festive mood that often prevailed.").

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *See* Leon F. Litwack, *Hellhounds*, *in* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 14 (James Allen ed., 2000).

370. *Id.*

dred men and women determined to 'teach her a lesson.'"[371] That she was eight months pregnant seemingly did not matter.

> After tying her ankles together, they hung her from a tree, head downward. Dousing her clothes with gasoline, they burned them from her body. While she was still alive, someone used a knife ordinarily reserved for splitting hogs to cut open the woman's abdomen. The infant fell from her womb to the ground and cried briefly, whereupon a member of this Valdosta, Georgia, mob crushed the baby's head beneath his heel. Hundreds of bullets were then fired into Mary Turner's body, completing the work of the mob.[372]

Later, the *Savannah Tribune* would observe that the mob responded to Turner's "unwise remarks" about her husband's misfortune. The people, according to the article, "in their indignant mood, took exception to her remarks, as well as her attitude."[373]

The horrors innovated through the racial caste system "often exceeded the most vivid imaginations."[374] Institutionally, racial caste violence fortifies and flows from the privileged against the disfavored, much like law, even while episodic instances of rebellion or attempts to strike back also mark history. Dr. Martin Luther King, Jr. put it thusly, "[T]he nation [has] come to count on [Black people] as a creature who could quietly endure, silently suffer and patiently wait. He was well trained in service and, whatever the provocation, he neither pushed back nor spoke back."[375]

A 1919 column in the *Nashville Banner*—in opposition to federal anti-lynching legislation—argued such a law "would overthrow a very important prerogative reserved for the states, and would be a dangerous encroachment on the right of local self-government—the principles of federalism, the groundwork on which the Union is built."[376] Legislators and governors were aligned in the view that lynchings constituted a states' rights issue.[377] Given that southern states (and northern ones too)

371. Walter F. White, *The Work of a Mob*, 16 THE CRISIS 215, 221-23 (1918); *See also Negro and Wife Lynched by Mob*, ASSOCIATED PRESS (May 20, 1918) (claiming Mary was a conspirator in a plot to murder a white farmer).

372. TROUBLE IN MIND, *supra* note 362, at 288–89.

373. *Lynching a Negro Woman for "Unwise" Remarks*, SAVANNAH TRIB., May 25, 1918.

374. TROUBLE IN MIND, *supra* note 362, at 288–90.

375. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 2–3 (1963).

376. Claudine L. Ferrell, Nightmare and Dream: Antilynching in Congress, 1917-1922, 6–7 (May, 1983) (unpublished Ph.D. dissertation, Rice University) (on file with ProQuest database).

377. *Id.*

rarely prosecuted white perpetrators and accomplices for lynching Black people, states essentially argued for their right to neither prosecute nor do anything else to intervene against lynch mobs attacking Black people.[378]

Tennessee Governor Malcolm Patterson rallied against the NAACP's campaign for the enactment of federal anti-lynching law.[379] He stated, "no more impudent challenge . . . was ever thrown in the face of a people or one more destructive to the rights of their states."[380] Similarly, Senator William Borah argued against anti-lynching legislation.[381] He claimed that anti-lynching legislation was unconstitutional and that it interfered with states' rights.[382] According to Senator Borah, a vote for anti-lynching legislation was comparable to lynching itself.[383]

The racial caste system innovates means of maintaining order; whipping, brining, lynching, and police violence represent a slice of what Black people endured as a matter of law and order. The racial caste system also inflicts economic punishment, undermines property rights, and even results in robbing people of their land.

Consider the following examples:

1. The Greenwood Massacre (Black Wall Street)

One of the nation's most devastating terror attacks occurred in 1921, when a Black community in Tulsa, Oklahoma, known as "Black Wall Street," was pillaged by a rampaging white mob who burned the community to the ground, murdering hundreds of Black people in the process.[384] The area "recognized nationally for its affluent African American community, became known as the Greenwood District. The business district and the surrounding Black community thrived with Black-owned banks, furriers, movie theatres, schools, places of worship, and fraternity.[385]

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378. MARGARET VANDIVER, LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH 117 (2005).

379. *Id*.

380. *Id*.

381. CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA 75 (Jacqueline M. Moore & Nina Mjagkij eds., 2009).

382. *Id*.

383. *Id*.

384. Chris M. Messer & Patricia A. Bell, *Mass Media and Governmental Framing of Riots: The Case of Tulsa, 1921*, 40 J. BLACK STUD. 851 (2010); Chris M. Messer, *The Tulsa Race Riot of 1921: Toward an Integrative Theory of Collective Violence*, 44 J. SOC. HIST. 1217 (2011).

385. *See, e.g.*, ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921, RACE REPARATIONS, AND RECONCILIATION (Oxford Univ. Press ed. 2002); *1921 Tulsa Race Massacre: The Attack on Greenwood*, TULSA HIST. SOC'Y &

Mob violence descended on Greenwood on May 31, 1921. By the morning "sunrise on June 2, Greenwood lay in ruins: burned to the ground by a mob of white people, aided and abetted by the National Guard."[386] It was the first time that bombs were dropped on an American city.[387] According to the *New York Times*, it was "one of the worst acts of racial violence in American history. The death toll may have been as high as 300, with hundreds more injured and an estimated 8,000 or more left homeless."[388]

However, in the immediate aftermath, the massacre was covered up. Local officials "set about erasing it from the city's historical record."[389] An unknown number of "[v]ictims were buried in unmarked graves."[390] Like the disappearing of people, police records similarly "vanished."[391] Equally, articles published by the *Tulsa Tribune* "were cut out before the newspapers were transferred to microfilm."[392] Local officials were so effective at scrubbing away the historical bloodstained aftermath of the Tulsa massacre that by two decades later, students were doubtful that the events ever took place.[393]

2. Rosewood Massacre

On New Year's Day, 1923, Rosewood, a prominent Black settlement in Florida, was set upon by a mob of white residents from a nearby town looking for a Black assailant who allegedly bruised a white woman.[394] This "small and prosperous predominantly black town, with its own baseball team, a masonic temple and a few hundred residents" was un-

MUSEUM, https://www.tulsahistory.org/exhibit/1921-tulsa-race-massacre/ [https://perma.cc/4G46-BG4R] (last visited Apr. 9, 2021).

386. Maggie Astor, *What to Know About the Tulsa Greenwood Massacre*, N.Y. TIMES (June 20, 2020), https://www.nytimes.com/2020/06/20/us/tulsa-greenwood-massacre.html.

387. DeNeen L. Brown, '*They Was Killing Black People*', WASH. POST (Sep. 28, 2018), https://www.washingtonpost.com/news/local/wp/2018/09/28/feature/they-was-killing-black-people/ ("Tulsa was likely the first city" in the United States "to be bombed from the air.").

388. Astor, *supra* note 386.

389. *Id*.

390. *Id*.

391. *Id*.

392. *Id*.

393. *Id*. ("City officials cleansed the history books so thoroughly that when Nancy Feldman, a lawyer from Illinois, started teaching her students at the University of Tulsa about the massacre in the late 1940s, they didn't believe her.").

394. Jessica Glenza, *Rosewood Massacre a Harrowing Tale of Racism and the Road Toward Reparations*, GUARDIAN (Jan. 3, 2016, 8:00 AM), https://www.theguardian.com/us-news/2016/jan/03/rosewood-florida-massacre-racial-violence-reparations [https://perma.cc/G3SV-4T45].

prepared for the horror that would soon be inflicted.[395] According to local reports, "[a] crowd swelled in Sumner to find the 'fugitive', some from as far away as Gainesville, where the same day the Ku Klux Klan held a high-profile parade."[396] In the ensuing days, "gangs of hundreds delivered lynch mob justice to the once-affluent town of Rosewood."[397]

Black people attempted escape. Morgan Carter recounts the stories told by her great-grandfather, Oren Monroe, who was a child when his family escaped. In Monroe's case, he and his family escaped with a group of children and women, "on an unusually cold night, wading through a swamp before boarding a train that took them to a safer place."[398] Again, the violence was indiscriminate when inflicted on Black communities; Black women were just as likely to be targeted as men and subjected to the same degree of indignities and violence.[399] It is unclear how many Black people were murdered through white mob violence in Rosewood or throughout their experience in the United States.

3. Eminent Domain: Seizing Bruce's Beach

In 1912, a community along a prime section of the California coastline was purchased by Willa Bruce.[400] She and her husband Charles, a railroad dining car chef, set out to establish their homestead. Willa built a café, lodge, and dance hall. Other Black families invested in the area and built hotel accommodations, a pier for boats, and restaurants. While today the property is known as the affluent Manhattan Beach in Southern California, at the time it was "Bruce's Beach."[401] Black visitors traveled from far and wide to experience Bruce's Beach, enjoy the ocean, and relax.

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395. *Id.*

396. *Id.*

397. *Id.*

398. Robert Samuels, *After Reparations: How a Scholarship Helped — and Didn't Help — Descendants of Victims of the 1923 Rosewood Racial Massacre.*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/graphics/2020/national/rosewood-reparations/.

399. Trevor Goodloe, *Rosewood Massacre (1923)*, BLACKPAST (Mar. 23, 2008), https://www.blackpast.org/african-american-history/rosewood-massacre-1923/ [https://perma.cc/TRV9-5M6T] ("On January 4, 1923, a group of twenty-to-thirty white men approached the Carrier home and shot the family dog. When Sylvester's mother Sarah came to the porch to confront the mob, they shot and killed her.").

400. Rosanna Xia, *Manhattan Beach Was Once Home to Black Beachgoers, but the City Ran Them Out. Now It Faces a Reckoning*, L.A. TIMES (Aug. 2, 2020, 6:00 AM), https://www.latimes.com/california/story/2020-08-02/bruces-beach-manhattan-beach; LA Times Today Staff, *The Legacy of Bruce's Beach and the Racism That Shut It Down*, SPECTRUM NEWS (Sept. 25, 2020, 3:22 PM), https://spectrumnews1.com/ca/la-west/la-times-today/2020/09/25/the-legacy-of-bruce-s-beach-and-the-racism-that-shut-it-down [https://perma.cc/4P9V-8YYN].

401. Xia, *supra* note 400.

Given the restrictions placed on where Black people could sleep, eat, play, recreate, stop for gas, and more in cities and states throughout the United States, safe spaces, such as Bruce's Beach, were an attraction. This became a California safe haven for some Black people with the means to enjoy it. Sunset laws in nearby California areas and threats of violence if Black people were out after dark meant that visitors enjoyed the security of the location without the need for further travel.

However, not unlike towns across the United States where Black people established successful neighborhoods, white residents organized and mobilized to push them out.[402] Their pier was burned down. The Bruces rebuilt. Regularly, guests' automobile tires were slashed. According to a *Los Angeles Times* report:

> The Ku Klux Klan purportedly set fire to a mattress under the main deck and torched a Black-owned home nearby. Fake "10 minutes only" parking signs were posted to deter Black out-of-town folk. To reach the ocean, visitors had to walk an extra half mile around property owned by [George] Peck, who had lined it with security and "No Trespassing" signs.[403]

Threats of racial violence ensued. The Ku Klux Klan engaged in cross-burning to further undermine the safety of the community and detract people from visiting. When they were unable to successfully push Black people off their ocean-front land, local white homeowners and business leaders appealed to local lawmakers.[404] As discussed in Part III, white people appealed to local authorities to create and maintain racial caste through law.

In 1924, "city officials condemned the neighborhood," seizing more than two dozen properties through "eminent domain."[405] Local officials claimed the city needed the property to build a public park.[406] The Bruces and other families sued, "citing racial prejudice."[407] The Bruces sought fair market value, $120,000 in compensation, for their two beach front lots, which is the amount required by law under imminent domain. Instead, "after years of litigation, the Bruces received $14,500."[408] Today, the property they owned has an estimated value of $75 million dollars.[409]

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402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*

C. *Reckoning, Reconciliation, and Post-Racial Mythology*

How does the United States come to engage in its own truth and conciliation regarding racial caste when the mythology of a post-racial America deeply resonates?[410] The first step, which this Article seeks to do, is to make evident the legal historical record so deeply buried. By excavating that record, the racial caste system and the laws that created it become visible. We can take stock.

Considering the legacies outlined in Parts I, II, and III of this Article, it is no surprise that a nation with such a grave history of racial violence and antagonism, spanning centuries and baked into law, wishes to forget, disremember, or rewrite its troubling past. In fact, mere years after the abolition of slavery, in the thick of states enacting racially restrictive laws and limiting full equality, the Supreme Court claimed that Black people were "running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make."[411]

In the wake of Barack Obama's election, "'post-racial' . . . [became] a powerful new buzzword in our social and political lexicon, and its reach has had an enormous impact."[412] That is, "[b]y electing an African American to be President, some politicians, judges, and media pundits have asserted that America has now officially overcome racism and that the work of the Civil Rights Movement is completed."[413] This mythology pervaded during the Obama administration, even while the first and only Black president in the United States and his family experienced harassment, threats, and caricaturing in American media.[414]

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410. *See, e.g.*, NAACP LEGAL DEF. & EDUC. FUND, "POST-RACIAL" AMERICA? NOT YET (2009), https://www.naacpldf.org/wp-content/uploads/Post-Racial-America-Not-Yet_Political_Participation.pdf [https://perma.cc/EYW4-QWFZ]; *See also* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1993).

411. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

412. NAACP LEGAL DEF. & EDUC. FUND, *supra* note 410, at 2.

413. *Id*.

414. *See, e.g.*, Terence Samuel, *The Racist Backlash Obama Has Faced During his Presidency*, WASH. POST, (Apr. 22, 2016) https://www.washingtonpost.com/graphics/national/obama-legacy/racial-backlash-against-the-president.html; *see also* Barry Blitt, *Fistbump: The Politics of Fear*, NEW YORKER, July 21, 2008 (cover depicting Barack Obama in sandals and Muslim garb giving a fist-bump to Michelle Obama as she is in an afro, combat boots, military fatigues and carrying and assault rifle on her back—they appear to be in the White House); Kyle Smith, *The Fat and the Furious*, N.Y. POST: OPINION (May 16, 2010), https://nypost.com/2010/05/16/politicians-want-to-tax-us-thin-but-its-big-government-that-needs-a-diet/ (illustration by Leah Tiscione depicting Michelle Obama in a police uniform, with baton at her side, violently clenching the mouth of a white elementary-school aged boy, while his hamburger, soda, and condiments are flung into the air); Sewell Chan & Jeremy W. Peters, *Chimp-Stimulus Cartoon Raises Racism Concerns*,

According to a report issued by the NAACP Legal Defense and Educational Fund, "President Obama's election mark[ed] continued progress toward our highest ideals of freedom and equality, affording all Americans great hope about the promises of our Constitution. Yet, some mistake this critical milestone as the end of our nation's ongoing journey toward racial equality."[415]

Yet, the *lingua* of post-racial and presumably post-caste is centuries old. The Supreme Court's holding in the *Civil Rights Cases* argued that the United States was legitimately "post-racial" as early as 1883.[416] The Court stated that racial progress in the United States required that Black people "shake off" the legacy of slavery and become "a mere citizen."[417] Barely twenty years after the abolition of slavery, the Court declared it was time that Black people cease being "the special favorite of the laws."[418]

The Court warned that, if taken to extremes, Black people could argue that the Fourteenth Amendment applied to matters involving discrimination related to being denied "coach or cab or car" service; refused admittance to a "concert or theatre;" or rebuffed "in other matters of intercourse or business."[419] The Court stated businesses were required to provide services to "all unobjectionable persons."[420] This explicitly affirmed that the Fourteenth Amendment's equality principle was inapplicable to private actors who discriminated against Black people and implied it was reasonable for businesses to regard Black people with suspicion and as 'objectionable.' Thus, rather than by accident, American law references the indignities and traumas experienced by Black Americans as "mere,"[421] incidental,[422] non-important,[423] and non-lingering.[424]

N.Y. TIMES (Feb. 18, 2009) https://cityroom.blogs.nytimes.com/2009/02/18/chimp-stimulus-cartoon-raises-racism-concerns/ ("Critics said the cartoon, drawn by Sean Delonas, implicitly compared President Obama with the primate and evoked a history of racist imagery of blacks.").

415. NAACP LEGAL DEF. & EDUC. FUND, *supra* note 410, at 2.

416. The Civil Rights Cases, 109 U.S. at 24–26.

417. *Id*. at 25.

418. *Id*.

419. *Id*. at 24–25.

420. *Id*.

421. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 542 (1896) ("A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."); *See also* The Civil Rights Cases, 109 U.S. at 24 (querying, "Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the appli-

Sadly, the Court's *laissez-faire* regard to the disenfranchisement and discrimination against Blacks perpetuated racial caste in the United States.

The post-racial mythology dangerously papers over American legal history, specifically obscuring American law used in service of racial discrimination, coercion, and exploitation. The mythology suggests that the laws and legal strategies discussed in Parts I through III were either harmless or its victims blameworthy of discrimination, or both, rather than what they truly were: abhorrent and a mark of shame on our country. Or, it suggests that discrimination is simply the scourge of life for Black Americans, for which there are limited remedies before the nation's highest Court, unless plaintiffs show the "smoking gun" of intentional or purposeful discrimination, providing the spent casings of race discrimination and powder residue of animus.

Sadly, this latter sentiment lingers in Supreme Court jurisprudence from *Dred Scott* and *Plessy* through *Palmer v. Thompson*,[425] *Arlington Heights*,[426] *Washington v. Davis*,[427] *Mobile v. Bolden*,[428] *Memphis v. Greene*,[429]

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cant . . . ?" and answering in the negative, while leaving the matter to states that enacted discriminatory laws).

422. *See, e.g.*, Ex Parte Virginia, 100 U. S. 339 (holding that excluding persons of color from juries is sustainable).

423. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding the death penalty based on the premise that the Eighth Amendment is not violated when purposeful racial discrimination cannot be proved despite evident disparate racial impact. In this case, the Court not only ignored overwhelming empirical research related to race discrimination, but it also effectively blessed judicial reliance on non-supported inferences over social science.).

424. *See, e.g.*, Shelby Cnty v. Holder, 570 U.S. 529 (2013) (striking down a key provision in the Voting Rights Act based on the notion that it is an old and outdated formula, ignoring evidence by the District Court that there is "compelling evidence that political exclusion through racism remains a real and enduring problem"); *id.* at 584 (Ginsburg dissenting).

425. 403 U.S. 217, 226 (1971) (upholding the decision of Jackson, Mississippi officials to close its swimming pools rather than desegregate them, holding that to do so does not violate the spirit of either the Thirteenth or Fourteenth Amendments).

426. Arlington Heights v. Metro. Hous. Dev. Corp,, 429 U.S. 252 (1977) (In a 5-3 decision, holding that the denial of a zoning request, necessary for the creation of low-and moderate-income housing may have been racially discriminatory in violation of the Fourteenth Amendment, but finding that the plaintiffs had failed to establish racially discriminatory intent or purpose).

427. 426 U.S. 229 (1978) (holding policies that have a racially discriminatory effect, but that were not put in place to advance a racially discriminatory purpose are valid under the U.S. Constitution in a case alleging race discrimination in police department hiring).

428. 446 U.S. 55, 56 (1980) (stating, "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment").

429. 451 U.S. 100 (1981) (rejecting plaintiffs' race discrimination claims that local authorities closed off Black people's access to a local park—that had a history of segregation—for failure to show purposeful discrimination).

and most recently, *Comcast Corp. v. National Association of African American Owned Media*.[430] Even in matters involving the death penalty, including *McCleskey v. Kemp*,[431] the Court has expressed disdain for claims of discrimination, and in that case, ultimately Black life.[432] By papering over how the law undergirds racial caste in the United States, legislatures and courts treat as moot intergenerational discrimination as well as physical and psychological trauma experienced by Black Americans.

In 1968, in a lesser-known concurrence, Justice Douglas sums up America's racial case system:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting . . . Negroes have been excluded over and again from juries solely on account of their race . . . or have been forced to sit in segregated seats in courtrooms . . . . They have been made to attend segregated and inferior schools . . . or been denied entrance to colleges or graduate schools because of their color . . . have been prosecuted for marrying whites . . . . They have been forced to live in segregated residential districts and residents of white neighborhoods have denied them entrance . . . Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches; public parks; restaurants; public beaches; golf courses; amusement parks; buses; public libraries. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton."[433]

430. No. 18-1171 U.S. Reports 1 (2019) (providing that in cases involving allegations of racial discrimination, plaintiffs must show in all matters of the litigation that race was the "but for" cause of the injury).

431. 481 U.S. 279 (1987).

432. In that 5-4 decision, McCleskey, a Black man convicted of murdering a police officer was sentenced to death. He provided statistical evidence that in Georgia the death penalty correlated with the race of the victim and the accused such that Black people who killed white people were statistically more likely to be put to death than white people who killed African Americans. The Court ruled that because McCleskey did not prove purposeful discrimination in his specific case, no constitutional violation could be established. *Id*.

433. Jones v. Mayer Co., 392 U.S. 409, 445-46 (1968) (Douglas, J. concurring).

The racial caste system undermines physical and mental health, criminal justice, constitutional equality, employment opportunity, access to education, and the ability to live free without the prospect of unwarranted surveillance and invasion of privacy. By focusing on the racial caste system, this Article contributes to a discourse begun more than a century ago by Harriet Jacobs, Sojourner Truth, Frederick Douglass, Ida B. Wells, W.E.B. DuBois and continued by the prophetic works of Pauli Murray and Paula Giddings, and more recently by Isabel Wilkerson. Over the years, critical race scholars and others have unpacked the ways in which racial constructions undermine equality and fasten the American society to enduring social inequality. This Article endeavors to take seriously the challenge to reckon, reconcile, and redeem. Where this Article falls short, the hope will be that others will further the discussion.

CONCLUSION

During the summer of 2020, streets in Minneapolis, Minnesota burned after the videoed execution of an unarmed Black man, who died underneath the weight of an officer's knee on his neck. George Floyd called to his mother, gasped that he could not breathe, and died. The scene was the contemporary analog to James Allen's *Without Sanctuary,* which exposed lynchings from throughout the United States, captured by 20th century photographers and often memorialized in postcards.

On the day of Mr. Floyd's death, anyone who witnessed even part of the video received an unwelcome postcard in their "inbox." It was a powerful reminder of America's racial caste system no longer depicted in cotton fields but rather the urban streets of the United States. This postcard shows what is *old*—the racial caste system—is new and revitalized. And, what is new reflects a history and performance that we have not shaken. Officer Chauvin demonstrated the performance of the racial hierarchy in literal terms, high above and seemingly unmindful about the value of life beneath his knee. He cared little for the equality of personhood that Senator Sumner argued for long ago at the debate about the Thirteenth Amendment.

In a key study of slavery, John Blassingame shares how masters first attempted to demonstrate their moral and intellectual superiority over blacks:

> Many masters tried first to demonstrate their own authority over the slave and then the superiority of all whites over blacks. They continually told the slave he was unfit for freedom, that every slave who attempted to escape was captured and sold further South, and that the black man must conform to the white man's every wish. The penalties for non-

> conformity were severe; the lessons uniformly pointed to one idea: the slave was [a] thing to be used by the "superior" race.[434]

Today, the endurance of racial caste cannot be maintained without the structures and forces of law. Vertical, racial hierarchies reshaped laws, and in so doing, reduced the impact of the Reconstruction Amendments for more than a century. Sadly, laws rendered the Amendments virtually meaningless by 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.

434. JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 257 (Oxford Univ. Press ed., 1972).