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In Fear of Black Revolutionary Contagion and Insurrection: Foucault, Galtung, and the Genesis of Racialized Structural Violence in American Foreign Policy and Immigration Law

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IN FEAR OF BLACK REVOLUTIONARY CONTAGION
AND INSURRECTION: FOUCAULT, GALTUNG, AND
THE GENESIS OF RACIALIZED STRUCTURAL
VIOLENCE IN AMERICAN FOREIGN POLICY AND
IMMIGRATION LAW

Ciji Dodds*

This article investigates the power relation between the political anatomy of the Black soul and non-somatic expressions of white supremacy-based violence. Utilizing Michel Foucault's theories of discipline and punishment in conjunction with Johan Galtung's theory of structural violence, I posit that the exercise of state-sanctioned discipline and punishment in furtherance of white supremacy constitutes racialized structural violence. Thus, this article contributes to the current public discourse concerning the role white supremacy plays in America by establishing a new construct that can be used to dissect the nature of racial oppression.

Furthermore, this article analyzes the genesis and construction of racialized structural violence in American foreign policy and immigration law using America's response to the Haitian Revolution as a case study. When combined, akin to discipline, American foreign policy and immigration law is a white supremacy-oriented, complex bundle of power technologies designed to evoke docility from Black and Brown nations. Both allow America to engage in dissociative white supremacy. Over time, America's "right" and power to discipline and punish Black and Brown nations has been normalized as a rational function of our global society.

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INTRODUCTION

Our policy towards Hayti, the old San Domingo, has been fixed, Mr. President, for three and thirty years. We trade with her, but no diplomatic relations have been established between us. We purchase coffee from her, and pay her for it; but we interchange no Counsels or Ministers. We receive no mulatto Consuls, or black Ambassadors from her. And why? Because the peace of eleven states in this Union will not permit the fruits of a successful negro insurrection to be exhibited among them. It will not permit black Consuls and Ambassadors to establish themselves in our cities, and to parade through our country, and give their fellow blacks in the United States, proof in hand of the honors which await them, for a like successful effort on their part.¹

– U.S. Senator Thomas Hart Benton of Missouri

The First Commandment of white supremacy is a Black body is not useful unless it is docile. The study of the Haitian Revolution is the study of the political anatomy² and economy³ of the Black body and soul. It is the study of attempts—attempts to transform the Black body using the macro and microphysics of power, to “have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs.”⁴ Ultimately, it is the study of concerted and sustained efforts to discipline the Black body and soul, to make it docile and, thus, useful. A disciplined Black soul languishes in the purgatory of white supremacy-based psychological inertia.⁵ It has yielded

1. Senator Thomas Hart Benton, Speech Delivered in the Senate of the United States (in Secret Session) on the Mission to Panama (Mar. 13, 1826).

2. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 28 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

3. *Id.* at 25.

4. *Id.* at 25.

5. David Gal, *A Psychological Law of Inertia and the Illusion of Loss Aversion*, 1 *JUDGMENT & DECISION MAKING* 23, 24–27 (2006). (I posit that the constituent element of White supremacy is the inculcation of White supremacy-based psychological inertia into the psyche of the oppressed individual and by logical extension, the collective psyche and social memory of the oppressed population. White supremacy-based psychological inertia shares the characteristics of Gal’s traditional formulation of psychological inertia

to the belief that white power is all-encompassing, inescapable, and indomitable. A docile Black body bears the constraints of white supremacy and inscribes upon herself the label of property.

Haitian revolutionaries were not docile. They did not believe in the all-encompassing, inescapable, and indomitable power of whiteness. For them, the fallacy of white supremacy was manifest, and their intense lucidity traversed time and space. Just as the ancestral trauma of the first capture, sale, ship hold, and master had become a part of the social memory of Africans in the diaspora, so did Haitian liberation. The Haitian Revolution (the “Revolution”) was an elegantly violent requiem for the theory that Africans are inherently inferior. Thus, Haiti’s arrival as a self-declared, sovereign negro nation was tantamount to a declaration of war against a global regime of white supremacy.⁶

Due to Haiti’s geographical proximity to the United States, the Revolution incited fears of emulation.⁷ America’s government recognized that the Revolution’s success exposed the fragility of White supremacy⁸ and threatened the sanctity of the pathology of slavery.⁹ The pervasive fear was that when the story of the slaves that had become masters reached America’s shores, Black revolutionary contagion would spread throughout the country and incite a mass slave insurrection. Such a slave insurrection would upend white supremacy and rupture the stability of America’s infant economy. The exercise of unsanctioned Black freedom emerged as the greatest existential and national security¹⁰ threat to the United States.¹¹ Consequently, the exigencies of white supremacy

with the added dimensions of racial terror and subjugation. Observing and experiencing omnipresent and persistent racial terror can cause an individual to develop White supremacy-based psychological inertia, which is the belief that White power is all-encompassing, inescapable, and indomitable. Absent psychological inertia, White supremacy could not take root or be sustained.)

6. MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976, 73 (Mauro Bertani, Alessandro Fontana, François Ewald & Arnold I. Davidson eds., David Macey trans. 1997) (arguing that one can “declare war by declaring rights”).

7. TIM MATTHEWSON, A PROSLAVERY FOREIGN POLICY: HAITIAN-AMERICAN RELATIONS DURING THE EARLY REPUBLIC 21 (2003).

8. *Id.* at 50-51.

9. *Id.* at 21-22.

10. See HANDBOOK OF PEACE AND CONFLICT STUDIES 23-24 (Charles Webel & Johan Galtung eds. 2007) (Galtung outlines a “security approach” for coping with violence that can be used as a lens to understand why the U.S. viewed Black Haitians as a security threat following the Haitian Revolution).

11. FOUCAULT, *supra* note 7, at 59-62. Foucault explains state racism as an internal quest for permanent purification, since “[t]he war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war” and society has determined “[w]e have to defend society against all the biologi-

propelled the American government into a manic state of anticipatory self-defense.¹²

Using Michel Foucault's theories of discipline and punishment¹³ in conjunction with Johan Galtung's theory of structural violence,¹⁴ I argue that the state-sanctioned exercise of discipline and punishment in furtherance of white supremacy constitutes racialized structural violence. I analyze the manifestation of racialized structural violence through the lens of America's response to the Revolution and make two claims. First, in fear of Black revolutionary contagion and insurrection, the United States launched a preemptive war¹⁵ against Haiti for the express purpose of transforming Haiti into a docile nation. The weapons of war were foreign policy and immigration law. The United States implemented pro-white supremacy foreign policies, immigration policies, and immigration laws designed to discipline and punish Haiti. In concert with France,¹⁶ the United States applied the art of distributions to politically, economically, and physically isolate Haiti, thereby transforming the island into a cellular disciplinary space that has, and continues to be, subjected to America's concentrated and uninterrupted disciplinary gaze.

Second, America's response to the Revolution was a watershed moment in American history where the exercise of disciplinary power over Black and Brown nations became the core tenet of American foreign policy and immigration law. Thus, America's response to the Revolution was the genesis of racialized structural violence in American foreign policy and immigration law. Haiti served as a beta test for a uniquely American form of dissociative white supremacy, where the government intentionally uses foreign policy and immigration law as joint mechanisms of white supremacy.¹⁷ Combined, they create a flexible disciplinary appa-

cal threats posed by the other race, the sub-race, the counterrace [sic] that we are, despite ourselves, bringing into existence."

12. See generally Mark Totten, *Using Force First: Moral Tradition and the Case for Revision*, 43 STAN. J. INT'L L. 95, 99 (2007).

13. See generally FOUCAULT, *supra* note 3.

14. See generally Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE & RSCH. 167 (1969).

15. FOUCAULT, *supra* note 7, at 51 (arguing politics is a continuation and iteration war) ("We are therefore at war with one another; a battlefield runs through the whole of society, continuously and permanently, and it is this battlefield that puts us all on one side or the other. There is no such thing as a neutral subject. We are all inevitably someone's adversary.").

16. See *id.* at 45 ("[W]e should not be looking for a sort of sovereignty from which powers spring, but showing how the various operators of domination support one another, relate to one another, at how they converge and reinforce one another in some cases . . .").

17. See JOHAN GALTUNG, *PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION* 200 (1996).

ratus and subsequent architecture of control that enables the United States to exercise disciplinary power over Black and Brown nations, and then feign historical amnesia¹⁸ when confronted with the effects of its actions.¹⁹ America's actions transcend traditional conceptualizations of colonialism and imperialism in that the primary objective is to exercise disciplinary power at the lowest political cost. The resulting systems of asymmetrical power relations reinforce a global racial hierarchy that perpetuates white supremacy.

In *Discipline and Punish: The Birth of the Prison*, Foucault dissects the art of punishment and the intersection of power ideologies and the human body.²⁰ Foucault examines two modalities of state punishment: torture and discipline. He argues that the shift from the use of medieval torture to discipline as the primary modality of state punishment coincided with the dissolution and reorientation of European power structures and proliferation of a new economic order.²¹ In the new economic order, property ownership emerged as a dominant form of capital accumulation.²² Accordingly, the state classified crimes against property as intolerable offenses.²³

As European power structures shifted from centralized monarchies to egalitarian rule, so did the technologies of power and the purpose of punishment.²⁴ Foucault asks the reader to:

accept the general proposition that, in our societies, the systems of punishment are to be situated in a certain 'political economy' of the body: even if they do not make use of violent or bloody punishment, even when they use 'lenient' methods involving confinement or correction, it is always the body that is at issue – the body and its forces, their utility and their docility, their distribution and their submission.²⁵

The state adopted discipline as the primary modality of punishment in reaction to the demands of the new economic order and egalitarian prin-

18. Michael Eric Dyson, Professor at Georgetown University, Keynote Address at California State University, Dominguez Hills, Dymally Distinguished Speaker Series: United States of Amnesia (May 8, 2019), <https://www.youtube.com/watch?v=73m0RJUZAMY> ("The United States of amnesia seems to conjure where we are as a nation because so much of the trouble we confront happens because we deny our history.").

19. GALTUNG, *supra* note 18, at 200.

20. See FOUCAULT, *supra* note 3, at 101-03.

21. *Id.* at 71-102.

22. *Id.* at 84-85.

23. *Id.* at 85.

24. *Id.* at 109.

25. *Id.* at 25.

ciples. The state shifted the target of punishment from the body to the soul²⁶ because 1) a tortured body compromises the stability of society by evoking the “cruel pleasure” tyrannical monarchs derived from punishing their subjects²⁷ and 2) an annihilated body is not utilitarian because it cannot produce wealth.²⁸ Hence, discipline is the strategic exercise of power over the body of the previously non-compliant and unproductive individual.²⁹ The goal is to make the individual useful by subjugating him until he is docile.

The period of the Revolution, 1791-1804, coincided with the period at the beginning of the nineteenth century when discipline became ingrained in Western society as the primary method of state punishment for crimes. Haiti committed two crimes. Because Africans were conceptualized as property, Haitian self-liberation was the equivalent of theft, an intolerable offense. Haiti committed the crime of answering violence with violence. For white men, violent resistance to violent oppression was reified as a natural right and moral obligation.³⁰ For Black men, violent resistance to violent oppression was criminalized as an assault on the God-ordained racial hierarchy. Haiti became a symbol of the African body and soul due to its crimes and the target of discipline and punishment.

America’s decision to use foreign policy and immigration law to discipline and punish Haiti was aimed at deterrence. It wanted to transform Haiti from a hero into a punitive signpost, a symbol of all the bad things that will happen if you, as a Black person, exercise agency in contravention of white supremacy: we will transform your liberated nation into a carceral state. Additionally, the United States needed to restore Haiti’s status as property to protect America’s economic interests in the Caribbean.³¹ As a result, America’s current foreign policies and immigration laws and policies towards Haiti are inherently structurally violent³²

26. *Id.* at 101.

27. *Id.* at 73-75.

28. *See id.* at 24-25.

29. *Id.* at 137-38.

30. Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/jefferson/105.html> [<https://perma.cc/CU5Z-PVC9>] (last visited Apr. 12, 2021) (“[W]hat country can preserve it’s [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? [L]et them take arms. [T]he remedy is to set them right as to facts, pardon & pacify them. [W]hat signify a few lives lost in a century or two? [T]he tree of liberty must be refreshed from time to time with the blood of patriots & tyrants.”).

31. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 268-69 (2006).

32. *See* Galtung, *supra* note 15, at 170-71 (discussing structural violence).

because they are the natural byproduct of America's nineteenth century, pro-white supremacy foreign policy.³³

Part I of this article articulates the theory of racialized structural violence by examining the convergence of discipline, punishment, and structural violence. Part II investigates the social and political conditions that gave rise to America's decision to discipline and punish Haiti, with an emphasis on the Revolution's impact on the foundational tenets of slavery and Black consciousness in the Atlantic. Additionally, Part II illustrates the economics of torture in the context of slavery. Parts III and IV analyze the emergence and trajectory of racialized structural violence in foreign policy, immigration law, and immigration policies. Together, all four parts are intended to capture the power relation between the United States and Haiti and how it has been engineered to compel Haitian docility.

I. THE CONSTRUCTION OF RACIALIZED STRUCTURAL VIOLENCE

A. Michel Foucault's Theory of Discipline

1. Torture as Punishment

Foucault conceptualizes the body as an instrument that can be used to understand historical changes in power structures.³⁴ He asserts the body is "invested by power relations," and, as such, the tablet upon which authority publishes and legitimizes its power.³⁵ During the medieval period, the sovereign was consumed with punishing crimes with a dynasty, meaning crimes that challenged the sovereign's authoritative power and inspired criminal imitation.³⁶ To demonstrate the sovereign's invincibility and complete dominion over its subjects' bodies, the sovereign's preferred mode of punishment for crimes against the crown was gruesomely violent, public torture.³⁷ The body was the target of punishment and corporeal pain was the constituent element of punishment.³⁸ The sovereign

33. See generally MATTHEWSON, *supra* note 8. Tim Matthewson argues that America enacted a pro-slavery foreign policy in response to the Haitian Revolution. By contrast, I argue that America enacted a pro-white supremacy foreign policy because America was aware that slavery was unsustainable. A pro-white supremacy foreign policy enabled America to continue to exploit the economy of the Black body. GALTUNG, *supra* note 18, at 196 (white supremacy and cultural violence legitimize racialized structural violence).

34. FOUCAULT, *supra* note 3, at 23-24.

35. *Id.* at 24-28, 55.

36. *Id.* at 93.

37. *Id.* at 50-52, 57-59.

38. *Id.*

used torture as a means of “exacting retribution in a manner that was both personal and public.”³⁹ When the sovereign publicly annihilated the body of the condemned, the sovereign was reaffirming its power and reconstituting its injured body.⁴⁰ The purpose of punishment was not to restore justice. It was to reactivate power through a policy of terror.⁴¹

Torture was a two-part process consisting of secretive judicial torture⁴² followed by public ritualized torture, which Foucault calls “the spectacle of the scaffold.”⁴³ Judicial torture was rooted in the Christian tradition of trial by ordeal.⁴⁴ The ordeal was supposed to extract the truth from the accused by divine intervention.⁴⁵ If a person were truly innocent, God would intercede on his behalf by performing a miracle or his survival would substantiate his innocence.⁴⁶ Judicial torture contained a granule of legal ceremony.⁴⁷ There were formal charges, evidentiary proceedings, and a trial.⁴⁸ But, criminal procedure was opaque. The accused often did not know the charges or evidence against him; he could not cross-examine his accusers and often did not learn his sentence until shortly before his public torture.⁴⁹ The sovereign’s agents privately tortured him in a judicial chamber⁵⁰ where they gradually increased the severity of the torture until he confessed or held out.⁵¹ “Judicial torture functioned in that strange economy in which the ritual that produced the truth went side by side with the ritual that imposed the punishment.”⁵² Once guilt was established, the condemned was transported from the judicial torture chamber, through the crowd, to the scaffold.

The condemned was displayed in full view of the crowd because the sovereign wanted the torture to be a spectacular display of his power. The torture consisted of the methodical application of regulated pain.

39. *Id.* at 48.

40. *Id.*

41. *Id.* at 49.

42. *Id.* at 44.

43. *See id.* at 32-69.

44. *Id.* at 40-42.

45. J. JEREMY WISNEWSKI, UNDERSTANDING TORTURE 20 (Brenda Almond ed., 2010).

46. *Id.*

47. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 13 (1977).

48. FOUCAULT, *supra* note 3, at 35-42.

49. *Id.* at 35.

50. *Id.*

51. *Id.* at 40.

52. *Id.* at 42.

The type, duration, and intensity of the torture correlated with the gravity of the crime and the victim's social rank.⁵³

[S]ome prisoners may be condemned to be hanged, others to having their hands cut off or their tongues cut out or pierced and then to be hanged; others, for more serious crimes, to be broken alive and to die on the wheel . . . others to be strangled and then broken, others to be burnt alive, others to be burnt after first being strangled; others to be drawn by four horses, others to have their heads cut off, and others to have their heads broken.⁵⁴

The crowd was the target audience and, hence, essential to the spectacle of the scaffold.⁵⁵ The purpose of torture was to deter future criminal acts: the sovereign used torture to terrorize its subjects into submission and obedience. The sovereign encouraged and expected the crowd to humiliate and insult the condemned as a public display of their allegiance.⁵⁶ Moreover, the crowd often saw the condemned as an enemy of the state and actively participated in the torture.⁵⁷ However, as the condemned cried out in pain, he became human again, and sometimes the crowd's mood shifted from righteous glee to empathetic horror.⁵⁸ At which point, the executioner and the king became symbols of abhorrence.⁵⁹ The risk of torture was that the criminal could be transformed into a hero due to the sheer brutality of the punishment and the publication of his crimes, mainly if they were crimes against societal symbols of oppression.⁶⁰ After his death, a convicted criminal could become a martyr, "his memory honoured and his grave respected."⁶¹

Foucault uses the execution of Robert-François Damiens to illustrate this phenomenon.⁶² Damiens was a French servant who was sentenced to death for attempting to assassinate King Louis XV of France. On March 28, 1757, he was transported from his prison cell to the scaffold, wearing only a shirt.⁶³ The executioner used red-hot pincers to tear the

53. *Id.* at 34.

54. *Id.* at 32.

55. *Id.* at 57-58.

56. *Id.* at 58-59.

57. *Id.* at 53; 61-62.

58. *Id.* at 59-62.

59. *Id.*

60. *Id.* at 61-62, 67.

61. *Id.* at 67.

62. *Id.* at 3-5, 45, 52.

63. *Id.* at 3.

flesh off his legs, right arm, and breasts.⁶⁴ He poured a mixture of molten Sulphur, oil, and lead into Damiens's wounds.⁶⁵ The executioner attached ropes to Damiens's limbs and harnessed him to six horses. When the horses failed to tear his limbs from his body, the executioner cut Damiens's tendons, and afterward, the horses succeeded.⁶⁶ Witnesses stated his torso was still alive after dismemberment.⁶⁷ The executioner burned Damiens's torso and four limbs at the stake.⁶⁸ The execution lasted for more than four hours.

The horror of Damiens's execution became a symbol of the sovereign's excessive cruelty. The public increasingly protested public executions, reflecting the public's malcontent with the sovereign's unrestrained power.

2. Discipline as Punishment

Foucault defines discipline as "a complex bundle of power technologies developed during the 18th and 19th centuries" that cannot be reduced to a single definition or apparatus.⁶⁹ Discipline consists of techniques and instruments that target the offender's soul in order to turn him into a docile body. The soul, as used by Foucault, is not defined by theological principles. The soul is the psyche of the individual; it is the individual's consciousness and sense of agency. The creation of a docile body occurs in two stages. First, the body is made submissive, and then the body is trained and corrected until it becomes useful.⁷⁰ Thus, "[d]iscipline increases the forces of the body in economic terms of utility and diminishes these same forces in political terms of obedience."⁷¹

Discipline is an expression of power whereby the state imposes policies of uninterrupted coercion over the body.⁷² The offender's body is "caught up in a system of constraints and privations, obligations and prohibitions" that deprives the offender of his psychological liberty and, occasionally, his physical liberty.⁷³ In the post-medieval era psychological manipulation became the essential element of punishment and not corpo-

64. *Id.*

65. *Id.* at 4-5.

66. *Id.*

67. *Id.*

68. *Id.*

69. METHODS FOR CRITICAL DISCOURSE ANALYSIS 9 (Ruth Wodack & Michael Meyer eds., 2d ed. 2009) (2001).

70. FOUCAULT, *supra* note 3, at 138.

71. *Id.*

72. *Id.* at 139-41.

73. *Id.* at 11.

real pain. The state decreased the physical severity of punishment, yet ensured the punishment had a stronger effect on the offender's mind.

The symbiotic relationship between the eruption of protests and changing power ideologies catalyzed the shift from torture to discipline.⁷⁴ Both were the manifestation of Enlightenment Era theories concerning the legitimate exercise of power. Foucault argues that the convergence of the following coequal societal forces were determinative factors: 1) the spread of protests against cruel public torture,⁷⁵ 2) the decentralization of power,⁷⁶ 3) the proliferation of the social contract theory,⁷⁷ and 4) the emergence of a new economic order in which mercantilism and industrial capitalism led to new forms of capital accumulation, specifically property ownership.⁷⁸

Reformers were concerned with the bad economy of power,⁷⁹ where the absence of procedure made punishment arbitrary. The prosecutor had too much power and, at the same time, the accused possessed little if any power. Judges and magistrates possessed almost unfettered discretion over sentencing and, most significantly, the right to punish derived from the sovereign's personal power.⁸⁰ Reformers called for a strategic reorientation of the power to punish, defined by a new juridical theory and concomitant legal apparatus.⁸¹ They asserted that the right to punish derived from public power and sought to establish a new economy of the power to punish.⁸²

The goal was to punish better by 1) embedding punishment into the public mind as a regular function of society via the social contract theory, 2) increasing the effects of punishment while decreasing its economic and political costs, 3) ensuring the consistent distribution of punishment so that punishment could operate in homogenous circuits in various locations, 4) removing the arbitrariness and capriciousness from the law by codifying the law and procedure, and 5) making the penalty commensurate with the crime.⁸³ Reformers recognized that the percep-

74. *Id.* at 82-86.

75. *Id.* at 73-75.

76. *Id.* at 79-81.

77. FOUCAULT, *supra* note 3, at 92-94, 101, 131-32; MICHEL FOUCAULT, POWER: ESSENTIAL WORKS OF FOUCAULT, 1954-1984, 54 (James D. Faubion ed., Robert Hurley & Others trans., New Press 2000) (1994) [hereinafter FOUCAULT, POWER].

78. FOUCAULT, *supra* note 3, at 85-89.

79. MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978-1979, 79 (Michel Senellart, François Ewald & Alessandro Fontana eds., Graham Burchell trans., Palgrave MacMillan 2008) (2004).

80. FOUCAULT, *supra* note 3, at 80.

81. *Id.* at 82-84.

82. *Id.* at 89.

83. *Id.* at 89, 249.

tion of measure and humanity could be an effective technique of power.⁸⁴ The ritual of torture was replaced with the penal ritual carried out by a swarm of disciplinary agents of the state.⁸⁵ The defendant is afforded an investigation, discovery, and sentencing (if guilty).⁸⁶

The focus of criminality was redefined under the new economic order⁸⁷ where new forms of capital accumulation, new relations to property, and the new legal status of property⁸⁸ led to a reorientation of wealth. Accordingly, the state classified crimes involving property as its own category of illegalities.⁸⁹ The new economic order was made possible by the proliferation of mercantilism and capitalist industrialization, both of which depended on able bodies. The new economic order demanded that the body be viewed as an economic investment. There was no economic utility in destroying the body. Torture resulted in the waste of a potentially valuable resource. There was economic utility in making the offender's body docile to transform it into a productive instrumentality,⁹⁰ which Foucault refers to as the docility-utility relation.⁹¹ Therefore, punishment was also an economic calculation designed to facilitate robust economic principles.

a. Techniques & Instruments of Discipline

The four techniques of discipline are 1) the art of distributions,⁹² 2) control of activity,⁹³ 3) organization geneses,⁹⁴ and 4) composition of forces.⁹⁵ Under the art of distributions, discipline requires that the offender is enclosed or confined in a disciplinary space. Enclosure makes it easier to observe, analyze, and acquire knowledge about the offender. A disciplinary space is a "protected place of disciplinary monotony" monitored and controlled by a guardian.⁹⁶ The architecture of the disciplinary space, with its emphasis on controlled isolation, reaffirms the soul as the target

84. *Id.* at 88-93.

85. *Id.* at 7-8, 10-11.

86. *See id.* at 96-99.

87. *See id.* at 67-69.

88. *Id.* at 86-87.

89. *Id.* at 87-92.

90. *Id.* at 136-39.

91. *Id.* at 137.

92. *Id.* at 140-49.

93. *Id.* at 149-56.

94. *Id.* at 156-62.

95. *Id.* at 162-69.

96. *Id.* at 140.

of discipline.⁹⁷ The disciplinary space should be structured based on the offender's disciplinary needs; preferably, he should have his own space⁹⁸ to avoid dangerous communications with other offenders.⁹⁹ The most functional space is isolation because solitude was believed to bring the offender closer to God.¹⁰⁰

The control of activity is a technique rooted in the Christian monastic tradition of non-idleness; each moment should be accounted for and filled with activity.¹⁰¹ Disciplinary agents should closely supervise the offender's time, and he should feel the looming pressure of supervision. The supervisor's observation of the offender's work allows the supervisor to correct and instruct, as needed.

Organization of geneses and composition of forces work in tandem. Under organization of geneses, a timetable of development should be created for each offender. Disciplinary time should be divided into isolated periods of training and graduated practice to train the offender effectively.¹⁰² The composition of forces is a technique that trains the offender to work efficiently. He should accede to the idea that he is a part of the greater machinery of society and learn how to work together with others.¹⁰³

The instruments of discipline are 1) hierarchical observation, 2) normalizing judgment, and 3) examination. Modern discipline rests on the principle that discipline can be achieved from afar through hierarchical observation. Hierarchical observation is a form of constant surveillance or the perception of constant surveillance, defined as the disciplinary gaze. The disciplinary gaze is the foundation of non-violent psychological coercion and subjugation. A "perfect eye" or disciplinary gaze is inescapable.¹⁰⁴ Hierarchical observation ensures that the power relation between the offender and authority remains unbroken. It is a part of the architecture of control where power is exercised over the offender using discrete, non-physical means.¹⁰⁵ Normalizing judgment refers to the process where authority observes the offender and determines whether the offender is following established societal norms.¹⁰⁶ Normalizing judgments is the foundation of the penalty of norms whereby offenders are

97. *Id.* at 128.

98. *Id.* at 143-44.

99. *Id.*

100. *Id.* at 143.

101. *Id.* at 154.

102. *See id.* at 166-67.

103. *Id.* at 164.

104. *Id.* at 173.

105. *Id.* at 174.

106. *Id.* at 182-84.

compared and those that exhibit deviant behaviors are punished.¹⁰⁷ The punishment should be corrective to normalize the offender and elicit repentance.¹⁰⁸ Lastly, examination is made possible by hierarchical observation and normalizing judgment. The purpose is to acquire knowledge about the offender to judge, classify, and adequately punish him.¹⁰⁹

b. Prison

An institution characterized by its “complete and austere conditions,” the prison emerged as the preferred site of state punishment in the early nineteenth century.¹¹⁰ Prison was conceived of as a dispassionate theater of state discipline and punishment—that is, the antithesis of the spectacle of the scaffold. Prisons were supposed to be an efficient means of implementing the techniques and instruments of discipline to reform the offender,¹¹¹ without inflicting direct corporeal pain. Theoretically, the prisoner’s pain is limited to execution, and even in execution, the prisoner’s pain is *de minimis*.¹¹² The prisoner is protected from cruel and unusual punishment, there are no crowds, and the act is approached with reticence instead of vengeance.¹¹³

Incarceration was initially criticized as a despotic abuse of power because it deprives offenders of their liberty, disserves society, and makes the offender worse.¹¹⁴ However, when discipline replaced torture, prison as a universal penalty and the concept of prison reform entered the discourse. Proponents argued that the purpose of incarceration is rehabilitation and prisons are rational instruments of humane and measured reformatory punishment.¹¹⁵ Prisons depersonalized punishment because prisoners are out of sight and out of mind, making it easier for society to accept incarceration as a legitimate penalty. Incarceration was conceptualized as the “machinery that transforms the violent, agitated, unreflective convict into a societal instrument that plays its role with perfect regularity.”¹¹⁶

In prisons, offenders become objects of knowledge to be analyzed and understood. The objectified offender assumed a new identity: “the

107. *See id.*

108. *Id.* at 179-80.

109. *Id.* at 184.

110. *Id.* at 232, 235; FOUCAULT, *POWER*, *supra* note 78, at 67.

111. FOUCAULT, *POWER*, *supra* note 78, at 233-34.

112. *Id.* at 11.

113. *Id.*

114. *Id.* at 114, 236, 265-69.

115. *Id.* at 232-34.

116. *Id.* at 242.

delinquent.” A delinquent needs to be reformed and normalized to reacquire his status as an unrestrained citizen. Delinquents are supposed to internalize the permanent disciplinary gaze and the power relation that it represents. They are supposed to be coerced into self-regulated discipline out of fear that they may be observed. While the delinquent’s body is constrained, the target of the discipline remains his soul because the deprivation of liberty combined with the disciplinary gaze reinforces his inferior position in the power relation and subtly transforms him into a docile body.¹¹⁷

Proponents argued that imprisonment symbolized the ideal form of punishment because prison infrastructure is characterized by its exhaustive, omni-disciplinary apparatus.¹¹⁸ The delinquent is subjected to the concentrated disciplinary gaze and regimented discipline.¹¹⁹ His disciplinary space is allocated according to his disciplinary needs. Every aspect of his life is controlled using a timetable.¹²⁰ He is corrected, reeducated, and trained in hopes that imprisonment will generate normalization and docility. By the early nineteenth century, America had become a leader in penitentiary science for its *ability* to “overcome the double obstacle constituted by the age-old rules of law and the despotic functioning of imprisonment.”¹²¹

c. Panopticism

Panopticism is a form of invisible power where the object of observation internalizes the faceless, permanent disciplinary gaze of authority.¹²² The name, Panopticism, is derived from Jeremy Bentham’s Panopticon, which is a large circular structure with a tall tower at its center, resembling a lighthouse.¹²³ The architecture of the panopticon is designed to maximize the surveillance of its occupants.¹²⁴ An authority figure intermittently occupies the tower to surveil the inhabitants, but the light remains on even when the tower is unoccupied.¹²⁵ Because the tower remains lit at all times, and the occupants cannot see inside it, they do not know when the authority figure is observing them and when he is not.¹²⁶

117. *Id.* at 201-03, 249-50.

118. *Id.* at 235-36.

119. *Id.*

120. *Id.* at 236.

121. *Id.* at 120.

122. *See id.* at 200-08.

123. *Id.* at 200.

124. *Id.* at 200-08.

125. *Id.* at 201-02.

126. *Id.*

The occupants are therefore coerced into good behavior through self-regulated discipline.¹²⁷

d. Nonpunitive Discipline in Modern Society

Society applies the instruments and techniques of discipline to non-punitive institutions.¹²⁸ Sanctions and disciplinary mechanisms have been normalized, such that now they are viewed as natural and rational functions of American society.¹²⁹ Societal discipline exists on two planes. There is standard discipline, which is a function of enforced societal norms and mores. Then there is racialized discipline, which is a function of societal norms and mores that are used to rationalize white supremacy. In both, individuals are supposed to engage in self-regulated discipline. But in the system of racialized discipline, Black and Brown people acquire the status of “delinquent” at birth. They are instantly presumed to need reformation and are classified as members of a dangerous population that must be methodically subjugated and surveilled.¹³⁰

B. Johan Galtung’s Theory of Structural Violence

Johan Galtung expands the scope of violence to include subtly coercive, imperceptible forms of violence that are embedded in the structures of society. He answers the question of whether violence can exist in the absence of intentional direct somatic harm, which is any action that destroys the body or reduces a person’s somatic capabilities, arguing that it can.¹³¹ He conceptualizes violence as an influencer-relation structure in which an actor (the influencer) adversely influences (via the mode of influence) an individual (the influencee), thereby reducing the individual’s actual somatic or mental realizations.¹³² The individual is therefore prevented from maximizing his potential. Galtung defines violence as “the cause of the difference between the potential and the actual, between

127. *Id.*

128. *Id.* at 302-03.

129. *Id.* at 304-305.

130. See FOUCAULT, POWER, *supra* note 78, at 57. Foucault argues “[t]he idea of dangerousness meant that the individual must be considered by society at the level of his potentialities, and not at the level of his actions; not at the level of the actual violations of an actual law, but at the level of the behavioral potentialities they represented.” Foucault’s assertion captures the essence of the criminalization of Black and Brown people. Assigned the status of delinquent upon birth, they are presumed dangerous in the absence of any actual violations of the law rather, based on the behavioral potentialities and proclivities assigned to being Black or Brown.

131. Galtung, *supra* note 15, at 169.

132. *Id.*

what could have been and what is” and as “that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance.”¹³³ Violence is only present when the cause for the increase in the distance between the individual’s potential and actual realization is avoidable.¹³⁴

1. Direct Violence & Structural Violence

Galtung distinguishes between direct violence and structural violence. Direct violence is present when an actor commits an act of violence and the target of the violence can clearly perceive and directly trace the source of the violence to the actor.¹³⁵ Direct violence tends to present as interpersonal violence. Structural violence is subtly coercive, indirect violence that upholds societal structures of inequality. Structural violence is “built into the structure and shows up as unequal power and consequently as unequal life chances.”¹³⁶ The targets of structural violence may be aware that an indistinct actor is constraining their ability to maximize their potential.¹³⁷ However, they may be susceptible to being gaslit into thinking that their perceptions are warped.¹³⁸ Significantly, Galtung also distinguishes between physical and psychological violence, stating that direct and structural violence can be physical or psychological.¹³⁹ Physical violence targets the body, while psychological violence targets the soul.¹⁴⁰ The soul can be an individual or the collective soul of a group of people.

The foundation of structural violence is inequality and exploitation.¹⁴¹ The unequal distribution of resources causes inequality and exploitation, be it the wholesale denial of resources to a group or the monopolization of resources by a group that occupies a position of power over another group.¹⁴² The subordinate group is isolated and marginalized in both instances. Therefore, structural violence operates in a system of asymmetrical power relations that place avoidable limitations on individuals of lesser power, preventing them from maximizing their potential.

133. *Id.* at 168.

134. *Id.* at 169.

135. *Id.* at 170-71.

136. *Id.* at 171.

137. *Id.* at 173.

138. *See id.*

139. *Id.* at 169, 170-71.

140. *Id.* at 169.

141. Johan Galtung, *Cultural Violence*, 27 J. PEACE RSCH. 291, 293 (1990).

142. Galtung, *supra* note 15, at 171.

Structures of inequality maintain social order and are comprised of actors, systems, ranks, and levels.¹⁴³ Actors have goals and interests, choosing with whom to interact based on mutuality of goals and interests. In each interaction the actors exchange value.¹⁴⁴ As actors continually interact with one another, they form systems that are defined by their mutual goals and interests.¹⁴⁵ Accordingly, an actor can operate in more than one system, given the diversity of its goals and interests. An actor occupies a rank within each system based on intangible and tangible qualities, such as actual or perceived power.¹⁴⁶ An actor can have a different rank in each system or maintain the same rank in all systems.¹⁴⁷ When systems combine, they create a structure.¹⁴⁸

Systems can coagulate into superstructures of inequality that maintain a racist, international social order. In the international system, each nation is an actor.¹⁴⁹ Nations interact with one another, exchanging value based on their mutual goals and interests.¹⁵⁰ Value is anything that meets the needs and/or satisfies the nation's goals and interests.¹⁵¹ These interactions create systems.¹⁵² A nation can operate within multiple systems and can occupy various ranks in each system.¹⁵³ The power of the nation informs its rank and its ability to achieve its goals.¹⁵⁴ Therefore, a nation with great economic power but little political capital can occupy a high rank in one system and low rank in another system.¹⁵⁵ A nation can also occupy a high rank consistently throughout systems and vice versa.¹⁵⁶

Structural violence in international systems exists in many forms. One example is when one or more nations exploit or deny resources to a less powerful nation. It also occurs when one nation or multiple nations act in concert to repress another nation by precluding the nation from mutually beneficial international systems. The less powerful nation's ability to meet its needs and satisfy its goals is constrained in both examples. As a result, that nation is prevented from maximizing its potential, which gives rise to conditions of inequality. Inequality can manifest both exter-

143. *Id.* at 175.

144. *Id.* at 176.

145. *Id.* at 175.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 175-76.

150. *Id.*

151. *See id.*

152. *Id.*

153. *Id.*

154. *See id.* at 176-77.

155. *Id.*

156. *Id.* at 176-77.

nally, in the relationships between the alienated nation and the repressive nations, and internally, within the alienated nation's infrastructure. "Thus the pattern is set for an aggravation of inequality" in international systems where the lowest-ranking nations "are deprived not only relative to the potential, but indeed below subsistence minimum."¹⁵⁷ Inequality shows up in differential morbidity and mortality rates, political immobility, powerlessness, and in other objective indicators.¹⁵⁸ Therefore, structural violence can cause somatic harm. Moreover, sustained and concentrated structural violence can demoralize entire populations resulting in psychological damage to the nation's soul.¹⁵⁹

Cultural violence occurs when an aspect of a culture is used to legitimize direct or structural violence, making the violence "look, even feel, right—or at least not wrong."¹⁶⁰ A society's culture is defined by its beliefs, characteristics, and norms, as exemplified by aspects like religion, ideologies, language, art, and empirical and formal science.¹⁶¹ When structural violence exists between two nations, 1) the culture of the dominant nation must justify the structural violence and 2) theoretically, according to the principles of international law, the culture of the overarching international system must justify the structural violence.¹⁶² Thus, the synthesis of the two cultures serves as the rationale for the structural violence.

2. Latent Violence & Manifest Violence

Lastly, Galtung identifies two levels of violence: latent violence and manifest violence.¹⁶³ Manifest violence is immediately observable.¹⁶⁴ It prevents an individual from maximizing his potential through immediate actions.¹⁶⁵ Latent violence exists when there is a threat of manifest violence that causes an individual to have a reasonable apprehension of imminent manifest violence.¹⁶⁶ It prevents the individual from maximizing his potential because it creates an environment of instability that con-

157. *Id.* at 177.

158. *Id.*

159. *Id.*

160. Galtung, *supra* note 142, at 291.

161. *Id.* at 291, 296.

162. *See id.* at 291-92.

163. Galtung, *supra* note 15, at 172.

164. *Id.*

165. *Id.*

166. *See id.* at 172.

strains the individual's actions.¹⁶⁷ Latent and manifest violence can present as either direct violence or structural violence.

C. *Racialized Structural Violence: The Intersection of Discipline, Punishment, & Structural Violence*

Discipline as punishment is structural violence. Therefore, the shift from torture to discipline represented a shift from direct somatic violence to structural violence as the primary modality of state punishment. Like structural violence, discipline is a process-driven, influencer-influencee relationship where avoidable limitations are placed on the individual that prevent him from maximizing his potential. Structural violence may be calculated to shift the focus from state-sanctioned direct somatic violence, which is an event that targets the body, to indirect state-sanctioned violence, which is a process that targets the soul.¹⁶⁸ Parallel to discipline, structural violence is designed to turn the targeted individual into a docile body. Both discipline and structural violence are dissociative in that punishment is removed from the public eye, allowing the true actor to deflect or deny culpability. The two are interdependent structures that have become entrenched in society.

This Article argues that the exercise of state-sanctioned discipline is racialized structural violence when it is activated to fulfill the goals of white supremacy. Racialized structural violence is an influencer-influencee relationship that places avoidable limitations on the individual, preventing the individual from maximizing his potential. Governed by the politics of optics and illusory propriety, the purpose of racialized structural violence is to shift the focus from immediately observable direct somatic violence to inconspicuous and complex, yet equally effective, indirect structural violence that coerces populations into docility.

America's relationship with Haiti illustrates how racialized structural violence targets a nation's soul and how it has become the dominant characteristic of American foreign policy, immigration laws, and immigration policies. Where the United States (the influencer) has used foreign policy and immigration law to politically,¹⁶⁹ economically, and physically isolate and marginalize¹⁷⁰ (the mode of influence) Haiti (the influencee), the United States has deployed the art of distributions to de-

167. *Id.*

168. *See* Galtung, *supra* note 142, at 294-95.

169. *See id.* at 294. I argue that the goal of political isolation is to achieve what Galtung refers to as "Penetration, implanting the topdog inside the underdog." *Id.* In a political context, the political underdog accepts and concedes the political supremacy of the political topdog.

170. *See id.* (denoting marginalization and isolation as forms of structural violence).

liberately impede Haiti's ability to maximize its potential. The concerted actions of the United States and other nations uphold an international superstructure of inequality that initially existed for the sole purpose of exploiting and punishing Haiti and now exists to exploit and repress¹⁷¹ Haiti and similarly situated countries. America's actions have contributed to the chasm between Haiti's actual realization and its potential realization.

In the instance of racialized structural violence between Haiti and the United States, both America's culture and the collective culture of colonial powers justified Haiti's subjugation.¹⁷² The ideologies of white supremacy¹⁷³ that were used to rationalize slavery are the common aspects of both cultures that made structural violence against Haiti "look, even feel, right—or at least not wrong."¹⁷⁴ Thus, the right to discipline and punish Haiti was derived from two cultures' established norms. Normalization makes it possible to classify deviant behavior and necessitates that deviance be punished.¹⁷⁵ In the context of the colonial world, the desired normative behavior of Africans was learned helplessness and psychological dependence.¹⁷⁶ It was easy to classify Haiti's behavior as deviant because self-liberation and psychological independence fell outside of the bounds of the desired normative behavior. Thus, in agreement with Foucault's theories, Haiti had to be rehabilitated through discipline and punishment to cure Haiti's deviance.

171. See GALTUNG, *supra* note 18, at 198-99 (analyzing repression as structural violence).

172. See Galtung, *supra* note 142, at 294-95 (discussing how cultural violence relates to and is used to justify both direct and structural violence).

173. See GALTUNG, *supra* note 18, at 203.

174. Galtung, *supra* note 142, at 291.

175. Margaret A. Paternek, *Norms and Normalization: Michel Foucault's Overextended Pan-optic Machine*, 10 HUM. STUD. 97, 104 (1987).

176. See Erin Dwyer, *Mastering Emotions: The Emotional Politics of Slavery*, 1-2; 144 (2012) (Ph.D. dissertation, Harvard University) (on file with the Harvard Library at <https://dash.harvard.edu/handle/1/9282890> [<https://perma.cc/HVR8-FWQ6>]) (Individuals such as Samuel Cartwright sought to teach slaveowners how to maintain psychological servitude by strategically using "affective expressions, and feelings like anger and affection . . . [to] trigger emotional responses in their slaves, including awe and reverence" *Id.* I view the desire to inspire awe and reverence as a desire to break the will of the enslaved person by making him psychologically dependent on the slaveowner's emotional state and to instill in him a sense of helplessness.). Samuel A. Cartwright, *Report on the Diseases and Peculiarities of the Negro Race*, NEW ORLEANS MED. & SURGICAL J., 691-715. (1851).

II. THE CASE FOR DOCILITY: THE ORIGIN OF THE NEED TO DISCIPLINE AND PUNISH HAITI

A. *The Spectacle of Slavery*

Slavery is torture. The scaffold is not limited to the metes and bounds of the plantation. Torture is not limited to a single incident because a slave is forced to live in a perpetual state of terror.¹⁷⁷ Punished for the sin of Blackness, a slave lives her life as either the target of manifest violence or haunted by latent violence.¹⁷⁸ She is interrogated ceaselessly. Her looks, words, mannerisms, and dispositions are analyzed. Her body is methodically racked, stretched beyond the limitations of humanity to produce babies, cotton, sugar, rice, or whatever commodity is necessary to satiate white supremacy. The origin of America's need to discipline and punish Haiti derived from America's and the colonial world's collective realization that torturing, i.e., re-enslaving, Haitians would have been futile, and that if Haiti were allowed to exist on its own terms, the fear of Black revolutionary contagion and insurrection would turn out to be a fear deferred.

1. Ideologies of White Supremacy

The Second Commandment of white supremacy is that God is white. The Third Commandment of white supremacy is that racial equality is heresy. White supremacists used religion, pseudoscientific racism,¹⁷⁹ and paternalism to create complicated and glaringly contradictory ideological frameworks to justify slavery.¹⁸⁰ The white supremacist, Christian rationalization for slavery rested on the premise that phenotypical differences proved that God ordained the separation of the races¹⁸¹ and established a hierarchical natural order where white Europeans were superior to Africans.¹⁸² White supremacists used the of Curse of Ham as ev-

177. Dwyer, *supra* note 177, at 125-28.

178. See GALTUNG, *supra* note 18, at 73-75 (describing the "manifest/latent dialectic" as, in part, a "consciousness/subconsciousness dialectic").

179. See REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 139-57 (1981) (discussing white southerners' use of pseudoscience to justify racism).

180. James W. Vander Zanden, *The Ideology of White Supremacy*, 20 J. HIST. IDEAS 385, 387-90 (1969) (describing rationalizations used to justify slavery and white supremacy, despite concurrent beliefs in ideologies such as Lockean natural order and the Biblical "Golden Rule").

181. See DAVID M. GOLDENBERG, THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM 168-77 (2003).

182. Vander Zanden, *supra* note 181, at 387-90.

idence that God approved of slavery.¹⁸³ The Curse of Ham is described as a “dual curse” because God cursed Ham and his descendants with both Blackness and slavery as punishment for Ham’s sins.¹⁸⁴ Slavery proponents argued that Black skin was conclusive evidence of Africans’ natural social status. As the alleged descendants of Ham, African slaves were characterized as morally depraved, “unjust, cruel, barbarous, half-human, treacherous, deceitful, thieves, drunkards, proud, lazy, unclean, shameless, jealous to fury, and cowards.”¹⁸⁵

Slavery was mythologized as a divinely ordered institution¹⁸⁶ premised upon Africans’ inherited sin.¹⁸⁷ Missionaries and slaveowners used the “Slave Bible”¹⁸⁸ to “convert” slaves to Christianity.¹⁸⁹ The editors of the Slave Bible omitted scriptures that could encourage rebellions but kept those scriptures that helped to rationalize slavery, like Romans 13:

Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. . . . For the one in authority is God’s servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God’s servants, agents of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities¹⁹⁰

Pseudoscientific racism provided additional justifications for slavery. Using phrenology and craniometry,¹⁹¹ “scientists” asserted that Africans were an inferior product of evolution and were incapable of being civi-

183. GOLDENBERG, *supra* note 182, at 175-77.

184. *Id.*

185. C.L.R. JAMES, *THE BLACK JACOBINS* 17 (Vintage Books 1989) (1963).

186. See GOLDENBERG, *supra* note 182, at 177.

187. See David M. Goldenberg, *What Did Ham Do to Noah?*, in 32 *STUDIA JUDAICA*, “THE WORDS OF A WISE MAN’S MOUTH ARE GRACIOUS” (QOH 10,12): Festschrift for GÜNTER STEMBERGER ON THE OCCASION OF HIS 65TH BIRTHDAY 264 (Mauro Perani ed., 2005) (“As punishment paralleling [Ham’s] crime, therefore, Ham’s descendants, through the line of Canaan, were eternally enslaved . . .”).

188. *THE NEGRO BIBLE – THE SLAVE BIBLE: SELECT PARTS OF THE HOLY BIBLE, SELECTED FOR THE USE OF THE NEGRO SLAVES, IN THE BRITISH WEST-INDIA ISLANDS* (Joseph Lumpkin ed., Fifth Est. Publishers 2019) (1807).

189. *Id.* at v.

190. *Romans* 13:1-5 (New Int’l Version).

191. See HORSMAN, *supra* note 180, at 141-42.

lized.¹⁹² Inferior races were believed to be well-suited for slavery because they were naturally passive and unintelligent.¹⁹³ Africans were classified as closer to a beast than a man,¹⁹⁴ “thousands of years behind the white race in development,” and as “essentially ‘illiterate, credulous, feeble in judgment, weak in discrimination, a child in his habits of dependence and self-indulgence.’”¹⁹⁵

Whether cursed descendant, beast, or child, slaves had to be “broken” for slavery to function.¹⁹⁶ Slaveowners used all methods of torture to force the slave to suppress his natural self and to make him psychologically dependent on the master’s approval and benevolence.¹⁹⁷ Arguably, the primary goal was to “impress Negroes with their helplessness.”¹⁹⁸ The breaking process was not complete until white-supremacy-based psychological inertia controlled the slave’s psyche. A broken slave believed in the all-encompassing, inescapable, and indomitable power of whiteness.

2. The Futility of Torture in Saint-Domingue¹⁹⁹

For the least fault slaves received the harshest punishment. . . . [T]here was no ingenuity that fear or a depraved imagination could devise which was not employed to break their spirit and satisfy the lusts of their owners and guardians Whipping was interrupted in order to pass a piece of hot wood on the buttocks of the victim

192. See Vander Zanden, *supra* note 181, at 393.

193. See generally SAMUEL GEORGE MORTON, *CRANIA AMERICANA* (Gustav’s Libr. 2008) (1839).

194. See DAVIS, *supra* note 32, at 32-35.

195. Vander Zanden, *supra* note 181, at 394-95.

196. See Floyd W. Hayes, III, *Fanon, Oppression, and Resentment: The Black Experience in the United States*, in *FANON: A CRITICAL READER* 16 (Lewis R. Gordon, T. Denean Sharpley-Whiting & Renée T. White, eds. & trans.) (1996) (“Here, then, was the strategy employed to produce the perfect slave, a dehumanized person. Impose on the slave rigid discipline, demand from the slave unconditional submission, impress upon the slave a sense of innate inferiority, develop in the slave a paralyzing fear of white people, train the slave to adopt the slave-owner’s code of ‘good’ conduct, and instill in the slave a sense of complete dependence.”); accord Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 668 (2003) (“[T]he enslavement and kidnapping of Africans to America inevitably caused severe psychic injuries to the victims. . . . This cultural genocide and associated psychological traumas created spirit-injuries so deep that current generations of Blacks still carry scars.”).

197. Hayes, *supra* note 197, at 16.

198. *Id.*; see also Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225, 230 (2004) (“When the slave chooses slavery its death is perfect and eternal. The slave chooses slavery when the master’s mastery becomes the sublime notion of rule of law.”).

199. Upon liberation, Saint-Domingue became Haiti, also spelled Hayti and Ayiti.

*Mutilations were common . . . [T]heir masters poured burning wax on their arms and hands and shoulders, emptied the boiling cane sugar over their heads, burned them alive, roasting them on slow fires, filled them with gunpowder and blew them up with a match; buried them up to the neck and smeared their heads with sugar that the flies might devour them; . . . made them eat their excrement, drink their urine and lick the saliva of other slaves.*²⁰⁰

Torture is an effective instrumentality of subjugation and structural oppression because it is situated at the intersection of manifest personal violence and latent personal violence. Frequent exhibitions of torture, unrestrained manifest personal violence, produce a climate of latent personal violence. In Saint-Domingue, torture was the primary modality of punishment for the sin of Blackness and transgressions against white supremacy. Thus, the Black body was the tablet upon which white supremacy published its power and legitimized its authority.

The majority of slaveowners in Saint-Domingue propagated a cycle of manifest personal violence and latent personal violence based on the presupposition that the threat of torture was necessary to maintain slavery and societal stability.²⁰¹ Slaveowners used gruesome, public torture to institute a policy of terror amongst slaves. The ideology that God ordained slavery as consistent with the natural order placed slaveowners in a position of dominance over their slaves. When a slave disobeyed his master, he was disobeying God.²⁰² The Fourth Commandment of white supremacy is honor your master, that your days may be long in the land that the Lord your God has given him.

However, the Saint-Domingue slaveowners' position was diametrically opposed to that of King Louis XIV. In 1685, King Louis XIV implemented The Code Noir (the "Code") to govern the relationship between slaves and slaveowners.²⁰³ African slaves outnumbered whites, 450,000-500,000 to 30,000,²⁰⁴ and when coupled with the barbaric conditions on the island, many predicted a slave insurrection was inevitable.

200. JAMES, *supra* note 186, at 12-13.

201. See GALTUNG, *supra* note 18, at 126 n.19 ("Repressive regimes would actually say . . . to terrorize the population once is not enough to keep them submissive, they may still start getting ideas. Terror has to be replenished, the vessel is leaky one . . .").

202. *Colossians* 3:22-25 (New Int'l Version) ("Slaves, obey your earthly masters in everything; and do it, not only when their eye is on you and to curry their favor, but with sincerity of heart and reverence for the Lord. Whatever you do, work at it with all your heart, as working for the Lord, not for human masters, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Christ you are serving.").

203. See JAMES, *supra* note 186, at 11.

204. JEREMY D. POPKIN, *FACING RACIAL REVOLUTION: EYEWITNESS ACCOUNTS OF THE HAITIAN INSURRECTION* 6 (2008).

The Code contained express prohibitions on torture and provided slaves with legal remedies. Under Article 26 of the Code, slaves could bring a complaint to the royal prosecutor in cases of malnourishment, lacking of clothing, or improper maintenance; Article 42 mandated punishment for masters who tortured or mutilated their slaves.²⁰⁵ Masters or overseers could be prosecuted for killing slaves; but prosecutions were rare.²⁰⁶

Arguably, the Code's prohibitions on torture were instead prohibitions on excessive medieval torture as punishments for "trivial" offenses, because by definition, enslavement is torture, and the punishments prescribed by the Code itself were methods of torture. Slaves could be killed, mutilated, whipped, chained, beaten with rods, or branded for any offense that challenged white supremacy.²⁰⁷

The fugitive slave who has been on the run for one month from the day his master reported him to the police, shall have his ears cut off and shall be branded with a fleur de lys on one shoulder. If he commits the same infraction for another month, . . . he shall have his hamstring cut and be branded with a fleur de lys on the other shoulder. The third time, he shall be put to death.²⁰⁸

The Code's limited definition of torture reflected the ideologies of white supremacy. Africans were inherently inferior, human-beasts and therefore were not entitled to fully benefit from Enlightenment Era principles concerning the natural rights of man and excessive punishment.

205. ANTHOLOGY OF LA. LITERATURE, CODE NOIR arts. 26, 42, http://www2.latech.edu/~bmagee/louisiana_anthology/texts/louis_xiv/louis_xiv—code_noir_english.html [<https://perma.cc/43PK-BSJS>] (last visited Aug. 19, 2021) [hereinafter CODE NOIR] (citing LOUIS XIV, "THE 'CODE NOIR' (1685)" (John Garrigus trans., 2012), <http://les.traitemnegrieres.free.fr/39_esclavage_code_noir_agl.html>).

206. See, e.g., JAMES, *supra* note 186, at 22–24 (explaining that irrespective of laws passed to protect enslaved persons, slaveowners abided by the belief that said laws could and should be disregarded because they posed a threat to the peace and stability of the island). The Le Jeune case exemplifies the unwillingness of officials to prosecute slaveowners for even the most egregious crimes. In 1788, the slaves of Le Jeune attempted to have him prosecuted for murdering and torturing a number of his slaves. The judges ruled in Le Jeune's favor despite overwhelming proof that Le Jeune tortured and killed his slaves. The Governor and the Intendant wrote to the presiding Minister, "it seems that the safety of the colony depends on the acquittal of Le Jeune." *Id.*

207. CODE NOIR arts. 15, 16, 18, 38, and 42 (John Garrigus trans.), http://www2.latech.edu/~bmagee/louisiana_anthology/texts/louis_xiv/louis_xiv—code_noir_english.html [<https://perma.cc/2CCJ-KQQS>] (last visited Apr. 18, 2021).

208. CODE NOIR art. 38 (John Garrigus trans.), http://www2.latech.edu/~bmagee/louisiana_anthology/texts/louis_xiv/louis_xiv—code_noir_english.html [<https://perma.cc/2CCJ-KQQS>] (last visited Apr. 18, 2021).

Despite the Code, slaveowners in Saint-Domingue still implemented a regime of brutality and terrorism.²⁰⁹ The culture²¹⁰ of torture was so notorious that the Code was revised and reinstated by ordinance because small uprisings began to occur with increasing frequency, generating fears that they would evolve into a massive slave insurrection.²¹¹ The new Code limited managers' and overseers' discretion so that they could not give slaves more than fifty lashes of the whip, beat them with a stick, mutilate them, or kill them, subject to provided exceptions.²¹² However, the revised Code was rarely enforced because white supremacy trumped logic. Slaveowners held steadfast to the idea that torture was an effective deterrent.²¹³

Torture was intended to be a spectacular display of white supremacy's power. Yet, ironically, slaves and slaveowners were locked in a perpetual²¹⁴ psychological battle.²¹⁵ Slaves actively resisted subjugation. They committed suicide, an act that reaffirmed the slave's ultimate dominion over his body.²¹⁶ Slaveowners put torture collars around the necks of women suspected of having abortions.²¹⁷ The master would not remove the torture collar until the woman produced a child.²¹⁸ Women used abortions to exercise agency over their bodies and undermine their masters' ability to reap the full economic benefits of slavery. One third of the children born to slaves died within the first few days of birth from jaw-sickness, which caused their jaws to mysteriously lock, preventing them from consuming food.²¹⁹ Notably, jaw-sickness did not afflict white infants.²²⁰ Slaves continuously conspired to overthrow their masters. A

209. EDUARDO GRÜNER, *THE HAITIAN REVOLUTION: CAPITALISM, SLAVERY, AND COUNTER-MODERNITY* 100 (Ramsey McGlazer trans., Polity Press 2020) (2017).

210. See Galtung, *supra* note 142, at 291, 296-301 (discussing "cultural violence" and examples of it).

211. MALICK W. GHACHEM, *THE OLD REGIME AND THE HAITIAN REVOLUTION* 156-57 (2012).

212. *Id.* at 156-58.

213. See LAURENT DUBOIS, *AVENGERS OF THE NEW WORLD: THE STORY OF THE HAITIAN REVOLUTION* 50 (2005).

214. See FOUCAULT, *POWER*, *supra* note 78, at 347 ("[B]etween a relationship of power and a strategy of struggle there is a reciprocal appeal, a perpetual linking and a perpetual reversal. At every moment, the relationship of power may become a confrontation between two adversaries.").

215. See JAMES, *supra* note 186, at 18.

216. See GRÜNER, *supra* note 210, at 89.

217. See JAMES, *supra* note 186, at 13.

218. *Id.*

219. JAMES, *supra* note 186, at 16-17 ("The Negro midwives alone could cause it, and it is believed that they performed some simple operation on the newly-born child which resulted in the jaw-sickness.").

220. *Id.*

common song was: “Eh! Eh! Bomba! Heu! Heu! Canga, Bafio té! Canga, mouné de lé! Canga, do ki la! Canga, li!” which translated to: “We swear to destroy the whites and all that they possess; let us die rather than fail to keep this vow.”²²¹

Poison was one of the most common methods of resistance.²²² Slaves poisoned other slaves (including their spouses and children), their owners, and other whites.²²³ In 1758, Macandal, a West African slave, was burned at the stake for poisoning whites and for teaching slaves throughout the colony how to use poison (“Macandalisme”).²²⁴ Macandalisme was a crime with a dynasty and thus, public torture was the only appropriate penalty.

Consequently, white supremacists used torture as a means of exacting retribution for crimes, real and imagined, in a manner that was both personal and public. Masters worked slaves to death;²²⁵ put them in barrels with studded spikes and rolled down mountainsides;²²⁶ ordered them devoured by dogs, mutilated their genitalia, and subjected them to other equally demented forms of torture.²²⁷ Like the monarchical torture Foucault described, the torture consisted of the methodical application of regulated pain. The type, duration, and intensity of the torture correlated with the gravity of the crime, subject to the master’s caprice. When a slaveowner publicly tortured a Black body, the slaveowner was attempting to reaffirm his power, reconstitute the injured body of white supremacy, and reactivate the policy of terror.²²⁸ The slaveowner wanted the body to serve as a punitive signpost to other slaves that reinforced the omnipresence of latent violence.

For example, when French general, Donatien-Marie-Joseph de Vimeur, Vicomte de Rochambeau, took command of the French forces during the Haitian Revolution, he purchased man-eating dogs from Cuba and brought them to Saint-Domingue to torture and murder Black people:

He [Rochambeau] was following in a venerable tradition: three centuries before, dogs had been introduced on the island

221. *Id.* at 18.

222. See CAROLYN E. FICK, *THE MAKING OF HAITI: THE SAINT DOMINGUE REVOLUTION FROM BELOW* 59-73 (1990) (describing the “epidemic” of poisonings surrounding the life and death of notorious rebel slave Makandal).

223. JAMES, *supra* note 186, at 16.

224. FICK, *supra* note 223, at 70-72; JAMES *supra* note 186, at 21.

225. See LAURENT DUBOIS, *HAITI: THE AFTERSHOCKS OF HISTORY* 20-21 (2012).

226. Sara E. Johnson, “*You Should Give Them Blacks to Eat:*” *Waging Inter-American Wars of Torture and Terror*, 61 *AM. Q.* 65, 90 n.9 (2009).

227. *Id.* at 68-69; JAMES *supra* note 186, at 12.

228. See FOUCAULT, *supra* note 3, at 57-58.

by Columbus in order to terrorize the indigenous population. Aiming to “lift white morale,” he set up a public demonstration of the dogs’ abilities, establishing a “circus” in the courtyard of Le Cap’s Government House, the old home of the Jesuits. (Fond of euphemisms for the horrors he was inflicting, Rochambeau referenced the practices of ancient Rome in calling the punishment of being eaten alive by dogs “descending into the arena.”) Although some principled individuals refused to attend the event, a huge crowd gathered to watch as a black prisoner—the domestic of a French officer—was placed at the mercy of the dogs. To the dismay of the crowd, the dogs showed little interest in attacking the servant until his master intervened, slicing open the domestic’s stomach to draw them into devouring him.²²⁹

The success of the Revolution confirmed the futility of torture and nullified the structural soundness of the “breaking” process. If Haitian slaves, who were subjected to notoriously perverse torture, still summoned the psychological strength to revolt, the logical implication was that it was only a matter of time before slaves in “less brutal conditions” rebelled. The danger was that Haiti was not an anomaly; it was an inevitable outcome of slavery. The colonial world was forced to come face to face with the “natural self” of Africans,²³⁰ which is the antithesis of an inherently inferior child or man-beast governed by his id. The natural self is a fully actualized, willful adult that possesses the intellectual capacity to exercise agency in all areas of her life. In a world where interlocking systems of racial oppression formed the framework for society, a slave’s ability to maintain her natural self posed the greatest barrier to subjugation.²³¹ The natural self did not accede to the belief that white power was all-encompassing, inescapable, and indomitable. Hence, for Blacks and Africans, the Revolution signified the ability of slaves to resist and withstand

229. DUBOIS, *supra* note 214, at 292.

230. RANDALL ROBINSON, AN UNBROKEN AGONY: HAITI, FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT 11-12 (2007). Robinson explains that the mass influx of enslaved Africans into St. Domingue meant that the colonists did not have sufficient time “to forcibly reacculturate them. As a result, the newly arrived Africans developed (or retained in critical mass) African memories, mores, and behaviors that tied them more closely together than enslaved Africans may have been in other French colonies.” *Id.* I argue that the natural self of enslaved Africans was the self that retained African memories, mores and behaviors, and thus, had not been forced to abandon that which creates a sense of self-determination and agency.

231. See DAVIS, *supra* note 32, at 51-52.

torture and to use the ability to endure it as a mass transformative experience that transcended geography.²³²

B. *In Fear of Revolutionary Contagion and Insurrection*

1. A Crime with a Dynasty

The death of approximately 145,000 English, Spanish, and French soldiers and colonists under the bloody hatchet of the Haitians²³³ was the natural consequence of the “ten thousand recollections” of the injuries the Haitians had sustained at the hands of white supremacy.²³⁴ Their deaths “produce[d] convulsions” that resonated throughout the world.²³⁵ Eighty-nine years later Frederick Douglass declared, “When [the Haitians] struck for freedom . . . they struck for the freedom of every black man in the world.”²³⁶ The Revolution permanently ruptured the psychological dimensions of slavery by exposing the cracks in white-supremacy-based, psychological inertia. In describing the consequences of the Haitian Revolution, Jefferson wrote that “the revolutionary storm now sweeping the globe will be upon us,” referring to it as almost inevitable, using the phrase, ‘Murmura, venturos nautis prodentia ventos’—“the breezes warning the sailors of the coming gale.”²³⁷

Latent violence permeated the American psyche and haunted the lives of slaves, slaveowners, abolitionists, moderates, and free citizens, alike. The institution of slavery, with its reliance on unpredictable, unrestrained, manifest personal violence, had created an atmosphere of extreme instability. The American populace was consumed by fears of im-

232. See MATTHEW J. CLAVIN, *TOUSSAINT LOUVERTURE AND THE AMERICAN CIVIL WAR: THE PROMISE AND PERIL OF A SECOND HAITIAN REVOLUTION* 122–23 (2010); LEON D. PAMPHILE, *HAITIANS AND AFRICAN AMERICANS: A HERITAGE OF TRAGEDY AND HOPE* 9–10 (2001).

233. See ALFRED N. HUNT, *HAITI’S INFLUENCE ON ANTEBELLUM AMERICA: SLUMBERING VOLCANO IN THE CARIBBEAN* 2 (1988).

234. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 147 (1785), <https://docsouth.unc.edu/southlit/jefferson/jefferson.html> [<https://perma.cc/B2T5-EA2Q>] (last visited Apr. 19, 2021).

235. *Id.*

236. Frederick Douglass, *Remarks at Dedication Ceremonies at the Haitian Pavilion, World’s Columbian Exposition, Chicago* (Jan. 2, 1893), <http://faculty.webster.edu/corbetre/haiti/history/1844-1915/douglass.htm> [<https://perma.cc/MN64-SKSY>] (last visited June 2, 2021).

237. Letter from Thomas Jefferson to St. George Tucker (Aug. 28, 1797), <https://founders.archives.gov/documents/Jefferson/01-29-02-0405> [<https://perma.cc/J3T3-ZB6S>] (last visited June 2, 2021).

minent slave insurrections and race wars.²³⁸ The consensus was that the institution of slavery was unsustainable. The question was not if slavery was going to end, it was how.²³⁹ Post Haitian liberation, the prevalent fear was that Black revolutionary contagion would spread to American slaves and ignite a massive slave insurrection and race war.²⁴⁰ Jefferson warned that Haiti had set a bad example and that the “pestilence must be confined to the island.”²⁴¹ The fear was not limited to the territorial bounds of the United States. The U.S. government was concerned that Black revolutionary contagion would spread to slave colonies in the Caribbean and South America, resulting in a decisive end to slavery and severe damage to the global economy.

Undoubtedly, the Revolution generated Black revolutionary contagion. However, it must be noted that Black revolutionary contagion was also a product of the surge of revolutionary contagion that fueled the American and French Revolutions. Black revolutionary contagion was pathologized as the product of a dangerous and deviant revolutionary consciousness because it involved Black people. It was treated as a disease that needed to be contained. Republicans resorted to violence to stop Blacks from celebrating the Fourth of July.²⁴² Blacks in Philadelphia were beaten for trying to participate in Independence Day celebrations out of fear they would catch revolutionary contagion.²⁴³ In contrast, the *white* revolutionary contagion that fueled the American and French revolutions was deified.

To protect the property rights in the Black body, which were deemed to be secured by the Constitution, the United States racialized the Haitian Revolution to delegitimize it. The founding fathers unapologetically averred that violence was a necessary and noble component of revolution.²⁴⁴ The mob atrocities in the French Revolution were justified as the price of freedom.²⁴⁵ However, some critics characterized the Hai-

238. See FOUCAULT, *supra* note 7, at 59-60 (defining “race war”).

239. CLAVIN, *supra* note 224, at 43.

240. See HUNT, *supra* note 234, at 156.

241. Eduardo Galeano, *Haiti: The White Damnation* (Franklin Garcia trans., Jan. 15, 2013) (2004), <http://dcireporter.com/haiti-the-white-damnation/> [<https://perma.cc/UMP9-3QBT>].

242. Simon P. Newman, *American Political Culture and the French and Haitian Revolutions: Nathaniel Cutting and the Jeffersonian Republicans*, in *THE IMPACT OF THE HAITIAN REVOLUTION IN THE ATLANTIC WORLD* 72, 84 (David P. Geggus ed., 2001).

243. *Id.*

244. DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 53-56 (1989).

245. See JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 127 (1997).

tian Revolution as especially violent, referring to it as savage anarchy.²⁴⁶ The use of violence as proof of the inherently savage nature of Africans.²⁴⁷ Haitian women were criticized as fighting with viciousness equivalent to the men.²⁴⁸ French Captain-General Charles LeClerc observed, Haitian rebels “die with an incredible fanaticism; they laugh at death. It’s the same with the women.”²⁴⁹ Leclerc reasoned that the only way the French could prevail was if they killed all women and men twelve-years-old and older.²⁵⁰

Factions of revolutionaries inflicted unmerciful violence,²⁵¹ while others, including Haitian General and revolutionary leader, Toussaint Louverture, insisted on restraint. Slaves killed their masters and the masters’ family.²⁵² Revolutionaries burned plantations.²⁵³ They put their victims’ heads on pikes and tortured prisoners of war.²⁵⁴ In response to Rochambeau’s barbarism, they slaughtered whole populations, including women and children.²⁵⁵ After the French defeat on January 1, 1804, Jean-Jacques Dessalines ordered some remaining whites adjudged hostile and loyal to France to be executed.²⁵⁶

So what? It is unreasonable to expect a population that has witnessed its kind devoured by dogs, roasted alive, eaten alive by fire ants, and mutilated to treat their oppressors mercifully. It is absurd to expect a woman to abstain from taking all measures to liberate herself from the individuals that have caused her to be sterile for years after the middle passage due to the physical trauma of the voyage, raped her, and forced her to kill her child or otherwise watch her child be enslaved and tortured. If such torture was the punishment for trivial transgressions, they could only imagine the torture that awaited them if they were unsuccessful. The rational choice was to secure a decisive victory.

246. RAYFORD W. LOGAN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH HAITI 1776-1891* 33 (2011); Timothy M. Matthewson, *George Washington’s Policy Toward the Haitian Revolution*, 3 *DIPLOMATIC HIST.* 324, 324 (1979).

247. See CLAVIN, *supra* note 224, at 11-12.

248. Jayne Boisvert, *Colonial Hell and Female Slave Resistance in Saint-Domingue* 7 J. HAITIAN STUDIES 61, 72-75 (2001); Philippe Girard, *Rebelle with a Cause: Women in the Haitian War of Independence, 1802-1804*, 21 *GENDER & HIST.* 60, 68 (2009).

249. Letter from General Charles Leclerc to the Navy Minister Denis Decrès (Aug. 9, 1802) in *THE HAITIAN REVOLUTION: A DOCUMENTARY HISTORY* 177 (David Geggus ed., 2014).

250. HENRY ADAMS, *HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* 280 (Libr. of Am. 1986) (1889).

251. GRÜNER, *supra* note 210, at 118.

252. See JAMES, *supra* note 186, at 88.

253. *Id.*

254. DUBOIS, *supra* note 226, at 27; JAMES, *supra* note 186, at 88-89.

255. DUBOIS, *supra* note 214, at 111.

256. GRÜNER, *supra* note 210, at 118; DUBOIS, *supra* note 226, at 42.

American newspapers incessantly published stories about Haitian atrocities, crying “[B]etween five and six hundred white persons fell under the bloody hatchet of the Haitians!” which increased fears concerning the domestic Black population.²⁵⁷ Government officials pushed rumors of impending domestic slave insurrections.²⁵⁸ General Benjamin Butler wrote both officially and privately that it was impossible to free the Negroes “without a San Domingo [sic] A single whistle from me would cause every white man’s throat to be cut in this city. . . . There is no doubt that an insurrection is only prevented by our bayonets.”²⁵⁹ South Carolina Governor Charles Pinckney warned President Washington stating, “a flame . . . will extend to all the neighbouring islands . . . and may prove [displeasing] . . . to the Southern States.”²⁶⁰ Slaveowners reported that slaves were becoming insolent.²⁶¹ Jefferson warned, “I become daily more and more convinced that all the West India islands will remain in the hands of the people of colour, and a total expulsion of the whites sooner or later take place. It is high time we should foresee the bloody scenes which our children certainly, and possibly ourselves (South of Patowmac) have to wade through, and try to avert them.”²⁶²

Their fears materialized. In the years during and following the Revolution, reported slave revolts increased. Several slave revolts, including Gabriel’s Rebellion (August 30, 1800) and Denmark Vesey’s plot (June 1822), cited the Revolution as inspiration.²⁶³ On January 8, 1811, Charles Deslondes, a mulatto slave from Louisiana, led an army of approximately two hundred slaves in the largest slave uprising in the United States, the German Coast Uprising.²⁶⁴ They marched from the German Coast of Louisiana towards New Orleans, burning plantations and killing and maiming slaveowners.²⁶⁵ The governor of New Orleans called on U.S.

257. ELEANOR JONES HARVEY, ALEXANDER VON HUMBOLDT AND THE UNITED STATES: ART, NATURE, AND CULTURE 219 (2020).

258. HUNT, *supra* note 234, at 182.

259. *Id.*

260. Letter from Charles Pinckney, Governor of South Carolina, to George Washington (Sept. 20, 1790), <https://founders.archives.gov/documents/Washington/05-08-02-0379> [<https://perma.cc/D8CU-7ZAH>].

261. JULIUS S. SCOTT, THE COMMON WIND: AFRO-AMERICAN CURRENTS IN THE AGE OF THE HAITIAN REVOLUTION 198 (2018).

262. Letter from Thomas Jefferson to James Monroe (July 14, 1793), <https://founders.archives.gov/documents/Jefferson/01-26-02-0445> [<https://perma.cc/3B8H-6AVG>] (last visited June 2, 2021).

263. NATHAN IRVIN HUGGINS, BLACK ODYSSEY: THE AFRICAN AMERICAN ORDEAL IN SLAVERY 226-27 (Vintage Books ed., 1990) (1977); SCOTT, *supra* note 262, at 210.

264. SCOTT, *supra* note 262, at 187; WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 18 (2013).

265. JOHNSON, *supra* note 265, at 19.

Army General, Wade Hampton, and a small group of soldiers to defend the city.

On January 10, Hampton's army, volunteers, and an army formed by planter Charles Perret found Deslondes' army and "une grand carnage" ensued.²⁶⁶ Deslondes was tortured on the battlefield, "his arms were amputated; then his thighs were shattered one after the other with a musket; finally he was burned alive."²⁶⁷ The armies hunted survivors and twenty-five were tried in New Orleans and sentenced to death. The judge in New Orleans was a white Haitian immigrant and gave explicit instructions on how prisoners should be executed and displayed.²⁶⁸ Some had their heads placed on pikes. The bodies of others were hung in conspicuous places throughout the city and left to rot.²⁶⁹ The judge wanted them to be punitive signposts that reconstituted the injured body of white supremacy and deterred future revolts.²⁷⁰

Evidence suggests that states responded to the Revolution in various ways. New York passed an emancipation law in 1799, and New Jersey followed in 1804, as preemptive measures in recognition of the inevitable abolition of slavery.²⁷¹ Some states tightened slave codes and increased surveillance of free communities of color.²⁷² Fear of revolt among the enslaved was used to justify a spatial expansion of slave territory to avoid replicating the conditions that led to the Revolution, namely, the concentration of²⁷³ Saltwater Africans²⁷⁴ who maintained the "passions of men."²⁷⁵ Saltwater Africans possessed memories of their life before slavery,²⁷⁶ had a sense of agency, and maintained their original non-Christian beliefs.²⁷⁷ Vodou²⁷⁸ and other forms of syncretism²⁷⁹ were the lifeblood of

266. *Id.* at 21.

267. *Id.*

268. *Id.* at 21-22.

269. *Id.*

270. *See id.* at 22.

271. *See* Geggus, *supra* note 243, at 17.

272. *See id.* at 18.

273. *Id.* at 5; ROBINSON, *supra* note 231, at 12.

274. *See* STEPHANIE E. SMALLWOOD, SALTWATER SLAVERY: A MIDDLE PASSAGE FROM AFRICA TO AMERICAN DIASPORA 7 (2007).

275. *See* Geggus, *supra* note 243, at 5-6.

276. *See* SMALLWOOD, *supra* note 275, at 187.

277. ROBINSON, *supra* note 231, at 12.

278. GRÜNER, *supra* note 210, at 90.

279. HUGGINS, *supra* note 264, at 69; PAMPHILE, *supra* note 233, at 61-62 ("In their struggle against oppression they invoked their African gods, especially the war gods, Ogun and Shango and others.' . . . Once they arrived in Saint-Domingue, slaves relied on ancestral gods for 'spiritual comfort, protection from misfortune and cures for . . . ills.' . . . Haitians have modified and enriched the Vodou rites and symbols. Haitian slaves found Catholicism to be an ideal venue for their Vodou practices. In the religious acculturation

the Revolution.²⁸⁰ Haitian slaves had not internalized the Curse of Ham or “the last shall be first, and the first, last,” promise.²⁸¹

2. Dangerous Intellectualism

A significant number of Haitian slaves were former soldiers. Experienced in “military tactics involving small, mobile autonomous units . . . [a]ll they needed were weapons and opportunity.”²⁸² The revolutionaries’ military knowledge negated pseudoscientific theories concerning the intellectual inferiority of Africans and confirmed the danger of enslavement. Whereas white supremacists perpetuated the myth of the inherent intellectual inferiority of Africans, they simultaneously believed that “[t]he safety of the whites demands that we keep the Negroes in the most profound ignorance.”²⁸³

The military prowess and political acumen demonstrated by Haitian generals was indisputable. They beat the greatest armies of the world, Great Britain and France, and outmaneuvered the most revered generals of the colonial world, Thomas Maitland of Great Britain and Napoleon, Leclerc, and Rochambeau of France.²⁸⁴ British and French generals were awed by their use of precise European military maneuvers in conjunction with guerilla warfare.²⁸⁵ Louverture was heralded by many as a military genius and compared to George Washington.²⁸⁶ Louverture, Christophe, Dessalines, and Rigaud were political tacticians as well.²⁸⁷ They capitalized on the competing economic and political interests of the United States, Great Britain, and France and leveraged them to sustain Haiti’s economy, secure military assistance, and obtain promises of non-intervention.²⁸⁸

of the slaves, there emerged a syncretism, ‘the recombinations of cultural elements from different societies into new wholes.’ . . . Catholic saints became ‘incorporated in the repertoire of their supernatural beings.’ The deities, called *lwas*, are analogous to Catholic saints.”).

280. GRÜNER, *supra* note 210, at 91.

281. *Matthew* 20:16.

282. DUBOIS, *supra* note 226, at 23.

283. JAMES, *supra* note 186, at 17.

284. See MATTHEWSON, *supra* note 8, at 65, 87, 113–15.

285. See, e.g., JAMES M. PERRY, ARROGANT ARMIES: GREAT MILITARY DISASTERS AND THE GENERALS BEHIND THEM 80 (1996).

286. Cf. MADISON SMARTT BELL, TOUSSAINT LOUVERTURE: A BIOGRAPHY 3, 298–99 (Vintage Books 2008).

287. See generally LOGAN, *supra* note 247.

288. See *id.* at 41, 63–64.

Haitians demonstrated a command of the requisite psychological dimensions of war.²⁸⁹ The sambo²⁹⁰ trope was used to assuage white fears of slave insurrections.²⁹¹ White supremacists asserted that Africans did not have the intellectual or psychological capabilities to organize and execute a successful rebellion because war is multidimensional.

Psychological factors influence decision making at all levels, and individuals must consider multiple criteria in their decision-making processes.²⁹² The most important decision is the one to declare war. As a condition precedent, the individual must overcome the psychological inertia that prevents her from engaging in the initial acts of direct violence and must also accept imminent retributive direct violence intended to cause fatal somatic harm. Under the best of circumstances, the individual would be in a position to make a rational assessment of the risk involved and decide to act where there is a high probability of success.²⁹³ In Haiti's case, there was no such high probability of success and former slaves had to overcome the collective psychological inertia formed as a result of being subjected to the horrors of slavery. Approximately 200,000 Haitian rebels accepted the reality of imminent direct violence and died.

The psychological aspects of war are not limited to urgent battlefield decisions. War must be an experience that resonates with the soldiers' souls and with the population that is deemed to be the primary beneficiary of the war. Leaders and soldiers must continuously feed the spirit of the war.²⁹⁴ Leaders must create an environment that motivates soldiers to persevere. The organizational structure of the army must be sound.²⁹⁵ The army must be disciplined,²⁹⁶ and soldiers must be rewarded for and allowed to enjoy their victories.²⁹⁷ The ideology that propelled the soldiers into war must be reinforced.²⁹⁸ Therefore, the psychological dimensions of war demand intelligence that circulates vertically and laterally and is not limited to a single figurehead.

289. See generally Anthony Kellett, *The Soldier in Battle: Motivational and Behavioral Aspects of the Combat Experience*, in PSYCHOLOGICAL DIMENSIONS OF WAR 215-35 (Betty Glad ed., 1990).

290. Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 436 (2006).

291. DAVIS, *supra* note 32, at 172.

292. PSYCHOLOGICAL DIMENSIONS OF WAR, *supra* note 290, at 83-87, 122.

293. See Anatol Rapoport, *The Problem with Gains-Maximizing Strategies*, in PSYCHOLOGICAL DIMENSIONS OF WAR, *supra* note 290, 91-115, 91-100.

294. Kellett, *supra* note 290, at 215-31.

295. See *id.* at 219-20.

296. *Id.* at 220.

297. *Id.*

298. See *id.* at 227.

Secondly, the former slaves synthesized and appropriated the egalitarian principles enunciated in the Declaration of Rights of Man and Citizens and the Declaration of Independence.²⁹⁹ They adopted the lexicon of natural rights, freedom from tyranny, and self-governance and used it to legitimize self-liberation.³⁰⁰ Witnesses stated Haitian revolutionaries sang the French Revolutionary song, *La Marseillaise*, as they went into battle.³⁰¹

In assessing how Great Britain, France, Spain, and the United States coalesced,³⁰² despite their competing interests, they were clearly vexed by the potential ramifications of allowing Haitian intellectualism to go unchecked.³⁰³

3. The Economy of the Black Body

The Black body's constitution as an economic engine was possible because it was bound by a system of subjugation, White supremacy, whose singular focus was perfecting a racialized docility-utility relation.³⁰⁴ While Jefferson enunciated a romanticized vision of the United States as an "empire of liberty"³⁰⁵ with an economy sustained by self-sufficient yeoman patriarchs, the reality was that liberty was voided in the interest of preserving America's slavocracy and slave capitalism.³⁰⁶ White supremacy, aristocratic sentimentalism,³⁰⁷ and capitalism converged to create an economy dependent upon the objectification of the Black body as constitutionally protected property.³⁰⁸

299. GRÜNER, *supra* note 210, at 65; FARLEY, *supra* note 199, at 250.

300. GRÜNER, *supra* note 210, at 141-147.

301. AFRICAN DIASPORAS IN THE NEW AND OLD WORLDS: CONSCIOUSNESS AND IMAGINATION 111 (Geneviève Fabre & Klaus Benesch eds., 2004).

302. FOUCAULT, *supra* note 7, at 75-84 (expounding upon the origins of the perpetual race war, and arguing the creation of a binary society, white vs. Black, is traceable to the Roman empire). Subsequently, "western" has become a fictitious racial classification around which countries with competing interests coalesce to "win" the race war. *See id.*

303. *See* DAVID NICHOLLS, FROM DESSALINES TO DUVALIER: RACE, COLOUR AND NATIONAL INDEPENDENCE IN HAITI, 61-62 (Rutgers Univ. Press 1996).

304. *See* JOHNSON, *supra* note 265, at 10.

305. *See generally* ROBERT W. TUCKER & DAVID C. HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON (1990).

306. GRÜNER, *supra* note 210, at 29.

307. GALTUNG, *supra* note 18, at 248.

308. *See generally* JOHN ASHWORTH, SLAVERY, CAPITALISM, AND POLITICS IN THE ANTEBELLUM REPUBLIC, 1820-1850 (1995); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716 (1993) ("The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race – only Blacks were subjugated as slaves and treated as property.").

The United States had an interest in maintaining property rights in Black bodies, domestically and abroad, as correlative instruments of capital and fixed capital.³⁰⁹ Slavery was the backbone of America's economy.³¹⁰ A massive domestic slave insurrection would have crippled the American economy. Before the Revolution, St. Domingue was referred to as the "Pearl of the Antilles" because it was the wealthiest colony in the world³¹¹ and the economic epicenter of the Atlantic slave trade.³¹² It produced half of the world's coffee,³¹³ more sugar than Jamaica, Cuba, and Brazil, combined, and exported large quantities of molasses, indigo, and cotton.³¹⁴

John Adams acknowledged America's economy depended on St. Domingue's economy.³¹⁵ First, St. Domingue's economic supremacy reduced Great Britain's economic power in the Atlantic, which helped the United States advance its economic interests in the region. Additionally, St. Domingue was America's second-largest trading partner.³¹⁶ America's trading relationship with St. Domingue generated an irreplaceable revenue stream that stabilized America's economy. The island consumed large quantities of American lumber and meat.³¹⁷ Louverture relied on the United States for his supply of munitions.³¹⁸ The United States recognized that a permanently destabilized economy in St. Domingue would have a domino effect that would extend to America's economy and compromise its foothold in the Caribbean.

4. The Decision

The cumulative effect of the foregoing led to America's decision to discipline and punish Haiti. By deploying a public penalty that linked Haiti's crime to abject failure and shame, it sought to reduce the attractiveness of emulation and extinguish the glory of Haiti's crime.³¹⁹ In disciplining Haiti, the United States and the colonial powers could "dis-

309. Ralph V. Anderson & Robert E. Gallman, *Slaves as Fixed Capital: Slave Labor and Southern Economic Development*, 64 J. AM. HIST. 24, 25 (1977).

310. See JOHNSON, *supra* note 265, at 31-32.

311. *Id.* at 22; MATTHEWSON, *supra* note 8, at 3.

312. POPKIN, *supra* note 205, at 6.

313. *Id.*

314. DUBOIS, *supra* note 226, at 19.

315. DUBOIS, *supra* note 226, at 137; LOGAN *supra* note 238, at 32.

316. See N. Pierre, *Liberal Trade in the Postcolonial Americas: Haitian Leaders and British Agents, 1806-1813*, 21 J. HAITIAN STUD. 68, 69 (2015).

317. DUBOIS, *supra* note 226, at 137.

318. *Id.*

319. See FOUCAULT, *supra* note 3, at 109.

pense with” the “violent relation” of slavery and military action and still obtain “effects of utility at least as great”—economic gain, diminution, and docility.³²⁰

III. RACIALIZED STRUCTURAL VIOLENCE IN AMERICAN FOREIGN POLICY

Racialized structural violence is the central precept of American foreign policy. American foreign policy is a complex bundle of power technologies designed to elicit docility from Black and Brown nations. It represents the institutionalization of the techniques and instruments of discipline on a global scale, such that America’s power, right, and obligation to discipline and punish Black and Brown nations has been normalized as a rational function of our global society. Using trade agreements, embargoes, sanctions, loans, and philanthrocapitalism, the United States, with U.N. assistance, coerces nations into an international system of constraints and privations, obligations, and prohibitions that allow the United States to operate as a global panopticon,³²¹ subjecting them to its concentrated and uninterrupted disciplinary gaze. Nations are supposed to internalize the disciplinary gaze and assent to self-regulation out of fear that they are being observed. The disciplinary gaze reinforces the nation’s inferior position in the power relation and subtly transforms it into a docile nation.

The United States politically and economically incarcerates delinquent, i.e., undocile nations, by precluding them from interactions in international systems and obstructing their efforts to exercise agency. Over time, the attendant isolation and marginalization causes living conditions in the penalized nations to decline until they mirror the complete and austere conditions of prisons. The nations remain incarcerated until they exhibit docility. Thus, the principles of mass incarceration are infused into foreign policy. Through foreign policy, the United States helped develop a superstructure of global apartheid defined by systems of asymmetrical power relations. These structurally violent systems place avoidable limitations on Black and Brown nations that prevent them from maximizing their potential.

America’s power, right, and obligation to discipline and punish Black and Brown nations originated with America’s *need* to discipline and punish a single Black nation, Haiti. Its foreign policy response to the Revolution was a white supremacy-driven calculation that reflected its obsession with maintaining an international racial hierarchy and political

320. *Id.* at 137, 140–41.

321. See FOUCAULT, POWER, *supra* note 78, at 70–73.

investment in the economic uses of the Black body.³²² Thereafter, in dealing with Black and Brown nations that act in contravention of white supremacy, the United States has sought to replicate the power dynamic that it has with Haiti, using the same strategies. Thus, the genesis of racialized structural violence in American foreign policy is directly traceable to America's attempts to mitigate the geo-political consequences of Haitian independence.

The United States attempted to transform Haiti into a docile nation by precluding it from international systems and obstructing its efforts to exercise agency during two eras: 1) 1804 to 1862 and 2) 1915 to 1934. These eras represent Haiti's infancy and, thus, the years in which Haiti was most vulnerable. During both eras, the United States used the art of enclosures as the dominant technique of discipline to create a relationship of dependence that enabled it to exercise disciplinary power over Haiti and to transform Haiti's geographical boundaries into a punitive, disciplinary space. From 1806 to 1862, it politically and economically isolated Haiti by refusing to grant *de jure* recognition of its government. This provided the United States with an opportunity to establish economic supremacy over Haiti. Then, from 1915 to 1934, it politically and economically marginalized Haiti through military occupation and intervention. The United States used its occupation and intervention to coerce Haiti into a system of economic constraints and obligations, rendering Haiti economically docile. America's occupation also created an architecture of control in Haiti's civil and military institutions that inflicted structural violence on Haiti from within.

A. *Establishing a Relationship of Domination: Punishing and Subjugating the "Terrible Republic"*³²³ using Nonrecognition and Economic Coercion

The question of whether to recognize the Haitian government forced the United States to deviate from its philosophical principles and established practice of viewing the recognition of new state governments as a legal duty. In his seminal work, Hersch Lauterpacht analyzes the law of statehood recognition and the two competing theories: the declaratory theory and the constitutive theory.³²⁴ Both theories have undergone a transformation since his article. However, this article applies his archetyp-

322. See DAVIS, *supra* note 32, at 270-71.

323. Letter from Thomas Jefferson to Aaron Burr (Feb. 11, 1799), <https://founders.archives.gov/documents/Jefferson/01-31-02-0015> [<https://perma.cc/V337-BN42>] (last visited Apr. 17, 2021).

324. H. Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 385 (1944) (notably, Lauterpacht discusses America's policy of recognition from the early 1800s to the 1870s; however, he doesn't mention Haiti).

ical arrangement of the two theories because it was most applicable during the period of the Revolution.

The constitutive theory, as commonly propounded, culminates in two assertions. The first is that prior to recognition the community in question possesses neither the rights nor the obligations which international law associates with full statehood; the second is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned. . . . The theory of the declaratory nature of recognition fully accepts the view of its rival that there does not exist in any circumstances a legal duty to grant recognition. At the same time with an obvious lack of consistency, it maintains that prior to recognition the nascent community exists as a State and is entitled to many of the most important attributes of statehood. This means, upon analysis, that the newcomer is entitled as a matter of legal right to claim what are usually regarded as the normal legal consequences of recognition, but that it is not entitled to claim recognition as such.³²⁵

The international personality of a nation vests upon recognition of its legal right to exist and its government's legitimacy.³²⁶ Once the nation and government are recognized, the nation gains access to the international plane. The nation acquires enforceable international rights and obligations that allow it to enter into formal diplomatic relations and bilateral inter-governmental agreements.³²⁷ The legal consequences of the nation's existence are respected pursuant to the principles of international law.³²⁸ Absent recognition, the nation occupies a subordinate position in the international system because it can be easily isolated and marginalized.³²⁹ Therefore, a dominant nation can use recognition as a tool for exerting structural violence against a subordinate nation.

Lauterpacht argues in favor of an arrangement of the constitutive theory where the first assumption, "prior to recognition the community in question possesses neither the rights nor the obligations which international law associates with full statehood,"³³⁰ is governed by the application of a rule of international law that determines if the community possesses

325. *Id.* at 385, 386.

326. *Id.*

327. M. J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE*, 1815-995 (1997).

328. *Id.* at 2-3.

329. See Lauterpacht, *supra* note 325, at 413.

330. *Id.* at 386.

the requisite conditions of statehood.³³¹ The requisite conditions are to be based on objective facts, and not irrelevant tests of statehood like those enunciated by James Lorimer: the degree of civilization of the new State, the legitimacy of its origin, its religion, or its political system.³³² Lauterpacht argues such considerations are subject to political discretion, which is not bound by the law and thus opens the door for an existing nation to exercise arbitrariness, attempt extortion, and attempt intervention at the threshold of the new nation's statehood.³³³ He disavows the second assertion, "recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned," stating recognition should be conceived as a legal duty that vests when the application of a rule of international law establishes that the community has satisfied the requisite objective conditions of statehood. Lauterpacht reasons,

Law must be based on facts – insofar as such facts are not in themselves contrary to law. Successful secession from the parent State is a fact which is not contrary to international law; the same applies to a rebellion resulting in a revolutionary government or in a civil war. This being so, these events are facts which, if law is to approximate to social reality, must through the medium of the legally obligatory act of recognition be permitted to produce the appropriate legal results.³³⁴

If the United States accepted the facts and social realities of Haitian independence in 1804, then it would have conceived recognition of the Haitian government as a legal duty. Haiti successfully revolted against its parent nation. A slave rebellion resulted in a civil war and produced a revolutionary government. France ceased attempts to reassert its authority.³³⁵ The newly independent Haitian government possessed effective authority over the population and a defined geographical territory.³³⁶

Instead, in contradiction of its established and consistent view of recognition as a legal duty based on facts and the natural right of self-determination, the United States refused to grant *de jure* recognition of the Haitian government until 1862. During a trading voyage in 1805,

331. *Id.* at 453.

332. *Id.* at 413, 413 n.66.

333. *Id.* at 413.

334. *Id.* at 390.

335. *See id.* at 392, 428.

336. *Cf. id.* at 412. (Possession of a precisely defined legal territory is not dispositive to an analysis of whether a state should be recognized, "it has been held that the fact that the frontiers of a new State have not yet been definitely decided does not constitute an impediment in the way of its statehood.").

merchants toasted: “The Government of Hayti; founded on the only legitimate basis of authority . . . the people’s choice! May it be as durable as its principles are pure.”³³⁷ In response to the succession of Latin-American states and colonial rebellions, Secretary of State John Quincy Adams wrote to President Monroe on August 24, 1818, expressing that “But there is a stage in such contests when the parties struggling for independence have . . . a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate.”³³⁸

In 1822, President Monroe asserted that when a revolution is incontrovertibly successful, recognition of the government “ought not be resisted.”³³⁹ Later, Adams asserted the United States “yielded to an obligation of duty of the highest order, by recognizing as Independent States, Nations which, after deliberately asserting their right to that character, have maintained and established it against all the resistance which had been or could be brought to oppose it.”³⁴⁰ Recognition was “the mere acknowledgment of existing facts.”³⁴¹ Caesar Rodney, United States Minister to Buenos Aires, stated America would not “have demanded, nor would we have accepted special privileges of any kind in return for an acknowledgement of Independence”³⁴² because America’s founding principles are unalienable rights and equality.³⁴³ In 1837, Secretary of State John Forsyth wrote that recognizing a state was a question of fact, resolved when there is evidence that the state has achieved permanent independence.³⁴⁴ In 1846, Secretary of State James Buchanan wrote, “that it is the settled policy of the United States to recognise the independence of all governments which have manifested to the world that they are *de facto* independent.”³⁴⁵

In 1861, Lincoln alluded to the principle of recognition as a legal duty stating “that he saw no ‘good reason’ why the United States should ‘persevere longer in withholding our recognition of the independence and sovereignty’ of its Caribbean neighbor.”³⁴⁶ By the time the United

337. DUBOIS, *supra* note 226, at 138.

338. Lauterpacht, *supra* note 325, at 402 (emphasis in original); see generally JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES 116-143 (1915).

339. *Id.* at 402.

340. *Id.*

341. *Id.*

342. *Id.* at 403.

343. *Id.*

344. *Id.* at 406.

345. *Id.* at 404 (emphasis in original).

346. DUBOIS, *supra* note 226, at 152.

States granted *de jure* recognition of Haiti on June 5, 1862, only the United States and the Vatican had refused to formally recognize Haiti.³⁴⁷ The “good reason” was white supremacy.³⁴⁸ Nonrecognition was used to discipline and punish Haiti. To justify³⁴⁹ nonrecognition, the United States selectively adopted the constitutive theory and used its political discretion to argue that the Haitian government should not be recognized pursuant to Lorimer’s theory that barbarous and savage populations should not be granted *de jure* recognition.³⁵⁰ To bolster its asserted rationalization, the United States established a regime of truth concerning Haiti, one of its first foreign policy imperatives. The purpose of the regime of truth was 1) to provide the United States with a way to rationalize its hostility towards the Haitian government in order to reconcile its contradictory foreign policy stances; 2) to reinforce the narrative that Haiti was a delinquent that needed to be disciplined; and 3) to dismantle the heroization of Haiti. According to Foucault,

Each society has its regime of truth, its “general politics” of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.³⁵¹

In a white supremacist society, the formation and imposition of racialized regimes of truth are used to justify direct and structural violence against non-whites. The general politics of truth are wedded to the ideologies of white supremacy. The types of discourse which society accepts and makes function as true must be capable of fitting into the paradigm of racial hierarchy. Those charged with saying what counts as true have the power³⁵² and incentive³⁵³ to reformulate the truth through the lens of white supremacy.

347. *Id.* at 142.

348. *See id.* at 140-141.

349. *See* FOUCAULT, POWER, *supra* note 78, at 346 (“[T]o designate the means employed to attain a certain end . . . designate the procedures used in a situation of confrontation to deprive the opponent of his means of combat and to reduce him to giving up the question; it is a question, therefore, of the means destined to obtain victory.”).

350. Karen Knop, *Lorimer’s Private Citizens of the World*, 27 EUR. J. INT’L L. 447, 448 (2016).

351. THE FOUCAULT READER 73 (Paul Rabinow, ed., 1984); Lorna Weir, *The Concept of Truth Regime*, 33 CAN. J. SOCIO., 367, 367 (2008).

352. FOUCAULT, POWER, *supra* note 78, at 31.

353. FOUCAULT, *supra* note 7, at 53-54.

The Haitian regime of truth was directly linked to white supremacy's ideologies, which were the aspects of American culture that made inflicting racialized structural violence, "look, even feel right – or at least not wrong."³⁵⁴ The United States refused to host Haitian dignitaries to prevent the spread of Black revolutionary contagion.³⁵⁵ Propaganda was used to demonize Haiti. Diplomats and foreign officials reformulated the truth about Haiti. Haiti was characterized as an anti-Christian, Voodoo riddled, cannibalistic, lazy,³⁵⁶ and diseased³⁵⁷ nation that lacked the capacity for self-governance.³⁵⁸ The British Envoy, Sir Spenser St. John, in his memoir, "Hayti or the Black Republic" asserted:

I know what the black man is, and I have no hesitation in declaring that he is incapable of the art of government, and that to entrust him with framing and working the laws for our islands is to condemn them to inevitable ruin. What the negro may become after centuries of civilized education I cannot tell, but what I know is that he is not fit to govern now.³⁵⁹

He also provided "accounts" of cannibalism and "eating young children and digging up freshly buried corpses for burial ceremonies or food."³⁶⁰ Newspapers were complicit in constructing the regime of truth, publishing sensationalized stories and eye-witness accounts of those with alleged first-hand knowledge of Haiti. Stories about Haitians killing babies, raping women, and burning victims alive dominated.³⁶¹ The regime of truth still persists today.

In actuality, the United States exploited Haiti's need for de jure recognition to open the door of arbitrariness, extortion, and intervention at the threshold of Haiti's statehood.³⁶² It withheld de jure recognition to preserve its relationships with European powers but granted de facto

354. Galtung, *supra* note 142, at 291.

355. *Id.* at 141.

356. THE HAITIAN REVOLUTION: A DOCUMENTARY HISTORY 204 (David Geggus ed., trans., 2014).

357. MARY C. WATERS & REED UEDA, THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965, 448 (2007).

358. PETER RIGBY, AFRICAN IMAGES: RACISM AND THE END OF ANTHROPOLOGY 17 (Routledge 2020) (1996) ("Haiti became a cautionary tale of great relevance to all colonial powers with holdings in the new world.")

359. SPENSER ST. JOHN, HAYTI; OR, THE BLACK REPUBLIC xi (London, Smith, Elder, & Co., 2d ed. 1889).

360. *Id.*

361. DUBOIS, *supra* note 226, at 151.

362. See Lauterpacht, *supra* note 325, at 413 (discussing the "fundamental importance" of recognition in international law).

recognition to maintain beneficial trading relationships with Haiti.³⁶³ By denying de jure recognition, the United States demonstrated its commitment to upholding white supremacy because formal recognition would have constituted a ratification of the slave rebellion.³⁶⁴ The United States dangled quasi recognition over Haiti's head and leveraged its reliance on the United States as a trading partner and "ally," akin to an international gatekeeper, to establish economic supremacy over Haiti.³⁶⁵ This was not a new practice. The United States used the promise of recognition during the Revolution to negotiate for more beneficial trade agreements. After liberation, nonrecognition was used to establish a relationship of economic and political dependency that placed the United States in a position to exercise disciplinary power over Haiti.

The measures taken to subjugate Haiti through economic coercion were an extension of foreign policies utilized throughout the Revolution. The United States vacillated between friend³⁶⁶ and enemy, depending on its strategic interests.³⁶⁷ It provided the French with guns, ammunition, and financial support but also maintained trading relationships that sustained Haiti's economy, illegally traded ammunition with Haitian rebels, and offered warships to protect Haitian ports.³⁶⁸

Once the Revolution succeeded, Jefferson emerged as the architect of America's punitive foreign policy toward Haiti.³⁶⁹ To reinforce the psychological impact of nonrecognition, Jefferson instituted an embargo³⁷⁰ in 1806 that prohibited all trade with Haiti as a part of a concerted global effort to destroy Haiti's economic viability.³⁷¹ The embargo severely diminished Haiti's trading partners³⁷² and crippled its economy, leading to political and social unrest.³⁷³

Economic subjugation made Haiti especially vulnerable because its sovereignty and national identity depended on its economic viability.³⁷⁴ Early leaders, including Henri Christophe, knew that a strong economy

363. LOGAN, *supra* note 247, at 32, 153.

364. *Id.* at 152; Tim Matthewson, *Jefferson and the Nonrecognition of Haiti*, 140 PROC. AM. PHIL. SOC'Y, 22, 22-23 (1996).

365. LOGAN, *supra* note 247, at 68.

366. SCOTT, *supra* note 262, at 140.

367. Matthewson, *supra* note 365, at 29-35.

368. Matthewson, *supra* note 365, at 22-28, 32, 44-46, 61-64, 83-87.

369. TUCKER & HENDRICKSON, *supra* note 306, at 19.

370. MATTHEWSON, *supra* note 8, at 131.

371. *Id.* at 8, 128-31.

372. RALPH PEZZULLO, *PLUNGING INTO HAITI: CLINTON, ARISTIDE, AND THE DEFEAT OF DIPLOMACY* 56 (2006).

373. Simon Henochsberg, *Public Debt and Slavery: The Case of Haiti (1760-1915)*, 41-42 PARIS SCH. OF ECON. (Dec. 2016).

374. GRÜNER, *supra* note 210, at 125.

would have allowed Haiti to rebuild its infrastructure, participate as an equal in the international system, and disprove the theory that Africans are incapable of self-governance.³⁷⁵ Moreover, because Haiti was aware that it was under the constant threat of invasion, militarization became an essential part of its national identity and its most significant budget line item. Dessalines and Christophe built a network of fortifications and stockpiled weapons in anticipation of invasion.³⁷⁶

In 1825, France surrounded Haiti with fourteen warships and demanded that Haiti 1) pay it 150 Million Francs, the equivalent of \$3 billion dollars, in reparations to slaveowners and the French government; 2) open its ports for international commerce to all nations; and 3) reduce taxes on French imports by fifty percent in exchange for France's withdrawal and recognition.³⁷⁷ Haiti's president, Jean Pierre-Boyer, accepted the terms to obtain relief from political and economic isolation without consulting with or getting approval from the government or citizens.³⁷⁸ France forced him to obtain a loan from a French bank to immediately pay a portion of the indemnity, 30 million Francs. The loan had an annual interest rate of 6 percent and was subject to a 20 percent fee.³⁷⁹ President Boyer's loan became known as the "double debt of independence."³⁸⁰

Haiti took out multiple loans from French and American banks, including National City Bank (now CitiBank), to pay the indemnity and other costs. In the 1890s, 25 percent of Haiti's budget went to satisfying debts; by 1898, the amount was 50 percent, and by 1913 it was more than 67 percent.³⁸¹ France agreed to reduce the indemnity to 90 million Francs in 1838, but still, Haiti was forced to obtain French loans in 1874 and 1875 to cover the indemnity.³⁸² In 1880, France created the Banque Nationale d'Haiti, (Haiti's "National Bank") and took over Haiti's treasury.³⁸³ The United States took control of the National bank in 1909 when two American banks purchased a majority stake.³⁸⁴

Haiti permitted extensive foreign investment in its economy to maintain a subsistence level of economic viability. France, Germany, and the United States soon dominated its markets and the majority of gov-

375. See DUBOIS, *supra* note 226, at 64-65.

376. *Id.* at 53.

377. *Id.* at 97-99.

378. *Id.* at 100-101.

379. *Id.* at 102.

380. *Id.* at 102.

381. *Id.* at 175.

382. *Id.* at 90; Joslyn Barns, *Haiti: The Pearl of the Antilles*, NATION (Jan. 19, 2010), <https://www.thenation.com/article/archive/haiti-pearl-antilles/>.

383. *Id.*

384. *Id.* at 205.

ernment revenue came from intake at customs houses and customs duties.³⁸⁵ By 1903, 60 percent of Haiti's imports were controlled by the United States.³⁸⁶ The United States steadily negotiated agreements that increased the presence of American investors and economic interests in Haiti. Eventually, the United States effectuated a sort of economic annexation that turned Haiti into a de facto colonial territory.³⁸⁷ Haiti was placed in a position where it had to be obedient to the requests of colonial powers if it wanted to engage in any economic activity. This was the beginning of a cycle that continues to impact Haiti. Countries force Haiti to accept coercive trade and financial agreements that diminish Haiti's rights and increase its financial obligations, in exchange for a subsistence level of tenuous economic stability.

The economic conditions in Haiti exacerbated its internal political and social instability. Military coups were common. Between 1911 and 1915, Haiti had seven presidents.³⁸⁸ During this period, Rosalvo Bobo actively opposed the Haitian government's willingness to cede economic control to the United States and led a revolt.³⁸⁹ In 1915, Haitian President Vilbrun Guillaume Sam executed 167 political prisoners in an effort to suppress the revolt.³⁹⁰ In response, rebels and citizens executed Sam.³⁹¹

B. *Building an Internal Architecture of Control: Solidifying the Disciplinary Relationship Between Haiti & the United States*

The United States used Haiti's economic instability and Sam's execution to rationalize its military occupation and intervention into Haitian affairs from 1915 to 1934. President Woodrow Wilson cited the Roosevelt Corollary to the Monroe Doctrine, which provided that if any nation within America's sphere of influence³⁹² appeared so economically unstable that it was vulnerable to European control, the United States

385. *Id.* at 118.

386. PATRICK BELLEGARDE-SMITH, HAITI: THE BREACHED CITADEL 54 (1990).

387. Edieth Y. Wu, *Recent Developments in The Currency War: The Euro, the Dollar, the Yen, and the BEMU*, 15 CONN. J. INT'L L. 1, 30 (2000) (describing how loans and debt can transform the borrowing country into a de facto colony).

388. DUBOIS, *supra* note 226, at 209.

389. *Id.* at 210.

390. *Id.*

391. *Id.*

392. Gilbert Loescher & John Scanlan, *Human Rights, U.S. Foreign Policy, and Haitian Refugees*, 26 J. INTERAMERICAN STUD. & WORLD AFFAIRS, 313, 321 (1984); *The U.S. Occupation of Haiti*, WOODROW WILSON PRESIDENTIAL LIBR. & MUSEUM (Aug. 29, 2019), <https://www.woodrowwilson.org/blog/2019/8/29/the-us-occupation-of-haiti-mgcn5> [https://perma.cc/4YVN-2E6S] (last visited June 3, 2021).

had a moral obligation and right to intervene.³⁹³ He claimed America's mission was to re-establish peace and order in Haiti.³⁹⁴ However, the predicate for military occupation and intervention was fear that America's economic supremacy was dissipating due to German economic expansionism³⁹⁵ and the fear of German military presence in the Caribbean.³⁹⁶ The United States used its occupation to establish an enduring architecture of control that solidified its disciplinary power and commanded a deeper level of docility from Haiti.³⁹⁷ It monopolized the import market, took absolute control of Haiti's national bank and customs houses, restructured its government and civil institutions,³⁹⁸ and reconstituted its military as an oppressive force that terrorized the people and set the stage for dictatorial regimes.

1. Disciplinary Economics

By 1915, 80 percent of Haiti's revenue was devoted to paying American and French banks to satisfy the reparations debt.³⁹⁹ Thus, France and the United States had coerced Haiti into an international system of constraints, privations, obligations and prohibitions that stunted its ability to maximize its potential at the threshold of its new statehood, fortifying the disparate power relation between itself and the United States. Upon occupation, the United States took over financial institutions and centralized its administrative structure.⁴⁰⁰ Haiti's National Bank and treasury were already under American control because in 1914, as security for Haiti's National City Bank loan, \$500,000 in gold was seized from Haiti's gold reserve by U.S. Marines, who took it to National City Bank in

393. See SIDNEY LENS & HOWARD ZINN, *THE FORGING OF THE AMERICAN EMPIRE* 223 (Pluto Press 2003) (1971).

394. RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY* 217 (1972).

395. JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS* 23-24 (1987).

396. DUBOIS, *supra* note 226, at 211.

397. FOUCAULT, *supra* note 3, at 279-82.

398. PAMPHILE, *supra* note 233, at 106-07; DUBOIS, *supra* note 226, at 215.

399. MARK SCHULLER, *BREAK THE CHAINS OF HAITI'S DEBT* 2, <http://www.ijdh.org/pdf/headline1-11-07.pdf> [<https://perma.cc/EK3V-X3YG>] (May 20, 2006).

400. Michel-Rolph Trouillot, *Haiti's Nightmare and the Lessons of History*, 27 *NACLA REPORT ON THE AMERICAS*, Jan.-Feb. 1994, at 46, 50; See generally, Patrick Bellegarde-Smith, Alex Dupuy, Robert Fattouh Jr., Mary Renda, Ermitte St. Jacques & Jeffrey Sommers, *Haiti and Its Occupation by the United States in 1915: Antecedents and Outcomes*, 21 *J. HAITIAN STUD.* 10 (2015).

New York.⁴⁰¹ To further stake a claim in the Haitian economy, four American banks agreed to refinance Haiti's debt, transferring it from European to American creditors.⁴⁰² Although the United States formally withdrew its occupation in 1934, Haiti remained indebted to the United States due to a \$40 million-dollar-loan taken out to satisfy the French debt, and the United States maintained control of the bank until 1947.⁴⁰³ Haiti repaid the debt by 1947 but was almost bankrupt.⁴⁰⁴

In describing his tour of duty in Haiti, former Marine, U.S. Major General Smedley Butler stated, "I spent [thirty-three] years and four months in active military service and during that period I spent most of my time as a high class muscle man for Big Business, for Wall Street and the bankers. . . . I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues in."⁴⁰⁵ By design, American occupation provided American companies with open and expanded investment opportunities.⁴⁰⁶ American investors planned to reinstitute commercial plantations, a method that was also advocated by Haitian leaders, in an effort to restore its economic supremacy and generate income to rebuild its infrastructure after the war.⁴⁰⁷

However, they were thwarted by the Haitian constitution, which contained a prohibition on ownership of Haitian land by foreigners.⁴⁰⁸ Dessalines added the provision to prevent the reinstatement of slavery.⁴⁰⁹

Franklin D. Roosevelt, then Assistant Secretary of the Navy, re-drafted the constitution, deleting the foreign ownership prohibition, and presented it to the legislature. The majority of the legislature refused to approve it and a popular movement opposing American occupation gained traction.⁴¹⁰ The United States suppressed the popular movement

401. SIMON JAMES BYTHEWAY & MARK METZLER, *CENTRAL BANKS AND GOLD: HOW TOKYO, LONDON, AND NEW YORK SHAPED THE MODERN WORLD* 43 (2016).

402. Henochsberg, *supra* note 374, at 29; HANS SCHMIDT, *THE UNITED STATES OCCUPATION OF HAITI, 1915-1934*, AT 129 (2d prtg. 1995) (1971).

403. SCHMIDT, *supra* note 403, at 229.

404. ROBINSON, *supra* note 231, at 22.

405. Dan Casey, *Quote of the Day: Smedley Butler on War and Rackets*, Roanoke Times (Aug. 9, 2009, updated on June 6, 2019), https://roanoke.com/news/local/quote-of-the-day-smedley-butler-on-war-and-rackets/article_5622d13b-9a8a-5299-a22e-c5ad7b7cdab6.html [<https://perma.cc/K3P5-3GQN>] (last visited June 3, 2021).

406. BELLEGARDE-SMITH, *supra* note 387, at 67.

407. DUBOIS, *supra* note 226, at 31-33, 104.

408. GRÜNER, *supra* note 210, at 190; CONSTITUTION OF HAYTI, 1805, art. 12, <https://s3-eu-west-1.amazonaws.com/s3-euw1-ap-pe-ws4-cws-documents.ri-prod/9780415814577/document6.pdf> [<https://perma.cc/KV7R-BVSF>] ("No whiteman of whatever nation he may be, shall put his foot on this territory with the title of master or proprietor, neither shall he in future acquire any property therein.").

409. Geggus, *supra* note 357, at 180-82; DUBOIS, *supra* note 226, at 43.

410. DUBOIS, *supra* note 226, at 245.

and, in 1917, named a puppet leader, Philippe Sudre Dartiguenave, as President, and the legislature was dissolved by “genuinely Marine Corps methods.”⁴¹¹ Major General Butler and his troops stormed the legislature and forced the members to leave, at gunpoint.⁴¹²

The new constitution was approved in 1918. Roosevelt had eliminated the foreign ownership provision, making it possible for foreign nations to own land in Haiti.⁴¹³ Additionally, the new constitution included the following article:

- (1) All the acts of the government of the United States during its military Occupation in Haiti are ratified and confirmed.
- (2) The actors of the courts martial of the Occupation, without, however, infringing on the right to pardon, shall not be subject to revision.
- (3) The acts of the Executive Power up to the promulgation of the present constitution are likewise ratified and confirmed.⁴¹⁴

The United States further amended the constitution in 1928 by eliminating the life tenure of judges to make it possible to install judges that were friendly to American interests.⁴¹⁵ Amendments to the Haitian constitution laid the groundwork for further intervention and represented a subversive attempt to materially damage Haiti’s soul, its claim as an autonomous, self-governing nation.

2. Cultural Genocide⁴¹⁶

The United States attempted to undermine the core of Haiti’s identity, its claim of intellectualism, by attempting to introduce vocational education in lieu of liberal arts education,⁴¹⁷ arguing that classical in-

411. PAUL FARMER, *THE USES OF HAITI* 93 (3d ed.2005).

412. DUBOIS, *supra* note 226, at 246.

413. PAMPHILE, *supra* note 233, at 107.

414. James Weldon Johnson, *Self-Determining Haiti*, *NATION* (Aug. 28, 1920), *reprinted in* *NATION* (Mar. 18, 2004), <https://www.thenation.com/article/archive/self-determining-haiti/> [<https://perma.cc/TQ5T-Q2MG>] (last visited Apr. 11, 2021).

415. SCHMIDT, *supra* note 403, at 179.

416. *ENCYCLOPEDIA OF BLACK STUDIES* 209 (Molefi Kete Asante & Ama Mazama, eds., 2005) (Defining cultural genocide as: “the deliberate and systematic annihilation of a people’s culture by another group of people. . . . [C]ultural genocide always entails the negation of the worth of the culture to be suppressed, and it often seeks to enlist the acquiescence and active cooperation of those whose culture is to be destroyed. This is done primarily through intense propaganda and bribery, making cultural genocide at times quite subtle and all the more effective.”).

417. SCHMIDT, *supra* note 403, at 183.

struction had adversely impacted Haiti's development.⁴¹⁸ The United States reasoned that Haiti was full of doctors and lawyers but what it needed was vocational workers.⁴¹⁹ The issue of how to properly educate Haitians paralleled a similar debate in the states, occurring concurrently, regarding the education of African Americans.⁴²⁰ The United States also averred that Haitians should learn English instead of French.⁴²¹ The attempted dismantling of Haiti's education system and religious diversity, along with the rewriting of its constitution, were acts of cultural genocide because the United States sought to suppress Haiti by negating and destroying the worth of its intellectual culture and key aspects of its culture.

3. Armies to Fight the People

During America's occupation, the Marines instituted a policy of terror and oppression. In 1916, they began implementing the *corvée* in a manner that was equivalent to the chain gangs formed in the American South during Reconstruction.⁴²² President Boyer had attempted to use the *corvée*, under Article 54 of the Code Rural, to force unemployed men to work on infrastructure projects but the citizens objected.⁴²³ The Marines enforced the *corvée* by forcibly conscripting men, sending them to concentration camps and shooting men who escaped.⁴²⁴ The *corvée* signified an effort to reconstitute the injured body of white supremacy through the reclamation of the Black body as property and the recreation of slave capitalism.

Known as the Caco War, Haitians launched guerilla campaigns against American occupation. Marines responded by terrorizing Haitian citizens. They tortured and murdered citizens they suspected of being rebels or of assisting rebels.⁴²⁵ They burned houses and villages, raped women and girls, and tortured Haitians to obtain confessions and/or information about the Cacos.⁴²⁶ On one occasion, they dropped bombs on a

418. DUBOIS, *supra* note 226, at 280.

419. SCHMIDT, *supra* note 403, at 183.

420. PAMPHILE, *supra* note 233, at 121.

421. DUBOIS, *supra* note 226, at 282.

422. Compare FARMER, *supra* note 412, at 83 ("the [American] occupying force resurrected the hated institution of the *corvée*—the voluntary conscription of labor crews"), with DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 90-93* (2008) (describing chain gangs in the American South); DUBOIS, *supra* note 226, at 239.

423. DUBOIS, *supra* note 226, at 239.

424. *Id.* at 240.

425. *Id.* at 226.

426. *Id.* at 234-6.

village.⁴²⁷ Former Haitian officer turned Caco leader, Charlemagne Peralte, led a peasant uprising.⁴²⁸ The Marines killed and mutilated him.⁴²⁹ Afterwards they tied his body to a door, took photographs of his body, and dropped hundreds of copies of the photographs out of an airplane over the area where Cacos were known to inhabit.⁴³⁰

The Marines destroyed the structure of Haiti's existing army and created and trained a new centralized army.⁴³¹ The Gendarmerie was formed to suppress anti-occupation uprisings and any organized opposition that rebelled against societal institutions of oppression and corruption.⁴³² After American withdrawal, François Duvalier, who was supported initially by the American government, used the Gendarmerie to impose tyrannical rule.⁴³³ One of the major thematic results of colonialism is the adoption of the imperial methodology of the colonizer. In this respect, Haiti's struggle against militarism and repression closely parallels those of newly independent African nations, who, according to Wendy Hamblet, are prone to self-destructive behavior because they have internalized, adopted, and thus seek to reenact and reproduce the structures and methods of oppression that were once used against them.⁴³⁴

America's racialized structural violence severely damaged Haiti's economic, political, military, and civil institutions, setting the stage for political instability and further intervention. In many respects, Haiti has been rendered an economically docile nation whose economic stability is linked to the goodwill⁴³⁵ of the United States and other foreign powers.⁴³⁶ Attacks on Haiti's constitution and education were intended to render Haiti's claims of liberty and autonomy rhetorical relics of the past. The United States has continued to interfere in Haitian affairs, ranging from

427. *Id.* at 259.

428. *Id.* at 248-250.

429. *Id.* at 260.

430. *Id.* at 261.

431. MICHEL-ROLPH TROILLOT, *Haiti's Nightmare and the Lessons of History*, in HAITI: DANGEROUS CROSSROADS 121, 128 (Deidre McFadyen, Pierre LaRamée, Mark Fried & Fred Rosen, eds. 1995).

432. SCHMIDT, *supra* note 403, at 120-21; Suzy Castor & Lynn Garafola, *The American Occupation of Haiti (1915-34) and the Dominican Republic (1916-24)* 15 MASS.REV. 253, 265-66; 273-75 (1974).

433. DUBOIS, *supra* note 226, at 9.

434. WENDY C. HAMBLET, SAVAGE CONSTRUCTIONS: THE MYTH OF AFRICAN SAVAGERY 9 (2008). ("Once victims have been indoctrinated into dark logic that underlies the law of 'civilization,' they have a tendency to learn all too well the lessons of their subjection. They tend to absorb, over their long suffering lives and across the generations of lives of their people's collective victimization, the ideology upon which the law rests, the ideology that 'might is right' in the world of political realities.")

435. PAMPHILE, *supra* note 233, at 107.

436. FARMER, *supra* note 412, at 85.

support of dictators, CIA intervention as a form of surreptitious occupation and interference, and suppression of popular movements.

IV. RACIALIZED STRUCTURAL VIOLENCE IN AMERICAN IMMIGRATION LAW & POLICY

The racial animus in America's immigration laws and policies toward Haiti operate in tandem with foreign policy to sustain the hierarchical power relation between the United States and Haiti. Racism in American immigration laws and policies is magnified because they are not subject to the same legal constraints as domestic laws.⁴³⁷ Domestically, intentional discrimination must be achieved through covert measures such as colorblind legislation,⁴³⁸ but in immigration law discrimination can be achieved through overt means with only marginal redress for those affected.

Racist immigration laws and policies are inextricably linked with domestic racism. Kevin R. Johnson posits that attacks on non-citizen minorities through immigration law can be explained as transference and displacement of animosity for minorities generally.⁴³⁹ Historically and presently, immigration laws and policies are utilized to reinforce nativism and preserve racial homogeneity. Furthermore, when domestic minorities share ancestry with classes of excluded immigrants, racist laws and policies are dog whistles⁴⁴⁰ that are amplified because they are exceedingly public.⁴⁴¹ Therefore, when the United States insists upon relentlessly exposing domestic minorities to codified racial animus in immigration laws and policies, it is engaged in racialized structural violence.⁴⁴²

Where "discipline proceeds from the distribution of individuals in space,"⁴⁴³ the United States has systematically utilized immigration laws and policies, along with domestic laws, to turn Haiti into a disciplinary space and a territory of domination.⁴⁴⁴ Immigration laws and policies can

437. *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972).

438. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 8 (2d ed. 2012).

439. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1112, 1116 (1998).

440. Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 *MICH. L. REV.* 1927, 1950 (1996).

441. FOUCAULT, *supra* note 3, at 109-10.

442. GALTUNG, *supra* note 142, at 292.

443. FOUCAULT, *supra* note 3, at 141.

444. See FOUCAULT, *POWER*, *supra* note 78, at 347-48. (explaining the structure of domination, its perpetual nature, and historical and societal significance) ("But what makes the domination of a group, a caste, or a class, together with the resistance and revolts that domination comes up against, a central phenomenon in the history of societies

be used to prevent the diffusion and absorption of a “dangerous” foreign population into the host country’s population.⁴⁴⁵ They can also be used to confine a population to a geographical territory by curtailing their liberty of movement, the effect of which is functional enclosure.⁴⁴⁶

A. *Reconstituting Black Haitians as Property: The Relationship Between Pro-Slavery Domestic Laws and Immigration Control*

To neutralize the threat of “dangerous communications” between Haitians and American Blacks, The United States enacted punitive domestic and immigration laws to deter and suppress Haitian immigration. During and after the Revolution, the United States experienced a massive influx of Haitian immigrants, who primarily entered through the ports of Baltimore, New York, New Orleans, Norfolk, Charleston, and Wilmington.⁴⁴⁷ Some states responded by passing a barrage of restrictive laws designed to repress enslaved persons and free Blacks.⁴⁴⁸ The legislation “encouraged new systems of surveillance and control, especially for free blacks, whom southerners thought to be dangerous incendiaries, owing to their role in the Dominguan revolution.”⁴⁴⁹ The federal government passed the Alien and Sedition Acts of 1798 (the “Alien and Sedition Acts”),⁴⁵⁰ which targeted white and Black Haitians alike and represented the federal government’s entrée into immigration law. Under the Alien and Sedition Acts, Haitians could be impounded or expelled as security risks or alien enemies.⁴⁵¹ I argue that the fear of Black revolutionary con-

is that they manifest in a massive and global form, at the level of the whole social body, the locking-together of power relations with relations of strategy and the results proceeding from their interaction.”). The relationship of domination between the U.S. and Haiti has had historical and global significance. It is the result of a strategic long-term confrontation.

445. GALTUNG, *supra* note 18, at 67 (describing horizontal structural violence as keeping people apart in that “[t]he whole 20th-century machinery of borders, border control, visas, passports, stamps and similar irritants . . . impedes contact with anybody, any Other, including the very different Other.”).

446. *See id.*

447. SCOTT, *supra* note 262, at 188–89.

448. Matthewson, *supra* note 365, at 25.

449. *Id.*

450. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 149 (2010); *The United States and the Haitian Revolution 1791-1804*, U.S. DEP’T OF STATE ARCHIVE, <https://2001-2009.state.gov/r/pa/ho/time/nr/91724.htm> [<https://perma.cc/2F2Y-5DQE>] (last visited May 9, 2021); Alien and Sedition Acts of 1798 – An Act concerning Aliens (“Alien Friends Act”) ch. 58, 2 Stat. 570 (1798); An Act Respecting Alien Enemies (“Alien Enemies Act”) ch. 66, 2 Stat. 577 (1798); Scott, 1087; Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

451. *See sources cited supra* note 451.

tagion and insurrection accelerated the development of federal immigration law.

The United States passed the Act Prohibiting Importation of Slaves of 1807, but on June 28, 1809, President James Madison suspended the penalties for importing slaves to accommodate slaveowners fleeing St. Domingue.⁴⁵² Notwithstanding that fact, many citizens expressed concerns about white Haitian immigration and were opposed to permitting white Haitians to retain their slaves because of the possibility that Haitian slaves would tell American slaves about the Revolution.⁴⁵³ The government asserted there was a presumption of servitude based on skin color. Due to the presumption, Black Haitians that visited or immigrated to the United States could be recategorized as fugitive slaves if they could not prove they were free by testimony or documentation.⁴⁵⁴ Because the majority of Black Haitians had acquired their freedom due to the Revolution, as set forth in Article 3 of the Haitian Constitution of 1801, their owners had not issued manumission documents to them.⁴⁵⁵ Thus, the suspension of the penalties for unlawfully importing slaves created incentives for disgruntled former Haitian slaveowners, aspiring slaveowners, slave catchers, and slave traders to falsely assert an ownership interest in Black Haitians, and they did.⁴⁵⁶

Black Haitians challenged their re-enslavement in American courts on the grounds of international comity,⁴⁵⁷ but, in most cases, the United States refused to adhere to international comity when presented with Haitian laws. Cases like *De Fontaine v. Bonard* (1818), demonstrate that in Maryland, domestic slaveowners' rights superseded Black Haitians' rights and international comity.⁴⁵⁸ In *Baptiste et. al v. Volunbrun* (1820),⁴⁵⁹ the

452. An Act for Remission of Certain Penalties and Forfeitures, and for Other Purposes, 2 Stat. 549 (1809).

453. SCOTT, *supra* note 262, at 188-90.

454. Acts Passed at the First Session of the First Legislature of the Territory of Orleans ch. 30, at 128-29 (1807).

455. GRÜNER, *supra* note 210, at 187-88 (2017); SAINT-DOMINGUE CONSTITUTION OF 1801, art. 3 (Haiti), <https://s3-eu-west-1.amazonaws.com/s3-euw1-ap-pe-ws4-cws-documents/ri-prod/9780415814577/document6.pdf> [https://perma.cc/KV7R-BVSE] ("There cannot exist slaves on this territory, servitude is therein forever abolished. All men are born, live and die free and French.").

456. Rebecca J. Scott, *Paper Thin: Freedom and Re-enslavement in the Diaspora of the Haitian Revolution* 29 LAW & HIST REV. 1061, 1071-75; 1086-87 (2011).

457. See generally Rebecca J. Scott, "She . . . Refuses to Deliver up Herself as the Slave of Your Petitioner": *Émigrés, Enslavement, and the 1808 Louisiana Digest of the Civil Laws*, 24 TUL. EUR. & CIV. L.F. 115 (2009).

458. *De Fontaine v. Bonard*, MSA S382-44, (Balt. Cty. Ct. 1818), *aff'd*, (Md. 1818), http://mdhistory.msa.maryland.gov/msaref12/m11014/html/msa_sc_4239_m11014-0417.html [https://perma.cc/UNN8-CVBP].

court again established that domestic slaveowners' rights superseded Black Haitians' rights and international comity.

In *Métayer v. Noret*, Black Haitian immigrant Adélaïde Métayer successfully challenged the re-enslavement of herself, her two daughters, and her son in New Orleans.⁴⁶⁰ In March 1810, Louis Noret, a tailor, claimed that he had the right to seize and sell Adélaïde and her children because Louis Métayer, the brother of her deceased owner, Charles Métayer, owed a debt to Noret.⁴⁶¹ He argued that Louis must have inherited Adélaïde upon Charles' death.⁴⁶² Adélaïde and her children were detained.⁴⁶³ She sued Noret for unjust imprisonment and detention, asserting that she had purchased her freedom from Charles Métayer in 1801.⁴⁶⁴ She produced a receipt, but the receipt did not name her son.⁴⁶⁵ The court suspended the sale of her and her daughters but upheld the sale of her son.⁴⁶⁶

However, Charles Métayer's son, Jean-Pierre, granted Noret power of attorney and in 1816 Noret again claimed ownership of Adélaïde and her children.⁴⁶⁷ Noret took Adélaïde's daughters and new baby.⁴⁶⁸ The court ruled in Adélaïde's favor and Noret appealed.⁴⁶⁹ The Louisiana Supreme Court ruled that she had not established her freedom but Noret had failed to establish a valid ownership claim.⁴⁷⁰ Finally, in 1819, after Pierre Metayer filed his own lawsuit to have Adélaïde and her children re-enslaved, the Louisiana Supreme Court acknowledged the Haitian government's emancipation of slaves, but ruled Adélaïde was free, not because of Haitian liberation, but because she lived as free for six years under Spanish rule in Cuba before she arrived in New Orleans.⁴⁷¹

These cases confirm the adverse consequences of nonrecognition. Re-enslavement of former slaves, on whom the Haitian government had

459. SHANE WHITE, SOMEWHAT MORE INDEPENDENT: THE END OF SLAVERY IN NEW YORK CITY, 1770-1810, at 144-45 (1991); SHANE WHITE, STORIES OF FREEDOM IN BLACK NEW YORK 27-28 (2002); Patricia A. Reid, *The Haitian Revolution, Black Petitioners and Refugee Widows in Maryland 1796-1820*, 50 AM. J. L. HIST. 431, 443 (2008).

460. KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS 166-67 (2014); *see generally*, Scott, *supra* note 458.

461. Scott, *supra* note 458, at 121, 127-28.

462. Scott, *supra* note 457, at 1075.

463. Scott, *supra* note 458, at 128.

464. *Id.* at 130.

465. Scott, *supra* note 457, at 1076.

466. *Id.* at 129.

467. *Id.*

468. *Id.*

469. *Id.* at 129-30.

470. *Id.* at 130; *Metayer v. Noret*, 5 Mart. (os.) 566 (La. 1818).

471. *Id.* at 131-32.

conferred the legal status of emancipated,⁴⁷² proved that the United States did not recognize the Haitian government as legitimate because the United States refused to adhere to international comity.

B. *Circumventing the Courts and Norms of Jus Cogens: Contemporary Haitian Immigration Laws & Policies*⁴⁷³

America's racialized structural violence has created dire conditions in Haiti that necessitate immigration as a tool for survival. Nevertheless, the United States has consistently discriminated against and targeted Haitians as a class to be excluded through the denial of asylum,⁴⁷⁴ detention, interdiction, and forced repatriation, even though in 1968 the United States assented to the 1967 United Nations Protocol Relating to the Status of Refugees (the "Protocol"),⁴⁷⁵ which incorporates by reference the terms of the 1951 United Nations Convention on the Status of Refugees (the "Convention"). The Protocol defines refugees as persons who have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."⁴⁷⁶ It prohibits the deportation of a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁴⁷⁷ Moreover, it also requires the United States to apply the Protocol "without discrimination as to race, religion, or country of origin."⁴⁷⁸ The United States passed the Refugee Act of 1980 (the "Act"), which incorporates the Protocol into domestic law.⁴⁷⁹ The Act enunciates the well-founded fear standard from the U.N. Protocol, defining a refugee as an individual who possesses a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion and thus, due to this fear is entitled to asylum."⁴⁸⁰ The American government has persistently claimed that Haitians lack a well-founded fear of persecution and are instead eco-

472. GRÜNER, *supra* note 210, at 187.

473. See e.g., Loescher & Scanlan, *supra* note 393, at 345.

474. See Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions* 1991 UTAH L. REV. 279, 341 (1991).

475. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

476. *Id.* at art. 1(A)(2); *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980).

477. *Civiletti*, 503 F. Supp. at 453.

478. *Id.*

479. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (1980).

480. *Id.*

conomic immigrants, which claim was pointedly deconstructed in the *Civiletti* opinion, as discussed below.⁴⁸¹ When the body of case law concerning Haitian immigration is viewed in its entirety, it is clear that there is a undercurrent of racial animus in courts' analyses. Racial animus is sometimes articulated outright and, in other instances, disguised as a function of an objectively neutral, colorblind application of immigration law.⁴⁸²

In derogation of international law that expressly opposes forcible repatriation and denial of asylum to refugees, President Ronald Reagan issued Executive Order No. 12324 in 1981,⁴⁸³ which was an agreement between the United States and the Haitian government that allowed the United States to interdict Haitian immigrants at sea and return them to Haiti.⁴⁸⁴ Executive Order No. 12324 was issued in response to the massive number of Haitians, 15 percent in total, fleeing Jean-Claude Duvalier's regime and subsequent regimes by dangerously constructed boats.⁴⁸⁵ These "Boat People" were intercepted at sea and forcibly returned to their country.⁴⁸⁶

Before the 1980s, another wave had occurred in the early 1960s in response to François Duvalier's regime. This wave of immigration is known as the "Brain Drain"⁴⁸⁷ because it was the period when the majority of Haitian professionals and intellectuals left the country.⁴⁸⁸ The intellectual and professional class in Haiti was the equivalent of a revolutionary class. They were the dominant dissident class during America's occupation⁴⁸⁹ and relentlessly organized in opposition.⁴⁹⁰ Their presence was crucial to the maintenance of Haiti's history and identity as a nation built on the ideals of democracy and natural law because they constantly reminded the government and the people of their obligations and rights.⁴⁹¹ When Duvalier took office, they posed a similar threat⁴⁹² and

481. *Civiletti*, 503 F. Supp. at 507.

482. See Jana Evans Braziel, *Haiti, Guantánamo, and the "One Indispensable Nation": U.S. Imperialism, "Apparent States," and Postcolonial Problematics of Sovereignty*, 64 CULTURAL CRITIQUE 127, 135-37 (2006).

483. Exec. Order No. 12324, 3 C.F.R. 180 (1981), 8 U.S.C. §1182.

484. Loescher & Scanlan, *supra* note 393, at 345-46.

485. DUBOIS, *supra* note 226, at 353-54.

486. *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1570 (S.D. Fla. 1991).

487. Tatiana Wah, *Engaging the Haitian Diaspora*, CAIRO REV. GLOB. AFFS. (Spring 2013), at 56, <https://www.thecaireview.com/wp-content/uploads/2014/12/CR9-Wah.pdf> [<https://perma.cc/J64U-SR7F>].

488. PAMPHILE, *supra* note 233, at 175.

489. SCHMIDT, *supra* note 403, at 23.

490. *Id.*

491. GUSTAVE LE BON, *THE PSYCHOLOGY OF REVOLUTION* 56 (Bernard Miall trans., Batoche Books 2001) (1913).

492. Loescher & Scanlan, *supra* note 393, at 319.

Duvalier welcomed their immigration⁴⁹³ Eighty percent of Haiti's engineers, professors, teachers, doctors, lawyers, and public administrators emigrated to the United States, Canada, or Africa.⁴⁹⁴

The Boat People learned that if they made it to American soil, they could acquire refugee status.⁴⁹⁵ Fleeing political persecution following the 1991 military coup d'état and removal of President Jean-Bertrand Aristide,⁴⁹⁶ The Coast Guard interdicted 18,095 Haitians between 1991 and 1992, repatriating 10,149 and housing 2,589 at Guantanamo Bay.⁴⁹⁷

In May 1992, President George H.W. Bush issued Executive Order No. 12807 (the "Kennebunkport Order"), which gave him the authority to suspend the entry of aliens coming by sea without necessary documentation and repatriate them without an asylum hearing.⁴⁹⁸ President Clinton continued to enforce the Kennebunkport Order despite contrary campaign promises.⁴⁹⁹ Clinton distinguished his program from Bush's by framing it as in the interest of "restoring democracy" to Haiti.⁵⁰⁰

1. *Haitian Refugee Ctr. v. Civiletti*: The Economics of Repression⁵⁰¹

In *Haitian Refugee Ctr. v. Civiletti*, the issue was whether the Immigration and Naturalization Service's (the "INS") program of expedited mass deportation of Haitian nationals constituted systematic discrimina-

493. *Id.*

494. Wah, *supra* note 488, at 56.

495. See Michael Ratner, How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation, 11 HARV. HUM. RTS. J. 187, 190 (1998) (discussing shifts in United States refugee policy immediately after the 1991 Haitian coup – the United States initially brought all interdicted Haitians to the United States where they could apply for asylum, but approximately two weeks later, ceased automatically bringing refugees to the United States).

496. *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1557 (S.D. Fla. 1991).

497. *U.S. Human Rights Policy Toward Haiti: Hearings Before the Subcomm. on Legislation and Nat'l Sec. of the H. Comm. on Gov't Operations*, 102d Cong. 7-8 (1992) (statement of Harold J. Johnson, Director, Foreign Economic Assistance Issues) [hereinafter *Subcomm. Hearings on Policy Toward Haiti*].

498. Exec. Order No. 12807, 57 Fed. Reg. 23133-34 (May 24, 1992); Editorial, *Haiti Betrayed*, 15 MULTINATIONAL MONITOR 3 (Mar. 1994), <https://www.multinationalmonitor.org/hyper/issues/1994/03/editorial.html> [<https://perma.cc/2SS5-JUZP>] (last visited Apr. 15, 2021).

499. PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 37-38 (200).

500. See Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES (Jan. 15, 1993), <https://www.nytimes.com/1993/01/15/world/clinton-says-us-will-continue-ban-on-haitian-exodus.html>.

501. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980).

tion.⁵⁰² The court held that the INS program amounted to intentional, systematic discrimination against Haitians and violated Constitutional due process and equal protection.⁵⁰³ In July 1978, the INS developed the Haitian Program to deal with the “Haitian Problem,” which was identified as the backlog of the six or seven thousand unprocessed asylum cases of the Boat People.⁵⁰⁴ INS changed its policy for processing Haitian asylum claims to expedite the review of asylum applications so that Haitians could be summarily expelled from the United States without a true determination of whether they met the well-founded fear standard.⁵⁰⁵

The INS classified Haitians as a single class of economic refugees not entitled to asylum.⁵⁰⁶ Tens of thousands of Haitians’ asylum requests were processed between September 1978 and May 1979 and the INS did not grant asylum to anyone.⁵⁰⁷ The court found that only Haitians had been consistently denied asylum when compared to Cubans, Indochinese, Nicaraguans, Hungarians, and refugees from other countries.⁵⁰⁸ The court determined that, by its very nature and intent, the process was prejudicial and discriminatory, and thus, violated Haitians’ due process and equal protection rights.⁵⁰⁹

A critical aspect of the opinion is its exhaustive analysis of the repressive conditions in Haiti.⁵¹⁰ The court refuted INS’s principal argument that Haitians were mere economic refugees who did not possess a well-founded fear of persecution, declaring that Haitians lived under the threat of constant physical persecution and faced imminent persecution if they returned.⁵¹¹ The court classified the persecution as human rights violations sufficient to warrant a finding that the plaintiffs qualified for asylum.⁵¹² The court described, in detail, the high likelihood that an individual accused of being a political opponent upon repatriation would be kidnapped, imprisoned in inhumane conditions, tortured, and killed.⁵¹³ The opinion explains Haiti’s economics of repression,⁵¹⁴ in which the

502. *Id.* at 511.

503. *Id.*

504. *Id.* at 511-12.

505. *Id.* at 511.

506. *Id.*

507. *Id.* at 519.

508. *Id.* at 518-19.

509. *Id.* at 511.

510. *Id.* at 475.

511. *Id.* at 480-82.

512. *Id.* at 482.

513. *Id.* at 493.

514. *Id.* at 507.

economic system and political system are fused into an oppressive structure where poverty is used to maintain power.⁵¹⁵

The court managed to articulate how Haitians could rightfully possess a well-founded fear of persecution that may facially present as economic concerns. But subsequent court decisions and official statements rest on the feigned inability of officials to make the same finding. Following the scathing opinion, the United States changed its policy to extraterritorial interdiction, which allowed it to circumvent the court's ruling.

2. *Sale v. Haitian Ctrs. Council, Inc.*:⁵¹⁶ Interdiction and Repatriation

In *Sale v. Haitian Ctrs. Council, Inc.*, the Court addressed whether forced repatriation of Haitians that was authorized to be undertaken beyond the territorial sea of the United States pursuant to Executive Order No. 12807⁵¹⁷ violated § 243(h)(1) of the Immigration and Nationality Act of 1952 (the "Act of 1952").⁵¹⁸ The broader issue was whether extraterritorial interdiction and forced repatriation violated America's obligations of non-refoulement under Article 33 of the Convention, thus giving the plaintiffs standing to seek redress and asylum.⁵¹⁹ Section 243(h) of the Act of 1952 provides that subject to exceptions, the United States Attorney General shall not "deport or return" any alien to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. Article 33.1 provides: no contracting state shall "expel or return ('refouler')" a refugee in any manner whatsoever to the frontiers of territories where the refugee's life or freedom would be threatened on account of the refugee's race, religion, nationality, membership in a particular social group, or political opinion.⁵²⁰

After engaging in a strained statutory interpretation of the definitions of return and refoulement, along with an analysis of the limited legislative history of Section 243(h) and Article 33,⁵²¹ the Court held the plaintiffs did not have a judicial remedy because the obligations of non-

515. *Id.* at 507-10.

516. *Sale*, 509 U.S. at 155 (1993).

517. Exec. Order No. 12807, 57 Fed. Reg. 23133 (May 24, 1992).

518. *Sale*, 509 U.S. at 155.

519. *Id.* at 156.

520. U.N. Convention Relating to the Status of Refugees art. 33(1), 19 U.S.T. 6259, 189 U.N.T.S. 150, (Jul. 28, 1951) (binding on the United States through its accession to the U.N. Protocol Relating to the Status of Refugees U.S.T. 6223, T.I.A.S. No. 6577 (Jan. 31, 1967)).

521. *Sale*, 509 U.S. at 176-87.

return and non-refoulement applied only to those who were physically present in the territory of the host country or on the threshold of initial entry into the host country.⁵²² There was no proof that Article 33 and Section 243(h) were intended to have extraterritorial effect. Because plaintiffs were not technically within American territory or at the threshold of initial entry, the Court held that America's actions did not violate international law.⁵²³

The Court acknowledged that the decision did not comport with the spirit refugee law: "Although gathering fleeing refugees and returning them to the one country they had desperately sought to escape may violate the spirit of Article 33, general humanitarian intent cannot impose unanticipated obligations on treaty signatories."⁵²⁴ The Court tried to justify America's actions:

With both the facilities at Guantanamo and available Coast Guard cutter saturated and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida) the Government could no longer both protect our borders and offer the Haitians even a modified screening process.⁵²⁵

Sale is significant because the opinion evinces the extent to which the United States will distort common understandings of terms and international obligations to preserve racist laws and policies.

The Office of the United Nations High Commissioner for Refugees issued *The Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol on January 26, 2007* (the "Advisory Opinion"), asserting:

an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. . . . As with non-refoulement obligations . . . the decisive criterion is not whether such persons are on the State's territory, but rather,

522. *Id.* at 177.

523. *Id.* at 182-83.

524. *Id.* at 183.

525. *Id.* at 163.

whether they come within the effective control and authority of that State.⁵²⁶

Notwithstanding the Advisory Opinion, other countries have followed America's lead and used extraterritorial measures to prevent the immigration of Africans and people of the African Diaspora.⁵²⁷

3. *Saget v. Trump: Shithole Countries*⁵²⁸ “African countries are toast . . . Haiti is up next.”⁵²⁹

In *Saget v. Trump*, the United States District Court for the Eastern District of New York denounced Donald Trump's racist immigration laws and policies. The court granted the Plaintiffs a nationwide preliminary injunction enjoining the Trump Administration from terminating Temporary Protected Status (“TPS”) for Haitians because the Plaintiffs demonstrated a likelihood of success on claims that the Department of Homeland Security (“DHS”) violated the Administrative Procedure Act by acting arbitrarily and capriciously based on improper political influence.⁵³⁰

Congress created TPS for nationals of designated countries experiencing an ongoing armed conflict, environmental disaster, or extraordinary and temporary conditions. 8 U.S.C. § 1254a(b) governs TPS designations, providing in relevant part:

(1) the Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

526. U.N. High Comm'r for Refugees, *Advisory Opinion the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 16 (Jan. 26, 2017), <https://www.refworld.org/docid/45f17a1a4.html>.

527. See REFUGEE RIGHTS, ETHICS AND ADVOCACY IN AFRICA 189 (David Hollenbach, ed. 2008).

528. *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

529. *Id.* at 362 (citing April 20, 2017 email from Gene Hamilton, former Senior Counsel to Senator Jefferson Sessions, to David Lapan).

530. *Id.* at 359-360.

(B) the Attorney General finds that —

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.⁵³¹

The authority to make TPS designations was transferred to the Secretary of DHS (the “Secretary”). The Secretary must conduct a periodic review to assess whether to re-designate, extend, or terminate TPS for a country.⁵³² The Secretary must “consult the appropriate federal agencies (including the Department of State),” “consider the current conditions in the foreign state and whether the conditions supporting the original designation are still met.”⁵³³ “This includes conditions ‘not necessarily caused by,’ and conditions ‘untethered’ to the initial event that led to an initial TPS designation.”⁵³⁴

DHS Secretary Janet Napolitano granted Haiti TPS on January 12, 2010 because the extraordinary and temporary conditions following the 7.0 magnitude earthquake prevented Haitian nationals from returning to Haiti safely. Napolitano re-designated Haiti’s TPS status in May 2011 after determining that “the conditions prompting the original designation continue[d] to be met.”⁵³⁵ Secretary Jeh Johnson extended TPS in October 2012, March 2015, and August 2015.⁵³⁶ DHS validated its TPS determinations by stating that damage to infrastructure, agriculture, public

531. 8 U.S.C.A § 1254a(b) (Westlaw Current through P.L. 116-259).

532. *Saget*, 375 F. Supp. 3d, at 298.

533. *Id.*

534. *Id.* at 300.

535. *Id.* at 301.

536. *Id.*

health, educational facilities, transportation, food insecurity, a housing crisis and a cholera epidemic, gender violence against women, environmental risks, political instability, and security risks resulting from the 2010 earthquake remained.⁵³⁷ Secretary John Kelly extended TPS from May 24, 2017 until January 22, 2018, citing approximately the same conditions.⁵³⁸

In March 2017, the Trump Administration began applying pressure on the United States Citizenship and Immigration Services (the “USCIS”) to draft a memorandum that supported the termination of TPS, arguing the conditions for TPS no longer existed and Haiti had made significant progress.⁵³⁹ Trump USCIS appointees (including Kathy Kovarik, the newly appointed Chief of the USCIS Office of Policy and Strategy, DHS staffers, and Kirstjen Nielsen, John F. Kelly’s chief of staff) made repeated requests to USCIS career staffers to compile data concerning the criminality, welfare, educational status, and employment status of Haitian TPS recipients in hopes of finding negative data to rationalize and draw support for the termination of TPS.⁵⁴⁰ During a White House meeting on November 3, 2017, to coordinate the process for terminating TPS for aliens from El Salvador, Haiti, Nicaragua, and Honduras, the briefing materials and Attorney General Jeff Sessions recommended Acting Secretary of DHS, Elaine Duke, terminate TPS that would become effective January 5, 2019, supporting Trump’s America First platform.⁵⁴¹

In November of 2017, Duke announced her decision to terminate TPS for Haiti, stating “the extraordinary but temporary conditions caused by the 2010 earthquake no longer exist.”⁵⁴² The court determined that there was evidence Duke was acting in bad faith and in an arbitrary and capricious manner because her decision to terminate TPS reflected a pre-ordained outcome motivated by racial animus and improper political influence.⁵⁴³ She departed from past agency practices, perpetuated pretextual justification for terminating TPS after the decision was made to terminate it, and changed the interpretation of the statute to effectuate discrimination in support of Trump’s America First platform.⁵⁴⁴

The court pointed to Hamilton’s April 20, 2017 email to David Lapan (DHS Press Secretary), stating, “African countries are toast . . .

537. *Id.* at 301-02.

538. *Id.* at 302.

539. *Id.* at 306.

540. *Id.* at 307-08.

541. *Id.* at 324.

542. *Id.* at 327-28.

543. *Id.* at 346, 371-74.

544. *Id.* at 349, 359-60.

Haiti is up next.”⁵⁴⁵ Significantly, the court determined that Trump’s racist statements could be imputed to Duke,⁵⁴⁶ citing Trump’s statements concerning Mexicans, and his June 2017 meeting where he stated all Haitians have AIDS and exclaimed “Why are we having all these people from shithole countries come here?”⁵⁴⁷ as proof that Duke’s decision was motivated by racial animus and improper political influence.

C. *Putting a Band-Aid on a Bullet Wound - The Haitian Refugee Immigration Fairness Act (HRIFA)*⁵⁴⁸

*“Why are you letting us suffer this way, America? Don’t you have a father’s heart? . . . Give us back our freedom.”*⁵⁴⁹

Congress enacted the HRIFA on October 21, 1998, which allowed specific categories of Haitians, who were provided refuge in the United States, to adjust their legal status. HRIFA was marketed as a narrowly tailored humanitarian antidote to Haitian militarism and corruption. Congress stated that the goal of HRIFA was to ensure that Haitian nationals received the same treatment afforded to similarly situated immigrants.⁵⁵⁰ Although the HRIFA’s congressional supporters openly acknowledged the pervasiveness of racial discrimination in America’s immigration laws and policies, the predominant sentiment was that the HRIFA was another instance where the United States was rescuing Haiti. In reality, the United States was providing an antidote to an illness that it was instrumental in causing.

The self-congratulatory tone⁵⁵¹ of Congressional statements prove that the United States expected Haiti to demonstrate its submission by expressing gratitude. Statements of Haitian nationals indicate that some Haitians were aware that they needed to outwardly display docility in ex-

545. *Id.* at 362.

546. *Id.* at 371-72.

547. *Id.* at 371.

548. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 902, 112 Stat. 2681, 538 (1998); See CAROLINE BETTINGER-LOPEZ, RACHEL BARISH, ERIN HYUN & OTTO SAKI, RIGHTS OF IMMIGRANTS IN AND MIGRANTS TO THE UNITED STATES, APPENDIX B: *DISCRIMINATION AGAINST HAITIAN ASYLUM-SEEKERS* 13 (2008), <https://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/ushrn5.doc>.

549. Malissa Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States’ Haitian Immigration Policy*, 45 STAN. L. REV. 687, 687 (1993).

550. *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 105th Cong. 3 (1997) (statement of Mich. Sen. Spencer Abraham, Chairman, S. Subcomm. on Immigration).

551. *Id.* (See opening statement by Mich. Sen. Spencer Abraham, statements of John Conyers).

change for ostensible benevolence.⁵⁵² Below are excerpts from Haitians' statements and letters presented in support of the HRIFA.

Thank you so much for caring about us and taking the time to learn about me, my problems and the problems of people in situations like mine . . . I was so grateful and happy when the U.S. ship saved us from our little boat”

– Statement of Nestilia Robergeau⁵⁵³

I would like to thank Senator Abraham and the Immigration Subcommittee for giving me this opportunity. The proposed law would help my family and me very much. Please pass the law that will allow my family and me to stay in the United States.

– Statement of Louiciana Miclisse⁵⁵⁴

Additionally, the statements show that Haitians are either aware of the regime of truth used to demonize them or have internalized the stereotypes. The writers and speakers made a conscious effort to prove they were not anti-Christian, lazy, diseased Haitians, but were upstanding, hard-working, Christian members of their community.

I plan on studying to become a registered nurse, so I can help people. Currently, I live in Atlanta, GA and work as a cashier at Harris Teeter, which is a supermarket, and at Wendy's. Most days, I work from 7 o'clock in the morning until 10 o'clock in the evening. I am a member of Bethel Baptist Church, where I attend services as often as I can, at least once and sometimes twice a week. I have my own apartment and I support myself and my little brother, Michelet Robergeau He attends Wheeler High School, where he is a junior. Michelet is a Mormon and attends prayer meetings and services almost daily.

– Statement of Nestilia Robergeau⁵⁵⁵

I make good grades so that I can go to medical school. I have decided that I want to be a doctor when I grow up so that I

552. RUDYARD KIPLING, *THE WHITE MAN'S BURDEN* (1899); Bellegarde-Smith, *supra* note 387, at 17-18.

553. *Supra* note 551, at 26-27 (statement of Nestilia Robergeau, Haitian refugee).

554. *Id.* at 28.

555. *Id.* at 27.

can help people from dying. I heard that children in Haiti do not go to school. I would be so sad if that happened to me. I also love my church. I participate in our Haitian dance group and I get to help take up the offerings on Sundays sometimes.

– Statement of Louiciana Miclisse⁵⁵⁶

CONCLUSION

The Fifth Commandment of white supremacy is a Black soul should accept discipline and punishment as for its own good. “Americans seem to have the power to control perceptions of reality, if not reality itself,”⁵⁵⁷ and concerning Haiti, this statement rings true. The United States has perpetuated a regime of truth that depicts Haiti’s perils as evidence of its violent and corrupt predilections. But the United States has played an outsized role in Haiti’s present condition. Where the United States has deployed racialized structural violence against Haiti using foreign policy, immigration law, and immigration policies, it has prevented Haiti from maximizing its potential. Haiti has devolved into a client state. The structure of inequality that represses Haiti is engrafted into the international social order. Now Haiti consistently occupies a low rank in all international systems, resulting in political instability, economic vulnerability, chronic food insecurity, ecological devastation, high infant mortality rates, and more.⁵⁵⁸

This Article investigated discipline and punishment as a form of racialized structural violence in American foreign policy, immigration law, and immigration policies towards Haiti. However, racialized structural violence permeates American society. The United States appropriated the disciplinary apparatus it developed for Haiti for use against domestic Blacks. When the United States launched a preemptive war against Haiti, it concurrently launched a preemptive war against Blacks within the United States for the express purpose of turning Blacks into a permanently docile subpopulation. Now, isolation, marginalization, and enclosure are defining features of the Black experience. Blacks have been precluded from operating within systems, which has led to a pattern of inequality where Blacks have been “deprived not only relative to the potential but, indeed below subsistence minimum.”⁵⁵⁹ To start, racialized structural violence exists in laws, education, housing, economics, voting, the justice

556. *Id.* at 28.

557. FARMER, *supra* note 412, at 49.

558. *Saget v. Trump*, 375 F. Supp. 3d 280, 301-02 (E.D.N.Y. 2019).

559. Galtung, *supra* note 15, at 177.

system, employment, and is apparent in government suppression of Black freedom movements.

The American government's treatment of domestic Black freedom and abolition movements such as Reconstruction, the Civil Rights Movement, the Black Panther Party Movement, and the Black Lives Matter Movement, mirrors its pro-white supremacy, nineteenth-century government's response to the success of the Haitian Revolution. Black revolutionary contagion and insurrection and unsanctioned Black freedom are construed as existential and national security threats to America. Therefore, the legacy of racialized structural violence in Haiti is the legacy of racialized structural violence in America.

Everybody has asked the question . . . “What shall we do with the Negro?” Do nothing with us! Your doing with us has already played the mischief with us. . . . If the apples will not remain on the tree on their own strength, if they are worm eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the Negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs!⁵⁶⁰

560. Frederick Douglass, *What the Black Man Wants*, Speech delivered at the Annual Meeting of the Massachusetts Anti-Slavery Society in Boston (Apr. 1865).

