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Africana Legal Studies: A New Theoretical Approach to Law & Protocol

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AFRICANA LEGAL STUDIES:
A NEW THEORETICAL APPROACH TO
LAW & PROTOCOL

*Angi Porter**

INTRODUCTION	250
I. LESSONS FROM AFRICANA STUDIES: LAW AS SOCIAL STRUCTURE AND “PROTOCOL” AS GOVERNANCE	254
A. <i>Africana Studies Methodology</i>	256
B. <i>Africana Legal Studies: The Application of Disciplinary Africana Studies Insights to Legal Study</i>	270
II. CASE STUDY: THE BAMANA IN COLONIAL LOUISIANA	287
A. <i>Law: Louisiana’s Legal Landscape</i>	288
B. <i>Protocol: Bamana Protocol from Africa to Louisiana</i>	295
C. <i>Persistence of Protocol</i>	304
III. WHAT PROTOCOL TELLS US	308
A. <i>Interpreting Actions</i>	309
B. <i>Positing Perspectives</i>	316
C. <i>Sankofa: Africana Protocol as Inspiration for Today and Innovation for Tomorrow</i>	318
CONCLUSION	321

* Assistant Professor of Law, American University Washington College of Law. This work is an offering to the ancestors. It exists only because your work does. I promise to continue in my devotion to our collective work toward something better for all of us and for those not yet born. Deepest gratitude to my parents, Douglas Porter and Barbara Jordan, and entire family. I am blessed by the sage guidance and profound teachings of Greg Carr, Valethia Watkins, and Mario Beatty; your important work and our treasured conversations shaped this piece, and I am forever grateful. *duA* to Mama Ife Carruthers, Kenneth Nunn, and the Association for the Study of Classical African Civilizations (ASCAC) community whose attention, questions, and encouragement propel me. I sincerely appreciate the input and insights graciously provided by Michael Gomez and Gwendolyn Midlo Hall. I will never forget the help of Aderson François, Deborah Cantrell, Kia Pankey, SooJin Pate, Torii Zamora Millet, Raegan Henderson, Sarah Haroon, Lindsay Docto, Chee Xiong, Ayah Helmy, Melissa Stewart, Julian Hill, and Nikola Nable-Juris. A big thank you to those who reviewed my work and offered helpful feedback, including Robin West, Heidi Li Feldman, K-Sue Park, Andre Smith, and many others at Georgetown University Law Center (GULC) and American University Washington College of Law. The editors at *MJRL* worked tirelessly on this piece, and I can’t imagine it was easy—a wholehearted thank you to each of you. Finally, to my amazing students in the first Africana Legal Studies course, taught at GULC in Spring 2022: I learned so much from each and every one in our *mbôngi*, and I am filled with gratitude.

INTRODUCTION

“African people have produced the same general types of institutions for understanding and ordering their worlds as every other group of human beings. Though this should be obvious, the fact that we must go to great lengths to recognize and then demonstrate it speaks to the potent and invisible effect of the enslavement and colonization of African people over the last 500 years.”

– Greg Carr¹

In 1743, a group of enslaved Africans from various estates in French colonial New Orleans gathered, held a musical ceremony sung in their native language, and discussed the actions and fate of a slaveholder named Corbin.² Earlier, Corbin had threatened to shoot one of the enslaved Africans in this group, and Corbin’s brother then actually shot that person with a gun loaded with salt.³ Now, as the group of Africans gathered, they determined that Corbin had to die.⁴ Two months later, Corbin disappeared and was never found.⁵

If we use a traditional (Western) legal framework to describe this situation, we might say that this group of *slaves* met, *conspired*, *plotted to murder*, and likely did *murder* Corbin. But if we center the perspective of these *enslaved Africans* and contemplate that they had their own home cultures with their own systems of justice, brought with them from Africa, we might rephrase: These *Africans convened and judged Corbin’s conduct, sentenced him to death*, and likely *executed* him.⁶

What’s the truth? Did the enslaved Africans who met that day conduct a trial and execute Corbin? Was this vigilantism and revenge? Was it a way of addressing wrongdoing? Were these Africans morally justified in taking Corbin’s life? Did they conspire to commit murder?

1. Greg Carr, *Teaching and Studying the African(a) Experience: Definitions and Categories*, in SCHOOL DISTRICT OF PHILADELPHIA, LESSONS IN AFRICANA STUDIES: AFRICAN-AMERICAN HISTORY COURSE 12 (2006).

2. GWENDOLYN MIDLO HALL, *AFRICANS IN COLONIAL LOUISIANA: THE DEVELOPMENT OF AFRO-CREOLE CULTURE IN THE EIGHTEENTH CENTURY* 162 (1992) (“A group of slaves met and ‘a service was sung in the style and language of the nègres.’”).

3. *Id.*

4. *See id.*

5. *Id.*

6. *Id.* (“They evidently sentenced Corbin to death and carried out his execution.”). Corbin disappeared after going out to hunt, and one of the members of this group named Jeannot threatened another slaveholder by saying he knew who killed Corbin.

The answers depend on your orientation. The way we frame and describe what these Africans did depends on our approach to history and whose perspectives we center. Whether we choose “kill” or “execute” says something about our thinking, specifically our thinking on the thinking of enslaved Africans. Which type of thinking should define justice, particularly in situations where oppression plays a key role—such as circumstances when enslavement exists, or where other conditions of oppression persist? How do we define justice in this U.S. situation, where a Western society includes non-Westerners and non-Western descendants who have inherited cultural survivals from their ancestors, have carried pieces of other, non-Western world-senses⁷ with them, and have developed concerns and questions informed by those non-Western world-senses? Does Western law and Western *thinking about law* adequately address their concerns and questions?

If public opinion is any indication, the answer is “no.” There has been, and remains, deep dissatisfaction and detachment felt by many in the Black community with respect to the U.S. legal system. Some feel that the U.S. legal system—like other classically “American” institutions—does not provide justice or even define it appropriately. This may explain why, in the debriefing conversations after decisions in cases about police and vigilante violence against Black people,⁸ many descendants of Africa—myself included—find ourselves, all too often, shaking our heads and saying, “*This system is not for us.*”⁹

7. The term “world-sense” is used by Oyèrónké Oyěwùmí to mean the “conception of the world” or “cultural logic of a society.” She explains the preference for “world-sense” over the term “worldview,” which “captures the West’s privileging of the visual.” OYÈRÓNKÉ OYĚWÙMÍ, *THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES* 2-3 (1997).

8. For example, the legal processes used to determine the fate of people like Derek Chauvin, Kyle Rittenhouse, Travis and Greg McMichael, William “Roddie” Bryan, and Kim Potter are illustrative. Not to mention the legal proceedings that weren’t—those decisions not to address the killings of Black victims like Breonna Taylor, Jacob Blake, Ma’Khia Bryant, Amir Locke, and countless named and unnamed others.

9. This sentiment was evident in private conversations and also on social media. See, e.g., posted after the George Zimmerman acquittal: Rihanna (@rihanna), TWITTER (July 14, 2013, 6:25 AM), <https://twitter.com/rihanna/status/356358831678291968> (“A system cannot fail those it was never built to protect’ #JudicialFail”) (quoting Vann Newkirk). See also, posted after the Kyle Rittenhouse acquittal: Kelly Butler (@whatkbsaysgoes), TWITTER (Nov. 19, 2021, 3:52 PM), <https://twitter.com/whatkbsaysgoes/status/1461799604354174984?s=21> (“Reminder that our criminal ‘justice’ system is a system of harm and is designed to only serve a few.”); Danté Stewart (@stewarddantec), TWITTER (Nov. 19, 2021, 1:57 PM), <https://twitter.com/stewarddantec/status/1461770512456105991?s=21> (“We live in the same country. But we experience two different Americas.”); Robert C. White, Jr. (@RobertWhite_DC), TWITTER (Nov. 19, 2021, 5:13 PM), https://twitter.com/robertwhite_dc/status/1461820037145243653?s=21 (“#Kenosha reaffirms that there are two systems of justice.”); Rodericka Applewhaite (@Rodericka), TWITTER (Nov. 19, 2021, 1:39

Indeed, when the U.S. legal system was constructed, it was not made *for* African people—or their descendants. It was not designed to provide them justice. Instead, that system, birthed out of generations of European thought, was founded on the interests of those capturing and enslaving Africans; it was both imposed on them and used to justify their enslavement and other violent and demeaning acts against them.¹⁰ An important next step after the acknowledgement that “this system is not for us” is to ponder and study the notion, hidden in plain view, that there were once systems that were.

We—African people, continental and diasporic¹¹—had our own systems. They existed in Africa long before enslavement and colonialism.¹² These African systems of thought on rules for social living, dispute resolution, addressing wrongdoing, upholding obligation, and other aspects of governance were, naturally, informed by African world-senses. And, when over 12 million¹³ Africans were forcibly taken from the Afri-

PM), <https://twitter.com/rodericka/status/1461766086312005641?s=21> (“What I absolutely do not want to hear today is that the justice system failed. It worked exactly as it intended to, and that’s what we’re up against.”); Tiffany Jeffers (@LawProfTJ), TWITTER (Nov. 19, 2021, 2:04 PM), <https://twitter.com/lawproftj/status/1461772411255283722?s=21> (“I don’t know whether to say ‘this is not how the law is supposed to work,’ or ‘the law protected whiteness exactly as designed.’ Feels like both are true.”); L E F T, PhD (@LeftSentThis), TWITTER (Nov. 19, 2021, 1:25 PM), <https://twitter.com/leftsentthis/status/1461762510525112328?s=21> (“The system is doing what it’s designed to do. To be shocked would be an admittance [sic] of gullibility and historical ignorance.”); Markus Batchelor (@MarkusforDC), TWITTER (Nov. 19, 2021, 1:42 PM), <https://twitter.com/markusfordc/status/1461766772495949831?s=21> (“White violence, legal as ever.”).

10. Law became established “through and for oppression.” Cf. JACOB H. CARRUTHERS, *SCIENCE AND OPPRESSION* 14 (1972); see also E-mail from Association for the Study of Classical African Civilizations, to contact@ascacfoundation.org (Sept 1, 2020, 10:25 PM CST) (on file with author) (“The humanity of African people has been under assault for over 500 years by the West through the use of *law*, theology, philosophy, biology, and political economics to frame African people as inferior in order to justify the slave trade, slavery, colonialism, and neo-colonialism.”) (emphasis added).

11. Throughout this Article, I use the term “African” to indicate a broad, Pan-African sense. “Africans” and “African peoples” includes both “continentals and people of African descent,” “continental and diasporic” Africans. See NGÜGĪ WA THIONG’O, *SOMETHING TORN AND NEW: AN AFRICAN RENAISSANCE* 48, 52, 89 (2009). Because this expansive sense of the term may require adjustment for some readers, however, I at times expressly indicate its breadth.

12. See, e.g., CHANCELLOR WILLIAMS, *The African Constitution: Birth of Democracy, in THE DESTRUCTION OF BLACK CIVILIZATION: GREAT ISSUES OF A RACE FROM 4500 B.C. TO 2000 A.D.*, at 161-75 (1987).

13. Lovejoy places the total number of enslaved Africans taken from Africa into the Western Hemisphere by Europeans from 1450 to 1900 at 11,313,000 people. PAUL E. LOVEJOY, *TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA* 19 (2d ed. 2000). For the time period from 1600 to 1800, he places the number at approximately 8,000,000, excluding the 15% to 20% who died during the Atlantic crossing or “Middle Passage.” *Id.* at 47, 49. More recently, estimates of the number of Africans crossing

can continent, those systems of thought did not seep out of their minds into the dank and dark hulls of ships only to dissipate into the misty Atlantic Ocean air. No, enslaved Africans retained their memories, and their thoughts on systems of governance accompanied them to the Western Hemisphere.

Legal scholars, then, should consider the story of Western Law and African people as a story of the interactions between *two* systems. By using this approach and studying African governance together *with* Western Law—in the U.S. and beyond, during the enslavement experience and beyond—legal thinkers can begin to fully understand the tensions between the two. In the U.S. context, using this method, legal scholars can develop “new” ways of thinking about U.S. legal history and U.S. law today, so that the legal system might be adjusted to better embrace and exist *for* its numerous cultural constituencies.

In this Article, I describe and demonstrate this approach to studying the story of Law and African people. The approach is informed by principles drawn from a specific intellectual tradition, Africana Studies.¹⁴ By extending Africana Studies methodology to legal study, this Article envisions a new type of interdisciplinary legal work: Africana Legal Studies. This work centers the humanity and self-defined thoughts and actions of African people while studying the story of Law, offering a new lens to legal scholarship.

This Article proceeds in three parts. Part I describes the core tenets of disciplinary Africana Studies methodology and outlines how to extend them to legal study for an Africana-informed examination of Law and African governance (what I call, in this context, “Protocol”). Part II applies the Africana Legal Studies approach through exploration of one notable example of Protocol and the perspective it offers on U.S. Law: the Pro-

the Atlantic Ocean as captives has increased to 12,521,337 people. See TOBY GREEN, *A FISTFUL OF SHELLS: WEST AFRICA FROM THE RISE OF THE SLAVE TRADE TO THE AGE OF REVOLUTION* 266–67 (2019) (citing the Trans-Atlantic Slave Trade Database), www.slavevoyages.org (last visited Jan. 7, 2022).

14. Africana Studies has been around for the last 60 years in formal education, but it arises out of an intellectual thrust that extends back to the origins of humans on the continent of Africa. See *infra* Part I. Du Bois championed the idea of studying African origins of society and the rewards doing so would bring to education. He explained that, at the Black College, the program of education should

seek[] from a beginning of the history of the Negro in America and in Africa to interpret all history; from a beginning of social development among Negro slaves and freedmen in America and Negro tribes and kingdoms in Africa, to interpret and understand the social development of all mankind in all ages.

W.E.B. Du Bois, *The Negro College*, in W.E.B. DU BOIS: A READER 71 (David Levering Lewis ed., 1995).

toocol of the Bamana people of West Africa, who were enslaved in colonial Louisiana. Part III then highlights the insights that are provided to us by the Bamana perspective, applicable to both our view of the past and our imagining of the future.

I. LESSONS FROM AFRICANA STUDIES: LAW AS SOCIAL STRUCTURE AND “PROTOCOL” AS GOVERNANCE

Africana Studies is “the study of Africa and Africans wherever and whenever you find it/them.”¹⁵ In the context of Africana Studies, the meaning conveyed by the term “African” is broad, including Africans on the African continent as well as people of African descent across the African diaspora.¹⁶ This includes African Americans. “Africana” is an even more expansive unit of analysis, encompassing African people, the geography of the African continent as well as “any physical place populated by Africans,” and African culture (“concepts, practices, and materials that Africans have created to live and to interact with themselves, others, and their environments”).¹⁷ The study of Africa and Africans (continental and diasporic) arose as a formal discipline in the Western academy in the 1960s; it is important to note, however, that Africans themselves have studied African people and culture since the origins of human life on the African continent.¹⁸ In the Western academy, one might observe academic units called “Black Studies,” “Afro-American Studies,” “African American Studies” and other names; the choice of the name “Africana Studies” for an academic unit generally indicates an acknowledgment of the breadth of subject matter studied.¹⁹

15. Carr, *supra* note 1, at 13. While there are varying definitions of Africana Studies from different scholars, the general subject matter, as encapsulated by Carr’s definition here, is noncontroversial.

16. *See id.*

17. *Id.*

18. Greg E. Carr, *Towards an Intellectual History of Africana Studies: Genealogy and Normative Theory*, in THE AFRICAN AMERICAN STUDIES READER 442-43 (Nathaniel Norment, Jr. ed., 2007) (“Africana Studies usually situates its origins with the emergence of distinctly-named units of Black and/or Afro-American Studies at U.S. universities in the 1960s.”); Fatou K. Camara, *From Contemporary African Customary Laws to Indigenous African Law: Identifying Ancient African Human Rights and Good Governance Sensitive Principles as a Tool to Promote Culturally Meaningful Socio-Legal Reforms*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 500 (Jeanmarie Fenrich, Paolo Galizzi, & Tracy Higgins eds., 2011) (“Africans have written about themselves since the invention of script.”).

19. *See* Greg Carr, *What Black Studies Is Not: Moving from Crisis to Liberation in Africana Intellectual Work*, 25 SOCIALISM AND DEMOCRACY 178, 179-80 (2011).

“Africana” indicates a global consciousness when thinking about the African family, and an Africana approach recognizes that borders,²⁰ Euro-linguistic distinctions,²¹ and cultural hegemony serve as obstacles between African peoples. The obstacles exist because of the *Maafa* (the “great suffering of our people,” the “disaster,” i.e., enslavement and colonization).²² The key to restoring the African family is surmounting the hurdles that remain as vestiges of the *Maafa*.²³

20. See NGŪGĪ, *supra* note 11, at 88 (explaining that, in Africa’s post-colonial reality, “even people of the same language, culture, and history remain citizens of different states.”); K. KIA BUNSEKI FU-KIAU, *MBONGI: AN AFRICAN TRADITIONAL POLITICAL INSTITUTION: A EUREKA TO THE AFRICAN CRISIS* vii (2007) (“The inherited boundaries of the colonial era should not destroy social, cultural and full-blooded links that naturally unite people of one area of a country to those of other countries within the ancient bounding lines of their tribal or ethnic states.”).

21. Carr is often heard raising the point that the only reason Africans in different parts of the Western Hemisphere speak one language and not another language is because of the origins of their ancestors’ enslavers. Africans have not spoken English and Spanish since time immemorial.

22. MARIMBA ANI, *LET THE CIRCLE BE UNBROKEN: THE IMPLICATIONS OF AFRICAN SPIRITUALITY IN THE DIASPORA* 12 (1980) [hereinafter *The Implications of African Spirituality in the Diaspora*] (defining Kiswahili *Maafa* as “disaster”); MARIMBA ANI, *YURUGU: AN AFRICAN-CENTERED CRITIQUE OF EUROPEAN CULTURAL THOUGHT AND BEHAVIOR* xxi (1994) (defining *Maafa* as “the great suffering of our people at the hands of Europeans in the Western hemisphere”); ASA G. HILLIARD, III, *SBA: THE REAWAKENING OF THE AFRICAN MIND* 1 (1997) (explaining that the term *Maafa* “refers to the terroristic interruption of African civilization that was occasioned by European and Arab slavery and cultural aggression.”); Greg E. Kimathi Carr, *The African-Centered Philosophy of History: An Exploratory Essay on the Genealogy of Foundationalist Historical Thought and African Nationalist Identity Construction*, in *AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE* 288 n.10 (Jacob H. Carruthers & Leon C. Harris eds., 1997) (explaining that the term *Maafa* was popularized by Marimba Ani and references “the processes of human aggression visited by Europeans upon African people globally over the past half millennium.”). We might date the commencement of the *Maafa* to whenever it was visited upon individual African cultures, generally keeping in mind that the first African captives were sold by the Portuguese in Europe around 1440 A.D. See GREEN, *supra* note 13, at 25 (setting this date at 1444 A.D.); JESSICA B. HARRIS, *HIGH ON THE HOG: A CULINARY JOURNEY FROM AFRICA TO AMERICA* 27 (2011) (setting the date at 1441). The *Maafa* is not over and is ongoing today. I use the term *Maafa* throughout this Article as a reference to the disaster resulting from Western (European, including acts of Europe’s current and former colonies) aggression in the broadest sense, extending globally, encompassing enslavement, colonization, and imperialism, wherever practiced, all from the earliest commencement date and continuing to the present.

23. MALIDOMA PATRICE SOMÉ, *THE HEALING WISDOM OF AFRICA: FINDING LIFE PURPOSE THROUGH NATURE, RITUAL, AND COMMUNITY* 2 (1999) (“A large number of tribal communities throughout the world suffered the same fate of being divided by the casual decree of colonizers.”).

A. *Africana Studies Methodology*

“Africana Studies” is still commonly used as a subject-matter term to adorn university academic units where Africana is studied using the methodologies of other disciplines. As the subject-matter discipline has developed, many scholars have done tremendous work defining disciplinary Africana Studies by distilling a unique Africana Studies methodological approach to its subject matter—i.e., the theoretical and analytical approach that guides, frames, and determines how study in the field is done.²⁴ Put another way, Africana Studies studies Africana, but *disciplinary* Africana Studies studies Africana in a specific, Africana-Studies way. Of course, as within other disciplines, there are various schools of thought, and scholars differ on what that methodological approach is and should be.²⁵

In this Article, I draw out key methodological approaches, developed by select Africana Studies scholars over the past several decades, that offer helpful insights for legal study of Africana subject matter. These approaches are (1) African-centeredness; (2) the “long view of history,” (3) cultural continuity, and (4) Carr’s Africana Studies Framework.

i. African-centeredness

African-centeredness²⁶ means that the perspectives, stories, thoughts, and audience of African people are prioritized in thinking and discourse.²⁷

24. See Carr, *supra* note 19, at 179–80.

25. *Id.* at 181 (“The contemporary struggle to define the discipline of Africana Studies is essentially a contestation over methodologies emanating from these various approaches to knowledge production.”).

26. Note that this methodology is “African-centered,” not “Black-centered,” indicating the emphasis on culture instead of race. African-centered work focuses on African culture, on the continent and throughout the diaspora, rather than the phenotype of race, i.e., “Blackness.” See, e.g., JACOB H. CARRUTHERS, *ESSAYS IN ANCIENT EGYPTIAN STUDIES* 40 (1984). In this vein, Jacob Carruthers recommended that African people “move from the rather stand-still position of hollow Black power and Black pride to a position of revolutionary restoration and reconstruction of the world according to the African principle.” *Id.*; see also Oyèrónké Oyèwùmí, Remarks at Desaprendendo lições da Colonialidade: Escavando saberes subjugados e epistemologias Marginalizadas (“Unlearning Coloniality Lessons: Excavating Subjugated Knowledges and Marginalized Epistemologies”) Conference, YOUTUBE (Oct. 7, 2016), <https://youtu.be/zeF19vTl8ZU>, at 47:00 (emphasizing that the notion of “Black” overwrites and erases “African”); HILLIARD, *supra* note 22, at 32 (referencing use of terms like “negroes,” “colored,” and “blacks”) (“[T]he use of such names to refer to a group of people effectively serves to remove them from time and space. It takes them out of the human historical process. They become a people without a tradition, without a homeland, and without an interest.”).

In turn, the humanity and agency of African people over space and time are always in focus and in the foreground of study. This is a revitalizing orientation in a reality where “[g]enerations of school kids were poisoned with a propaganda that depicted Black people as content in their oppression and nonparticipants in their freedom.”²⁸

A primary goal of African-centeredness, as an approach, is to unhook Africana intellectual genealogies from Western normative theory and epistemology, a process encapsulated in Jacob Carruthers’s charge to “break the chain that links African ideas to European ideas and listen to the voice of the ancestors without European interpreters.”²⁹ Scholarship adhering to this charge envisions “the decolonization of African memory” and seeks to use African ideas to study Africana (Africa and African people, their history, their culture) and the world.³⁰ Rather than applying theoretical approaches by European thinkers, which arise out of European history and worldviews, African-centered scholars attempt to apply the theoretical frameworks developed by continental and diasporic African thinkers.³¹ This means that African-centeredness rejects tendencies to relate Africana as subject matter back to the West. African-centered scholars strive to be unburdened by the specter in the mind—

27. “[T]he African scholar must be academically trained and bold enough to put Africa at the center of history and move all world history from that center.” John Henrik Clarke, *Foreword to AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE*, at x (Jacob H. Carruthers & Leon C. Harris eds., 1997); JACOB H. CARRUTHERS, *INTELLECTUAL WARFARE* 260 (1999) (“An African-centered education can only be built on the foundations of traditional African concepts of education.”).

28. Michael Paul Williams, *Williams: “If You Love the Declaration of Independence, You Have to Thank Black People.” They Helped Shape that Moment*, RICH. TIMES-DISPATCH, July 3, 2021, https://richmond.com/news/local/history/williams-if-you-love-the-declaration-of-independence-you-have-to-thank-black-people-they/article_b2ebd7c8-d6e5-5cb2-b2ad-26f52b9c58c2.html.

29. JACOB CARRUTHERS, *Preface to MDW NTR: DIVINE SPEECH; A HISTORIOGRAPHICAL REFLECTION OF AFRICAN DEEP THOUGHT FROM THE TIME OF PHARAOSHS TO THE PRESENT*, at xviii (1995); see Carr, *supra* note 18, at 439.

30. NGÜGĪ, *supra* note 11, at x; see *AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE* 356 (Jacob H. Carruthers & Leon C. Harris eds., 1997).

31. This idea extends to the way African-centered scholars conduct research and the sources they consult. In an African-centered orientation, there is a general caution about translations by Western interpreters of Africana oral and written texts. Inappropriately imposed Western constructions and biases manifest in translation, particularly when the translator/interpreter lacks a deep understanding or appreciation of African constructs. These works are approached with a critical eye and deprioritized when considered along with the words and works of African people themselves to describe their own cultures and histories. See, e.g., Carr, *supra* note 1, at 16 (emphasizing how we may explore that African “memories of their experiences differed from the memories constructed by other groups about who Africans were”).

the European orientation—and they search for truth based on an African orientation, characterizing the world from that vantage point.

Scholars working from an African-centered orientation do not seek validation from Western institutions or prioritize efforts toward “inclusion” in European-centered spaces. Within this orientation, inclusion projects are flawed, as they themselves center institutions with European-defined frameworks, seeking to expand and change those institutions rather than building African-centered institutions from an African foundation. This perspective is often met with hostility and accusation from those operating within a European-centered orientation; the practice of displacing or refusing to honor European culture’s position as the center of discourse feels threatening and offensive to those accustomed and devoted to that norm.³²

In the African-centered orientation, collectivism is an important principle applied to scholarly work, and scholarly work is an extension of community work.³³ Community is paramount as a “collaborative source of—rather than the receiving beneficiaries of—models of inquiry and normative assumptions.”³⁴ Collectivism extends to the African-centered historical narrative, which emphasizes movements of people (not individuals) over time. There is a divorcing from Western historiography and its emphasis on individual heroes of history. The individual, when studied, is placed in context and ideally connected to a genealogy of a family, community, and movements.³⁵

32. Cf. RUBY HAMAD, *WHITE TEARS/BROWN SCARS: HOW WHITE FEMINISM BETRAYS WOMEN OF COLOR* 240–41 (2020) (“Cheryl Matias described whiteness as narcissistic because its emotional nature insists on positioning itself as the center of the discourse, ‘especially when one is trying to push it to the margins.’”).

33. One notable feature of Africana Studies is its collaboration and “[s]ustained interaction with . . . non-elites in the African community”—the collectivism often identified as central to the African world-sense is part and parcel of Africana Studies as an intellectual tradition. Carr, *supra* note 18, at 438; see also CARRUTHERS, *supra* note 26, at ix; cf. FUKIAU, *supra* note 20, at v (“The concern is of everybody, in the community, by the community and for the community.”).

34. Carr, *supra* note 18, at 438.

35. For example, an African-centered approach would not simply study Ida B. Wells in a vacuum. The study instead would focus on who Ida B. Wells was in the context of her family genealogy, in the context of her forebearers and influences, in the context of her community and its organizations/social groups, and in the context of who she taught, trained, and influenced. See Carr, *supra* note 19, at 187. Kossola, an enslaved African in Alabama, explained this approach to his interviewer, Zora Neale Hurston:

Where is de house where de mouse is de leader? In de Affica soil I cain tellee you ‘bout de son before I tellee you ‘bout de father; and derefore, you unnerstand me, I cain talk about de man who is father (*et te*) till I tellee you bout de man who he father to him, (*et, te, te, grandfather*) now, dass right ain’ it?

ii. The Long View of History

Another orientation promoted by work in disciplinary Africana Studies is the “long view of African and world history.”³⁶ In this orientation, the history of African descendants in the Western Hemisphere does not begin with enslavement or the Middle Passage; it begins in Africa.³⁷ Contrast this with the popular “from slavery to freedom” approach to the historical narrative, which, for example, pinpoints the origins of African descendants in the United States to the period of enslavement.³⁸ John Henrik Clarke is quoted as saying that “when you start history with enslavement, it makes everything else look like progress.”³⁹ And the notion of progress overlaid on the story of African people is suspect at best. Consider the words of W.E.B. Du Bois:

We have imbibed from the surrounding white world a childish idea of progress. Progress means bigger and better results always and forever. But there is no such rule of life. In six thousand years of human culture, the losses and retrogressions have been enormous.⁴⁰

Du Bois’s words emphasize that, with a long view of history, and from the vantage point of African people, there is no superiority of now. Rather, to many, the current situation of African people in the United States, in the Western Hemisphere, and around the globe, is like a

ZORA NEALE HURSTON, *BARRACON: THE STORY OF THE LAST “BLACK CARGO”* 20–21 (Deborah G. Plant ed., 2018).

36. Carr, *supra* note 22, at 295.

37. Similarly, history on the African continent does not begin with the presence of Europeans in Africa, it begins with African people living their history since time immemorial. See NGŪGĪ, *supra* note 11, at 23.

38. You can see the “from slavery to freedom” approach to historical work in action at the National Museum of African American History & Culture, “Slavery and Freedom” exhibit (last visited May 29, 2022), where the timeline of history begins with a basement floor exhibit exploring enslavement, which includes a relatively infinitesimal section referencing history on the African continent. For more critique on the “slavery to freedom” orientation, see Carr, *supra* note 22, at 295; see also Olabiyi B. Yai, *Survivals and Dynamism of African Cultures in the Americas*, in *FROM CHAINS TO BONDS* 347 (Doudou Diène ed., 2001). Yai explains that one “inadequacy—not methodological but, this time, epistemological—that most studies of Afro-American cultures share, across all schools [is] namely, their blindness to pre-Atlantic African cultural traditions.” *Id.*

39. This quote is often mentioned by Greg Carr in his lectures and writings. See, e.g., Greg Carr, *Requiem for an Omni American: Albert Murray, Black Identities, and the Politics of Cultural Choice*, DR. GREG CARR: SCRIBE OF DJEHUTY (Aug. 21, 2013), <https://www.drgregcarr.com/blog/tag/Black+Intellectuals>.

40. Du Bois, *supra* note 14, at 72.

nightmare.⁴¹ The short-cited *Slavery to Freedom* orientation ignores these points; it ignores the losses Du Bois referenced, and it serves the oppressive society by shifting attention away from the impact of oppression and lessening the danger that the oppressed will attempt to reclaim what they have lost.⁴²

In the Long View orientation, the story of Africana is one of a “glorious African past”⁴³ which was then interrupted, giving way to disorientation, loss, struggle, and resistance. Therefore, “slavery to freedom” does not make sense; the more appropriate frame is a “Freedom to Slavery to Pseudo-Freedom” orientation, the goal being a return to Freedom.

Using the long view of history formulation, the past holds great value, as it represents a condition unencumbered by the impacts of the *Maafa*. African traditions offer a “deep well”⁴⁴ from which we may draw insights for today. It is in this vein that Valethia Watkins writes, “A major task of our historiography is to remove the ruin and rubble left in the wake of enslavement, colonization, and the ongoing fallout of white supremacy in order to recoup and relearn our tradition.”⁴⁵

This process of relearning African traditions to derive inspiration and innovation for today is encapsulated in the Akan principle of *Sankofa*. *Sankofa* is represented by the symbol of a bird turning its head around to

41. The events of the last several years have reemphasized this. In 2021, the judicial process rehashed video, photo, and testimonial evidence of the horrific deaths of George Floyd, Ahmaud Arbery, and Daunte Wright, as well as the horrific deaths and injuries of allies who protested after the horrific shooting of Jacob Blake. No criminal charges were brought to address the horrific killing of Breonna Taylor. Time and again, in recent years in particular but over the generations in the Western Hemisphere generally, African people have been reminded just how horrifying a nightmare their existence living under anti-Black racism is.

42. Another issue arising from the *Slavery to Freedom* orientation is that it creates an oppression-based identity. Since the *Maafa* (oppression) is the origin point of a people’s history, it forms their identity. Like a person afraid to finish a book or series that they enjoy, people within this orientation may avoid or delay efforts to meaningfully address oppressive forces, sitting comfortably in the oppressive situation, because if oppression disappears, so too does identity.

43. Nzinga Ratibisha Heru, *Statement from the International President, in AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE* vii (Jacob H. Carruthers & Leon C. Harris eds., 1997).

44. CARRUTHERS, *supra* note 26, at xv (“We must draw our ideas from the deep well of our heritage.”); *see also* Carr, *supra* note 19, at 187 (“Africana Studies is a reminder of the obligation to contribute to human society and, through it, to human meaning from the vast deep well of African experience and reflection.”).

45. Valethia Watkins, *Womanism and Black Feminism: Issues in the Manipulation of African Historiography, in AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE* 284 (Jacob H. Carruthers & Leon C. Harris, eds., 1997).

catch a lost egg.⁴⁶ It means “go back and fetch it” and embodies the idea that we must look back and “understand our past in order to move forward.”⁴⁷ Asa Hilliard explained that the principle of *Sankofa* in the context of intellectual work “does not mean that we should live blindly in the past, but it means that we must use the valuable wisdom that our ancestors left for us.”⁴⁸ Drawing from African systems of thought for inspiration, in line with *Sankofa*, African people may “look back to move forward by linking our glorious African past to the challenges of the African present.”⁴⁹ Accordingly, scholars using the long view of history may examine the cultures and traditions of African people (from the “Freedom” era) in order to apply useful aspects of those cultures today (in the “Pseudo-Freedom” era).⁵⁰

The value assigned to the African past has drawn criticisms of “romanticization.”⁵¹ But, telling African-positive histories is not romanticization. Looking back at the great expanse of history and focusing on what is positive and useful is not the same as looking back and describing what occurred in an idealistic way to make it more appealing than it actually was. “Romanticization” critiques are hyperreactive and overbroad, capturing and assailing merely African-positive narratives—and often without the deep knowledge of African history required to meaningfully examine specific characterizations.⁵² “Romanticization” critiques rest on

46. HEIKE OWUSU, AFRICAN SYMBOLS 206 (2000); *The Power of Sankofa: Know History*, BEREA COLLEGE, CARTER G. WOODSON CENTER, <https://www.berea.edu/cgwc/the-power-of-sankofa/> (last visited Jan. 7, 2022).

47. HILLIARD, *supra* note 22, at 7; *The Power of Sankofa*, *supra* note 46.

48. HILLIARD, *supra* note 22, at 7.

49. Heru, *supra* note 43, at vii.

50. In describing various schools of “modern African thinkers,” Carruthers describes the “foundationalists,” whose primary audience is people of African descent and whose mission is to restore African thought and culture, which have been interrupted by Western colonialism, imperialism, and enslavement. These foundationalists seek to “build[] on the foundations of African tradition.” Jacob H. Carruthers, *An African Historiography for the 21st Century*, in AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE 65–66 (Jacob H. Carruthers & Leon C. Harris eds., 1997); see FU-KIAU, *supra* note 20, at iv (“The study itself discusses traditional African practices of administrative politics within a rural, traditional African community. It attempts to show how these practices can be useful in a modern African society.”).

51. See Carr, *supra* note 19, at 188 (“Africana Studies is not a surrender of the difficult work of recovering and connecting African historical memories to the idea that such work amounts to ‘romanticizing’ or ‘mythologizing’ the past.”).

52. See *id.* (noting that a mere “handful of scholars [are] equipped with the requisite skills to undertake comparative analysis of African life, language and culture over the arc of long-view genealogies”); AYI KWEI ARMAH, THE ELOQUENCE OF THE SCRIBES: A MEMOIR ON THE SOURCES AND RESOURCES OF AFRICAN LITERATURE 129–31 (2006) (noting the “historical shallowness” of orientations like Négritude). Romanticization critiques are so commonplace that it would be misleading to provide specific examples of

false claims of objectivity in Western thought and Western scholarship about Africa. Characterization is a matter of orientation.⁵³ Critics wielding these critiques sometimes do not perceive their own orientation and its operation on their characterizations of Africa; Westocentric scholarship privileges itself as orientation-less, i.e., objective.⁵⁴

Objectivity, particularly as to Africana, is mythical in today's scholarly reality. Enslavement, colonialism, imperialism, segregation, and their legacies have driven the ideologies, assumptions, and viewpoints of scholars in the Western academy in ways even the attentive and self-aware do not fully understand, the result being an imbalance of knowledge and opinion about Africa.⁵⁵ Consequently, there is far from a dearth of scholarship and media content problematizing African continental and diasporic culture and conditions.⁵⁶ Western thinkers are enculturated to neglect or pathologize African history, hence the prevalence of narratives highlighting Africa's deficits, defects, problems, and needs. Africana is usually

them (and doing so might discourage our own self-examination). In my experiences attending, facilitating, and giving presentations, trainings, and lectures on various Africana topics with diverse audiences, comments evidencing hostility or suspicion toward African-positive narratives using the language of "romanticization" are so frequent and identically-expressed that it is uncanny. These critiques, expressed by people of various racial identities, seem learned and influenced by dominant narratives on Africa that permeate our Western educational experience. They do not typically raise historical facts as exceptions to characterizations. The knee-jerk reaction to voice romanticization as a critical talking point can be unlearned, with attention to the follow-up questions, "Does the person making the critique have the requisite knowledge to assert that what they are critiquing is a mischaracterization?" "On what evidence do they rely to claim that something has been mischaracterized?" Hopefully, these questions may encourage self-reflection, deep study, and elevation of discourse and debate regarding African history.

53. It makes sense that, in the long view of history orientation, the past—a period unencumbered by a potent and unique brand of anti-Black racism—is considered to be "glorious."

54. Compare this with the tendency to perceive White people as race-less.

55. See MICHAEL A. GOMEZ, EXCHANGING OUR COUNTRY MARKS: THE TRANSFORMATION OF AFRICAN IDENTITIES IN THE COLONIAL AND ANTEBELLUM SOUTH 9 (1998) ("The host society enjoyed physical, psychological, and military powers of coercion and could to varying degrees determine the cultural choices of the enslaved."); CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY xiv (Mercer Cook ed. & trans., Lawrence Hill & Co. 1974) (1967) ("Our investigations have convinced us that the West has not been calm enough and objective enough to teach us [Africans] our history correctly, without crude falsifications."); see AFRICAN WORLD HISTORY PROJECT, *supra* note 30, at 333.

56. "[W]hen much of the mainstream Western media turns to Africa, it far too often fixates on war and conflict, on famine or on Africa's 'amazing wildlife', instead of on its creative, resourceful and brilliant people." GREEN, *supra* note 13, at 11; see also SOMÉ, *supra* note 23, at 16 ("To many readers, my outline of African wisdom may appear a blatant idealization of the indigenous. The reason is simple: I am not interested in recounting all the bad things that indigenous Africans are known to do; these are abundantly available in the Western media.").

represented as a void needing to be filled by enlightened and innovative non-African problem-solvers.⁵⁷ This imbalance, veiled with the false notion of objectivity, has led many commentators to strictly scrutinize the notion that the vast and diverse expanse of pre-*Maafa* African history and culture have anything positive and useful to offer us today. At the same time, scholarly (and non-scholarly) discourse routinely celebrates classical and medieval European culture as having transcending relevance for human life in our present era.⁵⁸ So, when scholars with a long view of history do not even suggest that pre-*Maafa* African cultures are uniformly good or utopian,⁵⁹ their mere shift in focus to the positive aspects of African culture is enough for criticism of “romanticization” to ensue.

Disciplinary Africana Studies—being African-centered and aware of the challenge of studying Africana in the context of deeply-held anti-African biases—largely ignores this criticism and does not allow it to impede its work.⁶⁰ With its community-inclusive posture, Africana Studies both contributes to and is inspired by the global movement by African people to “reclaim” pre-*Maafa* African traditions, which is alive and well today.⁶¹ African people (continental and diasporic), oppressed by ele-

57. See HILLIARD, *supra* note 22, at 10 (“Some Africans argue that the African past has no value to Africans today. The same Africans will uncritically embrace the European—and sometimes the Arab or Asian—past as if they were essential to life itself.”).

58. HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ’S TORTS: CASES AND MATERIALS 3–6, 32 (14th ed., 2020).

59. See, e.g., WILLIAMS, *supra* note 12, at 170 (“These self-governing people [pre-colonial Africans] did not have a Utopian society in any idealistic sense.”).

60. See Carr, *supra* note 19, at 188. Chancellor Williams explains that the ideal of conducting study objectively, with no subjective or critical analysis, is a European luxury, one that a people “under perpetual siege and fighting an almost invisible war for survival” cannot afford to adopt. WILLIAMS, *supra* note 12, at 22.

61. This long-standing movement includes naming traditions (e.g., adopting African language names or naming children traditional African names rather than Western names, naming products and brands using traditional African language terms); reconnection with African spiritual traditions; supporting “Black-owned” and African-owned businesses promoting traditional African and African-inspired products and styles; exploring traditional African musical traditions; supporting narrative and documentary films set within or about traditional African societies; reengaging traditional African culinary traditions; and celebrating traditional African or African-inspired holidays and festivals. See, e.g., *A Little Juju Podcast*, APPLE PODCASTS PREVIEW, <https://podcasts.apple.com/us/podcast/a-little-juju-podcast/id1444197888> (last visited Jan. 7, 2022) (“A Little Juju Podcast celebrates the rapidly growing return of black folk reclaiming their indigenous spiritual practices, while creating a space for us to laugh, question, and to re-commit ourselves to liberation through the ancestral tools given to us.”); OMI WOODS, <https://omiwoods.com/pages/about-us> (last visited Jan. 7, 2022) (explaining the name of the jewelry brand incorporates Yoruba language and references the word “Jamaica” and its indigenous Caribbean etymology); *Randy Weston: African Rhythms*, <https://www.randyweston.info/randy-weston-biography.html> (last visited Jan. 7, 2022) (including albums by Randy Weston entitled

ments of the social structures around them, are seeking to revive African traditions that feel useful and meaningful, that provide a sense of connection to their history. Because the idea of community is so central to disciplinary Africana Studies—and because members of the Africana community have, for generations, been told, shown, and formally taught that Africa has nothing to offer—those working in the discipline understand that it is paramount to show that Africa has beautiful qualities, valuable knowledge, and a “glorious” story.⁶² This is an important aspect of the work that warrants no apology.

iii. Cultural Continuity

There is an ongoing debate among academics about the continuity of African cultures in the Americas.⁶³ Mario Beatty summarizes this debate by describing three broad approaches to interpreting African cultural identity in the diaspora: Emptiness, Hybridity, and Continuity.⁶⁴

In the Emptiness approach, a precedent African culture is considered either non-existent or totally lost during the trauma and fragmentation of enslavement.⁶⁵ The Emptiness approach is the idea that, due to

“The African Nubian Suite” and “Zep Tepi,” a classical African language phrase) (“Encompassing the vast rhythmic heritage of Africa, his global creations musically continue to inform and inspire.”); Jennifer Sefa-Boakye, *Introducing French Afro-Cuban Twin Sisters Ibeyi & Their Yoruba Doom Soul*, OKAYAFRICA, <https://www.okayafrika.com/ibeyi-oyaxl-recordings/> (last visited Jan. 7, 2022) (describing the Afro-Cuban singers whose songs draw on traditional African spiritual themes); TAWERET MIDWIFERY, <https://www.taweretmidwifery.com/> (last visited Jan. 7, 2022) (describing midwifery service offering “traditional birth services” and named after a classical African divinity); KWELI TV, <https://www.kweli.tv/pages/about-us> (last visited Jan. 7, 2022) (with the slogan “Our Culture. Curated.”) (“The global black community refers to the communities throughout the world of African descent who are comprised of unique cultures and histories from North America, Africa, Europe, Latin America, the Caribbean and Asia.”); QHEMET BIOLOGICS, <https://www.qhemetbiologics.com> (last visited Jan. 7, 2022) (showcasing a brand named for a classical African society and promoting “Ancestral hair care for modern naturals”); JUVIA’S PLACE, <https://www.juviasplace.com/> (last visited Jan. 7, 2022) (showcasing cosmetics products with shade names based on African places and peoples).

62. WILLIAMS, *supra* note 12, at 22 (“[T]he black historian, if he is to serve his generation, must not hesitate to declare what he thinks the results of these studies mean. For even when our history shows us where we have been weak, it is also showing us how, through our own efforts, we can become strong again.”).

63. See Cécile Vidal, *Introduction to LOUISIANA: CROSSROADS OF THE ATLANTIC WORLD* 14–15 (Cécile Vidal ed., 2014).

64. See College of Arts & Sciences Howard University *Week 5: Abandonment and Disemberment: “Something Torn and New” by Dr. Mario Beatty*, YOUTUBE (Sept. 24, 2015), <https://youtu.be/PLAt7nWt1wc?t=2643>, at 44:03 – 48:50.

65. *Id.*

enslavement, Africans lost their history, culture, language—everything.⁶⁶ As a result, this approach views diasporic Africans during early enslavement as culturally empty, i.e., cultureless, historyless “slaves” who originated in Africa. “African” is merely their race—the reason they have black skin—and they have no culture of their own; their culture is based on learning the culture of Western civilization.⁶⁷

The Hybridity approach acknowledges that enslavement resulted in a mixing of cultures but ponders a fundamental severance between diasporic Africans and their continental African experience.⁶⁸ This approach therefore elevates the “newness” of the resultant mix, emphasizing “local cultures as hybrid and creole, diminishing the connection with Africa.”⁶⁹ While this approach contemplates a combination of African and European traditions, a critique is that it overinflates the power of Western hegemony and overlooks the power of African agency to continue engaging in cultural practices and teachings, thereby giving undue primacy to the European side of the hybrid cultural composition.⁷⁰

The final approach, Continuity, maintains that the precedent African cultures informed diasporic culture.⁷¹ This approach emphasizes that African people were not empty vessels moved over space and time, and they did not suffer collective amnesia about their cultural identities.⁷² Instead, they arrived in the Western Hemisphere “with their own worldviews, with their own values, with their own beliefs, with their

66. *Id.*

67. *See id.*

68. *See id.*

69. *See id.*; e.g., GOMEZ, *supra* note 55, at 9 (referencing the work of Herskovits and his argument that “Africanisms” persisted in the Western hemisphere “in generalized form,” which lacked accounting for African cultural continuity through the lens of ethnicity).

70. See STERLING STUCKEY, *SLAVE CULTURE: NATIONALIST THEORY AND THE FOUNDATIONS OF BLACK AMERICA* 87 (25th ann. ed., 2013) (“[i]n America . . . much of African culture was hidden from whites . . .”) for a theory on why this may be the tendency.

71. *See* College of Arts & Sciences Howard University, *supra* note 64; GOMEZ, *supra* note 55, at 11 (“[T]he African antecedent would inform every aspect of African American culture . . .”); *see also* FREDDI WILLIAMS EVANS, *CONGO SQUARE: AFRICAN ROOTS IN NEW ORLEANS* 15 (2011) (“In addition to physical labor, technological skills, food items, and food ways, the Africans brought their cultural memory, their religions, music, and dances to colonial New Orleans; and, at every opportunity, they strived to observe the cultural dictates that remained central to who they were.”).

72. June 29, 2021, Communication from Valethia Watkins (“The narrative about us as empty vessels is absurd.”). “Often slaves, former slaves and their descendants still considered themselves Africans, no matter whether they reinterpreted that identity in reformulated ethnic terms (Nago, Coramantee, Mandingo, Pawpaw, etc.), in religious terms (Male/Muslim, Kongo Christian, animist) or in some other manner.” PAUL E. LOVEJOY, *Conditions of Slaves in the Americas*, in *FROM CHAINS TO BONDS: THE SLAVE TRADE RE-VISITED* 126 (Doudou Diène ed., 2001).

own customs,” and they were able to use their cultural memory as a “foundation to continue to innovate, to create, to build, and to extend themselves on the American landscape.”⁷³ It recognizes the threat to continuity presented by enslavement, but it emphasizes that severance and subjugation were not complete.⁷⁴ The Continuity approach contemplates a number of factors—including the organizing agency of enslaved Africans in the diaspora, ethnic clustering in the diaspora, inter-plantational communication and interaction, the independence of maroon communities, and intergenerational transmission of cultural practices⁷⁵—that enabled synthesis and transformation of various African cultures.⁷⁶ These conditions allowed African people to continue engaging in their traditions and, in turn, fostered a reality in which African cultures

73. See College of Arts & Sciences Howard University, *supra* note 64; see also NGŪGĪ, *supra* note 11, at 44 (“[T]he diasporic African’s memory of Africa does not itself turn into a corpse. It is nurtured in the field slave, who fashions his own means of keeping it alive.”); LOVEJOY, *supra* note 72, at 125 (“[T]he enslaved black population in the Americas can be viewed as Africans, not just as people who were forcibly transported from Africa. . . . I am suggesting that there be a fuller appreciation that Africans in the Americas were active agents in reformulating their own cultural and social identities, despite the oppressive settings to which they were subjugated.”).

74. See GOMEZ, *supra* note 55, at 10 (“[W]hile the culture of coercion tended to dominate the forms of expression, the intent and meaning behind the slave’s participation was quite another matter. The slaveholder may have commanded conformity in deed; he could not, however, dictate the posture of the inner person.”); Carr, *supra* note 24, at 181 (explaining that work in the “unbroken genealogy” approach “de-centers the impact of Western racialization as a formative factor for contemporary African-descended communities”).

75. See, e.g., ROBERT FARRIS THOMPSON, FLASH OF THE SPIRIT: AFRICAN & AFRO-AMERICAN ART & PHILOSOPHY 104 (1983); SYLVIANE A. DIOUF, SLAVERY’S EXILES: THE STORY OF THE AMERICAN MAROONS 1 (2014); Aaron E. Russell, *Material Culture and African American Spirituality at the Hermitage*, 31 HISTORICAL ARCHAEOLOGY 63, 78 (1997) (studying archaeological evidence excavated from enslaved African cabins at Andrew Jackson’s nineteenth century home, the Hermitage) (“[S]uccessful strategies were employed by these men and women to practice and maintain these traditions in defiance of slaveholders.”); LOVEJOY, *supra* note 72, at 126 (“[M]ost slaves more or less successfully re-established communities, reformulated their sense of identity and reinterpreted ethnicity in the context of slavery or freedom in the Americas.”); STUCKEY, *supra* note 70, at 7 (examining “Gullah Joe’s” life and his yearning to see his “tribe” once more before he died); GREEN, *supra* note 13, at 98.

76. See GOMEZ, *supra* note 55, at 8, 10 (“[P]eople of African descent were carefully selecting elements of various cultures, both African and European, issuing into combinations of creativity and innovation.”); GWENDOLYN MIDLO HALL, SLAVERY AND AFRICAN ETHNICITIES IN THE AMERICAS: RESTORING THE LINKS 98 (2005) (“African ethnic and regional identities survived for a longer period of time than most historians and anthropologists believe.”). Gomez explains that enslaved African people essentially lived in one world, “the world of the slaves,” separate from “the white world.” GOMEZ, *supra*, at 8. Because there were these two realms of experiences, Africans continued to engage in their culture within their spaces. See *id.* at 26.

could persist and combine throughout the diaspora.⁷⁷ Cultural continuity has been studied and seen in many areas, including, but not limited to, African spirituality,⁷⁸ aesthetics,⁷⁹ language,⁸⁰ food,⁸¹ and music.⁸²

For example, Sterling Stuckey explains, of African spiritual traditions, that “[f]or decades before and generations following the American Revolution, Africans engaged in religious ceremonies in their quarters and in the woods, unobserved by whites. . . . the possibility that whites might discover the guiding principles of African culture kept blacks on guard and led them, to an astonishing degree, to keep the essentials of their culture from view, thereby making it possible for them to continue to practice values proper to them.”⁸³ Cultural continuity was complex and involved simultaneous retention and innovation; as part of the process of adaptation to the condition of enslavement, new aspects of culture

77. See GOMEZ, *supra* note 55, at 10.

78. See, e.g., STUCKEY, *supra* note 70. Stuckey’s tracing of the “ring shout”—a spiritual practice from various African traditions and evident in church worship of enslaved and free Africans in the United States—is a seminal part of his work. The ring shout is an example of an African spiritual practice that persisted in the culture of enslaved Africans. See, e.g., *id.* at 10-14, 100-01. (“From the time of the earliest importations of slaves to the outbreak of the Civil War, millions of slaves did the ring shout, unobserved, with no concern for white approval.”) *Id.* at 25. Stuckey’s work also examines specific individuals who provided spiritual guidance among the enslaved community, e.g., Gullah Jack, a “conjurer” who participated in the 1822 Denmark Vesey rebellion and provided fighters with spiritual protection and “charms.” See *id.* at 55-56; see also *The Implications of African Spirituality in the Diaspora*, *supra* note 22; YVONNE P. CHIREAU, *BLACK MAGIC: RELIGION AND THE AFRICAN AMERICAN CONJURING TRADITION* (2003).

79. See, e.g., THOMPSON, *supra* note 75, at xiii-xiv (“*Flash of the Spirit* is about *visual* and *philosophic* streams of creativity and imagination, running parallel to the massive musical and choreographic modalities that connect black persons of the Western hemisphere, as well as the millions of European and Asian people attracted to and performing their styles, to Mother Africa.”); IVAN BARGNA, *AFRICA* 166 (2007) (African “religious beliefs and aesthetic concepts survived and were preserved in the New World.”); see generally JACQUELINE L. TOBIN & RAYMOND G. DOBARD, *HIDDEN IN PLAIN VIEW: A SECRET STORY OF QUILTS AND THE UNDERGROUND RAILROAD* (1999).

80. See, e.g., STUCKEY, *supra* note 70, at 408 n.13 (citing LORENZO TURNER, *AFRICANISMS IN THE GULLAH DIALECT* 193 (1947)) (observing that “the vocabulary of the Gullah [in South Carolina] contains words found in [various] African languages,” including the Bamana language, Bamanankan); THOMPSON, *supra* note 75, at 104-05.

81. See generally HARRIS, *supra* note 22; MICHAEL W. TWITTY, *THE COOKING GENE: A JOURNEY THROUGH AFRICAN AMERICAN CULINARY HISTORY IN THE OLD SOUTH* (2017).

82. AMIRI BARAKA, *BLUES PEOPLE* (1963); THOMPSON, *supra* note 75, at xiii (“Since the Atlantic slave trade, ancient African organizing principles of song and dance have crossed the seas from the Old World to the New.”); see also *id.* at xiv (“For several decades, scholarly concentration upon shared main organizing principles of dance and music have shown generalized African cultural unities linking the women and men of West and Central Africa to black people in the New World.”).

83. STUCKEY, *supra* note 70, at 25.

emerged alongside African traditional cultural aspects.⁸⁴ While, due to the constraints of enslavement, the precedent African cultures could not be replicated exactly, Michael Gomez asserts, “black folk had to re-create their society, their collective inner life, drawing from any number of ethnic paradigms and informed by the present crisis.”⁸⁵

The Continuity approach takes the position that African human beings did not simply forget the cultures they were raised into; their minds were not wiped clean at some invisible border in the Atlantic.⁸⁶ Enslaved Africans talked to each other about their African homelands, raised children and grandchildren and taught them African ways, and those children raised other children and taught them what they knew.⁸⁷ African captives continued to arrive in the Western Hemisphere and join African communities for generations, until 1860 in the United States.⁸⁸ With each wave of “new” Africans came waves of African cultural memory.⁸⁹ Furthermore, this continuity has implications for the present: because of the “unbroken genealogy,” scholars using this approach “emphasize[] the idea that modalities of African meaning-making are central to the study of *contemporary* African social, political and cultural life.”⁹⁰ When using the Continuity Approach, disciplinary Africana Studies scholars center

84. See GOMEZ, *supra* note 55, at 10; College of Arts & Sciences Howard University, *supra* note 64.

85. GOMEZ, *supra* note 55, at 15. Gomez concludes that the cultural continuity merged into a Pan-African cultural identity after 1830. *Id.* at 5. This assertion from Gomez does not suggest a weakening or eradication of African cultural retention—it merely suggests a combining and emergence of a different identity consciousness. Just because there was a combination of cultures does not mean there was dilution. Combination can also mean strengthening or bolstering of commonalities. For the complexities of cultural continuity, see also HALL, *supra* note 76, at 23, explaining that it is also important to recognize that “[p]eoples and their cultures evolved and changed on both sides of the Atlantic.”

86. See College of Arts & Sciences Howard University, *supra* note 64.

87. Enslaved Africans gathered and told stories of their homeland, transmitting memory and values to gathered listeners. These values are the ways of knowing that help reveal Protocol, discussed below. See STUCKEY, *supra* note 70, at 5–10.

88. The last ship to carry African captives to the United States (illegally) was the *Clotilda*, which landed in Alabama in 1860. See DEBORAH G. PLANT, *Introduction* to HURSTON, *supra* note 35, at xvi–xvii.

89. Lovejoy, *supra* note 72, at 130 (“Before the abolition of the transatlantic trade in enslaved Africans, new slaves were constantly arriving and thereby infusing slave communities in the Americas with new information and ideas which had to be assimilated in ways that we do not fully understand at present.”); GOMEZ, *supra* note 55, at 20 (“Although the African-born population declined precipitously after 1810, it represented a significant proportion of the black community before then; much of the remaining African-based population was only one or two generations removed from African soil.”).

90. Carr, *supra* note 22, at 181 (emphasis added).

the (re)connection between African peoples over space and time.⁹¹ Accordingly, they seek to trace diasporic African culture and systems of thought back to their continental African origins; and, conversely, trace African culture from the vast expanse of African history to the present⁹²—thereby reconstructing the bridges damaged by the *Maafa*.

iv. Carr's Africana Studies Conceptual Framework

Greg Carr developed six conceptual categories and accompanying framing questions to form the Africana Studies Framework, a system of inquiry which can be applied to any subject and time period within Africana.⁹³ The first three categories from this framework—which are particularly relevant to this project—are Social Structure, Governance, and Ways of Knowing.

The Social Structure category asks, “Who are Africans to other people?” and seeks to identify and understand “the social, economic, political and/or cultural environment that Africans found themselves living under during the period under study.”⁹⁴ The second category, Governance, poses the question, “Who are African people to each other?” and ponders how Africans organized themselves around common goals, made decisions, resolved disputes, etc.⁹⁵ It asks, “what sets of common rules and/or understandings did Africans create to internally regulate their lives in the situation under study?”⁹⁶ This second category compels thinkers to consider Africana not at the margins but at the center of their inquiry. It requires us to perceive Africans as actors, not merely acted upon, and contemplate African peoples’ own thoughts about their relationships to one another. Carr defines the third category, Ways of Knowing, as systems African people “develop[ed] to explain their existence” and think

91. Carr, *supra* note 1, at 12 (“Any study of African people which does not begin with the recognition of and systematic re-connection to both the concept of African cultural identities and the specific, lived demonstration of them will only continue to erase Africans as full human beings and actors in world history.”).

92. *See id.* at 13; *see also* Carr, *supra* note 18, at 445 (“The answers to these questions [from Carr’s Africana Studies framework] allow students to search for a rhythm of continuing tracing and re-tracing the African experience from its origins in Africa to the present.”). African cultural retentions, today, are not likely obvious among the Black elite, who, “inspired by visions of inclusion,” have “created distance” from all things “too African”; they are likely to exist more saliently among the masses of Black folk, where the soul of Africa—though not always overtly recognized or embraced—lives comfortably. *See* GOMEZ, *supra* note 55, at 16.

93. *See* Carr, *supra* note 1, at 13.

94. *Id.* at 14.

95. *Id.* at 13.

96. *Id.* at 15 (These systems of governance can include means by which Africans “manage[d] their daily affairs” and the customs developed to “interact[] with non-Africans.”).

about reality.⁹⁷ These can include sacred texts (oral, written, and material), creation stories, ideas about life and death, ways of understanding nature, etc.⁹⁸ Ways of Knowing are used to “address fundamental issues of living,” and they are often referred to as African “religion” or “spirituality” in Western academic discourse.⁹⁹ Ways of Knowing can represent principles that inform systems of Governance and the other categories: Science and Technology, Movement and Memory, and Cultural Meaning-Making.¹⁰⁰

Carr’s framework requires thinkers to recognize the presence of two systems—Social Structure and Governance—and shift perspectives from the systems imposed on African people to the systems of African people one to the other, awakening an African-centered orientation. By then continuing to move through the framework to categories like Ways of Knowing, thinkers may deeply explore aspects of Africana culture and thought across time and space. The framework helps us center the humanity and agency of African people, and bring to life entire cultures of peoples too often subjected to narratives that flatten and generalize them.

B. *Africana Legal Studies: The Application of Disciplinary Africana Studies Insights to Legal Study*

“Western conceptual schemes and theories have become so widespread that almost all scholarship, even by Africans, utilizes them unquestioningly.” – Oyèrónkẹ̀ Oyě̀wùmí¹⁰¹

“Ultimately the liberation of our thought from its colonized condition will require the creation of a new language.” – Marimba Ani¹⁰²

Scholarship has explored the intersection of law and Africana, as subject matter, including work on indigenous African governance.¹⁰³

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* at 15-16. The other three conceptual categories (Science and Technology, Movement and Memory, and Cultural Meaning-Making) prompt us to explore African world-senses broadly. Africana Protocol can be observed through, can relate to, and can be interchangeable with ideas Africans had regarding nature (Science and Technology), methods for preserving memories (Movement and Memory), and music, art, dance, and narratives created by African people (Cultural Meaning-Making). *See id.* at 16.

101. OYÈWÙMÍ, *supra* note 7, at x.

102. ANI, YURUGU, *supra* note 22, at 10.

103. *See, e.g.*, Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 MINN. J. L. & INEQ. 323, 323-27 (1997).

There is plenty of work being done about “African law,” “African indigenous laws,” and “indigenous African constitutionalism” by international law scholars, customary law scholars, and others.¹⁰⁴ In the context of enslavement, historians and legal historians have contemplated the “judicial sensibilities” of enslaved Africans, exploring evidence of African cultural continuity with respect to “law.”¹⁰⁵ However, this scholarship, for the most part, does not use the Africana Studies theoretical apparatus; it does not ask its questions while applying the methodological insights of disciplinary Africana Studies discussed above.¹⁰⁶ Another approach is needed.¹⁰⁷

With this Article, I am proposing Africana Legal Studies—the extension of disciplinary Africana Studies methodology to legal study, i.e., the study of Law (Western governance) and Protocol¹⁰⁸ (Africana governance) guided by the theoretical underpinnings of disciplinary Africana Studies. Africana Legal Studies has a global consciousness, asking questions that extend beyond *Maafa*-inherited borders, linguistic distinctions, and other divisions. Africana Legal Studies applies the key approaches of

104. See, e.g., BERIHUN ADUGNA GEBEYE, A THEORY OF AFRICAN CONSTITUTIONALISM 3 (2021); CASPER NJUGUNA, AFRICAN CUSTOMARY LAW: ASSESSING ITS STATUS AND EFFECTS TODAY 1 (2020) (using “neo-autogenous sub-Saharan law”).

105. SOPHIE WHITE, VOICES OF THE ENSLAVED: LOVE, LABOR, AND LONGING IN FRENCH LOUISIANA 151 (2019) (“Rather than a generic response to one slave’s infractions, Démocrite’s actions and viewpoint provide instead a tantalizing glimpse of the possible presence of West African judicial sensibilities about society, criminality, policing, and punishment in Louisiana.”); PHILIP J. SCHWARTZ, SLAVE LAWS IN VIRGINIA: STUDIES IN THE LEGAL HISTORY OF THE SOUTH 13 (2010) (“[B]ut did Africans held to slavery in the Old Dominion perceive slave laws through the prism of their native societies’ legal systems?”); *id.* (“We can see in full the intersection of the law of slavery, human behavior, and society only if we are aware of this possible ‘Old World’ African influence on African American perceptions.”); but see Natalie Zemon Davis, *Judges, Masters, Diviners: Slaves’ Experience of Criminal Justice in Colonial Suriname*, 29 L. & HIST. REV. 925, 928, 930 (2011) (exploring enslaved Africans’ memory of ideas about crime and punishment).

106. Historical scholarship tends to lack an African-centered orientation and underemphasizes the humanity and precedent culture of the people studied. Customary law scholarship is most often limited to the *continental* context—lacking the diasporic perspective and underemphasizing cultural continuity and connection between continental and diasporic Africans. And both areas tend to apply Western legal constructs to characterize indigenous African culture, presuming that Africans developed their governance systems on the same, or a parallel, track mirroring the developments of European law—despite the fact that ways of knowing governance are not uniform across all human experience. See generally RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002); see, e.g., GEBEYE, *supra* note 104, at 36–37, 41 (“Custom was the constitution of precolonial societies in Africa”); NJUGUNA, *supra* note 104, at 11 (“The debate of law and its emergence has been part of the human experience from Aristotle to Kant.”). There are, of course, exceptions.

107. Kenneth Nunn concluded his piece by calling for “an African-centered approach to law.” Nunn, *supra* note 103, at 370.

108. More on “Protocol” is discussed below.

disciplinary Africana Studies described above: African-Centeredness, the Long View of History, the Continuity Approach to African diasporic identity, and Carr's Africana Studies Framework. These tenets mean that legal scholars who see the world through an Africana lens will ask questions and consider concepts that differ from those following models of legal study steeped in Western legal thought.

i. Applying Carr's Framework: Conceptualizing Law and Protocol

Applying the first two conceptual categories from Carr's framework, Africana Legal Studies considers "Social Structure" and "Governance," but with modifications to take on legal subject matter. A subset of Social Structure—which asks about the environment where African people find themselves—is Law. In a legal context, one would interrogate the *legal* landscape in which African people found themselves living. In Africana Legal Studies, that legal landscape is, invariably, some specific form of (Western) Law. This is because Law is inherently Western; it is a Social Structure constructed by the West and imposed on African people.¹⁰⁹ Law began to interact with African governance on a large scale, as a Social Structure, when the *Maafa* began. Law is understood as a tool of the West enabling and ushering along the *Maafa*.

If, in a legal context, Social Structure is Law, the corresponding sub-category within the "Governance" category references the uniquely African systems of "rules and/or understandings" created by Africans to regulate their lives—with particular attention to those systems developed on the African continent before the *Maafa* and carried in the minds of Africans through the *Maafa*, including in the minds of Africans who were taken to the Western Hemisphere. These systems could include understandings about dispute resolution, ways of establishing and ensuring adherence to rules for social living, methods of addressing wrongdoing, arrangements for keeping promises, etc.—that exist outside and irrespective of (Western) Law. I call these systems and sets of rules "Protocol."¹¹⁰

109. There is more discussion on law as inherently Western, below. Notably, this category—Social Structure—does not reference only European systems. However, because I rely on the premise that law is inherently Western, the "Law" category always refers to a Western system.

110. December 8, 2020 Communication between Greg Carr and Angi Porter, regarding the word "Protocol." In a series of discussions with Carr, he and I explored terms and phrases that might be more expansive than "law" in hopes to acknowledge and appreciate the distinction between African systems of thought on governance and Western law—and in order to break through the concept of law and think freely about African governance. Carr suggests that the term "protocol" could express an idea that transcends our Western notions of "law" and "religion," capturing both ideas and extending beyond them. I am grateful for his collaboration in proposing the use of this term. While our conversation

Readers may, without even realizing it, assume that “Protocol” connotes something lesser than “Law.”¹¹¹ Distinct does not mean lesser. Protocol means the body of African systems of governance, rules for social living. Protocol is not Law but something else with which Law interacts. Protocol may or may not overlap with or run parallel to Law.¹¹² It may, in certain respects, extend beyond or diverge away from what Westerners think of as Law (e.g., it may fully encompass the sacred). This is why Carr’s third category, “Ways of Knowing” has a close relationship with Protocol: to understand the Protocol of an African people, we must first understand their cultural values and principles, i.e., the systems they “develop[ed] to explain their existence” and think about reality.

By applying Carr’s framework to legal study, scholars are compelled to see that Europeans did not gift governance to Africans—Law did not fill a cultural void. Rather, Protocol was there, populating the governance space in the African cultural logic. By examining Law, Protocol, and Ways of Knowing, we appreciate the limits of Law while focusing on and embracing Africana’s unique approaches to governance (Protocol) and the Ways of Knowing that inform them. Legal scholars applying this frame are able to determine what should be done in a world where Law has interacted in various ways with Protocol.

ii. Applying African-Centeredness: The Qualified Law Orientation and the Importance of Language

Some want to, with good intention, call Protocol “African law.”¹¹³ Or “indigenous African laws,” “tribal law,” “native law,” “folk-law,” “unofficial law,” “traditional law,” or “customary law.”¹¹⁴ In this formu-

identified “protocol” as a useful term for Africana Legal Studies discourse, the term “protocol” has been used more broadly to describe the customs and traditions of African people. See, e.g., NANA AKUA KYEREWAA OPOKUWAA, *AKAN PROTOCOL: REMEMBERING THE TRADITIONS OF OUR ANCESTORS* (2005).

111. This interpretation demoting *different* to *lesser* misses the point of Carr’s framework. The difference in conceptual categorization is a signal to change orientation, to center the views of African people, to break free from the rigidity and constraint of conceptual categories with contours already drawn for and imposed on African people.

112. Given the definition of Africana as “Africa and Africans, when and wherever we find it/them,” Protocol is not limited to governance systems as practiced by African people, but it extends to African governance systems practiced by non-Africans, and other systems influenced by or integrating the modalities of African governance systems.

113. See, e.g., Jacob O. Arowosegbe, *Indigenous African Jurisprudential Thoughts on the Concept of Justice: A Reconstruction through Yoruba Proverbs*, 61 J. AFR. L., 155, 155 (2017) (“Pre-colonial Africa had a functioning legal system.”); SCHWARTZ, *supra* note 105, at 13.

114. See, e.g., Salvatore Mancuso, *African Law in Action*, 58 J. AFR. L. 1, 3, 5 (2014) (using “native law” and “traditional law”); NJUGUNA, *supra* note 104; PETER ONYANGO, *AFRICAN CUSTOMARY LAW SYSTEM: AN INTRODUCTION* (2013); GEBEYE, *supra* note

lation, the term “law” is used and modified by another word, suggesting a world where law is universal and each culture or situation has a specific type of law. “Law,” in this usage, has an expansive sense as *human* rules for social living.¹¹⁵ In this approach, not only is “law” applied to describe the indigenous systems of African societies, but so too are legal constructs and terms of art.¹¹⁶ I call the use of “law” to describe all human forms of governance and the inappropriate use of (Western) legal constructs and terms of art to describe non-Western governance systems and systems of thought on governance the “Qualified Law Orientation” or “QLO.” This orientation maintains that law is a human universal, but “qualifies” (limits or modifies) the term “law” to mark deviations from the standard, pure law, which is Western.

The problem with the QLO, which treats “law” as a human universal, is that the term “law” is sharply-defined and weighed down to reference what the *West* perceives as law—a system of written codes, a profession practiced by lawyers and involving courts and legislatures, a discipline defined by theory and philosophy arising out of a European and European-American intellectual tradition.¹¹⁷ For hundreds of years, Western theorists determined what “law” means, and they continued to do so into an era when Africans were rendered (with the help of Western law) unable to meaningfully contribute to that defining process—if they wanted to.¹¹⁸ Put another way, what is considered “law” or “legal” is based on “widespread and longstanding agreements among members of the [here, legal] community,” a community in which Western thought had a metaphori-

104, at 3. Historians have followed suit, gesturing toward evidence of “legal” processes in Africa. See, e.g., LOVEJOY, *supra* note 13, at 60; see also NJUGUNA, *supra* note 104, at 1 (using “neo-autogenous sub-Saharan law”); Chuma Himonga, *The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 32 n.7 (Jeanmarie Fenrich et al. eds., 2011); Abdulmumini A. Oba, *The Future of Customary Law in Africa*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 58 (Jeanmarie Fenrich et al. eds., 2011). Lovejoy notes that, in African societies in the Bight of Biafra (now Nigeria) “slaves were obtained in small-scale raids by one village on another, through extensive kidnapping, and as a result of *legal proceeding* and religious rites.” LOVEJOY, *supra* note 13, at 60 (emphasis added); see also *id.* at 125 (referencing “legal cases about illegal enslavement” in the Bight of Biafra).

115. See, e.g., Oba, *supra* note 114, at 59 (defining “law” as “the body of rules which are recognized as obligatory by its members”) (quoting TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 55 (1956)).

116. See, e.g., NJUGUNA, *supra* note 104, at 12–13.

117. See Nunn, *supra* note 103, at 324–25.

118. See, e.g., Mancuso, *supra* note 114, at 17 (“Western commercial law has evolved using legal concepts and technicalities that were developed by Western legal culture over time, since they are not contemplated in African traditional legal culture.”).

cal “head start” or “leg up” when it came to outlining those definitional agreements.¹¹⁹

The QLO, thus, illustrates a phenomenon referred to by Carr as “the invisibility of language,”¹²⁰ the idea that the conceptual influence behind a term is allowed to hide by not being written or spoken in usage of the term. This, in turn, gives the underlying concept power because, in not being named, it presents itself as a norm, evades critical attention, and easily persists as an unrecognized default in our minds. Meanwhile, the term must be qualified when it diverges from the invisible concept. This occurs often with whiteness. For example, in U.S. society, the norm of whiteness is applied to “people” and goes unnamed. Meanwhile, common language usage beckons qualification of “Black people,” “LatinX people,” “Asian people.”¹²¹ For many, “white people” as a term is felt as superfluous and used only for emphasis. Because “white” is routinely and automatically invisible, it evades notice. Thus, whiteness’s role evades attention and examination. Because it goes unnamed and unnoticed, it remains nebulous, phantasmic, incomprehensible, lying beyond reach—free to run rampant, never to be wrangled, defined, limited, or constrained.

One might note the invisibility of “white” in front of the term “Santa Clause.”¹²² White Santa Claus is known as simply “Santa,” while non-white derivatives of Santa Claus are qualified, e.g., “Black Santa.” When we realize there is invisibility of language here, we can more readily ask questions about the whiteness of Santa and whether the default makes sense. “Is Santa normally white?” “Why?” “What makes Santa ‘white?’” Santa Claus is a European character from European folklore, created out of the European imagination. It is understood that original, normal Santa is white. If his whiteness is mentioned, it is mentioned for emphasis, not out of necessity. “Black Santa” emerges only later as a derivative version of Santa. Therefore, the invisibility of “white” in the

119. See CARRUTHERS, *supra* note 10, at 12.

120. In his classroom lectures, Carr discusses the fact that the construct of whiteness can hide as a purported default by using “the invisibility of language” in examples like “Santa” vs. “Black Santa,” “Jesus” vs. “Black Jesus.” Carr developed this series of metaphors by applying the insights of Clyde Taylor, who discussed the power of whiteness as invisibility. See CLYDE TAYLOR, *THE MASK OF ART: BREAKING THE AESTHETIC CONTRACT—FILM AND LITERATURE* (1998).

121. See, e.g., Senator Mitch McConnell’s use of “African Americans” vs. “Americans” in his January 19, 2022 statement about voting. Philip Bump, *McConnell Waves Off Voting Concerns Since Black People Turn Out as Heavily as ‘Americans,’* WASH. POST (Jan. 20, 2022), <https://www.theguardian.com/us-news/2022/jan/20/mitch-mcconnell-republican-black-voter-comments-outrage>.

122. “Santa Claus” is one of the examples Carr routinely uses to discuss the invisibility of language.

concept of original Santa makes sense because it is generally understood that Santa is a European (white) folk character and therefore a cultural export to non-white cultures. The invisibility of language makes sense when one culture's ideas are exported to another culture.

There is invisibility of language occurring with "law." Law, though not usually expressly qualified as "Western" or "European," is generally understood by Western audiences to reference distinctly European and European-derived systems and procedures related to written codes, courts, judges, etc.¹²³ "Law" outside of the European context is routinely qualified to reference European-derived systems within non-European cultures: for example, "African law" for the European-derived systems of law that exist in Africa because of colonialism. Qualifying these systems while maintaining invisibility of words like "European" before law makes sense here because—as with Santa—the original construct (law) is a European creation and, in these instances where law is qualified, law is an export to non-European/non-Western cultures. Thus, a reference to "African Law" is really a reference to the story of Western hegemony in Africa, which makes sense in post-colonial, *Maafa* Africa.

The problem emerges when we use the QLO formulation to reference systems that are *not* European exports. Like *indigenous* non-European systems. When the QLO reaches into history to apply the word "law" to pre-*Maafa* systems, systems that existed before oppressive contact by Europe, it becomes inappropriate. It is an anachronism: it does not make sense to say "indigenous African (European) law." And when applied to systems that developed before the *Maafa* and *persisted* in spite of the *Maafa*, QLO descriptions are an overreach, an overstatement of European influence on non-European systems, staking conceptual claims for Europe on conceptual grounds that Europe has perhaps trodden but never conquered. In this situation, the QLO inappropriately imports language based on European constructs to non-European cultures, and, by allowing the qualifier "European" to remain invisible, enables the European orientation to clandestinely exist in a situation where it should not, where it goes unnoticed and evades interrogation. The QLO, then, welcomes a European-centered specter in the mind, serving as an inappropriate "European interpreter" of non-European constructs.

Superimposing Western legal constructs onto indigenous African governance is not only a strained exercise requiring conceptual contortion and endless distinguishing, but it is an unjustified exercise, given the significant distinctions between African world-senses and European

123. See generally Nunn, *supra* note 103.

worldviews.¹²⁴ The cultures and systems of thought that Africans developed and retained are not one-to-one keyed comparators to the European cultures and systems imposed on them. One example of a significant distinction between African world-senses and Western worldviews is the space they afford governance in their cultural logic.¹²⁵ Law today is thought to occupy a specific space in the Western cultural logic separate from religion,¹²⁶ whereas in many indigenous African world-senses, spirituality or religion permeates every facet of the cultural logic, including governance.¹²⁷

Another way Western worldviews and African world-senses diverge is with respect to the preferred means of preserving the past. In the Western worldview, writing almost invariably enshrines history and therefore memorializes important acts. In the West, we understand that laws, case opinions, and contracts are—most often—written.¹²⁸ This privileging of the written word over orality, however, is not a human universal.¹²⁹ And it is not an African universal. It is a myth that writing was absent from pre-*Maafa* Africa; in fact, many African societies have

124. “The European and African world-views are so different, in such crucial aspects, that explanations of the African world-view that use European definitions are blatantly absurd.” The Implications of African Spirituality in the Diaspora, *supra* note 22, at 9.

125. OYĒWŪMÍ, *supra* note 7, at 11 (“[D]iffering cultures may construct social categories differently.”).

126. For example, legal principles regarding religion enshrined in the First Amendment of the U.S. Constitution are defined by a European history of religious oppression. The notion of “freedom of religion” has a uniquely European backstory, gesturing toward the experience of religious governance in Europe and its associated abuses. African people—vast and diverse—do not share this same unifying history, especially in their history before the *Maafa* and before the spread of Islam in Africa.

127. John Mbiti explains that in many African traditional societies, “the sense of corporate life is so deep,” and collectivism is so central to existence, that wrongdoing is felt by the entire community and maintaining social order is “essential and sacred.” JOHN S. MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 200 (2d ed. 1989). Because of this, Mbiti suggests, there are “many laws, customs, set forms of behavior, regulations, rules, observances and taboos, constituting the moral code and ethics of a given community or society”—i.e., Protocol. *Id.*; see also CARRUTHERS, *supra* note 26, at 55 (explaining that there is no word equivalent for “religion” in the classical African language of *mdw nTr*).

128. This explains why “customary law” is often defined in a way that characterizes the term as a deviation from the preferred norm of law that is written. For example, one definition of “customary law” is “a system of rigid norms . . . applied by a permanent judicial authority, which then become functionally equal to written rules.” Mancuso, *supra* note 114, at 2. Here, the definition reveals that the most powerful version of law, the thing customary law becomes equal to, is written law.

129. Oyĕwù mí cautions scholars to avoid belief that “the Western type of philosophy is a human universal.” OYĒWŪMÍ, *supra* note 7, at 21. Western approaches, however, oftentimes use the concept “preliterate” to describe some African societies, wrongfully assuming that writing is a universally necessary and inevitable development. *Id.*

used written scripts since ancient times, with some African societies being virtually obsessed with writing.¹³⁰

However, in many of those same and other African cultures, including cultures in the diaspora,¹³¹ reality was captured, preserved, and transmitted through oral tradition, and orality represented the height of expression, rendering writing secondary (at least) to orality.¹³² In such cultures, rules for social living, and applications of these rules, are not written; they are spoken or sung.¹³³ Still, other important distinctions between Western worldviews and African world-senses exist, such as differences regarding the existence, role, and treatment of the concept of gender in African world-senses, out of which matriarchal governance systems were commonly created, compared to the predominance of gender and patriarchy in Western worldviews.¹³⁴

So then, with such critical distinctions between Western worldviews and African world-senses, on what basis may one simply apply Western

130. Africa was not devoid of writing. There are African nations, from ancient times, that employed systems of writing. Kemet (ancient Egypt), for example, was such a society, and there are many others. See THOMPSON, *supra* note 75, at xvii (“Ejagham artistic influence in the Americas extends a deeply rooted and significant African ideographic writing system, surprising only to those who still believe that Africa alone among the continents was without letters before the arrival of whites, without a means for recording and transmitting moral and folk lore.”).

131. One example is the storytelling of enslaved Africans in the Western Hemisphere: “The indictment of slavery is so severe that one can conclude that this poem was not meant for the ear of the master.” STUCKEY, *supra* note 70, at 9.

132. See GREEN, *supra* note 13, at xvii–xviii (“To the western historical mindset, drawing on oral histories for this period [the ‘distant West African past’] is an anti-historical endeavor. But in West Africa, history is an oral genre . . .”). Note that in various time periods and nations in Africa, writing was very central to the lived experience. One example is the classical African civilizations of Kemet (“ancient Egypt”) and Nubia, where there seemed to be an obsession with writing. Also note the scripts of Ethiopia and Eritrea, and the proliferation of Islamic scripts across Africa.

133. Mancuso, *supra* note 114, at 3 (“[I]n Africa not only is the traditional rule unwritten, its application is unwritten as well.”). The distinctions between African and European world-senses related to writing may explain the fuzziness in the debate about where the partition between “law” and “custom” falls in the African context.

134. Camara, *supra* note 18, at 501 (“[M]atriarchy is the socio-political system that was Africa’s trademark for as long as the various parts of the continent remained free of external attacks.”); GOMEZ, *supra* note 55, at 115 (“Although [among the Akan] the head of the clan, the *abusua panyin*, was a male, there was always a female head of the clan as well, someone who bore ‘high moral authority.’”); see generally OYÉWŪMÍ, *supra* note 7. Matriarchal systems, however, were not universal across Africa. See J.M. SARBAH, FANTI CUSTOMARY LAWS 5 (London, William Clowes & Sons 1897) (referencing the Akan’s “patriarchal system” whereby the head of each family was a man, and he held authority over family affairs).

constructs to both?¹³⁵ Work from within the QLO seems to be aware of the tension that results from projection of Western legal constructs onto African cultural traditions.¹³⁶ However, it tends to resolve that tension by explaining away rather than embracing and centering unique features of the African world-sense.¹³⁷ It distinguishes African governance from Western law, while simultaneously securing the tether. In so doing, the primary effort is spent relating features of Africa governance back to normative legal theory and its originator: the West. While, from a certain perspective, this strained maneuver ensures maintenance of an African place within the Western legal academy and an African voice in Western academic discourse, such an inclusion project is not without its price.

One particularly destructive result of the effort to hook African governance onto Western Law is the reinforcement of Westocentric¹³⁸ deficit narratives about Africana.¹³⁹ For example, one customary law scholar writes, “Pre-colonial Africa neither had written records nor jurisprudential analysis of its law.”¹⁴⁰ Another customary law scholar concludes that “there is no general theory of obligations in African native law and the concept of contract in the modern sense is absent.”¹⁴¹ When scholars search for Western constructs outside of the West, they either do not find those constructs, or they find representations of those constructs that are “off” in some way—not up to the gold standard of the original Western prototype. The *true* law is the law that follows the rules that the West created.¹⁴² Thus, when Western Law is superimposed onto the governance systems of pre-*Maafa* Africa, and a Westocentric orientation is maintained, deficits emerge. And deficits give rise to the impression that African systems of governance are merely (Western) Law “waiting to

135. Oyèrónkẹ́ Oyěwùmí asked this question in her work *The Invention of Women*: “On what basis are Western conceptual categories exportable or transferable to other cultures that have a different cultural logic?” OYĒWŪMÍ *supra* note 7, at 11.

136. See, e.g., Mancuso, *supra* note 114, at 3 (“The Western jurist needs to abandon his traditional ways of thinking about understanding law if he wants to study and understand the African concept of law.”).

137. See, e.g., Arowosegbe, *supra* note 113, at 155. “Ancient African communities had legal systems that served the needs of the era and, *despite the absence of writing*, jurisprudential and philosophical thoughts about law, justice, morals, power and rights abounded.” *Id.* (emphasis added).

138. This term is used by Oywùmí in her seminal work, *The Invention of Women*. See, e.g., OYĒWŪMÍ, *supra* note 7, at 18.

139. See *The Implications of African Spirituality in the Diaspora*, *supra* note 22, at 9 (“Gross distortions and misconceptions result when alien metaphysical conceptions are injected into cross-cultural analysis of a given world-view.”).

140. Oba, *supra* note 114, at 61.

141. See Mancuso, *supra* note 114, at 16.

142. Cf. CARRUTHERS, *supra* note 10, at 11.

happen” or a “deformed” version of (Western) Law.¹⁴³ This orientation ensures that Western Law is maintained as the center, the model, the default comparator next to which every other system is assessed. As Oyèrónkẹ Oyěwùmí explained, “Whether the discussion focuses on history or historylessness, on having a state or being stateless, it is clear that the West is the norm against which Africans continue to be measured by others and often by themselves.”¹⁴⁴ So, too, when the discussion focuses on law or lawlessness.

We are left thinking that (Western) Law is a universal and absolute truth to which African governance systems must aspire, against which African governance systems must be measured. Worse yet, such an orientation furthers intellectual subscription to the old and odious Hegelian notion that Africa is an empty, “dark continent” without history and without anything to offer the world, a home to childlike peoples lacking bodies of thought worthy of study—or respect.¹⁴⁵ Such thinking contributes to thoughts that African people (including descendants of Africa) are “lawless”—and lawless people are prone to criminality, lack the capacity to resolve complex issues, and require the intervention of a more enlightened savior of European persuasion.

The fact is, humankind has given rise to a multitude of approaches to governance, many of which, before European intrusion, had absolutely

143. OYĒWŪMÍ explains that Africa is not “the deformed West” or “the West waiting to happen.” *Supra* note 7, at 21. Yet, African systems of governance are positioned as the “simplistic and primitive” systems, while the Western systems are “complex and advanced.” See CARRUTHERS, *supra* note 10, at 14–15. In this vein, scholars often focus on “customary law” in Africa as a result of African societies being “preliterate,” implying that those societies would one day be literate like Western societies and develop true law. See, e.g., SCHWARTZ, *supra* note 105, at 32 (“Legal anthropologists and historians have recognized the primacy of customary law in preliterate or largely illiterate societies.”).

144. OYĒWŪMÍ, *supra* note 7, at 18.

145. GEORGE WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 109 (Batoche Books 2001) (1956). Hegel characterized Africa as “the land of childhood, which lying beyond the day of self-conscious history, is enveloped in the dark mantle of the Night.” *Id.* He goes on:

At this point we leave Africa, not to mention it again. For it is no historical part of the World; it has no movement or development to exhibit. Historical movements in it—that is in its northern part—belong to the Asiatic or European World. . . . What we properly understand by Africa, is the Unhistorical, Undeveloped Spirit, still involved in the conditions of mere nature, and which had to be presented here only as on the threshold of the World’s History.

Id. at 117; see also *Lemmon v. People*, 20 N.Y. 562, 573–74 (1860) (Denio, J.) (“The negro never has sustained a civilized social organization, and that he never can is sufficiently manifest from history.”); CARRUTHERS, *supra* note 26, at vii–viii.

nothing to do with Law.¹⁴⁶ There is no basis, then, for the application of Western legal constructs to African governance, other than convenience resulting from the prevalence of Western thought—which is not a valid basis at all.¹⁴⁷ The prevalence of Western thought is ill-gotten pervasiveness—a monopoly on thinking about governance resulting from oppression, atrocities, and acts of subjugation by the West on other peoples.¹⁴⁸ Simply because (Western) legal ideas have become so ubiquitous does not mean the ubiquity of those ideas should go unquestioned.¹⁴⁹ It does not mean that those ideas are right or best for every community.

It may seem attractive to seek to redefine or expand the concept of “law” to encompass all systems in the universe. It may even seem like a way to restore justice, especially in the face of racist assumptions about pre-*Maafa* Africa.¹⁵⁰ This effort is, however, a delusion of inclusion, which does not ultimately address the bias that lives in distinction, deficit-framing, and other narrative-shaping characterizations. An Africana lens reveals that the true injustice to address is the obscuring, interruption, and misinterpretation of African systems of thought, with the true refuge from racist thought being independent thought. In our “quest for wholeness,”¹⁵¹ we can address injustice and build independent discourse by carefully studying, naming, and reformulating African systems of governance.

Using an Africana Legal Studies approach, one sees that the QLO, its application of Western constructs to African ideas, and its use of “African law” and other modified “law” terms, can easily serve as a chain linking African systems of governance to Western legal theory, when these two bodies of knowledge are not part of the same intellectual tradition.¹⁵²

146. “[N]o group has a monopoly on the interpretation of the human experience or on making plans for its posterity.” HILLIARD, *supra* note 22, at 10.

147. *See id.* at 7 (“It makes no sense for an African to begin an intellectual quest from someone else’s standpoint.”).

148. *See* SOMÉ, *supra* note 23, at 6 (“Western knowledge finds a cozy place in the African consciousness when carefully packaged inside a whip and regularly delivered.”).

149. By questioning our application of one type of thinking to diverse systems of thought, we foster potential to uncover that which has been obstructed. “[B]y lumping together divergent experiences, we run the risk of flattening each group’s specificities and of obscuring” one experience in favor of the better-known other. DIOUF, *supra* note 75, at 2.

150. *See, e.g.,* Arowosegbe, *supra* note 113, at 155 (citing “initial denial [to acknowledge pre-colonial African “legal” systems] by earlier Western scholars due to the wide social differences between Western and African societies”).

151. NGÜGĪ, *supra* note 11, at 29.

152. *See, e.g.,* NJUGUNA, *supra* note 104, at 11 (“The debate of law and its emergence has been part of the human experience from Aristotle to Kant.”). Carr opined that “[t]he struggle for Foundationalists [a school of Africana Scholars] has been to excavate and operationalize ways of interpreting behavior that do not draw their epistemological suste-

As Jacob Carruthers told us, we must break that chain.¹⁵³ In an exemplary chain-breaking exercise, Carruthers developed the phrase “African Deep Thought” in response to debate about whether “African Philosophy” exists.¹⁵⁴ He explained, “Philosophy is a European discipline—It does not mean that Africans did not have deep thought and deep thinkers.”¹⁵⁵ Carruthers’s point was that searching for equivalents of European disciplines across pre-*Maafa* Africa is pointless when Africans had ways of knowing and understanding the universe distinct from Europeans.

Carruthers’s thinking can be readily applied to thinking about law. Kenneth Nunn paralleled at the first point of Carruthers’s lesson: he concluded that law is Western, relies on and applies Western constructs, fits a Western worldview, and arises out of Western historical experience.¹⁵⁶ The theorists of law are overwhelmingly European and European-centered theorists. Legal historiography figures African people into the equation only at the eleventh hour of a very long history extending back to classical Europe and culminating with today, as if to say that African people did not think about governance until a very recent point.¹⁵⁷ We

nance from the ways of knowing produced by European historical thinkers.” Carr, *supra* note 22, at 319.

153. CARRUTHERS, *supra* note 29, at xviii; see Carr, *supra* note 18, at 439.

154. CARRUTHERS, *supra* note 29, at 15.

155. See Interview by Larry Crowe with Jacob H. Carruthers (May 13, 2002), *Jacob H. Carruthers Talks about His Publications*, HISTORYMAKERS DIGITAL ARCHIVE, Session 1, tape 6, story 7, <https://howard-thehistorymakers-org.proxyhu.wrlc.org/story/71131?type=2;pgS=30;pg=1;spec=—;q=Jacob%20carruthers;T=0;S=0>.

156. See Nunn, *supra* note 103, at 323–27. One need not look further than the subject of torts to see how deeply connected it is to English history and an English way of seeing the world. See, e.g., SCHWARTZ ET AL., *supra* note 58, at 3–6, 32. Nunn explained, “Law, as understood in European-derived societies, is not universal. It is the creation of a particular set of historical and political realities and of a particular mind-set or worldview.” Nunn, *supra* note 103, at 324–25. Nunn came to this conclusion and offered his critique of law by applying the work of African-centered scholars, who today would be characterized as foundational thinkers of disciplinary Africana Studies. See generally *id.* Nunn concluded his piece by calling for “an African-centered approach to law.” *Id.* at 370. The theory and methodology of disciplinary Africana Studies has crystallized in more recent years. For example, Carr’s Africana Studies Framework has emerged and been refined. It is this more recent theory that I apply to arrive at the approach to studying Law and Protocol described in this Article.

157. This notion is readily observable in legal discourse. One need look no further than texts that purport to outline the history of law or legal theory, both in the Western and world context. See, e.g., see generally FERNANDA PIRIE, *THE RULE OF LAWS: A 4,000-YEAR QUEST TO ORDER THE WORLD* (2021) (including chapters about law in Mesopotamia, India, China, Rome, Judaism, Islam, and Europe while mentioning Africa only in the context of colonialism and Islamic law); see *id.* at 10–11 (explaining that “[n]ot all societies have created laws” and including in this characterization ancient Egypt and “sub-Saharan Africa[n]” cultures); see also, e.g., J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* (1992); CAIRNS, *supra* note 58.

must recognize this and shrink the concept of “Law” to its actual—not inflated—size: Law is the collective system of rules and principles Europeans developed to govern themselves and to govern those people, places, and things Europe colonized, oppressed, and otherwise subjected to the *Maafa*. It is a particular system with particular constructs and assumptions.

Meanwhile, Africans have a different history; they lived through different shared experiences, learned wisdom from different thinkers, formed different constructs to explain the universe around them, developed different methods to address the opportunities and challenges of life, and created different rules to govern their ways of life. Africans were doing something else. Therefore, following Carruthers before us: *Africana Legal Scholars* must stop searching for Law across pre-*Maafa* Africa—and evict the specter in the mind that tells us doing so is a tragedy. Law is a European discipline—it does not mean that Africans did not have their own collective system of governance—*Protocol*—that was nuanced, varied, complex, profound, and important.

Using “Protocol” rather than “African(a) law” signals this necessary “epistemic rupture” from the QLO.¹⁵⁸ By shifting language, we may “take command of our own minds”¹⁵⁹ and attempt to study Protocol on its own terms.¹⁶⁰ Releasing European legal constructs and opening our way of thinking allows us to see and fully appreciate the creativity of our African ancestors. And while this attempt is imperfect, given its use of English language to describe African governance,¹⁶¹ “Protocol” is a men-

158. See Oyěwùmí, *supra* note 26, at 1:04:14.

159. CARRUTHERS, *supra* note 26, at 38.

160. To do this, we must broaden our sense of inquiry and zoom out the lens to what we believe are human universal concepts, and only then interrogate their place among the cultures under study. Rather than searching for judges or judicial structures, we might broaden our sense to resolution systems. Rather than search for contracts, we might instead interrogate promise-making.

161. African minds will not be truly liberated from Western hegemony until we are able to think and dream in the languages of our ancestors. So long as we are speaking English, we should at least be intentional about our classification of various systems of thought. See FU-KIAU, *supra* note 20, at 11. “Protocol” is intended as a bridge, but it must ultimately be replaced with words from the various African languages belonging to the cultures studied. In presentations, I have proposed the classical African term *Neta* to represent the general body of *Africana Protocols*. Angi Porter, *Kemeti Protocol: Core Ways of Knowing Governance as Shown in Selected Texts*, Presentation at the Ass’n for Study Classical Afr. Civilizations International Conference (Apr. 10, 2021). Another example: the Yoruba word *àsà* might be applied to reference Yoruba Protocol. See Yai, *supra* note 38, at 349 (explaining that *àsà* “describes a set of collective behaviors normally expected of individuals who have chosen it consciously and responsibly”). As of the date of this Article, I have not yet confidently identified a Bamanankan (Bamana language) term to replace “Protocol” in the phrase “Bamana Protocol”; doing so will require collective work and collaboration with Bamanankan experts. However, because this is my initial work on the

tal palate cleanser that helps legal thinkers take an initial conceptual step away from the QLO; it is an intentional shift toward recalibrating our thinking and delinking African ideas about governance from the highly-defined rigidity of Law and Western jurisprudence, with the next steps being exploration and use of African language and constructs.¹⁶² There will always be conceptual gaps in the process of translation between cultures, but the aim should be to minimize those gaps through awareness and intentionality, through particular attention to “the specter in the mind,” if present, and constant interrogation of Westocentric biases, assumptions, and fallacies that permeate our experience.¹⁶³

Accordingly, this Article regards Law and Protocol as two types of governance. Throughout this article, I use “Law” and “legal” to reference governance systems of the Western Social Structure being studied. I use “Africana¹⁶⁴ Protocol” to denote the body of indigenous African governance systems, in their pre-*Maafa* (continental) and *Maafa*-persisting (continental and diasporic) forms. As with “Law,” the singular sense of “Protocol” is meant as a collective term encompassing many specific cultural governance systems and rules over space and time, and depending on the context, it should be preceded by a broad term like “Africana” or a narrow term, such as “Bamana” to indicate the scope of usage.¹⁶⁵

subject, and because the reorientation for the reader may require time and practice, “Bamana Protocol” is most useful at this time.

162. “[L]anguage is the basic re-membling practice . . .” NGŪGI, *supra* note 11, at 90. “Diasporic African communities must try to add an African language to their cultural arsenal.” *Id.*; see also FU-KIAU, *supra* note 20, at 11 (“The Mbôngi [community council /learning shelter] does not borrow dialects in order to discuss its political matters or to educate its members.”).

163. Théophile Obenga explains that “[i]n our quest to ‘let the ancestors speak’ for themselves about themselves, we must be consistently vigilant in recognizing and grappling with the side effects of Western prejudice and the way in which it has affected the treatment of African history.” Théophile Obenga, *Who Am I? Interpretation in African Historiography*, in AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE 32, 32 (Jacob H. Carruthers & Leon C. Harris eds., 1997).

164. Though Africana Studies methodology applies the term “African” broadly, I sometimes use “Africana” before “Protocol” to remind readers of the expansive sense of the body of governance being studied; it is not limited spatially or temporally and can include continental and diasporic systems of governance, Pan-African systems of governance, etc. It can also include the pre-*Maafa* systems as well as the persisting systems to be studied in the future.

165. This recognizes that Protocol across Africana, given there are about 3,000 distinct African peoples and more cultures, is diverse and varied, but embraces that when juxtaposed with the Western worldview, there is broad commonality or “cultural nationalism” in Africana governance. *Cf.* MBITI, *supra* note 127, at 1.

iii. Applying the Long View of History and Sankofa

Applying the long view of history to legal study means contemplating the vast expanse of African governance over space and time. It means resisting the interpretation that the only governance stories relevant to African people are stories about legal developments since the time of enslavement. Using the long view of history in legal study also means that there is no presumption of “progress” in narratives about law for African descendants, as thoughts on a past when Protocol was unencumbered by Law are ever-present. The long view of history also means that legal scholars studying *Africana* see their work as contributing to what Ngũgĩ wa Thiong’o described as “remembering Africa.”¹⁶⁶ Their work enables them to participate in the movement, guided by the principle of *sankofa*, to reclaim African governance traditions and draw on them for inspiration and innovation.¹⁶⁷

iv. Applying the Continuity Approach

Applying the Continuity approach to legal study of *Africana* means considering the persistence of Protocol over space and time. The approach presumes that Africans, just like their captors, brought their ideas about governance with them to the Western Hemisphere; conversely, it rejects the notion that Protocol was totally destroyed or lost.¹⁶⁸ Accordingly, scholars applying the Continuity approach will trace the origins of Protocol in the Western Hemisphere backward in time to the African continent—and trace pre-*Maafa* continental African Protocols forward in time through the engagement of diasporic Africans with their governance traditions, and through the transmission, adaptation, adjustment, improvisation,¹⁶⁹ combination, and synthesis of African culture to the present. They will account for the fact that Protocol is not unchanging, but was and is responsive to the *Maafa*, with African people deciding how to reformulate and use Protocol as response, combining with other Protocols,

166. NGŪGĪ, *supra* note 11, at ix.

167. See Camara, *supra* note 18, at 494 (“Identifying indigenous African laws and practices is of the greatest importance, as Africans truly need to take stock of their past laws if they want to implement much-needed culturally based socio-legal reforms.”).

168. See, for example, the Protocol of secret societies indicated in the story of John Matthews, raised by Michael Gomez. Matthews was a formerly enslaved man interviewed by the Works Progress Administration in the 1930s. He mentioned formerly belonging to a “sect” in which he played the part of a spirit. Matthews indicated that he was unable to tell the sect’s secrets. GOMEZ, *supra* note 55, at 100.

169. Carr often analogizes African preservation of community and culture in the face of the *Maafa* to the musical technique of improvisation. See, e.g., Carr, *supra* note 18, at 440–43 (examining the idea of improvisation in *Africana* music and cultural preservation).

and combining with Law, in various legal landscapes and, more broadly, Social Structures.¹⁷⁰ From this it is apparent that one cannot fully understand the thoughts or attitudes of African Americans about U.S. Law without first understanding the unique world-senses and Protocol of their African ancestors.¹⁷¹ One cannot understand African American movements, including movements that resist, respond to, or are apathetic to U.S. Law, without understanding the origins and evolutions of the orientations informing those movements.

v. Interdisciplinary Nature

We find ourselves in a Social Structure where the Western Academy has set disciplinary boundaries. In this reality, work on Africana Protocol should be done across those boundaries. In the larger discipline of Africana Studies, and in other disciplines, scholars may devote their time and focus to deep learning and thinking about Africana governance systems. At the same time, major contributions can be made to Africana Studies by legally-trained thinkers applying an Africana lens. Legal thinkers are uniquely poised to do this work, as they are attuned to thinking about governance and rules for social living, albeit in a Western way. If these thinkers are careful and alert, their expertise can help them easily see Protocol across Africana.

Legal scholars are able to understand the technical aspects of Law. Equipped with knowledge of Protocol, they can consider how these two forces collided and comment on how Law operated to restrict, constrain, punish, stifle, interrupt, inhibit, exploit, manipulate, or embrace Protocol. Legal thinkers can effectively examine how Protocol found ways to grow through the cracks of Law, change Law, evade Law, or defeat Law. Legal thinkers can also consider the incidental influences between Protocol and Law.¹⁷² Finally, Protocol enables legal thinkers to learn about comparators in governance, thereby expanding their minds to allow for deeper assessment of Law and broader creativity with which to change it. For the benefit of those whom Law has oppressed, legal thinkers may imagine a legal world where Law shifts to make way for the reclamation of Protocol.

170. *See id.* at 10; LOVEJOY, *supra* note 72, at 126.

171. *Cf. Carr, supra* note 1, at 14.

172. For example, Africana Protocol *did* shape American Law, given statutes were enacted to prevent Africana governance during enslavement and beyond. These statutes not only indicate that Protocol existed and persisted, but the statutes themselves are the legal manifestation of and response to Protocol.

II. CASE STUDY: THE BAMANA IN COLONIAL LOUISIANA

During enslavement in the Western Hemisphere, about 481,000 of the 12 million enslaved Africans¹⁷³ forcibly transported across the Atlantic ultimately arrived in North America (that is approximately 4% of the total).¹⁷⁴ At the peak of the trade (the eighteenth century), the most significant populations of enslaved Africans were found in the “five core colonies” of South Carolina, Virginia, Maryland, Georgia, and Louisiana.¹⁷⁵ The documented French slave trade in Louisiana lasted from 1719 to 1731, and during that period, six thousand African captives arrived there.¹⁷⁶ Two-thirds of these captives came from the Senegambia region of West Africa and from a limited number of nations in that region with cultural similarities.¹⁷⁷ Fifteen percent of these Senegambians were likely Bamana people.¹⁷⁸

The Bamana, or “Bambara”¹⁷⁹ as they are sometimes incorrectly called, are a Mande-speaking people from the far interior of the Senegambia.¹⁸⁰ The powerful Bamana state, Segu, was formed in the early

173. GOMEZ, *supra* note 55, at 18. Enslaved Africans came from many regions of Africa including West Central Africa (Angola and Kongo); the Bight of Benin; the Gulf of Guinea (also called the “Gold Coast,” modern-day Ghana); the Bight of Biafra (modern-day Nigeria and Cameroon); Sierra Leone; the coast near Fouta Djallon (modern-day Guinea); parts of Liberia; Mozambique-Madagascar; and the Senegambia region (modern-day Senegal and the Gambia). LOVEJOY, *supra* note 13, at 49.

174. GOMEZ, *supra* note 55, at 18.

175. *Id.* at 24.

176. WHITE, *supra* note 105, at 7 (“Africans were first forcibly taken to Louisiana in 1719, but the slave trade to the colony reached a high point in 1730-1731 and virtually ceased thereafter until the end of the French regime.”); see also Nat’l Museum Afr. Am. Hist. & Culture, *Louisiana: Converging Cultures*, in SLAVERY AND FREEDOM (exhibit), (visited Sept. 5, 2021); JUDITH KELLEHER SCHAFFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 1 (1994).

177. HALL, *supra* note 2, at 29, 158-9, 288; HALL, *supra* note 76, at 92, 97 (“In the French slave trade to Louisiana, 64.3 percent of the Africans arriving on clearly documented French Atlantic slave trade voyages came from Senegambia narrowly defined.”); WHITE, *supra* note 105, at 7.

178. See HALL, *supra* note 76, at 97-98.

179. “Bambara” is the incorrect spelling and pronunciation of Bamana. It is the name used by the French, but it was never used by the actual people to refer to themselves, who used “Bamana.” Jean-Paul Colley & Laurie Ann Farrell, *Bamana: The Art of Existence in Mali*, 34 AFR. ARTS, 16, 16 (2001); A STATE OF INTRIGUE: THE EPIC OF BAMANA SEGU ACCORDING TO TAYIRU BANBERA 1 (David C. Conrad ed., 1990). Bambara has come to mean an insult connoting “barbarian.” See HALL, *supra* note 76, at 97.

180. GOMEZ, *supra* note 55, at 38, 46; IBRAHIMA SECK, BOUKI FAIT GOMBO: A HISTORY OF THE SLAVE POPULATION OF HABITATION HAYDEL (WHITNEY PLANTATION) LOUISIANA, 1750-1860 38 (2014). The Mande are the principal group who comprised the Malian “empire.” Ismail Rashid, *Class, Caste and Social Inequality in West African History*, in THEMES IN WEST AFRICA’S HISTORY 126 (Emmanuel Kwaku Akyeampong ed.,

1600s and was located on the banks of the Niger River in what is now Mali.¹⁸¹ Segu was an expansive state that was influential in trade and commerce, including during the period of European trade in enslaved Africans.¹⁸² The Bamana notably resisted Islam in Africa, at least until 1861, when the Segu state collapsed.¹⁸³ In West Africa today, the Bamana remain a major cultural group.¹⁸⁴ When enslaved in early Louisiana, the Bamana formed a “substantial, well-organized Bambara language community.”¹⁸⁵

Through this Africana Legal Studies exploration, we will examine the Law of the place where the Bamana found themselves living, then consider their Protocol, carried with them from the Senegambia.¹⁸⁶

A. Law: Louisiana’s Legal Landscape

The legal landscape that Africans found themselves living in during this period was primarily defined by a legal instrument called the *Code Noir* (“Black Code”).¹⁸⁷ The eighteenth century was the peak of the Eu-

2006). The Bamana spoke different dialects of the language Mandekan. HALL, *supra* note 2, at 45. Other modern Mande peoples are the Mandinka, Maninka, Malinke, Mandinga, Manya, Dyula, Duranko, and Wangara. *Id.*

181. LOVEJOY, *supra* note 13, at 74; A STATE OF INTRIGUE, *supra* note 179, at 1.

182. A STATE OF INTRIGUE, *supra* note 179, at 14; HALL, *supra* note 2, at 41.

183. See HALL, *supra* note 76, at 96-97; A STATE OF INTRIGUE, *supra* note 179, at 13.

184. MARQ DE VILLIERS & SHEILA HIRTLE, TIMBUKTU: THE SAHARA’S FABLED CITY OF GOLD 46 (2007); HALL, *supra* note 2, at 43.

185. HALL, *supra* note 2, at 288. Hall argues that, while “Bambara” was used as a generic label for Africans in the late 1700s and in some earlier contexts, the Africans called “Bambara” (Bamana) in early Louisiana were, in fact, Bamana. *Id.* at 288-89. *But see* SECK, *supra* note 180, at 39 (explaining that other Mande peoples may have identified themselves as Bamana or Mandingo—the larger Mande groups); Peter Caron, ‘Of a Nation Which the Others Do Not Understand’: Bambara Slaves and African Ethnicity in Colonial Louisiana, 1718-60, 18 SLAVERY & ABOLITION 98, 107 (1997). Caron believes claims about Bamana clusters in Louisiana are overblown. He does not lend a great amount of credence to the self-identification of Africans regarding their ethnicities and subscribes to the notion that Europeans created some these ethnicities, including the “Bambara” ethnicity. See *id.* Hall, however, responds to approaches like this by stating that we should take the Africans who self-identified their ethnicities at their word. HALL, *supra* note 76, at 23, 100; *id.* at 98 (“The Bamana in Louisiana knew who they were.”).

186. Hall explains that “[t]he Bambara came to Louisiana equipped with a concept of sovereignty that was based upon control of people rather than of territory; with experience in creating new spiritual and legal communities; and with extensive experience in self-governing organizations.” HALL, *supra* note 2, at 52.

187. This section is not meant to be a comprehensive exploration of Louisiana Law; rather, it highlights certain portions of the *Code* and other elements of Law that were likely particularly relevant to the African experience in Louisiana. I have left unexamined certain important portions of the *Code Noir*, which warrant further study and exploration,

ropean trade and trafficking in African people, and by this time, the French had already been fully participating in enslavement in the Caribbean—namely in the French Antilles—for several decades.¹⁸⁸ In the early 1680s, King Louis XIV of France instructed two top officials in the Antilles—Jean-Baptiste Patoulet and Comte de Blénac—to draft a legal instrument by incorporating past ordinances and judgments from the islands of Martinique, Guadeloupe, and St. Christophe from the previous 50 years.¹⁸⁹ Patoulet and de Blénac were to infuse the draft with the advice they gathered from jurists in these islands as well as their own views.¹⁹⁰ Louis XIV wrote to Patoulet and de Blénac in 1681, requesting that they draft the “ordinance” regarding “the Blacks . . . in order that His Majesty may lay down the prohibitions, injunctions, and everything touching the conservation, policing, and judging of these people.”¹⁹¹ In 1685, the *Code Noir* was promulgated and applied to the French Antilles. Other versions of the *Code* were enacted in Saint-Domingue, Guiana, and the French Mascarene Islands in the Indian Ocean.¹⁹²

Until that point, there had been no royal legislation about enslavement in the French domain.¹⁹³ Instead, the local Sovereign Councils (or *Conseils*) of each island had been enacting laws on enslavement. These councils served both judicial and legislative functions, and at least some council members were “large slaveowners.”¹⁹⁴ Thus, the community of drafters of the *Code Noir* included French colonists who participated in enslavement and had an interest in maintaining it for their benefit.

In March 1724, Louis XV issued the *Code Noir* for the Louisiana colony, which was patterned after the original *Code*, integrating 51 of the original *Code*’s 55 articles.¹⁹⁵ It remained in effect in Louisiana until 1769, after Spain took control of the colony.¹⁹⁶ Despite the interruption

e.g., provisions related to escape from the plantation and marronage and the ban on interracial marriages; and other important provisions.

188. See LOVEJOY, *supra* note 13, at 47; GOMEZ, *supra* note 55, at 18 (“The apex for the trade as a whole was between 1700 and 1810”); Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56 LA. L. REV. 363, 363, 366-67 (1995).

189. Palmer, *supra* note 188, at 366-67; Guillaume Aubert, “To Establish One Law and Definite Rules”: Race, Religion, and the Transatlantic Origins of the Louisiana Code Noir, in LOUISIANA: CROSSROADS OF THE ATLANTIC WORLD 21, 22 (Cécile Vidal ed., 2013).

190. Palmer, *supra* note 188, at 366.

191. *Id.* at 367 (quoting the King’s Mémoire to his Intendant, dated April 30, 1681).

192. LOUISIANA: CROSSROADS OF THE ATLANTIC WORLD 22 (Cécile Vidal ed., 2014).

193. Palmer, *supra* note 188, at 369.

194. *Id.*

195. See *id.* at 363. See also Aubert, *supra* note 189, at 22; DIOUF, *supra* note 75, at 32; EVANS, *supra* note 71, at 135.

196. The Louisiana colony west of the Mississippi was ceded to Spain in 1762, but Spain did not occupy and take control until 1769. Thus, 1769 is often cited as the end of

of Spanish rule, the *Code* retained relevance in U.S. legal history, as it was resurrected and subsumed into U.S. Law after the Louisiana Purchase in 1803.¹⁹⁷

i. The Written Code & Enforcement

Law was carried out in the Superior Council, a Louisiana court established in 1712.¹⁹⁸ In the eighteenth century French civil law system, judges acted as members of the prosecution team and finders of fact, and defendants were considered guilty until proven innocent.¹⁹⁹ Additionally, in Louisiana, defendants were not entitled to legal representation.²⁰⁰ Interrogation was made and testimony was given verbally in court.²⁰¹ A court clerk recorded testimony in writing and read it back to witnesses so that they could confirm the record.²⁰² Judges made their decisions as fact-finders by conducting interrogations, which could include judicial torture.²⁰³

The *Code* contained several criminal provisions applicable to the enslaved. For example, a prohibition on “marronage,” or escape from the plantation, prescribed harsh punishments.²⁰⁴ The *Code* invited the relevant slaveholder to “denounce” the escaped African in court and, after a month of denunciation, the escaped Africans were subject to have their ears cut off and be branded with a *fleur-de-lys*, the symbol of the colony.²⁰⁵ A second offense warranted a severed hamstring and second brand, and a third offense was punishable by death.²⁰⁶

While the *Code* contemplated several situations in which enslaved Africans could be criminal defendants, it also imposed a number of “civil incapacity” constraints on Africans’ ability to meaningfully participate in

the French period. See WHITE, *supra* note 105, at 7; HALL, *supra* note 2, at 276; SCHAFER, *supra* note 176, at 2.

197. See SCHAFER, *supra* note 176, at 3-6.

198. WHITE, *supra* note 105, at 33; THOMAS N. INGERSOLL, MAMMON AND MANON IN EARLY NEW ORLEANS 39 (1999).

199. SCHAFER, *supra* note 176, at 60. See e.g., WHITE, *supra* note 105, at 11.

200. WHITE, *supra* note 105, at 33 (stating lawyers were banned in the colony); see INGERSOLL, *supra* note 198, at 39 (“Lawyers were few in the colony because French justice never involved juries.”).

201. See WHITE, *supra* note 105, at 11-14.

202. *Id.* at 11.

203. *Id.* at 11. Five councilors in the Superior Council were required to agree for criminal convictions, three in civil matters. *Id.* at 33; INGERSOLL, *supra* note 198, at 39.

204. *Code Noir* of 1724, art. XXXII.

205. *Id.*

206. *Id.*

the legal system.²⁰⁷ It barred enslaved Africans from holding public office; acting as “arbitrators”; or acting as witnesses in legal proceedings, “unless they [were] necessary witnesses, and only in the absence of whites, but in no event [could] they serve as witnesses for or against their masters.”²⁰⁸ Beyond this, enslaved Africans could not be parties in civil matters and could not make contracts, gifts, or devises.²⁰⁹ Thus, there were no causes of action to sue for freedom in French Louisiana.²¹⁰

And while the *Code* also prohibited slaveholders from killing, mutilating, or torturing the enslaved (promoting chaining and flogging instead as the primary modes of punishment), this prohibition was never enforced.²¹¹ Meanwhile, the *Code* enshrined the colony’s ability to officially kill, mutilate, and torture enslaved Africans—by cutting off their ears, branding them, severing their hamstrings, and ending their lives—for violations of Law.²¹² And the colony indeed inflicted such harms: “[t]he judicial record for the first decade of New Orleans’ history is full of evidence of the most horrific bloodletting by whites in order to achieve mastery.”²¹³

ii. Religion

The *Code Noir* opens with several provisions establishing Catholicism as the religion of Louisiana.²¹⁴ The *Code* prohibited the exercise of any other religion and declared “all assemblies to that end . . . to be secret, illegal, and seditious.”²¹⁵ It required expulsion of “all declared enemies of Christianity” from the colony,²¹⁶ and required all enslaved Africans

207. *See id.* art. XXVI.

208. *Id.* art. XXIV.

209. *See id.* art. XXV.

210. The *Code Noir* stated that the enslaved had neither standing nor capacity to sue, and, therefore, they were unable to bring suits for freedom during the French period. This right would arise under the Spanish. SCHAFER, *supra* note 176, at 220–21.

211. *Code Noir* of 1724, art. XXXVIII; WHITE, *supra* note 105, at 40–41 (“[N]o master was ever prosecuted in Louisiana for abusing his or her slaves.”).

212. *See* Palmer, *supra* note 188, at 385; *see also* Aubert, *supra* note 189, at 21 (“[T]he torture, maiming, and execution of slaves remained the prerogative of colonial judges.”); WHITE, *supra* note 105, at 11, 36, 231 n.14 (explaining that judicial torture was allowed by French law but not used until 1763).

213. INGERSOLL, *supra* note 198, at 74.

214. *Code Noir* of 1724 (“[W]e have judged that it is within our authority and our justice, for the preservation of that colony, to establish there a law and certain rules, in order to maintain the discipline of the Catholic, Apostolic, and Roman church . . .”). Louisiana’s Catholic character endures today (e.g., it has “parishes” instead of “counties,” Mardi Gras is celebrated before the Catholic observance of Lent).

215. *Id.* art. III.

216. *Id.* art. I.

to be “baptized and instructed in the Roman, Catholic, and Apostolic Faith.”²¹⁷ Catholicism also extended to court procedure: Africans who appeared before the Superior Council as witnesses were required to swear an oath to tell the truth in front of a crucifix.²¹⁸

In accordance with Catholic mandates, Article 5 prohibited enslaved Africans from working on Sundays, and slaveholders could be punished and fined for permitting them to work:

We enjoin all our subjects, of whatever quality and social status they may be, to regularly observe Sundays and the holidays; we forbid them to work or to have the slaves worked, from midnight until the following midnight in the cultivation of the land, and every other type of work, under penalty of a fine and an arbitrary punishment against the masters, and the confiscation of the slaves discovered working by our officers; nevertheless, they may send their slaves to the markets.²¹⁹

This provision created a holiday or “free day” during which Africans could take up other activities.

iii. Protecting Enslavement

The entire *Code Noir* was meant to preserve the institution of enslavement. Accordingly, several provisions of the *Code* were intended to prevent rebellion or resistance against enslavement. For example, the *Code*, in Article 8, prohibited enslaved Africans from assembling:

We likewise forbid slaves belonging to different masters to gather by day or by night, under the pretext of a wedding or any other reason, whether on their master’s property or elsewhere, and still less in the main roads or the out of the way places, on penalty of corporal punishment, which cannot be less than a whipping and [branding] of the *fleur de lys*; and in case of frequent repetition and other aggravating circumstances, they may be put to death, which we leave to the decision of judges.²²⁰

217. *Id.* art. II.

218. See WHITE, *supra* note 105, at 1, 28, 31, 77–78 (citing instances when enslaved Africans were made to swear to tell the truth in the presence of a crucifix) (“Testimony in court required swearing an oath to tell the truth . . . before a crucifix . . .”).

219. *Code Noir* of 1724, art. V.

220. *Id.* art. XIII.

The intent behind this prohibition on gathering was to prevent Africans from revolting.²²¹ In the same vein, a later statute, the 1751 New Orleans Police Code, also restricted the movements of enslaved and free Africans and prevented them from assembling.²²²

Related provisions prohibited violence by enslaved Africans against anyone in their respective slaveholding families, or any “free persons” for that matter.²²³ With no associated provisions about self-defense, enslaved Africans could be punished by death for such an offense.²²⁴ The 1751 New Orleans Police Code also prohibited Africans from being on streets or public roads carrying canes, rods, or sticks.²²⁵ Enslaved or free Africans had to carry passes and could be stopped and questioned “by any white person.”²²⁶ Notably, the *Code* was silent on wrongs that enslaved Africans committed against each other, and the Superior Council was generally uninterested in prosecuting cases where enslaved Africans were the victims.²²⁷

The *Code* also contained another provision oft-cited as “protective” toward enslaved Africans: Article 53, which prohibited families from being “sold separately.”²²⁸ This provision banned the breaking up of husband, wife, and their children “below puberty” during sale or seizure of enslaved Africans.²²⁹ This provision arose out of the infrequency of shipments of Africans directly to Louisiana during the French period and the desire by the French to encourage family life among Africans as both a breeding strategy and an incentive for Africans to remain on the properties of slaveholders rather than seek escape.²³⁰ Eighteenth century Louisiana colonist and plantation manager Antoine Simon Le Page du

221. Palmer, *supra* note 188, at 384.

222. CHARLES GAYERRÉ, HISTORY OF LOUISIANA VOL. 2, at 364–65 (New Orleans, Armand Hawkins 1885) (outlining arts. 20, 21, 22); *but see* Thomas Ingersoll, *Slave Codes and Judicial Practice in New Orleans, 1718-1807*, 13 L. & HIST. REV. 23, 40 n.62 (1995) (noting Gayerré’s English translation as “frequently unreliable”); *see also* WHITE, *supra* note 105, at 30.

223. *Code Noir* of 1724, arts. XXVII, XXVIII.

224. *Id.*

225. GAYERRÉ, *supra* note 222, at 365.

226. *Id.* Here we can see an early, proto-U.S. instance of whites—regardless of societal role—policing the movements of African people.

227. *See* Palmer, *supra* note 188, at 385; WHITE, *supra* note 105, at 32. These would be areas, of course, that Protocol would have addressed—and did indeed address in the case of the slaveholder Corbin, referenced in the Introduction of this Article. *See supra* Introduction.

228. *Code Noir* of 1724, art. XLIII.

229. *See id.* (“It is our wish nevertheless that the husband, his wife and their children below puberty, may not be seized and sold separately from each other, if all of them are under the power of the same master . . .”).

230. *See* GOMEZ, *supra* note 55, at 51.

Pratz explained, in his recommendations “of the Manner of governing the Negroes,” that “[i]t is necessary that the negroes have wives, and you ought to know that nothing attaches them so much to a plantation as children.”²³¹ So, this “protective” provision ensuring families were kept intact was merely a means to protect the colony’s system of enslavement.

iv. Conducting Business

Article 15 of the *Code* forbade enslaved Africans from “put[ting] goods on sale at the markets . . . without express permission from their master . . .”²³² This prohibition extended to selling food and clothes.²³³ The penalty for this provision was to fine the buyers of the goods, with steeper fines imposed for clothing and merchandise.²³⁴ The *Code* established patrols of the markets to enforce this provision.²³⁵ The *Code* declared “all promises and obligations which the slaves may make” as null, “since they are made by persons incapable of disposing or contracting in their own right.”²³⁶ The *Code* also included several anti-theft provisions, punishable by corporal punishment and even death “if the case require[d] it.”²³⁷ One example of such punishment imposed in 1764 was branding on the cheek with the letter “v” for *voleur* (French for “thief”).²³⁸

From this glimpse at Louisiana Law, one may conclude that it served as a social structure whereby Africans had virtually no power in judicial process; were required to participate in the religion of the French; were policed as to their movements, gatherings, and associations with one another; were heavily punished for acts threatening the security and safety of enslavement-based colonial society; and were prohibited from building institutions of commerce among themselves.

231. ANTOINE SIMON LE PAGE DU PRATZ, HISTORY OF LOUISIANA: OR, OF THE WESTERN PARTS OF VIRGINIA AND CAROLINA 432 (Stanley Clisby Arthur ed., Pinnacle Press 2017) (1774); see also WHITE, *supra* note 105, at 196 (“Masters hoped that unions between enslaved people would lead to procreation, facilitate cooperation, prevent slave marronnage by keeping them anchored to plantations, and also provide an incentive for desirable behavior.”).

232. *Code Noir* of 1724, art. XV. Such activity was also forbidden by the 1751 New Orleans Police Code. WHITE, *supra* note 105, at 30.

233. *Code Noir* of 1724, art. XV.

234. *Id.*

235. *Id.* art. XVI.

236. *Id.* art. XXII.

237. *Id.* arts. XXIX, XXX.

238. WHITE, *supra* note 105, at 42.

B. *Protocol: Bamana Protocol from Africa to Louisiana*

Based on various sources,²³⁹ we can posit what the Bamana world-sense was like at the time of their arrival in Louisiana in the early eighteenth century, and we can glean their Ways of Knowing.²⁴⁰ By studying the Bamana Ways of Knowing, we can understand contours of Bamana Protocol.

i. Elders, Family, & Community

Traditional Bamana society was organized in an “agricultural commune controlled by the elders.”²⁴¹ The elders—or *cèkòròbaw*²⁴²—were key figures in Bamana Protocol, as they were the society’s decision-makers regarding food, marriage, access to knowledge, and other important aspects

239. To see illustrations of Bamana Protocol, we must consult not only legal sources but also non-legal sources, as Protocol and Law are not one-to-one comparators. By confining our study to legal sources, we use only legal frames to study Protocol, which risks reinscribing Western constructs and furthering the assumption that Western legal frameworks are universal. Some evidence of Protocol shows up in court records and other legal materials, but legal proceedings do not house the heart of Protocol. Protocol arises out of the African world, so to get a complete sense, we must look beyond legal documents to the work of those in other disciplines studying Africana (e.g., Africana Studies, History, Anthropology). Additionally, even if Protocol and Law were totally aligned, in this example, one would not see evidence of Protocol in legal documents due to the constraints on legal participation imposed by the *Maafa*. Cf. GREEN, *supra* note 13, at 21 (“[E]xclusive reliance on written sources will tend to reproduce a purely European view of history, and the assumption that specific European institutional economic [also, legal] frameworks are ‘universal,’ since this is what appears in the ‘sources.’”).

240. It is important to note that enslavement had a profound impact on African societies, which changed in response to the European demand for humans. Thus, Africans from Bamana Segu who existed at different moments in history would not necessarily have the same world-sense as one another. See GOMEZ, *supra* note 55, at 18. Hall explains, however, that many of the elements of Bamana culture present in the early 1700s persist to the present day. HALL, *supra* note 2, at 44.

241. HALL, *supra* note 2, at 44.

242. A STATE OF INTRIGUE, *supra* note 179, at 91. Note: The “w” suffix denotes the plural in Bamanankan. *Id.* at 2 n.2, 43.

of life.²⁴³ The elders convened to make significant community decisions, such as choosing leaders.²⁴⁴

For example, a Bamana *jeli*²⁴⁵ (roughly, “historian”) explained a pre-*Maafa*²⁴⁶ process of selecting leaders among the Bamana, whereby three community members in a row chose the same pieces of indistinguishable, cut straw.²⁴⁷ Because of the element of chance in the process, the leader was “chosen . . . by destiny.”²⁴⁸ The community was involved: people of varying ages and identities—including women, uncircumcised (younger) boys, and circumcised (older) boys—participated.²⁴⁹ However, the process was overseen by the *cèkòròbaw* (elders).²⁵⁰

The authority of elders was related to their life experience. They were seen as “those soon to be ancestors.”²⁵¹ Elders were thus honored and respected, and children were expected to care for their elderly parents.²⁵² It is the elders who had attained *doniya duna*, or “profound knowledge,”²⁵³ by gradually moving through age-classes or age-grades,²⁵⁴ stating at age six, within the Bamana community.²⁵⁵ These age-classes were groups “whose members were born within a few years of each oth-

243. HALL, *supra* note 2, at 44. More broadly, as an example of cultural nationalism, the negotiating role of the elder was paramount across pre-*Maafa* West Africa. See Catherine Coquery-Vidrovitch, *Women, Marriage and Slavery in Nineteenth-Century Black Africa during the Precolonial Period*, in FROM CHAINS TO BONDS 4 (Doudou Diène ed., 2001) (“Marriage was thus at one and the same time an economic, social and political matter, the negotiations concerning which were the prerogative of the elders, who alone had power to negotiate and exercise control over the group’s wealth.”).

244. A STATE OF INTRIGUE, *supra* note 179, at 79 (referencing “a meeting of elders” to choose a leader).

245. More about the *jeliw* is discussed below.

246. Tayiru commented that this process for selecting leaders was “the way it was done in the past . . . [b]efore the coming of Islam, [b]efore the coming of European education.” A STATE OF INTRIGUE, *supra* note 179, at 80.

247. *Id.* at 80–82.

248. *Id.* at 82.

249. *Id.* at 82–84.

250. *Id.* at 82–84.

251. See STUCKEY, *supra* note 70, at 375. The West African “tradition above all, is based on respect for the ancestors and the elders.” *Id.*

252. A STATE OF INTRIGUE, *supra* note 179, at 54.

253. HALL, *supra* note 2, at 46–7.

254. See Colley & Farrell, *supra* note 179, at 25 (describing village organization into age groups).

255. HALL, *supra* note 2, at 52. It was “age-group affiliation and personal loyalty,” rather than kinship, that formed the basis of Bamana state-membership. HALL, *supra* note 76, at 46; see also GREEN, *supra* note 13, at 304 (“These West African societies became sites for providing the potential to enter adulthood . . .”); see also *id.* at 302.

er, passed together through circumcision and other rights [sic] of passage, and maintained a life-long association.”²⁵⁶

Relatedly, the Bamana had an expansive definition of family.²⁵⁷ For example, in Bamana language, the word for “uncle” is an “age-grade term, indicating any male of the same generation as one’s father”²⁵⁸ Thus, family was a concept that incorporated the functioning Bamana community, complete with its age-grade system of reaching elderhood.

ii. Orality

The Bamana world-sense also prized orality. In the early 1700s, the Bamana had a strong oral tradition, which was kept and told by the *jeliw* (singular, *jeli*) (who are widely known by the French term “griots”).²⁵⁹ There is no single English word that adequately defines the role of the men and women who served as *jeliw*; they have been described as culture keepers, historians, musicians, oral traditionists, poets, public speakers, genealogists, negotiators, political counselors, linguists, praise-singers, spokespersons, mediators, entertainers, performers, spiritual guides, and diplomats.²⁶⁰ A large aspect of their role was to preserve the past in the memory of Bamana people.²⁶¹ Because they knew “the secrets of the past,” they were influential and had power in Bamana society.²⁶²

Jeli was a role that one was born into, and *jeli* families were connected to other “patron” families.²⁶³ They would compose their historical narratives as a service to their employers.²⁶⁴ The *jeliw* in places like Segu could be found assisting with settling disputes between community

256. A STATE OF INTRIGUE, *supra* note 179, at 98.

257. *See id.* at 87.

258. *Id.*

259. Carr, *supra* note 22, at 291; David C. Conrad, *Oral Tradition & Perceptions of History from the Manding Peoples of West Africa*, in THEMES IN WEST AFRICA’S HISTORY 76 (Emmanuel Kwaku Akyeampong ed., 2006). The *jeli* (plural, *jeliw*) is also referenced as *djeli* or *jali*. *See also* HALL, *supra* note 2, at 45; GREEN, *supra* note 13, at xvii (“[I]n West Africa, history is an oral genre, held and recounted by professional historians known as praise-singers, or griots, whose patrons ask them to sing important histories at key public events and commemorations.”); A STATE OF INTRIGUE, *supra* note 179, at 4.

260. Carr, *supra* note 22, at 291; Conrad, *supra* note 259, at 76, 78, 81; Rashid, *supra* note 180, at 126–27; GOMEZ, *supra* note 55, at 64; THOMPSON, *supra* note 75, at 196.

261. *See* CARRUTHERS, *supra* note 29, at 80–82.

262. Conrad, *supra* note 259, at 82. Mamadou Kouyaté, one of the Mande *jeliw* in Mali, explained, “[H]istory keeps no mysteries from us.” SIMONE SCHWARZ-BART & ANDRÉ SCHWARZ BART, IN PRAISE OF BLACK WOMEN VOL. 1: ANCIENT AFRICAN QUEENS 126 (2001).

263. Conrad, *supra* note 259, at 76, 78; A STATE OF INTRIGUE, *supra* note 179, at 5 (these patrons are called *jatigiw*).

264. Carr, *supra* note 22, at 291.

members or negotiating marriages between families.²⁶⁵ Another important function of the *jeliw*, specifically a sub-group of *jeliw* called the *jeli-faama*, was to accurately convey accounts of the past and invoke the ancestors during times of crisis, so as to strengthen and encourage the community.²⁶⁶ Mamadou Kouyaté, a *jeli* in present-day Mali, explains the obligations of his role:

My word is pure and bare. I tell no lies. I carry my father's words and the words of my father's father.

I will give my father's words the way he gave them to me: the king's praise singer knows nothing of lies.²⁶⁷

The *jeliw* performed narratives called *kuma koro* ("ancient speech") in their ancestral language at community rituals (e.g., marriages, funerals, festivals).²⁶⁸ These narratives were often accompanied by music.²⁶⁹ In these narratives, the *jeliw* used proverbs and constantly evoked heroic ancestors and their important deeds, so members of the community were aware of specific ancestors from childhood.²⁷⁰ Community members were connected to these ancestors through their *jamu* or family name, and the connections, which established relationships, were acknowledged in personal greetings.²⁷¹ Therefore, this *jeliw* role was integral to establishing Protocol between community members and elders responsible for decision-making:

When elders meet in village council, the ancestral spirits are felt to be present because, according to tradition, it was they who established the relative statuses of everyone present, as well as

265. See Conrad, *supra* note 259, at 78.

266. Carr, *supra* note 22, at 291 (citing Amadou Hampâté Bâ, *The Living Tradition*, in INTERNATIONAL SCIENTIFIC COMMITTEE FOR THE DRAFTING OF A GENERAL HISTORY OF AFRICA, GENERAL HISTORY OF AFRICA, VOL. I: METHODOLOGY AND AFRICAN PRE-HISTORY 166-203 (J. Ki-Zerbo ed., 1981). The word *faama* is a reference to rulers in Segu "distinguished by their wealth and power." A STATE OF INTRIGUE, *supra* note 179, at 2 n.5.

267. SCHWARZ-BART & SCHWARZ-BART, *supra* note 262, at 126.

268. Conrad, *supra* note 259, at 80; MICHAEL A. GOMEZ, AFRICAN DOMINION: A NEW HISTORY OF EMPIRE IN EARLY AND MEDIEVAL WEST AFRICA 65 (2018).

269. See Conrad, *supra* note 259, at 75 (In Manding culture, "musicians and narratives specialists are responsible for preserving and performing oral narratives that have evolved through many generations."); BARGNA, *supra* note 79, at 152 ("The Bamana of Mali believe that the power of a griot's word rests on his musicianship . . ."); A STATE OF INTRIGUE, *supra* note 179, at 31; GOMEZ, *supra* note 268, at 64.

270. See Conrad, *supra* note 259, at 79; A STATE OF INTRIGUE, *supra* note 179, at 30.

271. See Conrad, *supra* note 259, at 79; A STATE OF INTRIGUE, *supra* note 179, at 17.

the administrative protocols to be followed and the values underpinning every decision.²⁷²

The *jeliw* are figures who possess the community's memory, including its memory related to Protocol, including past promises, transgressions, and disputes. Given the role of the *jeliw* in preserving the ancestral past, and the role of ancestors in determining the status of present decision-makers, one might conclude that Bamana ancestors are seen as key "participants" in Bamana Protocol. This is consistent with an observation from Hall, who explains that rules of Bamana society (Protocol) were "transmitted from generation to generation within each community, and sanctified by appeals to the heritage of the ancestors."²⁷³

iii. Ways of Knowing

Central to understanding Bamana Ways of Knowing is a notion that is frequently discussed with respect to African cultures, which I will refer to as "permeative principle." Permeative principle is the idea that Ways of Knowing permeate all other aspects of culture and are therefore inseparable from those other spheres of life.²⁷⁴ This is worth stating, because it runs counter to Western normative notions about law and religion as occupants of distinct spaces within the Western cultural logic.²⁷⁵ Permeative principle was present in the Bamana world-sense: "The symbolism of Bambara [Bamana] cosmology transcends religious life and ceremonies and penetrates all of secular life and daily conduct."²⁷⁶

272. Conrad, *supra* note 259, at 79.

273. HALL, *supra* note 2, at 54.

274. MBITI, *supra* note 127, at 1 ("Religion permeates into all the departments of life so fully that it is not easy or possible always to isolate it."); *see also id.* at 2 ("Because traditional religions permeate all the departments of life, there is no formal distinction between the sacred and the secular, between the religious and non-religious, between the spiritual and the material areas of life."); CHIREAU, *supra* note 78, at 38 ("[I]ndigenous African religions are not compartmentalized. Many African people of the past, as now, drew few distinctions between the substance of their beliefs and the other aspects of the world in which they participated."); STUCKEY, *supra* note 70, at 25 ("The division between the sacred and the secular, so prominent a feature in modern Western culture"—and law—"did not exist in black Africa in the years of the slave trade, before Christianity made real inroads on the continent."); *see* Mancuso, *supra* note 114, at 4.

275. *See* Mancuso, *supra* note 114, at 3 ("One of the peculiarities of African societies is that social phenomena are undifferentiated, so that it is impossible (and probably useless) to separate what is juridical from what is religious, supernatural or economic.").

276. HALL, *supra* note 2, at 49; MBITI, *supra* note 127, at 1 ("To ignore these traditional beliefs, attitudes and practices can only lead to a lack of understanding of African behavior and problems.").

The Bamana people were decidedly non-Muslim and adherent to their indigenous beliefs, with the rejection of Islam in Africa being a major component of their identity.²⁷⁷ They maintained their traditional Ways of Knowing during the time of the slave trade.²⁷⁸ In traditional Bamana Ways of Knowing, nature, humans, and the unseen spirit world are closely intertwined, joined by a force called the *nyama*, a “vital beneficial energy” or “the vital spiritual force,” into which components of humans, animals, and plants transform upon death.²⁷⁹ In Bamana cosmogony, animals, plants, and humans come from the same origin—the first woman.²⁸⁰ Therefore, a certain “reverence” was attached to all living things.²⁸¹ Consequently, “[b]ecause humans kill animals, plants, and insects for various reasons, the world is filled with hostile *nyama*.”²⁸² Therefore, for the Bamana, “negotiating with the realm of the unseen” was integral to living peaceably.²⁸³

Part of negotiating with the realm of the unseen was carrying and using charms. For example, before doing significant acts, the Bamana consulted with a vase filled with charms known as the *canari*—which was likely a representation of ancestors or an instrument used to communicate with ancestors.²⁸⁴ Making sacrifices “to appease the *nyama* of the ancestors” was also necessary, and sacrifices were made on sacred “power objects” called *boliv*.²⁸⁵ These objects were “the most essential instruments of communication between earthly mortals and the supernatural powers that control *nyama*.”²⁸⁶

Ancestral emphasis is clear in Bamana Ways of Knowing and—because of permeative principle—can be assumed to frame and *be part of*

277. GOMEZ, *supra* note 55, at 43; HALL, *supra* note 2, at 46; Colleyn & Farrell, *supra* note 179, at 16; LOVEJOY, *supra* note 13, at 60; A STATE OF INTRIGUE, *supra* note 179, at 3 (explaining that Islam did not become firmly established in Bamana culture until the 1800s).

278. HALL, *supra* note 76, at 100; HALL, *supra* note 2, at 41 (“[T]he struggle against Islam was an important component of Bambara identity until the late nineteenth century.”).

279. BARGNA, *supra* note 79, at 303; GOMEZ, *supra* note 55, at 49; A STATE OF INTRIGUE, *supra* note 179, at 3.

280. HALL, *supra* note 2, at 47.

281. *Id.*

282. GOMEZ, *supra* note 55, at 49; *see* HALL, *supra* note 2, at 47.

283. GOMEZ, *supra* note 55, at 49.

284. *Id.* at 49–50 (explaining that charms were key objects “[c]ritical to the negotiations”). The Bamana had “profound concern with what is seen and what is not,” and charms or amulets were tools to ensure balance and harmony between these realms. *See id.* at 50.

285. *Id.* at 49; Colleyn & Farrell, *supra* note 179, at 19; A STATE OF INTRIGUE, *supra* note 179, at 3 (explaining that *boliv* “functioned as a locus of sacrifice performed as a means of calling upon and influencing” the *nyama*).

286. A STATE OF INTRIGUE, *supra* note 179, at 3.

Bamana Protocol.²⁸⁷ Ancestors were part of the community that legitimized Protocol; thus, a key part of Protocol was consulting with ancestors. For example, oaths were made to the ancestors.²⁸⁸ These promises committed not only the promisors but all of their descendants as well.²⁸⁹

Additionally, the Bamana had the concept of *tiné*, a sacred “animal or plant that is regarded as the protector of a particular clan, lineage or branch thereof.”²⁹⁰ A group’s *tiné* was based on stories about how the animal (e.g., lion) or plant (e.g., a certain tree) played a key role in an ancestor’s life.²⁹¹ Therefore, that animal or plant was considered sacred, and the ancestor’s descendants were not allowed to kill it.²⁹²

iv. Social Organization

Members of Bamana age-classes could also join independent associations or “secret societies”²⁹³ to learn profound knowledge “by traveling and working for a reputed master.”²⁹⁴ The *Tyi Wara* society, for example, taught “the art of agriculture and conducted secret dances in the fields.”²⁹⁵ Other societies convened other groups, such as hunters.²⁹⁶

Aside from the secret societies, there were social status groups. One of these groups was the endogamous, occupationally-defined *nyamakalaw*,

287. Conrad explained that *boliv*, because of their role in communicating with ancestors and influencing the *nyama*, “were an important part of the Bamana judicial structure.” See *id.* at 3–4.

288. HALL, *supra* note 2, at 54. Hall describes pacts, promises, or alliances made among Bamana people called *dyonge*, whereby parties “mixed several drops of blood from their forearms with goat’s milk, announced the conditions of alliance, and swore *on the ancestors*. Each party then drank part of the beverage.” *Id.* (emphasis added).

289. See *id.*

290. A STATE OF INTRIGUE, *supra* note 179, at 46–47 n. 42. Also, generally, in the Senegambia, there existed the idea of sacred forests. See GREEN, *supra* note 13, at 305, 362–3. Because land was seen as sacred, it was considered occupied by spirits and not “unoccupied,” as was thought by European outsiders. See *id.* at 363.

291. A STATE OF INTRIGUE, *supra* note 179, at 46–47 n. 42.

292. *Id.* at 46–47 n. 42., 88.

293. *Id.* at 3 n.3, 14 n.4, 98–99 n.1344. Initially, these societies or *tonw* had age criteria, but they evolved to be voluntary associations. *Id.* See GREEN, *supra* note 13, at 301.

294. Examples of these secret societies were the *Komo*, *Kono*, *Tyi Wara*, *Nama*, *Jo*, *Ntomo*, and *Korè* societies. Colleyn & Farrell, *supra* note 179, at 24, 28; OWUSU, *supra* note 46, at 75; BARGNA, *supra* note 79, at 135; SECK, *supra* note 180, at 39; A STATE OF INTRIGUE, *supra* note 179, at 3.

295. OWUSU, *supra* note 46, at 75.

296. A STATE OF INTRIGUE, *supra* note 179, at 79 n. 869, 98–99 (describing the *donso ton*, a council of hunters). Conrad describes the evolving concept of the *ton*, which is a group that evolved over time in Bamana society, from age-classes themselves, to voluntary associations, to a large social organization including various groups. *Id.* at 98–99.

sometimes translated as “craftsmen,” though this term is grossly reductive.²⁹⁷ The *nyamakalaw* included the *jeliw*, leatherworkers (*garankéw*) metalworkers (*numuw*), and woodworkers (*daliluw*).²⁹⁸ The *nyamakalaw* were held in high esteem in the community, and could serve as a check on the *cèkòròbaw* (elders) when it came to adhering to Protocol, e.g., selecting leaders.²⁹⁹

There was also a societal status group known as *Jonw* which included what some scholars might refer to as “slaves,” but what is, more accurately, “captive” status.³⁰⁰ It is important, however, to appreciate the distinctions between *Jonw* status and European enslavement.³⁰¹ In pre-*Maafa* African societies generally, the system that some might call “enslavement” “functioned at the edge of society” and was an interaction between “groups of kin,” whereby people served as members of a servant class due to failure to pay debt, commission of a wrongdoing,³⁰² allegations of “sorcery,” seizure in war,³⁰³ or as compensation as a remedy for

297. *Id.* at 5.

298. *See id.* at 2, 48 n. 69; BARGNA, *supra* note 79, at 303 (explaining that the woodworkers knew “the science of trees,” made masks, used medicinal plants, and created extracts and concoctions).

299. *See* A STATE OF INTRIGUE, *supra* note 179, at 83–4 (explaining an instance when the *cèkòròbaw* grumbled at the leadership choice of the community, and the *nyamakalaw* made the *cèkòròbaw* stick to their word and adhere to the process they established for selecting a leader).

300. *See* GREEN, *supra* note 13, at 267.

301. This distinction is important, given the argument by some that “Africans sold each other into slavery.” *See, e.g.*, the arguments referenced in Albert, *supra* note 189, at 27. This argument is often meant by narrators to minimize European responsibility for enslavement and the inhumane nature of the institution by pointing toward African “unclean hands.” But, as noted above, it relies on a false equivalency. This argument also relies on anachronism. By using the words “each other” to reference Africans, narrators are projecting backward a Pan-African identity that did not exist at that time, not for purposes of facility of study and discourse, but to assert that such an identity was actually held by those studied. However, continental Africans at the time of enslavement did not see themselves as “Africans,” but as members of separate polities, nations, ethnicities, or peoples who occasionally had conflict. *See* HALL, *supra* note 76, at 11–15; GREEN, *supra* note 13, at 268 (“[I]dentity was not based on some common sense of belonging to an abstract continent, but on local and regional ties, ties that also determined who could and could not become enslaved.”); *see also* LOVEJOY, *supra* note 13, at 21 (“That slavery probably existed in Africa before the diffusion of Islam is relatively certain, although its characteristics are not. If we mean by ‘slaves,’ people who were kidnapped, seized in war, or condemned to be sold as a result of crime or in compensation for crime, then slaves there were. Structurally, however, slavery was marginal.”); WHITE, *supra* note 105, at 5.

302. LOVEJOY, *supra* note 13, at 4 (“Slavery was a form of judicial punishment, particularly for such crimes as murder, theft, adultery, and sorcery.”).

303. Curtin explains, with reference to the eighteenth century Senegambia region and Bamana society, “Prisoners of war were the inevitable by-product of successful empire building, and they were an item of commerce.” AFRICA REMEMBERED: NARRATIVES BY

wrong.³⁰⁴ This system was vastly different from the large-scale, agricultural, lineage enslavement that Europeans instituted in the Americas, which was central—not marginal—to European society in the Western Hemisphere.³⁰⁵ Thomas Ingersoll explained that enslaved Africans in the Western Hemisphere

came with some experience of an institution historians call “slavery” in Africa, but it was not like the racial plantation slave regime of North America: it was a transient condition that was not based on race. Those who had been slaves in Africa were far more unfree as slaves in the New World, and, by contrast with Africa, their descendants were required by law to remain in slavery.³⁰⁶

Because of these distinctions, Toby Green prefers “dependency” to “slavery” as the term to apply to intra-African servitude.³⁰⁷ The Bamana state, described as an empire by some historians, was expansive and influential, and it was engaged in “chronic imperial warfare” during the eighteenth century, meaning Bamana people often took non-Bamana people as war captives and integrated them into Bamana society as *jonw*-status dependents.³⁰⁸

WEST AFRICANS FROM THE ERA OF THE SLAVE TRADE 29 (Philip D. Curtin ed., 1967); *see also id.* at 75 (words of Olaudah Equiano, an Ibo man kidnapped and brought to Barbados by British enslavers, referencing his homeland in what is now Nigeria, “Sometimes indeed we sold slaves to [a group of men from southwest of Equiano’s community], but they were only prisoners of war, or such among us as had been convicted of kidnapping, or adultery, and some other crimes, which we esteemed heinous.”); GREEN, *supra* note 13, at 269 (“War captives could be incorporated as new members of an expanding society, with dependent status.”).

304. *See* WHITE, *supra* note 105, at 151.

305. *See* LOVEJOY, *supra* note 13, at 21.

306. INGERSOLL, *supra* note 198, at 68–69.

307. GREEN, *supra* note 13, at 267 (“[T]he word ‘slavery’ can be problematic, for it carries a different meaning in different historical settings.”); SARBAH, *supra* note 135, at 6 (“The word ‘slave,’ to the European ear, conjures up horrible atrocities—kidnapping, murder, bloodshed, fire, plague, pestilence, famine, whips and shackles, ruined and desolated villages, and all that debases and makes man worse than the brute beasts.”); HALL, *supra* note 76, at 11–14.

308. *See* INGERSOLL, *supra* note 198, at 70. This proved to be a convenient model for European slave-traders to exploit, and they formed a relationship with the Bamana to obtain captives to supply the European trade. LOVEJOY, *supra* note 13, at 94; BARGNA, *supra* note 79, at 162. Thus, as was true with other powerful African societies, the Bamana empire participated in supplying Europeans with people who would ultimately be enslaved in the Western Hemisphere. Considering the Bamana perspective within a society that contemplated dependency through *jonw* status, and the fact that the ultimate manner of European enslavement was unseen on the coasts of Africa, it is doubtful the Bamana fully understood the nature of the institution to which they supplied captives.

Finally, there were the *horonw*, or farming people, the guardians of land.³⁰⁹ Cultivating land was not by any means a new concept for Africans—including the Bamana.³¹⁰ One Bamana proverb says, “The first work of mankind is farming.”³¹¹ In Bamana society, farming was considered a significant, “noble” occupation and was seen as “normal and dignified in Segu.”³¹² Farming was taught by the *Tyi Wara* society, and rituals called upon the *tyi wara*—a mythical animal ancestor who taught the Bamana how to farm—to bless the harvest.³¹³

The various roles in Bamana society resulted in a system where people were able to trade. Tayiru Banbera notes, “In early times our trade was done by barter. If you had millet, you took it to someone who had fish.”³¹⁴

From this survey of the Bamana world-sense, it is evident that Bamana Protocol required the involvement of elders and ancestors; included an expansive, communal definition of family; valued orality; contemplated collective work and safeguarding of information and profound knowledge within age-grades and secret societies; included social organization of various occupational groups, including a class of servitude; and incorporated rituals of communication with the unseen spiritual realm.

C. Persistence of Protocol

“If they brought with them their clothes, their food, and their religion, did they forget their laws? If they knew how to raise their babies, did they forget how to resolve disputes?” – Aderson François³¹⁵

What happened to Protocol? Given the Continuity approach of the Africana Legal Studies orientation, which recognizes the persistence, combination, and evolution of Africana Protocol in the Western Hemisphere, we must conclude that it did not simply die off. Did it survive to today in some way, shape, or form? Did specific systems of Protocol

309. See A STATE OF INTRIGUE, *supra* note 179, at 2.

310. See *id.* at 66, 76; Nat’l Museum Nat. Hist., *Innovators on the Land*, in AFRICAN VOICES (exhibit) (visited Dec. 19, 2021) (“Africa’s 8,000-year history of agriculture is one of innovation.”).

311. Nat’l Museum Nat. Hist., *Masquerades Celebrate the First Farmer*, in AFRICAN VOICES (exhibit) (visited Dec. 19, 2021) (citing these words as a Bamana proverb, from Mali).

312. A STATE OF INTRIGUE, *supra* note 179, at 5 n.4, 76 n. 796.

313. Nat’l Museum Nat. Hist., *Masquerades*, *supra* note 311.

314. A STATE OF INTRIGUE, *supra* note 179, at 91.

315. Communication from Aderson François, Anne Fleming Rsch. Professor, Professor of L., Director, Inst. for Pub. Representation Civ. Rts. L. Clinic, Georgetown Univ. L. Ctr. (June 29, 2021).

combine into one system or various regional systems of Pan-African Protocol, and then persist into the present? These are questions that ought to be posed but will take years of collective work to answer.³¹⁶

But the question of whether specific bodies of Protocol survived into the *early* period of enslavement is more straightforward. Because Africans are human beings with history and culture, the presumption must be that they remembered and engaged in their specific indigenous³¹⁷ systems of Protocol despite the interruption, disruption, and relocation posed by the *Maafa*. The evidence only affirms this presumption.³¹⁸

During the French colonial period, Africans did not yet have a Pan-African consciousness.³¹⁹ Indeed, Africans around the world did not yet consider themselves “Africans.”³²⁰ A Pan-African identity did ultimately

316. The hope is that legal scholars, Africana Studies scholars, and others will collectively undertake finding the answers to these questions—not only about Bamana Protocol, but about various systems of Africana Protocol. This knowledge can be built incrementally. How far into the future can we search for manifestations of Protocol? It should be the project of scholars to search this out, relying on the work of historians and others in Africana Studies who explore the persistence of African culture over time. While this is no easy task, it is one that ought to be taken up. The persistence of English jurisprudential concepts and English common law principles in our legal system today is an uncontroversial notion. The persistence, inheritance, and manifestations of Africana Protocol and the Ways of Knowing that informed them—in Africa and throughout the African diaspora—also ought to be explored. Perhaps these precedent cultural underpinnings had more of an impact on people and institutions today than most realize.

317. While some assert that much of West Africa had been Islamicized by the time of European enslavement—therefore suggesting not all Africana Protocols transported to the Western Hemisphere represented indigenous African Protocols—others note that the spread of Islam through Africa did not displace indigenous governance until the late 1800s. See LOVEJOY, *supra* note 13, at 93; *but see* Camara, *supra* note 18, at 499 (“Indeed, it was not until the late nineteenth century that Islam really began to penetrate the masses.”). The role of Islam in Africa, however, is significant and should not be ignored in the conversation about Protocol. The work of Khaled Beydoun is instructive here. See Khaled A. Beydoun, *Antebellum Islam*, 58 HOW. L.J. 141 (2014).

318. White describes a specific instance showing the “informal justice” systems of enslaved Africans in New Orleans in 1766, suggesting Africans had their own means of addressing conflict and wrongdoing. See WHITE, *supra* note 105, at 134–35 (“[T]his was a judicial affair that one cohort of plantation slaves initially sought to resolve and to police, on their own.”). Even Louisiana slaveholders, for different reasons of course, acknowledged the persistence of African systems of thought on Louisiana’s non-African soil: French colonist and King’s Plantation manager Antoine Simon Le Page du Pratz explained, “The negroes must be governed differently from the Europeans; not because they are black, nor because they are slaves; but because they think differently from the white men.” LE PAGE DU PRATZ, *supra* note 231, at 423.

319. See GOMEZ, *supra* note 55, at 1–4.

320. Despite this, I use the term “Africans” in this article to designate the larger group of people transported to the nascent United States. This is used to aid in the modern analysis, not as an assertion of how people saw themselves at the time.

arise among enslaved and free Africans,³²¹ but forming this collective identity was a challenge, and moving “from ethnicity to race” was not straightforward prior to 1830.³²² Thus, ethnicity remained relevant for a long time, and “a polycultural African American community” emerged during the enslavement period.³²³

Additionally, and contrary to popular belief,³²⁴ African people of the same nations were not totally fragmented or separated.³²⁵ Instead, there were ethnic clusters in the Western Hemisphere, including in what is now the United States.³²⁶ These ethnic clusters resulted from several factors, including the geographic influences on trade routes,³²⁷ resistance of

321. We can conclude, then, that Pan-African Protocols also ultimately emerged in the African diaspora. As Paul Lovejoy explains, scholars have recently accepted that elements of “slave culture” (which, I argue, include Protocol) are “the conscious and not-so-conscious decisions made by the people [Africans] themselves, selecting from their collective experiences those cultural and historical attributes that helped make sense of their experience of slavery in the Americas.” LOVEJOY, *supra* note 72, at 126.

322. GOMEZ, *supra* note 55, at 3–4. At the same time, there is a cultural unity among various ethnicities of Africans, particularly when juxtaposed with the vastly different worldviews of European culture, just as there are broad commonalities among the ethnicities of Europe, Asia, Indigenous North America, and other broad geographic areas. African world-senses, while distinct, were consonant in various respects. This idea is encapsulated by the principle of “cultural nationalism”—a concept that posits that African people (continental and diasporic) share cultural commonalities and a common world-sense that is, at its foundation, distinct from European and other non-African cultures. Carr, *supra* note 22, at 315–16 (citing ALPHONSO PINKNEY, RED, BLACK AND GREEN: BLACK NATIONALISM IN THE UNITED STATES 127 (1976)); *see also* CHEIKH ANTA DIOP, CIVILIZATION OR BARBARISM: AN AUTHENTIC ANTHROPOLOGY 113 (Harold J. Salemson & Marjolijn de Jager eds., Yaa-Lengi Meema Ngemi trans., 1991); HALL, *supra* note 76, at 22 (“There are many common cultural features in Africa. It is not always easy to disaggregate which features are characteristic of any particular ethnicity or region.”). Cultural nationalism may be applied to the Senegambians, as a regional culture, as well. For example, though there were many ethnicities within the Senegambia region of West Africa, Senegambians had a cultural and linguistic unity. *See* GOMEZ, *supra* note 55, at 47 (“Senegambian societies were remarkably similar in structure.”).

323. GOMEZ, *supra* note 55, at 2–3, 9.

324. It is still widely believed that “Africans were so fragmented when they arrived in the Western Hemisphere that specific African regions and ethnicities had little influence on particular regions in the Americas. In most places, the pattern of introduction of Africans does not support this belief.” HALL, *supra* note 76, at xv.

325. Melville Herskovits argued that “Africanisms” persisted in the Western Hemisphere *in a generalized form*, an idea that has been rebutted by more recent work suggesting particularized cultural continuity resulting from ethnic clustering and other factors. GOMEZ, *supra* note 55, at 9; *see generally* HALL, *supra* note 76.

326. Work on ethnic clusters of enslaved Africans has examined documentary evidence of Africans’ self-identified ethnicities during enslavement. *See* HALL, *supra* note 76, at 23; *see also* GREEN, *supra* note 13, at 389 (“Africans in the New World often sought out people from the same shared cultural region.”).

327. For example, systems of air and ocean currents. HALL, *supra* note 76, at 79, 108.

certain Africans to the slave trade,³²⁸ and slaveholder preferences for specific skills and knowledge associated with certain ethnicities.³²⁹ Consequently, systems of Protocol belonging to the cultures of specific ethnic identities could persist through the engagement Africans had with their ethnic communities. And that is precisely what happened in Louisiana.

³³⁰

There are key considerations when contemplating the persistence of Bamana Protocol in Louisiana, where some of the best information about African ethnicities during enslavement exists.³³¹ In Louisiana, Senegambian ethnic clusters (like the Bamana) were retained because of an exclusive trade monopoly held by the Company of the Indies, which organized the trade in both Louisiana and the Senegambia region.³³² Senegambians were known to have expertise in rice cultivation, which drove the preferences of slaveholders in places like Louisiana, where rice was important.³³³

While there were not many large plantations in New Orleans in the first half of the eighteenth century, there were many opportunities for community-building and interplantational relations.³³⁴ Time and space existed in Louisiana colony for the Bamana and other Africans to carry on their cultural practices. Enslaved Africans in New Orleans frequently met in groups where some of them were not on their enslavers' property, including on the weekly "free day" established by Article 5 of the *Code Noir*.³³⁵

328. Because of the resistance of certain African peoples to the slave trade, traders were forced to rely on fewer regions to establish their trade routes. *Id.*

329. *Id.* at 66–67; EVANS, *supra* note 71, at 13 (“[T]he Africans brought agricultural and technological skills that helped to provide the sustenance for everyday survival.”); GOMEZ, *supra* note 55, at 40–41 (explaining that in South Carolina and Georgia, “slaveholders expressed a strong preference for Africans from Gambia and the Gold Coast”).

330. HALL, *supra* note 2, at xiv, 158–59 (“The Louisiana experience calls into question the assumption that African slaves could not regroup themselves in language and social communities derived partly from the sending cultures.”).

331. See HALL, *supra* note 76, at 100. Interestingly, much of the information about African ethnicities during enslavement is captured in parish courthouse documents, such as notes from cases when the enslaved were routinely asked, “What is your nation?” *Id.* at 33, 41.

332. HALL, *supra* note 2, at 32; SECK, *supra* note 180, at 8 (“The majority of the slave force came from Senegambia throughout the Colonial period especially during the French regime when Louisiana and Senegal were both under the control of the French Company of the West Indies, from 1719 to 1731.”).

333. INGERSOLL, *supra* note 198, at 69 (“The provision of a majority of blacks from Senegalese markets was in accordance with French planters’ tastes in supposed ethnic attributes and skills . . .”); GOMEZ, *supra* note 55, at 41, 44; HALL, *supra* note 76, at 90.

334. INGERSOLL, *supra* note 198, at 73.

335. See *id.* at 85–86; EVANS, *supra* note 71, at 15 (explaining that the “free day” allowed by the *Code Noir* and Catholicism created space for enslaved Africans to carry on their cultural practices.”).

Additionally, existence of the Bamana ethnic cluster can be seen through persistence of language. The Bamana did not suddenly and solely speak French when in the colony. The Bamana language group (Bamanankan)³³⁶ persisted during the French colonial period.³³⁷ Notably, a Bamana man named Samba Bambara served as a court interpreter in several Superior Council proceedings involving other enslaved Bamana people.³³⁸

If the Bamana could remember how to speak their language, did they simply forget how to secure promises between one another? If they could remember how to grow rice, does it make sense that they would forget how to make oaths to their ancestors? Michael Gomez asked and answered a related question: “What is the likelihood that either the Bambara [Bamana] worldview or their warrior-cultivator tradition survived the foreign environment of the lower Mississippi? The informed response is that the likelihood was very high, and indeed, the evidence supports the projection.”³³⁹ Relying on the work of Gomez and others, we can conclude that the unique Bamana world-sense was brought to Louisiana with the Bamana people, and Bamana Protocol survived, at least during the early period of the colony.³⁴⁰ Understanding Bamana Protocol and acknowledging its continuation in the venue of enslavement brings new insights to interpreting the actions of the Bamana in violation of the *Code Noir*. The next Part of this Article explores those insights as well as Bamana Protocol as inspiration for today.

III. WHAT PROTOCOL TELLS US

“History . . . is the ideological tool a people may use for the assessment of their past, the evaluation of their present conditions, and the charting of a course for their collective destiny.” – Anderson Thompson³⁴¹

A consciousness of Protocol enables us to do three things: (1) reinterpret the actions of enslaved Africans under law by centering the per-

336. A STATE OF INTRIGUE, *supra* note 179, at 1.

337. HALL, *supra* note 2, at xiv.

338. *Id.* at 42, 108–09.

339. GOMEZ, *supra* note 55, at 50. “Surely, the Bambara worldview would be altered over time as a consequence of life in America, but in colonial Louisiana, there is evidence that the Bambara attempted to adhere to their unique understanding of the world.” *Id.* at 51.

340. *Id.* at 38; *see also* WHITE, *supra* note 105, at 151.

341. Anderson Thompson, *Developing an African Historiography*, in AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE 16 (Jacob H. Carruthers & Leon C. Harris eds., 1997).

spectives of enslaved Africans; (2) posit the African perspectives about Law based on the vantage point of their Protocol; and (3) derive lessons from Protocol that can be applied in today's legal landscape.

A. *Interpreting Actions*

Law and Protocol are not in perfect alignment. There are clashes and tension points between them. Because of the dominant traditional framework of Law, we most often interpret these clashes as violations of Law. What we do not tend to do is interpret the clashes as violations of Protocol. The Africana Legal Studies method helps us shift perspectives to the Protocol orientation, reframing actions of enslaved Africans as related to Protocol.

Much to the chagrin of French colonists, despite the mandates and prohibitions of the *Code Noir*, Africans collectively continued to follow their own agenda. The Bamana, in particular, notably clashed with the *Code* and were overrepresented among those Africans accused of its crimes.³⁴² Early Louisiana legal records indicate that the Bamana frequently interacted with the courts for various legal offenses, including threatening slaveholders, attacking slaveholders, and escaping enslavement by fleeing captivity.³⁴³ Why did the Bamana (and other Africans) flout the *Code Noir*? The *Code* was one way of knowing governance, and it was at odds with the Bamana way.

i. Louisiana Religion and Bamana Ways of Knowing

One tension involves the *Code Noir*'s provisions on religion and Bamana Ways of Knowing. Despite outwardly adopting Catholicism, Africans in colonial Louisiana gathered to practice non-Catholicism.³⁴⁴ This

342. HALL, *supra* note 2, at 112 (“[A]mong twenty-seven slaves accused of crimes whose African nation was identified in judicial records during the French period, eighteen were Bambara [Bamana].”). “In these cases, the slaves often identified their own nations.” *Id.*; see also HALL, *supra* note 76, at 98.

343. See HALL, *supra* note 2, at 399–401.

344. “Although many of the Africans accepted Catholicism in Louisiana, aspects of their traditional beliefs remained internalized, invisible, and immune to the law resulting in a dual existence of religious properties. That is, many African descendants essentially practiced Catholicism in public and traditional African belief systems in private.” EVANS, *supra* note 71, at 52; see also Kimberly Sambol-Tosco, *Historical Overview: Religion, SLAVERY & THE MAKING OF AMERICA*, <https://www.thirteen.org/wnet/slavery/experience/religion/history.html> (last visited Jan. 30, 2022) (“An unquestionable obstacle to the acceptance of Christianity among slaves was their desire to continue to adhere as much as possible to the religious beliefs and rituals of their African ancestors.”). Africans practicing Christianity in the Americas did not leave their own beliefs behind: “Instead, they engaged in syn-

conduct violated the restrictions on exercise of religion outlined in Article 3 of the *Code*.³⁴⁵ On the “free day” created by the *Code*’s prohibition on Sunday work, Africans convened at various locations around New Orleans, built community, sang, danced, and practiced their various spiritual traditions.

Le Page du Pratz, who lived in New Orleans in the 1720s, observed that 400 Africans (of the approximately 2,000 Africans in the colony at that time) gathered every Sunday on the Company of the Indies’ Plantation (also known as the “King’s Plantation”).³⁴⁶ That plantation, which Le Page du Pratz managed, was located in Algiers across the Mississippi from New Orleans, and was where newly-arrived Africans and those not yet sold were held.³⁴⁷ Le Page du Pratz described what he saw during these gatherings:

In a word, nothing is more to be dreaded than to see the negroes assemble together on Sundays, since, under pretence [sic] of Calinda or the dance, they sometimes get together to the number of three or four hundred, and make a kind of Sabbath, which it is always prudent to avoid; for it is in those tumultuous meetings that they sell what they have stolen to one another,³⁴⁸ and commit many crimes. In these likewise they plot their rebellions.³⁴⁹

Gatherings like these also occurred elsewhere in New Orleans and on other plantations in the colony.³⁵⁰

cretism, blending Christian influences with traditional African rites and beliefs. Symbols and objects, such as crosses, were conflated with charms carried by Africans to ward off evil spirits.” *Id.* Sterling Stuckey explains that for most enslaved Africans, “Christianity was deeply African beneath the surface.” STUCKEY, *supra* note 70, at 162. This was especially the case in Louisiana, where the markers of *voudou*, disguised by Catholic iconography, are easily traced to West African traditions.

345. *Code Noir* of 1724, art. III.

346. See EVANS, *supra* note 71, at 13, 18.

347. See *id.* at 13.

348. Selling goods was another *Code* violation. The *Code* expressly forbade enslaved Africans from putting goods on sale in markets without permission from slaveholders. *Code Noir* of 1724, art. XV.

349. LE PAGE DU PRATZ, *supra* note 231, at 432–33. Le Page du Pratz urged slaveholders to abolish these types of assemblies. EVANS, *supra* note 71, at 18. In 1734, all of the Africans kept on the Company Plantation were sold, and Le Page’s position as manager of the plantation was no longer needed. *Id.*

350. See EVANS, *supra* note 71, at 18. From the earliest days of New Orleans, founded in 1718, the enslaved gathered at a place located right outside the city limits to the back of the city. *Id.* at 10, 18. Later, in 1817, Africans were restricted to gather only there. *Id.* at 1. This area became known as “Place Congo” or “Congo Square.” *Id.* The site of Congo Square can be visited today immediately outside of New Orleans’ French Quarter.

Because resistance to Islam was a major part of Bamana history and identity, it is likely that the religious mandates of the *Code Noir* would have been repugnant to them. For the Bamana, the attempt at forced conversion by the French may have felt all too familiar, in the worst way.³⁵¹ Le Page du Pratz's observations suggest that the Bamana took advantage of the "free day" (prohibition of Sunday work) created by Article 5 of the *Code* and gathered together to engage in practices that were part of their Protocol, including Bamana Ways of Knowing and, quite possibly, other elements of Protocol unnoticed by colonists. What the colonists saw as dancing and plotting rebellion could have also included participation in Bamana Protocol associated with decision-making, transmitting histories and knowledge, and organizing into secret societies and other social organizations. The French recognized that there was some spiritual undertone to the conduct at these gatherings. For the Bamana, this likely means they participated in Protocol related to their Ways of Knowing. Their activity at Sunday gatherings was the maintenance of Protocol—hidden in plain view within the space and time authorized by Law.

Second, it is clear from the historical data and observations by the French that the Bamana, specifically, carried charms with them in the colony. Le Page du Pratz explained, "They [enslaved Africans] are very superstitious, and are much attached to their prejudices, and little toys which they call *gris, gris*. It would be improper therefore to take them from them, or even speak of them to them; for they would believe themselves undone, if they were stripped of those trinkets."³⁵² Carrying these charms would have technically violated the *Code's* prohibition of the exercise of other religions, though Le Page du Pratz's statements suggest that the *Code* was not enforced against enslaved Africans in this way.

Using the Protocol orientation, by carrying charms, the Bamana were simply continuing to employ their Ways of Knowing, which permeated their Protocol. The purpose of the *gris-gris* charm—missed by Le Page du Pratz—was to cause harm.³⁵³ From the Bamana perspective, the

351. The Bamana in Louisiana retained their African names more often than other non-Bamana ethnicities, which may be indicative of resistance to Catholic baptism and Christianization. See HALL, *supra* note 76, at 54.

352. LE PAGE DU PRATZ, *supra* note 231, at 424. Africans continued to make and use charms in the colony including *gris-gris*, *zinzin*, and *wanga* charms. GOMEZ, *supra* note 55, at 50 ("There is no doubt that the Bambara continued to manufacture amulets in the New World."); HALL, *supra* note 2, at 162 ("All adult Bambara [in Louisiana] knew how to make charms."); see also *id.* at 51, 163. The names of the *zinzin* charm is from the Bamana language (Bamanankan), while *gris-gris*, a reference to spiritual force, comes from the broader Mande language. GOMEZ, *supra* note 55, at 50–51; CHIREAU, *supra* note 78, at 46.

353. See HALL, *supra* note 2, at 163.

*gris-gris was a weapon.*³⁵⁴ This role of the charm was beyond the contemplation of the French, and, therefore, it was a clandestine weapon that fell outside the purview of the *Code*. Bamana participation in their Protocol hid in the gaps of Law.

Finally, the Bamana appeared in court in various cases, and in these cases, before giving testimony, they were required to take an oath in front of a crucifix to tell the truth. During a 1748 murder investigation, one witness, Charlot dit Karacou, told French authorities that a man named Pierrot (who identified as “Bambara”) was his accomplice.³⁵⁵ Pierrot denied this.³⁵⁶ But Karacou insisted that Pierrot was a liar, especially because “the Bambara always lie.”³⁵⁷ Ultimately, Pierrot confessed and was executed.

A Law orientation might stop here, taking note of the interesting remark by Karacou, but framing this incident as one of perjury and punishment. Using our Protocol lens, we know that the Bamana had an oath-taking Protocol: Bamana oaths were made to Bamana ancestors.³⁵⁸ Considering the Bamana maintained their Ways of Knowing in the colony by carrying charms and participating in gatherings of a spiritual sort, the fact that a Bamana witness, when made to promise to tell the truth before a crucifix—a symbol representing Jesus Christ (not a Bamana ancestor)—was undeterred from breaking that promise and lying to the Superior Council should give us little surprise.³⁵⁹ For the Bamana, this oath before the crucifix was no oath at all. Considering this and the Bamana’s social organization into secret societies, their Protocol of safeguarding information would not have wavered in the halls of the Superior Council.

ii. Louisiana Enslavement and Bamana Social Organization

In violation of the anti-rebellion, anti-assembly, and anti-violence sections of the *Code*, Africans in Louisiana indeed assembled to do various

354. *Id.*

355. See WHITE, *supra* note 105, at 167.

356. *Id.*

357. HALL, *supra* note 2, at 115; see also INGERSOLL, *supra* note 198, at 70; WHITE, *supra* note 105, at 167.

358. HALL, *supra* note 2, at 54.

359. Interestingly, later on in other parts of the country, courts prohibited enslaved Africans from providing testimony because of the idea that they would not adhere to Christian oaths: “[I]t was a settled point at common law, that a slave could not be a witness, because [among other things] . . . it would be difficult to administer an oath to a slave, for want of knowing any religion he professed.” *Respublica v. Mulatto Bob*, 4 U.S. 145, 145 n.1 (1795).

things.³⁶⁰ There were “interplantational relations” among Africans, enslaved and free, and they created communities expanding beyond singular “slaveholding units.”³⁶¹ And, in 1731, the Bamana would have had to coordinate large-scale gatherings, because in that year, they conspired to kill the French and take over the colony.³⁶² At that time, Africans outnumbered the French in lower Louisiana 3,352 to 1,095, and the Bamana represented fifteen percent of the enslaved population in the colony.³⁶³ Over 400 enslaved Bamana were involved in the Conspiracy of 1731; they collaborated with the nearby indigenous nations in a plan to kill the French, free themselves, and “make themselves the masters of” the other enslaved Africans in the colony.³⁶⁴ The participants in this plan were led by none other than Samba Bambara, the aforementioned court interpreter and one of Le Page du Pratz’s *commandeurs* (overseers) on the King’s Plantation.³⁶⁵

The conspiracy was discovered before steps were taken toward carrying it out. Of course, the very act of gathering and conspiring to rebel violated the *Code*.³⁶⁶ When Samba Bambara and seven others were arrested and imprisoned for their roles in the Conspiracy of 1731, they were repeatedly tortured, but they refused to confess to the crime or reveal their accomplices.³⁶⁷ The known participants of the 1731 Conspiracy were killed—eight were “broke[n] alive on the wheel,” (i.e., tied to a wheel and had their bones broken) and one was hanged.³⁶⁸ The governor admitted that it was not clear whether those executed had formed the

360. “[T]he African continued to practice a group life, despite the restraints of slavery.” STUCKEY, *supra* note 70, at 287; *see also* HALL, *supra* note 2, at 162.

361. *See* GOMEZ, *supra* note 55, at 25–26; *see also* STUCKEY, *supra* note 70, at 115; INGERSOLL, *supra* note 198, at 73.

362. HALL, *supra* note 2, at 106; LE PAGE DU PRATZ, *supra* note 231, at 123 (“[T]he negroes formed a design to rid themselves of all the French at once, and to settle in their room, by making themselves masters of the capital, and of all the property of the French.”).

363. *See* HALL, *supra* note 76, at 98; WHITE, *supra* note 105, at 7.

364. INGERSOLL, *supra* note 198, at 76; HALL, *supra* note 2, at 42, 106; GOMEZ, *supra* note 55, at 53.

365. LE PAGE DU PRATZ, *supra* note 231, at 124 (“I heard them talking together of their scheme. One of them was my first commander and my confidant, which surprised me greatly; his name was Samba.”); HALL, *supra* note 2, at 106.

366. *See* HALL, *supra* note 2, at 106, 110; LE PAGE DU PRATZ, *supra* note 231, at 125.

367. HALL, *supra* note 2, at 108–09 (“Samba and his alleged accomplices were tortured again, to no avail.”).

368. *See id.* at 106, 110; *id.* at 107 n.22 (“The number of slaves reported executed varies in these documents between five and twelve.”); LE PAGE DU PRATZ, *supra* note 231, at 125. This low number of participants out of the 400 estimated is likely owing to the French concern over losing enslaved Africans to judicial process: “French officials did not want to deepen the investigation because of the damages that would be caused to private individuals if they lost their slaves.” HALL, *supra* note 2, at 106.

conspiracy, but a scapegoat was needed to quell the hysteria of the French colonists.³⁶⁹

It's clear that, like all enslaved Africans, the Bamana would have found the system of enslavement under the French to be abhorrent. Resistance to enslavement is not a Bamana particularity; there are countless instances of African resistance to European enslavement. Arguably, most human beings would likely resist such a condition. But the specific contours of *why* they resisted and *how* they resisted can be traced back to their Protocol. Knowing something about Bamana Protocol gives us a sense of the particulars of their contempt.

With their Protocol around social organization well in mind, the Bamana would have certainly noticed that French enslavement, unlike *Jonw* dependency, was not premised on wrongdoing, debt, or war capture. Those key distinctions meant that, to the Bamana, the French system of enslavement was particularly violative of the Protocol for incorporating members into society. Because of this, from the Bamana perspective, the French system of enslavement had to be addressed.

The *manner* in which the Bamana organized and formed their plan is also consistent with their Protocol. The exclusive nature of the conspiracy tells us something about the strength of Bamana ethnic identity in this period. Understanding Bamana Protocol around secret societies and safeguarding information brings a certain appreciation to the fact that they gathered and organized on a large scale in 1731, safeguarding their plan in a "secret society" of sorts, to address what they considered to be wrongdoing imparted on their community.³⁷⁰ The Protocol orientation helps us to understand that the Bamana came into forming this plan ready with the skills of social organizing and protecting information, skills that were integral in their own rules for social living.

Finally, knowledge of Bamana Protocol helps us contextualize the narrative describing the Bamana's plot to "enslave"³⁷¹ other Africans in the colony. While a Westocentric orientation might attribute their plan to emulation of the French, a Protocol orientation suggests otherwise: the Bamana may have planned to recreate their own *jonw* system of dependency.³⁷² In their plan, the French would meet death, but other non-

369. INGERSOLL, *supra* note 198, at 76.

370. See GOMEZ, *supra* note 55, at 97; MBITI, *supra* note 127, at 207 (explaining that oaths are taken in secret societies to safeguard information). Relatedly, we can consider the witness comment (discussed above) that "the Bambara always lie." HALL, *supra* note 2, at 115.

371. HALL, *supra* note 2, at 42, 106.

372. This is a conclusion at which historians, not using an Africana lens, have also arrived. See INGERSOLL, *supra* note 198, at 76 ("It would have been natural for the Bambaras to create a version of their own Old World society, which was based on an African type of slavery.").

Bamana Africans would be converted from war captives to *jonw* dependents, thus replicating the Bamana method of empire building and integration of the “other” into their society.

iii. Conducting Business in Louisiana and Bamana Social Organization

In 1764, an enslaved African man named “Louis” and others were arrested in New Orleans.³⁷³ During interrogation, the man explained that he was named “Louis” by the French, but his real name was “Foy” in his native language.³⁷⁴ He testified that he was of the “Bambara” nation.³⁷⁵ Foy at one point worked in the lead mines of Illinois, escaped from those mines, stole a boat, and went to New Orleans, where he worked as a free person.³⁷⁶ Foy was the leader of “a cooperative network” of Mande speakers around New Orleans, which included enslaved Africans and Africans who had escaped enslavement.³⁷⁷ Hall explains, “[w]hen the Africans were asked how they knew each other, they often replied that they were from the same country.”³⁷⁸ Members of the network gathered regularly and made and sold various goods, including clothing and food.³⁷⁹ The group would “steal” food, cook and eat some, and sell the rest.³⁸⁰ They also sold other various “stolen” items.³⁸¹

Foy’s conduct, and the conduct of all those involved in the network, would have violated several provisions of the *Code*, including the articles prohibiting enslaved Africans from assembling, making promises or contracts, and selling goods, such as clothes and food, without permission from slaveholders. Foy did not confess to the crimes until he was brutally tortured with a hammer.³⁸² He was then sentenced to be broken on the wheel.³⁸³

Sophie White points out that “the very concept of [enslaved Africans] perpetrating criminal acts is a deeply problematic one, raising questions such as how enslaved persons could be guilty of theft when they themselves were stolen—their time, labor, and even family ties stripped from them.”³⁸⁴ The

373. HALL, *supra* note 76, at 98.

374. *Id.*

375. *Id.*

376. See INGERSOLL, *supra* note 198, at 90–91.

377. See HALL, *supra* note 76, at 98–99.

378. *Id.* at 99.

379. *Id.* at 98–99.

380. *Id.* at 99.

381. *Id.*

382. INGERSOLL, *supra* note 198, at 90–91; see also HALL, *supra* note 76, at 98–100.

383. INGERSOLL, *supra* note 198, at 90–91.

384. WHITE, *supra* note 105, at 8.

Africana Legal Studies method compels us to raise those questions by shifting perspectives and contrasting the paradigms of Law and Protocol. From a Protocol perspective, Foy and the collective “network” of Mande people seemed to, at least in part, recreate the social organization that Bamana Protocol dictated. In the traditional social organization of the Bamana, various roles in the community involved specific trades, and people bartered various goods.³⁸⁵ This element of Protocol adds context to the “cooperative network” established by Foy, who was likely recreating the trade and barter system he and his country-people remembered from their lives in the Senegambia.

B. *Positing Perspectives*

What about Louisiana Law would have been striking to the Bamana? What about Louisiana Law may have made perfect sense to them?

i. *Emphasis on Writings*

Given the emphasis on orality and central role of the *jeliw* in Bamana Protocol and given the fact that Bamana Protocol was transmitted over space and time through speech and song rather than through writings, the Bamana were likely struck by the French’s reliance on written codes like the *Code Noir* as the authoritative encapsulation of governance and their reliance on written transcripts of their court testimony. The grounding of governance in the written word runs counter to the Bamana understanding that history is preserved by culture-keepers who perform the past with words and song. For this reason, the Bamana may have thought of Louisiana Law as backward.

However, they would likely have noticed the spaces within Louisiana legal process that allowed for emphasis on speech. When in court, Bamana people would have given oral testimony, which they probably perceived as being somewhat consonant with Bamana Protocol. Fittingly, when enslaved Africans provided testimony to the Superior Council during the French period, they seemed to do so readily and extensively.³⁸⁶ For the Bamana, many did so in their own language, through the interpreting services provided by Samba Bambara.

385. A STATE OF INTRIGUE, *supra* note 179, at 91.

386. See WHITE, *supra* note 105, at 11–14.

ii. “Families” Not Sold Separately

Using a traditional framework from the Law orientation, one might conclude that the Bamana found some comfort in Article 53 of the *Code*, which prohibited families from being sold separately. From the Protocol orientation, however, one sees more nuance here. Insights from Bamana community Protocol suggest that there still would have been tension between Protocol and Law in this area, as the notion of family set forth in the *Code* was the Western notion of a nuclear family, while the Bamana world-sense interpreted the idea of family more expansively. Therefore, the *Code Noir* did not help to retain family in the Bamana sense, where (1) society organized itself around age-grades expanding beyond siblings, (2) children were raised to attribute parenthood to all adults in the same generation, and (3) a group of elders made the important decisions for the community. Using a Protocol orientation reveals that this element of Law, by imposing itself on Bamana social organization and fragmenting the community into smaller units, was actually destructive to the Bamana family, not “protective” (as a Law orientation might suggest).

iii. Otherness

Africans in Louisiana knew about the *Code Noir* and its enforcement—after all, the *Code* was enforced against them, so they experienced its implementation and consequences firsthand.³⁸⁷ The Bamana likely did not consider Louisiana Law to be legitimate or worthy of respect, merely because of its otherness. In the Africana Legal Studies approach, Law is a Social Structure imposed on African people, while Protocol represents Africans’ systems for themselves. Thus, definitionally, Louisiana Law was not a Bamana creation; it was not *theirs*, nor was it *for* them. The drafters of Louisiana Law and decision-makers in the Louisiana legal system had no ties to Bamana social organization. King Louis XIV, King Louis XV, the *Code Noir* drafters, and the Superior Council jurists were not Bamana elders. They had not gone through Bamana age-grades or joined secret societies. They did not possess *doniya duna* (profound knowledge). And they had no regard for Bamana ancestors.

Law represented the thoughts of French colonists *about* the Bamana, not Bamana thoughts about each other. This is a particularly salient fact given the *Code Noir* did not even contemplate the ability of Africans to seek redress for wrongs committed against them by other Africans—a

387. See HALL, *supra* note 2, at 204 (describing testimony of Africans during a case about their escape) (“[Those testifying had] a strong sense of justice and solidarity as well as an awareness of their rights under the Code Noir.”); WHITE, *supra* note 105, at 135 (suggesting that enslaved Africans had knowledge of the Code and its implementation).

void that rendered Law inadequate to cover all aspects of African life in the colony, even if Africans wanted it to.

Bamana thoughts about each other are reflected in Bamana Protocol. The Bamana had already created their own system of governance for themselves, in Africa, in the generations before their capture. From their standpoint, Bamana Protocol pre-dated Louisiana Law, and, more importantly, it aligned with the Bamana world-sense, including its Ways of Knowing. Law, in addition to being oppressive and coercive, and therefore morally bankrupt, simply did not align with Bamana Protocol.³⁸⁸ For these reasons, Louisiana Law was not legitimate. In the clash of governance systems, when faced with a choice between a Western Law system and an Africana Protocol system—the choice was simple for the Bamana: Bamana Protocol.

Thus, Bamana resistance, illustrated by the Conspiracy of 1731, meant more than simply fighting back; Bamana resistance was a rejection of Law and a reaffirmation of Protocol. It was a reflection of Bamana beliefs about how things should be, how society should work; it was “a stubborn refusal not to learn a grammar whose rules are contrary to African ideas of” governance.³⁸⁹ The long view of history and cultural continuity tenets of Africana Legal Studies remind us that resistance has a backstory, and the resistance of enslaved Africans has an African backstory. Resistance not only challenges a thing—it champions another thing.

C. Sankofa: Africana Protocol as Inspiration for Today and Innovation for Tomorrow

Through enslavement, segregation, intimidation, and harassment, Africans transported to the Western Hemisphere were in many ways chained to the Western way—of solving conflict, of raising complaint, of addressing wrongdoing, of conducting one’s manner in certain circumstances, of securing and asserting ownership, of seeing the past and charting the future. Because of this, the legal systems all Americans (i.e., people of the Western Hemisphere) have inherited lack the full benefit of Protocol insights. By studying Protocol—a different way, an African way—we can imagine beyond permutations of the Western way to other ideas.

With *Sankofa* in mind (“go back and fetch it”) we may draw upon Africana Protocol not only to ponder the past, but to newly-examine the present and imagine the future. The Africana Legal Studies approach,

388. See SCHWARTZ, *supra* note 105, at 14 (“[Enslaved Africans] could easily conclude . . . that the mistreatment of people of African descent in American courts made those judicial bodies inferior to African ones.”).

389. Yai, *supra* note 38, at 349.

then, is not about the study of “dead letter” Protocol; it is not a project of nostalgia. Rather, it has the potential to be a viable and rich area of study raising questions and insights from the past that are relevant for us today. For example, we can both consider whether the Protocol of secret societies was ever viable under the regime of U.S. law and whether the U.S. legal system is hostile to African people gathering in an organized and confidential way, even today.

To imagine the future, we can draw from systems of Africana Protocol, which offer potential for disruption and innovation in today’s legal landscape. Legal thinkers and practitioners, through study of Protocol, such as Bamana Protocol, can challenge their imagination, creativity, and ability to critique Law in order to establish pathways within and through it toward a better circumstance for African people and others.³⁹⁰

What can Bamana Protocol offer us today? It will take deeper study for the full answer, but one immediate answer is *imagination*. Bamana Protocol fundamentally offers us a new set of imaginings that would not otherwise be imagined without the serious inquiry prompted by disciplinary Africana Studies insights. I list these imaginings as part of a dynamic and ongoing litany of musings I have compiled over the years, entitled *Imagine a World*:³⁹¹

Imagine a World

Where Africana Protocol was not constrained by the machinations of the Maafa, and it developed and freely flourished to create systems of governance today,

Where the people who create rules for social living, enforce those rules, and decide disputes are African elders who know me, my family, and our history,

Where mediators of my disputes and representatives who negotiate on my behalf are African people with deep knowledge of the history of my

390. The work of Robin Wall Kimmerer is a great illustration of the process of thinking differently by drawing upon indigenous knowledge to imagine positive changes to Western institutions. See ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS* 56 (2020 ed.) (discussing Potawatomi language as worldview) (“Maybe a grammar of animacy could lead us to whole new ways of living in the world, other species a sovereign people, a world with a democracy of species, not a tyranny of one—with moral responsibility to water and wolves, and *with a legal system that recognizes the standing of other species.*”) (emphasis added).

391. I originally composed and used a version of this poem as a training tool in 2019 at the University of Minnesota, where I regularly co-facilitated a training program called *Race, Racism, and Whiteness* with Skyler Stef Jarvi, the former Director of Education for the University’s Office for Equity and Diversity. I have continued to use this poem in other settings, including in my Spring 2022 Africana Legal Studies class, where students added their own imaginings.

family, the history of my people, and the deeds of my ancestors, which they shared with others in the process,

Where the destruction of plant and animal life is seen as a spiritual transgression that must be avoided, acknowledged, and addressed,

Where venues of rulemaking and dispute resolution are adorned with names and monuments of revered African ancestors, symbols of African thought (e.g., Sankofa), and showcase musical histories of the African cultural community,

Where scholars consider the impact of Bamana Protocol on the Protocol of the nineteenth century Black church, similar to how other scholars consider the impact of Roman law on the French Code Noir,

Where the discourse about classical Western antecedents of jurisprudential concepts exists alongside equally robust discourse about Africana Ways of Knowing on concepts central to Protocol,

Where textbooks explain the detailed history of the development of various systems of Protocol, including what happened to them in the face of European enslavement and colonization,

Where scholarly projects about Africana Protocol on the continent and in the diaspora proliferate to such an extent that production studios create shows and films telling Protocol stories, similar to how studios create legal dramas,

Where the curriculum at my school, my university, my law school, deeply explores African systems of thought, without apology, without controversy, without question.

These are musings that arise out of a very different orientation from the traditional Western legal orientation. Such a world is so freely imagined with the awareness that many would object to its existence and doubt whether it could exist. But, are there *pieces* of this imagined world that should exist? Are there spaces in our real world where those pieces *could* exist? What would American Law be had Africans come to the Western Hemisphere of their own volition, had their ideas about governance—on equal footing with European ideas—influenced the development of American jurisprudence? What would a dispute resolution process sensitive to shared community culture and elderhood look like? How might a restorative justice program that valued permeative principle be designed? What harsh results might be avoided by adjudicative processes that valued orality over written documents?

These questions are not for one person to answer. They are for the collective.

The point is that they have now been asked.

CONCLUSION

An Africana lens filters our vision of the history of American Law and African people to reveal the cultural continuity, memory, and complexity of African life in the face of a foreign and coercive system—in turn, illuminating the involvement of two systems of governance, Law and Protocol, which clashed in notable ways, giving rise to tension points and resistance. Analyzing the interactions between Law and Protocol systems provides insights and encourages creative ways to think about past, present, and future.

The case study of Bamana Protocol and its interaction with Louisiana Law is but one of many Africana governance stories to be studied and told. There must be continued collective study of various systems of Protocol,³⁹² comparative work on Law and Protocol,³⁹³ the story of what happened to Africana Protocol,³⁹⁴ and the implications of that story. Such a discussion will require extensive knowledge of Africana, so there is much of collective work to be done in collaboration with Africana Studies scholars outside the legal academy. The work will require the insight to center and draw from the wealth of available information—written and oral—on Africana. It will also require knowledge of African languages, considering language is the schema for cultural logic and is therefore necessary for studying African peoples and their systems of thought. When viewed with an individual consciousness, the task is overwhelming. When viewed as a collective project, the task is achievable.

It is time that those of us who find ourselves in the legal space seriously dedicate ourselves to studying systems of Africana Protocol and their in-

392. Scholars could explore other systems of Protocol belonging to various African cultural groups, making sure to understand their pre-*Maafa* African origins. These systems of Protocol can be studied within and beyond the borders of the United States (across the African continent and diaspora), within and beyond the context of enslavement and colonialism. The Protocol of enslaved Africans, free Africans, and Maroons also ought to be studied.

393. Africana Legal Studies scholars could carefully compare—not equate—systems of Africana decision-making Protocol, inheritance Protocol, secret society Protocol, seniority/elderhood Protocol, etc., to features of Western Law.

394. Scholars could explore the systems of Protocol belonging to various African ethnicities over time and space and consider how those Protocol systems merged and evolved into Pan-African Protocol. Africana Legal Studies also offers a framework within which to study Africana resistance movements. Instead of viewing the actions of African people during those movements as legal contributions by victim-survivors of oppression, legal scholars can reanalyze those contributions as surviving manifestations of Protocol. For example, they can view the values promoted by the Civil Rights Movement of the 1960s as the parts of Africana Protocol that the Social Structure of U.S. Law “could not fully digest.” Communication between the Author and Greg Carr, July 24, 2021 (discussing areas of common interest between legal scholarship and Africana Studies).

teractions with Law over space and time. In making this contribution to both legal scholarship and Africana Studies, we may help improve various legal landscapes for the many cultural constituencies living in them. And we may pull closer a reality where systems “not for us” nonetheless work for us.