

Summer 2019

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### Recommended Citation

William Y. Chin, *Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America*, 16 HASTINGS RACE & POVERTY L.J. 109 (2019).

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## Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America

WILLIAM Y. CHIN\*

*The struggles of African Americans against oppressive law help discern the nature of law. Torture, assassinations, and other controversies in America's war on terror are merely more recent manifestations of prior law-sanctioned atrocities committed against Blacks in their struggle for equality. In the struggle, African Americans contended with a white legal caste system that sought to turn them into innominate persons. From the struggle, law's variegated aspects manifest—as a weapon, persecutor, pliable instrument, edifice of oppression, bounded justice provider, and higher ideal. Through the struggle, the nature of law is more clearly revealed.*

### I. Introduction

Blacks<sup>1</sup> live and have lived lives of legal inequality in America. Black inequality is supported by an entire legal edifice. The law has been an instrument of inequality for Blacks since America's inception. At the dawn of the Revolution, the founding documents precluded African Americans. The Declaration of Independence complained that Great Britain "excited domestic [slave] insurrections amongst [the colonies]"<sup>2</sup> and the U.S. Constitution protected slavery. African Americans have not been afforded equal access to the "Justice" and "Blessings of Liberty" proffered by the Constitution.<sup>3</sup> Blacks contend with not only racial discrimination, but a legal regime that legitimizes the discrimination. Blacks have experienced lawful oppression from the slavery era to the current era. Unsurprisingly, blacks

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1. This article uses the terms "Blacks" and "African Americans" interchangeably.
2. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).
3. U.S. CONST. pmb1.

distrust law enforcement,<sup>4</sup> the courts,<sup>5</sup> the criminal justice system,<sup>6</sup> and the civil legal system.<sup>7</sup> The black experience with legal inequality helps reveal the nature of law and exposes law's myriad aspects. Part two below analyzes law as an instrument of war in a counterinsurgency campaign against black freedom seekers. Part three surveys law as a perpetrator of the worst type of abuses in American history. Part four discusses law as a manipulable tool in the hands of power holders. Part five examines the legal edifice supporting lawful oppression. Part six considers law's limits in providing justice and redress. Part seven reveals the need for higher law when human law oppresses. The story of the black experience in America is the story of Blacks contending against law-legitimated injustices. Understanding this story illuminates the understanding of the nature of law.

## II. Law as an Instrument of War

Law can become the continuation of war by other means.<sup>8</sup> "Lawfare" is the strategy of using law in lieu of the military to achieve an "operational objective."<sup>9</sup> The operational objective of Whites has been to undermine black resistance to white supremacy.<sup>10</sup> To achieve this objective, Whites used law as a counterinsurgency tool to pacify the African American population.<sup>11</sup> A variety of methods were used to control Blacks. One was restricting their access to information and keeping them ignorant. For example, colonial law prohibited free Blacks, mulattoes, American Indians, and Whites from associating with enslaved Blacks to prevent them from hearing abolitionist ideas.<sup>12</sup> In the antebellum period, Whites denied Blacks knowledge of their culture, educational prospects, and opportunities to read or write.<sup>13</sup>

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4. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1287 (2004).

5. See Liana J. Pennington, *Engaging Parents As A Legitimacy-Building Approach in Juvenile Delinquency Court*, 16 U.C. DAVIS J. JUV. L. & POL'Y 481, 525 (2012).

6. Kathryn Russell-Brown, *Critical Black Protectionism, Black Lives Matter, and Social Media: Building A Bridge to Social Justice*, 60 HOW. L.J. 367, 380 (2017).

7. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1268 (2016).

8. This is a rendition of Prussian military strategist Clausewitz's dictum that war is politics by other means. David A. Westbrook, *Law Through War*, 48 BUFF. L. REV. 299, 324 (2000).

9. ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 2 (2016).

10. NIKHIL PAL SINGH, *RACE AND AMERICA'S LONGEST WAR* 17, 27 (2017).

11. William Y. Chin, *Domestic Counterinsurgency: How Counterinsurgency Tactics Combined with Laws Were Deployed Against Blacks Throughout U.S. History*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 31, 37 (2013).

12. A. Leon Higginbotham, Jr., *"Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 32 (1991).

13. A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief*

A second method was preventing Blacks from associating with each other. Whites passed laws prohibiting slaves from congregating because of fears of insurrections and rebellions.<sup>14</sup> A 1721 South Carolina law sought to “prevent all caballings amongst negros, by dispersing of them when drumming or playing . . . .”<sup>15</sup> Even into the Civil Rights era, Blacks were viewed suspiciously and were jailed under vagrancy or loitering statutes merely for exercising their constitutional right to assemble.<sup>16</sup>

A third method was surveilling and infiltrating the African American community. White antebellum legislatures passed laws permitting slaves in some circumstances to be compensated for providing information about runaways and rebellions.<sup>17</sup> FBI Director J. Edgar Hoover surveilled Dr. Martin Luther King, Jr., believing that his promotion of civil rights and objection to the Vietnam War constituted a clear threat to the United States.<sup>18</sup> The FBI’s Counter Intelligence Program (COINTELPRO) that was deployed against Dr. King in the 1950s expanded to destabilize the Black Panthers and other Black Power militants in the 1960s.<sup>19</sup> Director Hoover publicly labeled the Black Panthers an internal security threat and employed unlawful counterintelligence measures against Black Power militants to destroy their cohesiveness and prevent what the FBI referred to as a “black messiah” from arising.<sup>20</sup>

A fourth method was disarming Blacks. An antebellum Alabama law stated, “No slave shall keep or carry any gun, powder, shot, club, or other weapon whatsoever . . . .”<sup>21</sup> The slave codes of Kentucky, Virginia, and Missouri called for punishing slaves who kept a gun or other weapons.<sup>22</sup> One white editorial, after the 1866 Memphis Massacre when Whites attacked the black community in Memphis, blamed the riot on “the poor, ignorant, deluded Blacks.”<sup>23</sup> The editorial advised: “[W]e cannot suffer the occasion

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*Justice Roger Taney’s Defense and Justice Thurgood Marshall’s Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1698 (1996).

14. William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1782–83 (1996).

15. Chin, *supra* note 11, at 39–40.

16. F. Michael Higginbotham, *An Open Letter from Heaven to Barack Obama*, 32 U. HAW. L. REV. 1, 25 (2009).

17. Andrea L. Dennis, *A Snitch in Time: An Historical Sketch of Black Informing During Slavery*, 97 MARQ. L. REV. 279, 289–90 (2013).

18. Marjorie Cohn, *Trading Civil Liberties for Apparent Security Is A Bad Deal*, 12 CHAP. L. REV. 615, 619 (2009).

19. PENIEL E. JOSEPH, *WAITING ‘TIL THE MIDNIGHT HOUR: A NARRATIVE HISTORY OF BLACK POWER IN AMERICA* 187, 229 (2006).

20. *Id.*

21. Chin, *supra* note 11, at 41–42.

22. Chin, *supra* note 11, at 41–42.

23. *Lynching in America: Targeting Black Veterans*, EQUAL JUST. INITIATIVE, <https://ejl.org/reports/online/lynching-in-america-targeting-black-veterans> (last visited July 2, 2018).

to pass without again calling the attention of the authorities to the indispensable necessity of disarming these poor creatures, who have so often shown themselves utterly unfit to be trusted with firearms.”<sup>24</sup>

A fifth method was attempting to prevent Blacks from receiving military training. The federal Militia Act of 1792 authorized “white male citizens,” but not African Americans, to enlist in state militias.<sup>25</sup> During World War I, when Blacks served in the U.S. military, a Mississippi senator warned that it was dangerous to “[i]mpress the negro with the fact that he is defending the flag, inflate his untutored soul with military airs, [and] teach him that it is his duty to keep the emblem of the Nation flying triumphantly in the air” because this would lead to Black demands for political rights.<sup>26</sup> During World War II, when black recruits poured into southern bases for military training, southern Whites were alarmed at the sight of armed Blacks in uniform.<sup>27</sup> Even as the United States permitted Blacks to serve in the fight against Nazi Germany and Imperial Japan, Secretary of War Henry Stimson voiced his belief that Blacks and Whites were not equals.<sup>28</sup>

### III. Law as a Purveyor of Atrocities

Law should be a “mighty bulwark” against murder and tyranny,<sup>29</sup> but the experience of Blacks shows otherwise. The Black experience reveals that law is not inherently good. Rather, law is a tool, and like any tool, it can be used for good or evil depending on who wields power.<sup>30</sup> Whites have wielded power, and under white dominance, law has been wielded to perpetrate atrocities against African Americans.<sup>31</sup> Law has no intrinsic capacity to prevent oppression.<sup>32</sup> Indeed, law can be used to inflict the worst oppressions imaginable as shown below.

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24. *Lynching in America*, *supra* note 23.

25. MICHAEL LEE LANNING, *THE AFRICAN-AMERICAN SOLDIER: FROM CRISPUS ATTUCKS TO COLIN POWELL* 18 (2004).

26. *Lynching in America*, *supra* note 23.

27. Jason Morgan Ward, *A War for States' Rights: The White Supremacist Vision of Double Victory*, in *FOG OF WAR: THE SECOND WORLD WAR AND THE CIVIL RIGHTS MOVEMENT* 126, 127 (Kevin M. Kruse & Stephen Tuck eds., 2012).

28. PAUL GORDON LAUREN, *POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION* 147–48 (2d ed. 1996).

29. David Luban et al., *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 *BROOK. L. REV.* 1121, 1143 (1995).

30. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 241 (2017); see Anthony V. Baker, *(Re)integrating Psychic Space: Law, Ontology, and the Ghosts of Old Savannah*, 2 *SAVANNAH L. REV.* 117, 131 (2015).

31. Chin, *supra* note 11, at 33.

32. See Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 *IND. L.J.* 379, 398 (1991).

a. Terrorism

Government leaders warn of foreign terrorists infiltrating the United States to attack Americans in the continuing war on terror.<sup>33</sup> As one senator warned, “[W]e must do everything we can to prevent even a very few jihadis from slipping into our nation.”<sup>34</sup> But domestic terrorism has existed for centuries. Whites have used various means, including a racist legal regime, to terrorize African Americans since pre-Revolution times. The colonial laws of North Carolina permitted slaves deemed guilty of crimes or offenses to be “publicly [sic] executed to the Terror of other Slaves.”<sup>35</sup> North Carolina Chief Justice Howard observed in 1771 that slaves had no legal rights or legal protection because the slave’s life could be forfeited merely upon the “caprice of a white man should [he] be pleased to take it away.”<sup>36</sup> The colonial laws of New York authorized judges to prescribe cruel methods of death for a murder committed by slaves whereby the offenders were to “Suffer the paines [sic] of Death in such manner and with such Circumstances as the aggrevation [sic] and Enormity of their Crime” required.<sup>37</sup> Under the colonial laws of Maryland, for slaves convicted of petty treason or arson, the authorities lopped off the slave’s right hand, hanged the slave, chopped off the head, quartered the corpse, and “set up [the head and quartered parts] in the most public places” to terrorize the slaves in their midst.<sup>38</sup>

During the antebellum period, the South employed terror methods to preserve its slavery system. Southern states formed white patrols to terrorize Blacks. A patrol consisted of four to twelve white members.<sup>39</sup> These patrols combed the countryside day and night to intimidate and terrorize slaves into submission.<sup>40</sup> But slavery was not confined to the South. Slavery also existed in the North when the United States was formed,<sup>41</sup> and “the slave-era farms of New England [were] virtually indistinguishable from the

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33. Laurel R. Boatright, “*Clear Eye for the State Guy*”: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, 1642 (2006).

34. Press Release, Sen. Cruz Introduces the Terrorist Refugee Infiltration Prevention Act (Nov. 18, 2015), [https://www.cruz.senate.gov/?p=press\\_release&id=2524](https://www.cruz.senate.gov/?p=press_release&id=2524).

35. MARVIN L. MICHAEL KAY & LORIN LEE CARY, SLAVERY IN NORTH CAROLINA, 1748-1775 91 (1995).

36. *Id.*

37. ANSEL JUDD NORTHRUP, SLAVERY IN NEW YORK: A HISTORICAL SKETCH 266 (1900).

38. Wiecek, *supra* note 14, at 1782.

39. Chin, *supra* note 11, at 40.

40. KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 40 (2007).

41. Wilson Huhn, *A Higher Law: Abraham Lincoln’s Use of Biblical Imagery*, 13 RUTGERS J.L. & RELIGION 227, 265 (2011).

slaveholding regions of the rural South.”<sup>42</sup>

In the aftermath of the Civil War, when African Americans gained the right to vote and run for office, hostile Whites engaged in systematic campaigns of terrorism and violence to suppress their new freedoms.<sup>43</sup> Nonetheless, African Americans resisted subjugation to produce a turnout of 90% between 1868 and 1898.<sup>44</sup>

To counter Black freedom, Jim Crow laws were enacted across the South.<sup>45</sup> Segregation was enforced with Blacks barred from white areas and relegated to unequal facilities.<sup>46</sup> In both the North and South, Blacks faced discrimination in employment, education, health care, and other sectors of society.<sup>47</sup> White vigilante groups engaged in racial lynchings and mob violence while cheered on by the press and white leaders.<sup>48</sup> The Ku Klux Klan (KKK) formed during the post-Civil War period to maintain white supremacy.<sup>49</sup> The KKK employed acts of intimidation, violence, and terrorism to subjugate Blacks.<sup>50</sup> By the early 1900s, the KKK often used a burning cross to terrorize African Americans.<sup>51</sup> The burning cross directly expressed the KKK terrorists’ hatred of African Americans.<sup>52</sup> The U.S. legal regime protected terrorists such as the KKK by failing to prosecute them for their terroristic acts.<sup>53</sup>

Law enforcement also terrorized African Americans. In the early 1900s, police officers often committed criminal acts of violence against Blacks to enforce black subjugation.<sup>54</sup> Police in the South during the Civil Rights

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42. Willy E. Rice, “Commercial Terrorism” from the Transatlantic Slave Trade to the World Trade Center Disaster: Are Insurance Companies & Judges “Aiders and Abettors” of Terror?—A Critical Analysis of American and British Courts’ Declaratory and Equitable Actions, 1654-2002, 6 SCHOLAR 1, 39–40 (2003).

43. Irving Joyner, *North Carolina’s Racial Politics: Dred Scott Rules from the Grave*, 12 DUKE J. CONST. L. & PUB. POL’Y 141, 160 (2017).

44. *Id.*

45. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 847 (1982).

46. Michael F. Blevins, *Restorative Justice, Slavery, and the American Soul, A Policy-Oriented Intercultural Human Rights Approach to the Question of Reparations*, 31 T. MARSHALL L. REV. 253, 263 (2006).

47. *Id.*

48. Schmidt, Jr., *supra* note 45, at 847.

49. Carla D. Pratt, *Should Klansmen Be Lawyers? Racism As an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 860 n.12 (2003).

50. *Id.*

51. Tess Godhardt, *Reconciling the History of the Hangman’s Noose and Its Severity Within Hostile Work Environment Claims*, 51 J. MARSHALL L. REV. 137, 146 (2017).

52. *Id.*

53. Zachary Leibowitz, *Terror on Your Timeline: Criminalizing Terrorist Incitement on Social Media Through Doctrinal Shift*, 86 FORDHAM L. REV. 795, 812 (2017).

54. Christina Swarns, “I Can’t Breathe!”: A Century Old Call for Justice, 46 SETON HALL L. REV. 1021, 1024–25 (2016).

period turned vicious dogs loose on peaceful protesters to terrorize Blacks.<sup>55</sup> Police killings of Blacks in the post-Civil Rights era continue.<sup>56</sup> Law enforcement has been a tool to enforce state-sanctioned brutality against black Americans.<sup>57</sup>

## b. Torture

Many criticized the U.S. government's torture program used in the war on terror.<sup>58</sup> One U.S. senator declared, "Torture is a black mark against the United States."<sup>59</sup> Another U.S. senator asserted, "We are a nation of laws. We believe that all people . . . are entitled to human dignity."<sup>60</sup> But the laws did not prevent white slaveowners from using torture<sup>61</sup> as an instrument of control against African Americans who were denied their human dignity. Cruel slaveowners were common and not exceptions to the rule.<sup>62</sup> As stated by George Mason, a Virginia delegate to the 1787 Constitutional Convention: "Every master of slaves is born a petty tyrant."<sup>63</sup>

### 1. *Myriad Torture Methods*

White slaveowners tortured African Americans using myriad methods including branding, stabbing, tarring and feathering, burning, shackling, mutilating, crippling, and castrating the victims.<sup>64</sup> Whipping was also common.<sup>65</sup> In Charleston, South Carolina, slaveowners sent runaway slaves

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55. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 787 (2007).

56. Eleanor Lumsden, *How Much Is Police Brutality Costing America?*, 40 U. HAW. L. REV. 141, 169 (2017).

57. Swarns, *supra* note 54, at 1025.

58. Astineh Arakelian, *Extraordinary Rendition in the Wake of 9/11*, 40 SW. L. REV. 323, 349 (2010).

59. *Id.*

60. Sen. Tammy Duckworth, *Commentary: Haspel's torture record violates American values*, CHICAGO TRIBUNE (May 14, 2018), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-duckworth-haspel-cia-torture-0515-20180514-story.html>.

61. One definition of torture involves the "intent to cause cruel or extreme physical or mental pain and suffering" and the infliction of "great bodily injury or severe mental pain or suffering upon another person." MICH. COMP. LAWS ANN. § 750.85(1) (West).

62. REPARATIONS FOR SLAVERY: A READER 12 (Ronald P. Salzberger & Mary Turck eds., 2004).

63. Madison Debates (Aug. 22, 1787), [http://avalon.law.yale.edu/18th\\_century/debates\\_822.asp](http://avalon.law.yale.edu/18th_century/debates_822.asp).

64. A. Leon Higginbotham, Jr., *The "Law Only As an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 979 (1992).

65. Scott W. Howe, *Slavery As Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1030 (2009).

and others deemed needing punishment to the Sugar House to be tortured.<sup>66</sup> The Sugar House was used to manufacture loaf sugar before being converted into a torture chamber. Below the building was a dungeon with various rooms, including one for whipping. This whipping room contained various torture instruments including paddles, whips, bluejays, and cat-o'-nine tails. The "bluejay" had two lashes and was full of knots that made a hole where it struck. The whipping room included ropes to tie hands and feet and to stretch the victim.<sup>67</sup>

Slaveowner cruelty extended beyond whippings. In one situation, a runaway slave was captured after weeks of escaping and returned to the slaveowner's plantation.<sup>68</sup> He was whipped and received hundreds of lashes. Then he was imprisoned in a cotton gin with only enough room to turn on his side when he could not lie on his back. The victim was to remain imprisoned for as long as he escaped, which was weeks, but after only a few days, he was found dead with his body partially eaten by rats.<sup>69</sup>

White female slaveholders also engaged in torturous acts. A former female slave, Silvia Dubois, recounted how her "mistress" persecuted her: "Why, she'd level me with anything she could get hold of—club, stick of wood, tongs, fire-shovel, knife, ax, hatchet."<sup>70</sup> When Dubois had enough, she retaliated. "I struck her a hell of a blow with my fist," Dubois declared.<sup>71</sup> She thereafter gained her freedom.<sup>72</sup>

Whites continued to torture African Americans in the post-Civil War period when they were arbitrarily arrested and re-enslaved as forced laborers to be sold to mines, lumber camps, quarries, farms, and factories of both the South and the North.<sup>73</sup> Re-enslaved Blacks were whipped for failure to complete their tasks and tortured for disobeying their white supervisors.<sup>74</sup>

White law enforcement officials were also part of the torture system. They subjected African Americans to appalling cruelty and continual brutality.<sup>75</sup> They were victims of unconscionable treatment in American

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66. Damon L. Fordham, *The Sugar House – A Slave Torture Chamber in Charleston*, CHARLESTON CHRONICLE (Nov. 29, 2017), <https://www.charlestonchronicle.net/2017/11/29/the-sugar-house-a-slave-torture-chamber-in-charleston/>.

67. *Id.*

68. REPARATIONS FOR SLAVERY, *supra* note 62, at 12.

69. REPARATIONS FOR SLAVERY, *supra* note 62, at 12.

70. Paula C. Johnson, *Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa*, 1 J. GENDER RACE & JUST. 471, 491 (1998).

71. BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE 39 (Ruth Bogin & Bert J. Loewenberg eds., 1996).

72. *Id.*

73. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 6 (2008).

74. *Id.* at 2.

75. Amos N. Guiora, *Relearning Lessons of History: Miranda and Counterterrorism*, 71 LA.

jails.<sup>76</sup> State courts were willing participants as they ignored white brutality against Blacks.<sup>77</sup> Louisiana State Penitentiary, known as Angola, placed a black prisoner, Albert Woodfox, in solitary confinement for 44 years for the murder of a prison guard despite evidentiary problems with the state's murder case.<sup>78</sup> One witness stated that Mr. Woodfox was not involved. With other witnesses, the state provided them with incentives that were not disclosed by the prosecutor. Woodfox's first conviction was thrown out and his second conviction was overturned. The state indicted Woodfox a third time and kept him in solitary confinement. He was kept alone in a cell that was six feet by eight or nine feet with bars on one end and allowed out his cell only one hour each day. He was released in 2016 after reaching a plea deal with the prosecution.<sup>79</sup>

## 2. Water Torture

Government leaders have decried the use of waterboarding to interrogate detainees in the war on terror. One presidential candidate declared waterboarding to be torture and stated that it was "un-American" to torture people captured by U.S. forces.<sup>80</sup> But Whites have used water to torture African Americans for generations. In one situation, a white slaveowner replaced whipping with the "punishment of the pump."<sup>81</sup> The slaveowner demonstrated this method to a slave to dissuade him from running away.<sup>82</sup> In the demonstration, a female slave was punished for an alleged offense by being stripped naked and tied to a post.<sup>83</sup> A stream of water was pumped on her head and shoulder, and after a minute, she cried and screamed in agony. Her convulsive throes ended when she became unconscious.<sup>84</sup> In this method of torture, although the initial contact with the water is not painful, it becomes exceedingly painful after a short period of time to the point that the "skull bone and shoulder blades appear to be broken

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L. REV. 1147, 1171 (2011).

76. *Id.*

77. *Id.*

78. Campbell Robertson, *For 45 Years in Prison, Louisiana Man Kept Calm and Held Fast to Hope*, N.Y. TIMES (Feb. 20, 2016), <https://www.nytimes.com/2016/02/21/us/for-45-years-in-prison-louisiana-man-kept-calm-and-held-fast-to-hope.html>.

79. *Id.*

80. Loran Nordgren, *Waterboarding isn't torture? Try it*, CNN (Nov. 16, 2011) <https://www.cnn.com/2011/11/16/opinion/nordgren-waterboarding/index.html>.

81. Charles Ball, *Slavery in the United States: A Narrative of the Life and Adventures of Charles Ball*, in I WAS BORN A SLAVE: AN ANTHOLOGY OF CLASSIC SLAVE NARRATIVES, VOLUME 1 1770-1849, 259, 477 (Yuvall Taylor ed., 1999).

82. *Id.* at 478.

83. *Id.* at 477.

84. *Id.*

in pieces.”<sup>85</sup> This cruel method was described as “temporary murder.”<sup>86</sup>

Whites continued to use water torture against Blacks after the Civil War, during the neo-slavery period of involuntary servitude under the convict leasing system.<sup>87</sup> White supervisors in southern slave labor camps would restrain the black prisoner and then pour water on the prisoner’s face and upper lip.<sup>88</sup> The constant stream of water effectively stopped the prisoner’s breathing.<sup>89</sup> Whites used variations of this water torture technique repeatedly for decades in the neo-slavery labor camps.<sup>90</sup>

### c. Rape

American law permitted the mass rape of black women during the slave regime. Black women were sexually abused and exploited in the prostitution houses of the North and the slave plantations of the South.<sup>91</sup> In the South, rape was a fact of life for female slaves.<sup>92</sup> One abolitionist stated that these rapes resulted in 800,000 mulattoes.<sup>93</sup> Further, if a white perpetrator raped a black female slave, the slave had no remedy because only the slaveowner, not the victim, had standing to pursue civil or criminal penalties.<sup>94</sup> The law punished black men who raped white women, but not white men who raped black women.<sup>95</sup> White legislators used the laws to maintain domination over Blacks and women.<sup>96</sup>

A formerly enslaved woman from Georgia who was interviewed in the 1930s recalled resisting her owner’s sexual advances:

[H]e pretended I had done somethin’ and beat me. I fought him back because he had no right to beat me for not goin’ with him. His mother got mad with me for fightin’ him back and I told her why he had beat me. Well then she sent me to the courthouse to be whipped for fightin’ him. They had stocks there where most people would send their slaves to be whipped.<sup>97</sup>

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85. Ball, *supra* note 81, at 478.

86. *Id.*

87. BLACKMON, *supra* note 73, at 71.

88. BLACKMON, *supra* note 73, at 71.

89. BLACKMON, *supra* note 73, at 71.

90. BLACKMON, *supra* note 73, at 71.

91. Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 800 (1993).

92. *Id.*

93. *Id.*

94. Pamela D. Bridgewater, *Ain’t I A Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89, 116 (2005).

95. Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 2008 (1989).

96. *Id.*

97. Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. CIV. RTS.

White cruelty and debasement went further. White slaveowners sexually exploited their own daughters who were the product of their sexual advances against their female slaves. As recounted by a former slave:

I knew a man at the South who had six children by a colored slave. Then there was a fuss between him [the white slaveowner] and his wife, and he sold all [of his slave] children but the oldest slave daughter. Afterward, he had a child by this daughter, and sold mother and child before the birth. This was nearly forty years ago. Such things are done frequently in the South.<sup>98</sup>

White slaveowners sexually exploited their control over their female slaves by sexually assaulting them, and when daughters were born, sexually assaulting their daughters.<sup>99</sup> In fact, America's legal regime under slavery allowed the slaveholder, his sons, the overseer, or any other white man to rape and sexually abuse enslaved black women with impunity.<sup>100</sup>

#### d. Child Exploitation

American law permitted enslaving African American children and exploiting them as slave property. In 1705, the Virginia Assembly declared, "All Negro, mulatto and Indian slaves within this dominion . . . shall be held to be real estate."<sup>101</sup> The law did not protect child slaves from abuse. One African child of eleven who was enslaved described the horrors of a slave ship journey.<sup>102</sup> When he refused to eat, a white slaver flogged him. Slaves were crowded under the deck so closely that they barely had room to turn around.<sup>103</sup> The packed bodies, perspiration, hot weather, and lack of sanitary conditions created a suffocating and "pestilential" hell on water.<sup>104</sup> Many died from disease and sickness.<sup>105</sup> Children, like the women and men, were packed like mere meat into these floating terrors.<sup>106</sup> The shrieks of the oppressed and the groans of the dying filled the air. It was a floating prison of horror.<sup>107</sup> As mere property, children suffered all the horrors of slavery. It was

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& CIV. LIBERTIES 177, 184–85 (2016).

98. ON SLAVEHOLDERS' SEXUAL ABUSE OF SLAVES: SELECTIONS FROM 19TH- & 20TH-CENTURY SLAVE NARRATIVES 4 (National Humanities Center 2007), <http://nationalhumanitiescenter.org/pds/maai/enslavement/text6/masterslavesexualabuse.pdf>.

99. *Id.*

100. Johnson, *supra* note 70, at 490.

101. CHARLES JOHNSON, ET AL., AFRICANS IN AMERICA: AMERICA'S JOURNEY THROUGH SLAVERY 48 (1998) (emphasis added).

102. NOEL RAE, THE GREAT STAIN: WITNESSING AMERICAN SLAVERY 114 (2018).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. RAE, *supra* note 102.

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common to see enslaved African children's backs crisscrossed with scars.<sup>108</sup>

Young slaves also endured sexual abuse. As one former enslaved person stated in an interview, "The slave traders would buy . . . well[-]developed young girls with fine physique to barter and sell. They would bring them to the taverns where there would be the buyers and traders, display them and offer them for sale."<sup>109</sup> Also, white slaveowners sexually exploited young slave girls when they left their parents' hut or cabin to work in the slaveowner's domestic household.<sup>110</sup> Harriet Jacobs recounted her experience as a fifteen-year-old slave girl who had to resist the sexual predation of her white owner who told her she was his property and had to subject to his will in all things.<sup>111</sup> He stalked her and swore that he would compel her to submit to him. She had no protection from the law. As she stated, "[T]here is no shadow of law to protect [the slave girl] from insult, from violence, or even from death; all these are inflicted by fiends who bear the shape of men."<sup>112</sup>

White exploitation of black children continued in the post-slavery period. For example, white southerners sought black child labor and resisted minimum wages.<sup>113</sup> Franklin Roosevelt's New Deal supported laws to prohibit child labor and establish minimum wages.<sup>114</sup> To pass New Deal legislation, Roosevelt needed the votes of southern lawmakers, but they would support Roosevelt's legislation only if it excluded industries such as agriculture where African Americans predominated.<sup>115</sup>

#### e. Breeding

Americans expressed revulsion at Nazi breeding experiments,<sup>116</sup> but white slaveowners instituted a breeding program to create a domestic supply of slaves.<sup>117</sup> White slaveowners were unperturbed by the loss of black slaves when importing slaves ended in 1808 because American slaveowners created their own domestic breeding program to replenish their supply of slaves.<sup>118</sup>

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108. JOHNSON, ET AL., *supra* note 101, at 48.

109. ON SLAVEHOLDERS' SEXUAL ABUSE OF SLAVES, *supra* note 98, at 1.

110. BELL HOOKS, *AINT I A WOMAN: BLACK WOMEN AND FEMINISM* 25 (South End Press, 1981).

111. HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 27 (Harv. U. Press 1987).

112. *Id.*

113. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 4 (2017).

114. *Id.*

115. ROTHSTEIN, *supra* note 113.

116. CARA DUNNE & CATHERINE WARREN, *LETHAL AUTONOMY: THE MALFUNCTION OF THE INFORMED CONSENT MECHANISM WITHIN THE CONTEXT OF PRENATAL DIAGNOSIS OF GENETIC VARIANTS*, 14 *ISSUES L. & MED.* 165, 181 (1998).

117. Evelyn L. Wilson, *People As Crops*, 40 *U. TOL. L. REV.* 695, 709 (2009).

118. Penelope Pether, "Perverts," "Terrorists," and *Business As Usual: Fantasies and*

As Martin Luther King, Jr., explained, “[S]laves were bred for sale, not casually or incidentally, but in a vast breeding program which produced enormous wealth for slave owners. This breeding program was the economic answer to the halting of the slave traffic early in the 19th century.”<sup>119</sup>

American law protected and encouraged the slaveowner’s breeding of slaves.<sup>120</sup> Property law recognized that slaveowners, like livestock owners, could retain title to the offspring of human slaves. American law permitted slaveowners, using husbandry techniques, to exploit human beings to create a self-replenishing supply of slaves.<sup>121</sup> White slaveowners forced female slaves to have children to increase the supply of slave workers.<sup>122</sup> The slaveowner at times forced female and male slaves to breed.<sup>123</sup> At other times, the white slaveowner raped female slaves to produce mulatto slaves who were easier to sell and commanded higher prices.<sup>124</sup>

As one white politician stated, “[T]he owner of land had a reasonable right to its annual products, the owner of broodmares to their product, and the owner of female slaves of their increase.”<sup>125</sup>

Slave breeding was a formal practice engaged in by white slaveowners.<sup>126</sup> Newspapers and journals at the time contained advertisements for breeding slaves.<sup>127</sup> To combat the breeding system, female slaves consciously and covertly resisted in various ways including using herbs as contraceptives and abortifacients and practicing other types of self-induced abortions.<sup>128</sup>

#### f. Massacres

Americans expressed shock at the My Lai massacre of 1968 when U.S. soldiers during the Vietnam War killed hundreds of Vietnamese civilians including children, women, and men.<sup>129</sup> Massacres, though, were part of the American landscape generations before My Lai. The 1873 Colfax Massacre

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*Genealogies of U.S. Law*, 33 CARDOZO L. REV. 2547, 2552 (2012).

119. *Id.*

120. Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)productivity*, 19 YALE J.L. & FEMINISM 1, 14–15 (2007).

121. *Id.*

122. Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN’S L.J. 133, 173 (1994).

123. Bobby L. Dexter, *The Hate Exclusion: Moral Tax Equity for Damages Received on Account of Race, Sex, or Sexual Orientation Discrimination*, 13 PITT. TAX REV. 197, 215 (2016).

124. Davis, *supra* note 122, at 173–74.

125. Nelson, *supra* note 120, at 19.

126. Bridgewater, *supra* note 94, at 122.

127. Bridgewater, *supra* note 94, at 122.

128. Bridgewater, *supra* note 94, at 122–23.

129. Jeannine Davanzo, *An Absence of Accountability for the My Lai Massacre*, 3 HOFSTRA L. & POL’Y SYMP. 287, 288 (1999).

occurred because of white animus towards recognizing black equality in the aftermath of the Civil War.<sup>130</sup> White anti-Reconstruction Democrats were battling black and white pro-Reconstruction Republicans in contested local and state elections.<sup>131</sup> Both sides attempted to appoint local officials. In Grant Parish where both sides also disputed the elections, Blacks gathered in the parish courthouse in Colfax to support Republican appointees.<sup>132</sup> A white paramilitary force descended on the courthouse to enforce white supremacy.<sup>133</sup> Whites shot into the courthouse and Blacks shot back.<sup>134</sup> Whites then rolled a cannon into place, causing some Blacks to flee, and Whites on horseback shot them as they fled.<sup>135</sup> A massacre ensued when 300 white men set fire to the courthouse and killed more than three hundred Blacks as they tried to surrender.<sup>136</sup>

In the Tulsa Black Massacre of 1921, Whites uses a machine gun and planes to murder Blacks and raze an entire black community in the segregated Greenwood neighborhood. Greenwood was the wealthiest black neighborhood in the country due to the oil boom of the 1900s. It was called Black Wall Street, but Whites resented black success. White animus was unleashed when a black teenager allegedly sexually assaulted a white elevator operator. But a common narrative was that the black teenager tripped against the operator causing her to scream.<sup>137</sup> Nonetheless, Whites descended on the courthouse holding the black teenager to dispense white mob justice. Armed Blacks were also present to prevent a lynching. A white man wrestled with a black defender over a gun when a gunshot rang out.<sup>138</sup> Groups of Whites and Blacks had a running gunfight back to Greenwood. Once there, Whites fired indiscriminately on black bystanders.<sup>139</sup> Whites dragged Blacks with nooses tied to the back of cars, and they looted and burned down buildings.<sup>140</sup> Whites in planes dropped explosives on black defenders and buildings. One official report stated that some planes were flown by police conducting reconnaissance and others were piloted by white

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130. J. MICHAEL MARTINEZ, TERRORIST ATTACKS ON AMERICAN SOIL: FROM THE CIVIL WAR ERA TO THE PRESENT 77 (2012).

131. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 920 (2009).

132. Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 317 (2017).

133. MARTINEZ, *supra* note 130, at 84.

134. MARTINEZ, *supra* note 130, at 85.

135. MARTINEZ, *supra* note 130, at 85.

136. Davis et al., *supra* note 132, at 316.

137. Meagan Day, *The history of the Tulsa race massacre that destroyed America's wealthiest black neighborhood*, TIMELINE (Sept. 21, 2016), <https://timeline.com/history-tulsa-race-massacre-a92bb2356a69>.

138. *Id.*

139. *Id.*

140. *Id.*

civilians who fired on Blacks and dropped bottles of gasoline on buildings.<sup>141</sup> Fires raged, smoke ascended, and planes patrolled the sky, a black lawyer reported.<sup>142</sup> He noted the absence of the fire department and considered whether the city was conspiring with the white mob.<sup>143</sup>

g. Assassinations

“[A]ssassination, poison, perjury . . . . All of these were legitimate principles in the dark ages . . . but exploded and held in just horror in the 18th century,” asserted Thomas Jefferson.<sup>144</sup> More recently in the war on terror, a former U.S. representative criticized the U.S. drone strike program for “assassinating American citizens without charges . . . .”<sup>145</sup> According to the American Civil Liberties Union (ACLU), the targeted killing program violates both U.S. and international law.<sup>146</sup> But white racist assassins have targeted and murdered black victims throughout U.S. history. For example, Whites targeted black veterans because their expectations of, and demand for, racial equality at home threatened white supremacy.<sup>147</sup> Whites feared black veterans skilled in combat and weapons who could lead other Blacks to resist segregation and inequality. Regarding “colored soldiers” in Kentucky, a Secretary of War report stated, “Having served in the Union army, they have been the especial objects of persecution, and in hundreds of instances have been driven from their homes. The outrages perpetrated by the Ku- klux Klan [sic] have caused a great exodus into other States.”<sup>148</sup>

After World War I, Whites targeted returning black servicemembers who wore their uniforms because Whites saw this as an act of defiance.<sup>149</sup> In Arkansas, when a black veteran would not move after being told by a white woman to get off the sidewalk, Whites abducted him, tied him to a tree with tire chains, and fatally shot him nearly fifty times.<sup>150</sup> Shortly after World

141. Day, *supra* note 137.

142. Allison Keyes, *A Long-Lost Manuscript Contains a Searing Eyewitness Account of the Tulsa Race Massacre of 1921*, SMITHSONIAN.COM (May 27, 2016), <https://www.smithsonianmag.com/smithsonian-institution/long-lost-manuscript-contains-searing-eyewitness-account-tulsa-race-massacre-1921-180959251/>.

143. *Id.*

144. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 688 (2003) (emphasis added).

145. Michael Eshaghian, *Are Drone Courts Necessary? An Analysis of Targeted Killings of U.S. Citizens Abroad Through A Procedural Due Process Lens*, 18 TEX. REV. L. & POL. 169, 173 (2013).

146. *Id.*

147. *Lynching in America*, *supra* note 23.

148. 1868/69 SEC. OF WAR ANN. REP. vol. 1, 1056, <https://babel.hathitrust.org/cgi/pt?id=uc1.b2979878;view=1up;seq=1110>.

149. *Lynching in America*, *supra* note 23.

150. *Lynching in America*, *supra* note 23.

War II in 1946, a black veteran removed a Jim Crow sign from a trolley and was shot five times by the white trolley conductor.<sup>151</sup> The wounded veteran staggered off the trolley and crawled away, but was arrested and placed in the back of a police car by the chief of police who then shot the veteran in the head.<sup>152</sup> One black veteran and civil rights leader stated, “I had fought in World War II, and I once was captured by the German army, and I want to tell you the Germans never were as inhumane as the state troopers of Alabama.”<sup>153</sup>

During the Civil Rights era, a white assailant assassinated Dr. Martin Luther King, Jr. in 1968.<sup>154</sup> Another black victim was fourteen-year-old Emmett Till who was targeted for death in 1955 for allegedly whistling at a white woman in a grocery store in Mississippi.<sup>155</sup> Two white assassins (the husband and brother-in-law of the white woman) abducted Emmett at gunpoint from his great-uncle’s house.<sup>156</sup> He was found three days later shot in the head and brutalized.<sup>157</sup> The two white assassins were acquitted by an all-white jury.<sup>158</sup> They later confessed without remorse to the murder in an interview in *Look* magazine, but could not be retried because of the prior acquittal.<sup>159</sup> Six decades later, the white woman revealed that allegations of Emmett being menacing and sexually crude toward her was not true.<sup>160</sup>

Reverend George Lee, an African American minister, was targeted by the white Belzoni Citizens Council because he registered Blacks to vote in Mississippi.<sup>161</sup> Local white officials offered him protection from the Citizens Council if he stopped his black voter registration efforts, but he refused.<sup>162</sup> He was soon murdered on May 7, 1955, while driving.<sup>163</sup> Local white officials asserted his death was due to an unfortunate auto accident and that

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151. *Lynching in America*, *supra* note 23.

152. *Lynching in America*, *supra* note 23.

153. *Lynching in America*, *supra* note 23.

154. Andrene N. Plummer, *A Few New Solutions to A Very Old Problem: How the Fair Housing Act Can Be Improved to Deter Discriminatory Conduct by Real Estate Brokers*, 47 *HOW. L.J.* 163, 168 (2003).

155. Jennifer Latson, *How Emmett Till’s Murder Changed the World*, *TIME* (Aug. 28, 2015), <http://time.com/4008545/emmett-till-history/>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Richard Pérez-Peña, *Woman Linked to 1955 Emmett Till Murder Tells Historian Her Claims Were False*, *N.Y. TIMES* (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/emmett-till-lynching-carolyn-bryant-donham.html>.

161. Alan Rappoport, *With History in Mind, Black Voters in Mississippi Aided Cochran*, *N.Y. TIMES* (June 25, 2014), <https://www.nytimes.com/2014/06/26/us/politics/with-history-in-mind-black-voters-in-mississippi-aided-cochran.html>.

162. *Id.*

163. *Id.*

shotgun pellets removed from his face were merely tooth fillings.<sup>164</sup> But the Department of Justice determined that he had been fatally shot in the face.<sup>165</sup> The FBI eventually identified two men as possible suspects who were members of the segregationist Citizens Council.<sup>166</sup> Nonetheless, the Department of Justice and state prosecutors in 1956 declined to prosecute.<sup>167</sup> The Department of Justice in 2011 closed the case in part because the suspects had died.<sup>168</sup>

#### h. Spectacle Murders

Many abhorred the spectacle murders committed by al-Qaeda terrorists when they beheaded their victims and broadcasted the grisly acts.<sup>169</sup> But white terrorists also engaged in spectacle murders when they lynched their black victims in public. White lynchers turned lynching into a public spectacle for their white audience.<sup>170</sup> Local newspaper and word-of-mouth advertising drew crowds to see black victims tortured, mutilated, and lynched.<sup>171</sup> Police officers often participated in, or permitted, spectacle lynchings.<sup>172</sup> Grand juries refused to indict white assailants.<sup>173</sup> Despite thousands of lynchings spread across thirty-four states, no white person was ever convicted of murder in any of these lynchings.<sup>174</sup>

In one situation, a white mob lynched a black veteran returning from World War I because he dared to challenge white authority by asserting his innocence when a sheriff attempted to arrest him for robbery.<sup>175</sup> The next day, hundreds of white spectators viewed his dead body that was still in uniform. A white editorial board wrote, “This is the right time to show them what will and what will not be permitted, and thus save them much trouble

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164. K.C. Meckfessel Taylor, Marielle Elisabet Dirx, William McIntosh, W. Tucker & Carrington, *CSI Mississippi: The Cautionary Tale of Mississippi's Medico-Legal History*, 82 MISS. L.J. 1271, 1274–75 (2013).

165. U.S. Dept. of Justice, *George Lee-Notice to Close File* (July 12, 2011), <https://www.justice.gov/crt/case-document/george-lee>.

166. *Id.*

167. *Id.*

168. *Id.*

169. Benjamin R. Davis, *Ending the Cyber Jihad: Combating Terrorist Exploitation of the Internet with the Rule of Law and Improved Tools for Cyber Governance*, 15 COMMLAW CONSPPECTUS 119, 120–121 (2006).

170. Joseph Pugliese, *Abu Ghraib and Its Shadow Archives*, 19 LAW & LITERATURE 247, 261 (2007).

171. *Id.*

172. Michael Brazao, *The Death Penalty in America: Riding the Trojan Horse of the Civil War*, 4 MOD. AM. 26, 31 n.102 (2008).

173. Swarns, *supra* note 54, at 1024–25.

174. Swarns, *supra* note 54, at 1024–25.

175. *Lynching in America*, *supra* note 23.

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in the future.”<sup>176</sup>

Spectacle lynching, torture, and other atrocities reveal that American law has been the sword attacking African Americans rather than the shield protecting them.<sup>177</sup> American leaders extol America’s adherence to the rule of law and market it to other countries.<sup>178</sup> The rule of law creed says the rule of law limits abuses and protects individual liberty.<sup>179</sup> But American law has perpetrated and supported the most egregious of offenses against Blacks. Current civil rights abuses are merely the more recent of past abuses.<sup>180</sup>

#### IV. Law’s Manipulability

Law is manipulable.<sup>181</sup> Whites manipulated the legal status of African Americans to serve white interests. Whites alternated between African Americans being more property-like or more person-like depending on white expediency and in the process created a constitutional contradiction.<sup>182</sup> The founders manipulated the Constitution so that, in the first instance, African American slaves were regarded as property. Although slavery is not explicitly mentioned, the Constitution’s wording was delicately chosen, a Massachusetts court explained, to avoid “. . . offend[ing] some in the convention whose feelings were abhorrent to slavery; but we there entered into an agreement that slaves should be considered as property.”<sup>183</sup> For example, the Constitution’s Fugitive Slave Clause does not refer to a “slave” who seeks freedom by running away, but to a “Person held to Service or Labour in one State . . . escaping into another.”<sup>184</sup> Despite the semantic obfuscation, this clause refers to slaves and, moreover, treats them as property that must be returned to the property owner—i.e., the slaveowner, thus elevating property in slaves as a new constitutional right.<sup>185</sup> But even as

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176. *Lynching in America*, *supra* note 23.

177. See Reginald Leamon Robinson, “*The Other Against Itself*”: *Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 36 (1993).

178. Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7, 63 (2000).

179. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1156 (1997).

180. See Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act As A Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 269 (2017).

181. Earl M. Maltz, *The Concept of Precedent in Choice of Law Theory*, 51 MO. L. REV. 191, 197 (1986).

182. See David C. Durst, *Justice Clarence Thomas’s Interpretation of the Privileges or Immunities Clause: McDonald v. City of Chicago and the Future of the Fourteenth Amendment*, 42 U. TOL. L. REV. 933, 939 (2011).

183. *Commonwealth v. Griffith*, 19 Mass. (2 Pick.) 11, 20 (1823).

184. U.S. CONST. art. IV, § 2, cl. 3.

185. Robert J. Kaczorowski, *Fidelity Through History and to It: An Impossible Dream?*, 65 FORDHAM L. REV. 1663, 1674 (1997).

the Constitution deemed African American slaves to be property, it also deemed them to be three-fifths of a person<sup>186</sup> because this also served white interests.<sup>187</sup> The three-fifths provision was not to grant African Americans three-fifths of the vote, but to grant white southerners increased representatives in the House as a compromise that satisfied both northern and southern delegates.<sup>188</sup>

Like the founders, courts also manipulated the status of African Americans to serve white interests. On the one hand, courts regarded enslaved African Americans as mere property. A Kentucky court in 1828 stated that the laws regarded slaves not as “persons,” but as “things” and “living property.”<sup>189</sup> Likewise, the Supreme Court in *Dred Scott* stated that Blacks were not “citizens” under the U.S. Constitution with rights and privileges, but were instead mere “property.”<sup>190</sup> On the other hand, when an African American committed an alleged offense, then law was manipulated to provide the African American defendant with sufficient person-like status to punish the defendant. As an 1861 Alabama court explained, although the slave is “*not . . . a person*” and possesses neither legal mind nor will, “as soon as we pass into the region of crime, *he is treated as a person*, as having a legal mind, a will, capable of originating acts for which he may be subjected to punishment as a criminal.”<sup>191</sup>

The law was also manipulated regarding the ability of African Americans to testify in court. African Americans in antebellum America, as slave property, could not testify in court against Whites because Whites wanted to reinforce white superiority. But other laws such as New York’s 1702 slave code allowed slaves sufficient person-like status to testify against other slaves in slave rebellion cases because this also helped Whites control African Americans.<sup>192</sup>

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186. U.S. CONST. art. I, § 2, cl. 3.

187. Alan E. Garfield, *What Should We Celebrate on Constitution Day?*, 41 GA. L. REV. v453, 467 (2007).

188. *Id.*

189. *Jarman v. Patterson*, 23 Ky. (7 T.B. Mon.) 644, 645–46 (1828).

190. *Dred Scott v. Sandford*, 60 U.S. 393, 404, 451 (1857).

191. *Creswell’s Ex’r v. Walker*, 37 Ala. 229, 236 (1861) (emphases added).

192. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267 (1996).

## V. A Legal Edifice of Oppression

“[N]o law is an island . . . .”<sup>193</sup> Black inequality is not the product of any single law, but of an entire legal edifice from the slavery period to the present.<sup>194</sup>

### a. The Slavery Period and Legal Oppression

At America’s inception, a legal edifice promoted and sustained black inequality.<sup>195</sup> Slavery was a national institution that was protected by the Constitution.<sup>196</sup> First, the *three-fifths* clause<sup>197</sup> allowed southern states to count a slave as three-fifths of a person for representation purposes. This augmented southern political power in the House (leading to additional representatives from the South) and the electoral college (leading to the election of pro-slavery presidents).<sup>198</sup> Second, the *capitation* clause<sup>199</sup> ensured that any head tax levied would have to accord with the three-fifths clause so that slaves would be taxed lower at three fifths the rate of Whites. This prevented anti-slavery forces from using taxation as a means to end slavery.<sup>200</sup> Third, the *slave trade* clause<sup>201</sup> prohibited Congress from terminating the African slave trade before 1808. By 1808, Congress was permitted, but not required, to end the African slave trade, even as the nation’s internal slave trade and slavery itself continued.<sup>202</sup> Fourth, Article V<sup>203</sup> prohibited lawmakers from amending the slave trade clause or the capitation clause before 1808.<sup>204</sup> Fifth, the *fugitive slave* clause<sup>205</sup> prohibited states from freeing fugitive slaves and required runaway slaves to be returned to their owners.<sup>206</sup>

State laws were part of this legal edifice oppressing Blacks in the pre-Civil War period. One Alabama anti-insurrection statute protected lynch

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193. Adam F. Scales, *Following Form: Corporate Succession and Liability Insurance*, 60 DEPAUL L. REV. 573, 625 (2011).

194. See Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 581–82 (1998).

195. Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2055 (2006).

196. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 5 (2d ed. 2001).

197. U.S. CONST. art. I, §. 2, cl. 3.

198. FINKELMAN, *supra* note 196, at 7.

199. U.S. CONST. art. I, §. 9, cl. 4.

200. FINKELMAN, *supra* note 196, at 7.

201. U.S. CONST. art. I, §. 9, cl. 1.

202. FINKELMAN, *supra* note 196, at 7.

203. U.S. CONST. art. V.

204. FINKELMAN, *supra* note 196, at 7.

205. U.S. CONST. art. IV, §. 2, cl. 3.

206. FINKELMAN, *supra* note 196, at 7.

mob injustice.<sup>207</sup> It called for a summary trial based on a prosecutor's written affidavit alleging insurrection.<sup>208</sup> The trial was to be completed within fifteen days of the offense with the slave being executed immediately without the right to appeal.<sup>209</sup> During this period, Whites who killed slaves usually escaped without any punishment.<sup>210</sup> Also, southern states had laws that criminalized the education of slaves.<sup>211</sup> Further, as mere property, an African American had no right to sue in court, to own property, to make a contract including a marriage contract, to acquire any civil rights, or to secure the protection of the law because, as a court contended, the "law as to him [the enslaved African American] is only a compact between his rulers, and the questions which concern him are matters between them."<sup>212</sup>

#### a. The Jim Crow and Neo-slavery Period and Legal Oppression

After the Civil War, slavery was transformed into Jim Crow.<sup>213</sup> State and local laws were passed to re-subjugate Blacks including restricting their right to sign contracts, buy or sell property, and access local courts.<sup>214</sup> This was also a period of neo-slavery when white sheriffs and constable enforced spurious laws such as vagrancy to re-enslave innocent black men who were delivered to coal mines, quarries, and other neo-slavery employers to work without compensation.<sup>215</sup> Under this system of involuntary servitude, (1) legislatures passed flimsy legal concoctions such as vagrancy or talking loudly with white women, (2) sheriffs enforced these spurious laws, and (3) magistrates presided over these cases and sentenced innocent Blacks to hard labor.<sup>216</sup> A white South Carolina scientist wrote in September 1865 shortly after the end of the Civil War, "There must . . . be stringent laws to control the negroes . . . ."<sup>217</sup>

#### c. The New Jim Crow Period and Legal Oppression

This system of legal inequality exists today.<sup>218</sup> The "old Jim Crow" has

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207. ANDREW FEDE, *PEOPLE WITHOUT RIGHTS* 195 (1992).

208. *Id.*

209. FEDE, *supra* note 207, at 196.

210. Higginbotham, *supra* note 64, at 979.

211. Liu, *supra* note 195, at 2055.

212. *Bailey v. Poindexter's Ex'r*, 55 Va. 132, 142 (1858).

213. BUTLER, *supra* note 30, at 7.

214. Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 143 (2010).

215. BLACKMON, *supra* note 73, at 6.

216. BLACKMON, *supra* note 73, at 1, 6, 7.

217. BLACKMON, *supra* note 73, at 53.

218. BUTLER, *supra* note 30, at 7.

transformed into the “new Jim Crow.”<sup>219</sup> For example, the criminal justice system is rife with racially biased chokepoints for Blacks—the police decides who to stop or arrest; judges decide who gets bail; prosecutors decide whether to charge, what to charge, and whether to offer a plea deal; judges and juries hand down verdicts; judges set sentences; and parole boards decide whether to grant early release.<sup>220</sup> Bias at any individual chokepoint is amplified by the cumulative effects of bias at multiple chokepoints.<sup>221</sup> A result is the mass incarceration of Blacks.<sup>222</sup> According to 2010 Census data, “Blacks are incarcerated five times more than Whites” and Blacks make up 40% of the U.S. incarcerated population while making up only 13% of the U.S. population.<sup>223</sup>

Regarding sentencing, Blacks are “27 percent more likely than Whites to receive jail or prison time for misdemeanor drug offenses.”<sup>224</sup> Additionally, the 1986 Anti-Drug Abuse Act<sup>225</sup> imposed disproportionate sentences on Blacks by treating one gram of crack (crystallized cocaine) as equal to one hundred grams of coke (powder cocaine).<sup>226</sup> Blacks are more likely to possess crack and Whites are more likely to possess coke.<sup>227</sup> Thus, the mandatory minimum sentence for possessors of crack, who were more likely black, was one hundred times higher than the mandatory minimum sentence for possessors of coke, who were more likely white.<sup>228</sup> This 100:1 ratio was reduced to 18:1 ratio by the Fair Sentencing Act of 2010,<sup>229</sup> but this law did not apply retroactively, meaning crack offenders sentenced prior to the 2010 Act under the 100:1 ratio would remain in prison under sentences

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219. BUTLER, *supra* note 30, at 7.

220. Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 400 (2017).

221. William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J.L. & POL'Y 441, 446 (2016).

222. *Id.* at 444.

223. Leah Sakala, *Prison Policy Initiative, Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html>.

224. Evan G. Hall, Note, *The House Always Wins: Systemic Disadvantage for Criminal Defendants and the Case Against the Prosecutorial Veto*, 102 CORNELL L. REV. 1717, 1731 n.71 (2017).

225. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

226. Andrew Cockroft, *Congress Blewett by Not Explicitly Making the Fair Sentencing Act of 2010 Retroactive*, 107 J. CRIM. L. & CRIMINOLOGY 325, 326 (2017).

227. Jason A. Gillmer, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 503 (1995).

228. R. Danielle Burnette, *American Hypocrisy: How the United States' System of Mass Incarceration and Police Brutality Fail to Comply with Its Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 45 GA. J. INT'L & COMP. L. 571, 581 (2017).

229. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372.

considered unjust.<sup>230</sup> Moreover, the 18:1 ratio is still disproportionate and needs to be changed to a 1:1 ratio to achieve some semblance of equality.<sup>231</sup>

Racial inequality for Blacks endure because an entire legal edifice supported black oppression.<sup>232</sup> The oppressive legal edifice endures to perpetuate inequality even as its form changes over time.<sup>233</sup> The slavery regime became the Jim Crow and neo-slavery regime which became the new Jim Crow and mass incarceration regime.<sup>234</sup> In each mutation, racial inequality remains because federal, state, and local officials fail to resist majority opinion and decline to side with minority voices with regard to race.<sup>235</sup> The legal oppression edifice must be countered by the civil rights edifice of the 1960s constructed from the struggles of African Americans and supportive Native Americans, Latinos, Asian Americans, and Whites.<sup>236</sup> The civil rights edifice can be strengthened through a strategy encompassing various areas including schools, the workplace, and local communities.<sup>237</sup> It takes into account not only filing lawsuits in courts but the possible existence of converging interests among disparate groups.<sup>238</sup> It considers proposals for reforming law to break up the cycle that perpetuates White advantage and Black disadvantage.<sup>239</sup> It recognizes and challenges biases at the individual, institutional, and systemic levels.<sup>240</sup>

## VI. Law's Limits

Let justice be done though the heavens fall, except when the injustice is too great.<sup>241</sup> White oppression of Blacks shows the limits of justice. Just as

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230. Paul J. Larkin, Jr., "A Day Late and A Dollar Short" – *President Obama's Clemency Initiative 2014*, 16 GEO. J.L. & PUB. POL'Y 147, 151 (2018).

231. Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and A Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 899 (2014).

232. See Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 GEO. J.L. & PUB. POL'Y 59, 60 (2017).

233. See Kindaka Sanders, *A Reason to Resist: The Use of Deadly Force in Aiding Victims of Unlawful Police Aggression*, 52 SAN DIEGO L. REV. 695, 742 (2015).

234. See *id.*

235. ROTHSTEIN, *supra* note 113, at 216.

236. See Eric K. Yamamoto et al., *American Racial Justice on Trial-Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1287 (2003).

237. See Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1066 (2005).

238. See Bell, Jr., *supra* note 237.

239. See Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 503 (2010).

240. See Brooks Holland, *Anticipatory Self-Defense Claims As A Lens for Reexamining Zealous Advocacy and Anti-Bias Disciplinary Norms*, 49 TEX. TECH L. REV. 89, 142 (2016).

241. See R. George Wright, *Michael Perry, Peter Singer, and Quasimodo: Persons with Disabilities and the Nature of Rights*, 14 J.L. & RELIGION 113, 156 (1999-2000).

slavery was deemed too complex to address by the founding generation,<sup>242</sup> reparations for injustice against Blacks is deemed too complex to address for the current generation.<sup>243</sup> The massive injustice ostensibly becomes “too big to remedy.”<sup>244</sup> The Constitution’s preamble states that the Constitution was crafted to “establish Justice” for the “People of the United States,”<sup>245</sup> but “People” did not include African Americans, thus instituting generations of injustice against them.<sup>246</sup>

a. Limited by Self-Interest

Law should promote justice,<sup>247</sup> but justice is circumscribed by self-interested calculations.<sup>248</sup> This is especially true for Blacks because the law has always focused more on the interests of Whites than of Blacks.<sup>249</sup> For example, during the slavery era, state laws provided compensation to white slaveowners if their slaves were executed for capital crimes.<sup>250</sup> Second, although a number of states abolished slavery in the late eighteenth and early nineteenth century, they did so with gradual schemes that effectively provided partial compensation to slaveowners for their losses.<sup>251</sup> Third, during the Civil War, Congress passed the District of Columbia Emancipation Act that provided compensation to loyal slaveowners for their emancipated slaves in the District of Columbia.<sup>252</sup> Fourth, four months before the Emancipation Proclamation, President Lincoln proposed to southern slaveholders the voluntary, compensated emancipation of their

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242. Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1118 (1997).

243. Xuan-Thao Nguyen, *China’s Apologetic Justice: Lessons for the United States?*, 4 COLUM. J. RACE & L. 97, 128 (2014).

244. See Kaimipono David Wenger, “*Too Big to Remedy?*” *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 211 (2010).

245. U.S. CONST. pmb1.

246. Christine L. Jones, *Affirmative Action and Land-Grant Universities in the Millennium: When Will We Fulfill the Original Promise?* 10 U. D.C. L. REV. 1, 2 (2007).

247. Natsu Taylor Saito, *At the Heart of the Law: Remedies for Massive Wrongs*, 27 REV. LITIG. 281, 303 (2008).

248. Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 931 (2002).

249. Chin, *supra* note 11, at 46.

250. Kevin Barry & Bharat Malkani, *The Death Penalty’s Darkside: A Response to Phyllis Goldfarb’s Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 74 WASH. & LEE L. REV. ONLINE 184, 189 (2017).

251. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 25 (2000).

252. Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 57 HOW. L.J. 1, 25 (2013).

slaves.<sup>253</sup> Fifth, although the post-Civil War Freedman's Bureau was able to sell land at discounts to some former slaves, the land redistribution program ultimately failed because of resistance by former slaveholders who felt they should have been compensated. Also, the Freedmen's Bureaus were dismantled under President Andrew Johnson who rescinded promises of land to former slaves and instead restored land to southern Whites.<sup>254</sup> Thus, the promise of "forty acres" and the loan of a federal government mule to plow the land was never kept because much of the promised land were taken from African Americans and returned to Confederate loyalists.<sup>255</sup> Sixth, other efforts at compensating African Americans failed including the effort in the late nineteenth century by a white Alabama Democrat, William R. Vaughn, to grant pensions to former slaves depending on their age (e.g., those seventy or older would receive an initial lump sum of \$500 and then \$5 per month thereafter).<sup>256</sup> His bills did not get past committee.<sup>257</sup> Seventh, with earlier reparation efforts for blacks nullified by reparation critics, current critics argue that reparations is too complex because of the passage of time, amount of people involved, size of the claims, and other rationalizations.<sup>258</sup>

#### b. Seeking Reparations Despite the Limits of Justice

Reparations for massive injustices against African Americans could and should be provided.<sup>259</sup> First, if compensation can be provided to white slaveowners for the loss of their slave "property" (e.g., through capital punishment or emancipation as mentioned earlier), then compensation can be provided to the descendants of slaves who lost so much more. Second, the government's promotion of black subjugation through enslavement, terrorism, torture, rape, and more, and enforced by law over generations, requires, minimally, some effort at providing reparations.<sup>260</sup> Third, obstacles such as the difficulty of identifying current victims because of the passage of time exist only because the white-dominated government failed to provide reparations earlier.<sup>261</sup> Fourth, precedents exist for reparations. For example,

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253. Pace Jefferson McConkie, *Civil Rights and Federalism Fights: Is There A "More Perfect Union" for the Heirs to the Promise of Brown?*, 1996 BYU L. REV. 389, 399 (1996).

254. Lee A. Harris, *Political Autonomy As A Form of Reparations to African-Americans*, 29 S.U. L. REV. 25, 32 (2001).

255. Roy L. Brooks, *Getting Reparations for Slavery Right – A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 263 (2004).

256. Blevins, *supra* note 46, at 261–62.

257. Blevins, *supra* note 46, at 261–62.

258. Wenger, *supra* note 244, at 217.

259. See Wenger, *supra* note 244, at 213.

260. See David Boyle, *Unsavoury White Omissions? A Review of Uncivil Wars*, 105 W. VA. L. REV. 655, 689 (2003).

261. See Blevins, *supra* note 46, at 261–62.

Canada agreed in 2017 to pay 750 million Canadian dollars in legal settlements because Canadian social workers forcibly removed indigenous children from their families to be adopted by nonnative families from the 1960s to the 1980s.<sup>262</sup> This was part of a larger effort by Canada in recent years to address injustices against the country's indigenous populations.<sup>263</sup> Also, Congress passed the Civil Liberties Act of 1988 to apologize for violating the constitutional rights of Japanese Americans interned during World War II and provide each surviving victim with \$20,000 in financial reparations.<sup>264</sup> Fifth, funding is available for reparations depending on the budget choices of those in power. For example, lawmakers choose to budget *foreign assistance* annually to over 100 countries.<sup>265</sup> The amount planned in 2019 is \$27.7 billion.<sup>266</sup> Major recipients include Israel, Afghanistan, Egypt, Jordan, Pakistan, Kenya, and Nigeria.<sup>267</sup> The objectives include reducing poverty, enhancing health care, providing humanitarian assistance, and promoting other development programs.<sup>268</sup> Likewise, lawmakers could choose to provide *domestic assistance* in the form of reparations to African Americans to reduce poverty, enhance health care, and promote other development programs in the black community. Seeking reparations entails resistance because courts more often follow, rather than lead, public opinion,<sup>269</sup> and political leaders rarely venture too far in front of the majority electorate to side with the minority community, no matter how worthy the cause.<sup>270</sup> Nonetheless, for African Americans inflicted with injustices for generations and not included in the Constitution's goal of "establish[ing] Justice" for the "People of the United States,"<sup>271</sup> providing overdue reparations would be just.

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262. Ian Austen, *Canada to Pay Millions in Indigenous Lawsuit Over Forced Adoptions*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/world/canada/indigenous-forced-adoption-sixties-scoop.html>.

263. Austen, *supra* note 262.

264. Jason Levy, *Slavery Disclosure Laws: For Financial Reparations or for "Telling the Truth?"*, COLUM. BUS. L. REV. 468, 475 (2009); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat 903 (1988).

265. \$27.7 BILLION requested in foreign assistance for FY 2019, U.S. STATE DEPARTMENT, <https://www.foreignassistance.gov/> (last visited July 11, 2018).

266. *Id.*

267. *Id.*

268. James McBride, *How Does the U.S. Spend Its Foreign Aid?*, COUNCIL ON FOREIGN RELATIONS (last updated Oct. 1, 2018), <https://www.cfr.org/backgrounder/how-does-us-spend-its-foreign-aid>.

269. Karin Wang, *When Litigation Collides with Grassroots Organizing: The Impact of the Perry Lawsuit Through the Eyes of Asian Americans Organizing for Marriage Equality*, 37 N.Y.U. REV. L. & SOC. CHANGE 113, 120 (2013).

270. MARTINEZ, *supra* note 130, at 73.

271. U.S. CONST. pmb.

## VII. Appealing to Higher Law

Oppressive human law requires recourse to higher law.<sup>272</sup> White, human-made laws oppressed African Americans for centuries and African Americans sought freedom and equality by appealing to higher law.<sup>273</sup> America's entire legal edifice subjugated Blacks.<sup>274</sup> This oppressive legal edifice included the U.S. Constitution and U.S. Supreme Court decisions supporting slavery. Slavery mutated into neo-slavery with forced labor<sup>275</sup> and Jim Crow with inherently unequal segregation.<sup>276</sup> White-created laws promoted white superiority and black inferiority during the slavery and post-slavery periods.<sup>277</sup> Thus, African Americans appealed to suprahuman law to pursue equality because white, human-made law was the oppressor.<sup>278</sup>

### a. Black Invocation of Higher Law

Black leaders appealed to higher law to free themselves from white, human-made law that oppressed them. Frederick Douglass, a former slave who became an international abolitionist, asked, "God says thou shalt not oppress: the Constitution says oppress: which will you serve, God or man?"<sup>279</sup> Douglass chose God.<sup>280</sup> For Douglass and other antislavery advocates, the human-made Constitution had to be superseded by higher law because the Constitution itself was the oppressor.<sup>281</sup> In appealing to higher law, Douglass railed against the "hypocritical Christianity" of church-attending slaveholders who enslaved children, women, and men.<sup>282</sup> He distinguished the "pure" Christianity of Christ from the "corrupt" Christianity of the North and South.<sup>283</sup> For Douglass, breaking white-made law (by teaching himself to read) was the first essential step to freedom.<sup>284</sup> When the Supreme Court's 1857 *Dred Scott* decision cast Blacks as

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272. See VINCENT W. LLOYD, *BLACK NATURAL LAW* 1, 3 (2016).

273. See LLOYD, *supra* note 272, at 1–2, 88.

274. See Siegel, *supra* note 194, at 581–82.

275. BLACKMON, *supra* note 73, at 4–5.

276. Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building A Canon One Case at A Time*, 76 *UMKC L. REV.* 851, 862 (2008).

277. D. Wendy Greene, *Determining the (In)determinable: Race in Brazil and the United States*, 14 *MICH. J. RACE & L.* 143, 167 (2009).

278. *Id.*

279. FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE, WRITTEN BY HIMSELF*, 130, 134 (David W. Blight ed., 1993).

280. *Id.*

281. See JUSTIN BUCKLEY DYER, *NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION* 169–70 (2012).

282. DOUGLASS, *supra* note 279, at 105.

283. *Id.* at 105, 107.

284. RAE, *supra* note 102, at 12.

“inferior” noncitizens,<sup>285</sup> Douglass replied, “The Supreme Court of the United States . . . is very great, but the Supreme Court of the Almighty is greater.”<sup>286</sup> Chief Justice Taney, who wrote the *Dred Scott* decision, was raised in the South, owned slaves, opposed rights for Blacks, and supported slavery all of his life.<sup>287</sup> But although Taney “may decide [a court case],” he “cannot change the essential nature of things—making evil good, and good, evil,” Douglass proclaimed.<sup>288</sup> Douglass’s invocation of a higher law would become a template for the black natural law tradition.<sup>289</sup>

During the Civil Rights era, Dr. Martin Luther King, Jr., invoked higher law to justify taking direct action in Birmingham, Alabama, against its racial segregation, police brutality, racially biased court system, unsolved bombing of black homes and churches, and other injustices.<sup>290</sup> As Dr. King explained, “There are just [*sic*] and unjust [*sic*] laws.”<sup>291</sup> A human-made law is a just law if it accords with the “moral law or the law of God,” but a human-made law is an unjust law if it is “out of harmony with the moral law,” he elaborated.<sup>292</sup> According to Dr. King, a just law “uplifts human personality” whereas an unjust law “degrades the human personality.”<sup>293</sup> Thus, people could disobey statutory laws in the South that oppressed Blacks because they were unjust laws that violated a higher law.<sup>294</sup> Dr. King’s speeches and writings suggested a hierarchy of laws beginning with local law, ascending to national law, and ending with the highest law—the law of God.<sup>295</sup>

Stokely Carmichael, a civil rights leader who initially followed Dr. King’s philosophy of nonviolence but later advocated “Black Power,”<sup>296</sup> also invoked higher law when he declared, “There is a higher law than the law of government. That’s the law of conscience.”<sup>297</sup> Further, Carmichael did not believe that Whites could give freedom to Blacks because Blacks were “born

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285. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

286. LLOYD, *supra* note 272, at 1.

287. PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT* 223 (2018).

288. LLOYD, *supra* note 272, at 1.

289. LLOYD, *supra* note 272, at 2.

290. Martin Luther King, Jr., *Letter from a Birmingham Jail*, STANFORD UNIV., THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE 3 (Apr. 16, 1963), [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf).

291. *Id.* at 7.

292. King, Jr., *supra* note 290.

293. “*Love, Law, and Civil Disobedience*”, in *THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, 43, 49 (James Melvin Washington ed., 1991).

294. *Id.* at 43, 48.

295. LLOYD, *supra* note 272, at 94.

296. *SAY IT PLAIN: A CENTURY OF GREAT AFRICAN AMERICAN SPEECHES* 55 (Catherine Ellis & Stephen Drury Smith eds., 2005).

297. CHARLES ERIC LINCOLN, *IS ANYBODY LISTENING TO BLACK AMERICA?* 221 (1968).

free.”<sup>298</sup> A white person could *take away* a black person’s freedom, but the white person could not *give* to the black person something inherent in the person.<sup>299</sup> So the goal was not for Whites to give freedom to Blacks, but for Whites to stop denying Blacks their preexisting freedom.<sup>300</sup>

Black advocate Malcolm X argued for going beyond white-legislated “civil rights” to “human rights” because “[h]uman rights are something you were born with” and are “God-given rights.”<sup>301</sup> He criticized government leaders who did not follow law and instead misused law for their own interests.<sup>302</sup> Noting how black and white civil right activists were still murdered even after the passage of civil rights legislation in 1964, he argued that Blacks had rights including the right to self-defense when the government failed in its duty to enforce the law to protect all citizens including black citizens.<sup>303</sup>

#### b. The Supreme Court’s Insufficiency as Higher Law

In theory, those denied rights could seek succor from the Supreme Court because the Court’s authority to judicially review the actions of others is a type of human-made higher law imposed on actors in the polity.<sup>304</sup> In reality, the Supreme Court has been a major oppressor of Blacks. “Equal Justice Under Law” is chiseled on the front of the U.S. Supreme Court building,<sup>305</sup> but the antebellum Court overwhelmingly supported slavery over liberty.<sup>306</sup> Three key antebellum justices—Chief Justice John Marshal, Associate Justice Story, and Chief Justice Roger Brooke Taney—believed that *opposition* to slavery (rather than slavery itself) imperiled the nation and the Constitution.<sup>307</sup> In 1857, Chief Justice Taney stated in *Dred Scott* that African Americans were “inferior” and “had no rights which the white man was bound to respect.”<sup>308</sup> He also stated that it was not for the Court “to decide upon the justice or injustice” of laws that oppressed African Americans.<sup>309</sup> This justice-averse perspective was essentially echoed decades later in the early part of the twentieth century during the segregation

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298. SAY IT PLAIN, *supra* note 296, at 58.

299. SAY IT PLAIN, *supra* note 296, at 58.

300. SAY IT PLAIN, *supra* note 296, at 58.

301. MALCOLM X SPEAKS 35 (George Breitman ed., Grove Press 1965).

302. *Id.* at 220.

303. *Id.* at 22, 151, 153.

304. Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 62 (2008).

305. Carl M. Selinger, *Public Interest Lawyering in Mexico and the United States*, 27 U. MIAMI INTER-AM. L. REV. 343, 344 (1995-1996).

306. FINKELMAN, *supra* note 287, at 221, 224.

307. FINKELMAN, *supra* note 287, at 1.

308. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

309. *Id.* at 405.

era when Judge Learned Hand commented to Justice Oliver Wendell Holmes to “do justice” and Justice Holmes replied, “That is not my job. My job is to play the game according to the rules.”<sup>310</sup> But jurists should and must “do justice” when the rules themselves are unjust and oppress a minority group.<sup>311</sup>

Even in the post-slavery era, Blacks could not look to the Court to secure their rights. Instead, the Court continued to subjugate Blacks when it ruled in *Plessy v. Ferguson*<sup>312</sup> in 1896 that segregating black from Whites was constitutionally permitted, thus enshrining inequality for successive generations of Blacks.<sup>313</sup> Even when the Court ruled in *Brown v. Board of Education* in 1954 that segregating Blacks in separate educational facilities was “inherently unequal,”<sup>314</sup> Southern states resisted, leading black civil right activists to challenge Southern laws that denied them equal rights. When Whites questioned Dr. King regarding his breaking of the law, he replied that people should obey a law that “squares with moral law,” but disobey laws that oppressed Blacks because they were “unjust” and did not “square with the law of God.”<sup>315</sup>

### c. A Global Body’s Insufficiency as Higher Law

Another form of higher appeal is to go beyond the state and appeal to a global body such as the United Nations. The United Nations can, at times, be supportive of black equality as seen in the issuance of a report by the United Nation’s Working Group of Experts on People of African Descent. This report stated that despite U.S. civil rights laws, “[m]ass incarceration, police violence, housing segregation, disparity in the quality of education, labour market segmentation, political disenfranchisement and environmental degradation continue to have detrimental impacts” on African Americans.<sup>316</sup> But appeals to the United Nations do not automatically result in justice and equality because, fundamentally, the United Nations is a collection of self-

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310. See Michael Herz, “Do Justice!”: *Variations of A Thrice-Told Tale*, 82 VA. L. REV. 111, 128 (1996).

311. See Nathan Muchnick, *The Insular Citizens: America’s Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 834 (2016).

312. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), *overruled by* *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

313. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 748 (1985).

314. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

315. “*Love, Law, and Civil Disobedience*”, *supra* note 293, at 43, 48, 49.

316. HUMAN RIGHTS COUNCIL, REP. OF THE WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT ON ITS MISSION TO THE UNITED STATES OF AMERICA ON ITS THIRTY-THIRD SESSION, 5 U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/PDF/G1618330.pdf?OpenElement>.

interested nation-states and thus subject to the political maneuverings and self-interested calculations of individual member states.<sup>317</sup> For example, the National Association for the Advancement of Colored People (NAACP) encountered resistance when it attempted to use the United Nations to highlight the plight of African Americans in America.<sup>318</sup> In one instance, the NAACP and W.E.B. Du Bois presented to the U.N. Human Rights Commission staff a 1947 petition titled *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress*. Those who resisted included not only U.S. segregationist politicians, but also the U.S. State Department because of fears that Communist countries would use the petition as anti-America propaganda.<sup>319</sup> Despite being on the NAACP Board and sympathetic to black civil rights, Eleanor Roosevelt (who was chair of the U.N. Human Rights Commission) also objected to the petition because she believed such criticism was unpatriotic and aided Communist countries.<sup>320</sup> The Human Rights Commission chose not to act on the petition at the urging of the U.S. government.<sup>321</sup>

Another obstacle to appealing to a global body for justice is the possibility of a tyrannical global body. A world government is not necessarily just. It could be just or unjust.<sup>322</sup> Given humanity's propensity to conflict and violence,<sup>323</sup> a world government might end up being oppressive. If so, the subjects might find themselves "living a life worse than death."<sup>324</sup> Those oppressed by the laws of an unjust world government would need to appeal to a higher law to overcome their global shackles.<sup>325</sup>

When human law sanctions the oppression of people, the people will turn to higher law. American law sanctioned the oppression of African Americans and denied them personhood, so African Americans turned to higher law to justify their resistance and retain their human dignity. The

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317. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1785 (2000).

318. Margaret R. Somers & Christopher N.J. Roberts, *Toward A New Sociology of Rights: A Genealogy of "Buried Bodies" of Citizenship and Human Rights*, 4 ANN. REV. L. & SOC. SCI. 385, 393-94 (2008).

319. *Id.* at 393.

320. Darin E.W. Johnson, *How U.S. Civil Rights Leaders' Human Rights Agenda Shaped the United Nations*, 1 HOW. HUM. & C.R.L. REV. 33, 43 (2016-2017).

321. *Id.*

322. Edward B. Foley, *The Elusive Quest for Global Justice*, 66 FORDHAM L. REV. 249, 268 (1997).

323. Valerie Jenness, *The Emergence, Content, and Institutionalization of Hate Crime Law: How A Diverse Policy Community Produced A Modern Legal Fact*, 3 ANN. REV. L. & SOC. SCI. 141, 143 (2007).

324. KENNETH N. WALTZ, *MAN, THE STATE AND WAR* 228 (1959).

325. See George W. Dent, Jr., *Secularism and the Supreme Court*, BYU L. REV. 1, 31 (1999).

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higher natural law tradition established and sustained the antislavery movement<sup>326</sup> and provided the foundation for the civil rights movement in America.<sup>327</sup>

### VIII. Conclusion

The black experience in America helps reveal the nature of law. Blacks contended with not merely inequality, but inequality backed by law. Black resistance to legal inequality exposes law's instrumentality, manipulability, limitability, and liberating higher modality. Founder John Adams declared that we are "a nation of laws,"<sup>328</sup> but the black experience with law reveals its double-edged nature with its power to promote justice or injustice. Blacks have experienced much injustice under the law. It is time for blacks to fully experience the equal "Justice" that the Constitution establishes for all citizens.

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326. DYER, *supra* note 281, at 187.

327. Jennifer L. Wright, *Religious Law Schools and Democratic Society*, 57 HOW. L.J. 277, 297 (2013).

328. Kirk W. Junker, *The Inherent Role of Translation in the Macrocomparison of States' Separation of Powers*, 47 DUQ. L. REV. 947, 951 (2009).