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## **The Jena Six and Black Punishment: Law and Raw Life in the Domain of Nonexistence**

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Donald F. Tibbs<sup>1</sup> & Tryon P. Woods<sup>2</sup>

*[W]e must firmly place ourselves in another space to describe our age, the age and space of raw life . . . . It is a place where life and death are so entangled that it is no longer possible to distinguish them, or to say what is on the side of the shadow or its obverse.*

—Achille Mbembe

### INTRODUCTION

The welcome sign at the entrance to Jena, Louisiana, describes it as “a nice place to call home.”<sup>3</sup> Recent events involving its criminal justice system, however, produce a counternarrative at the intersection of race and law that refutes this slogan. Trouble in Jena arose in September 2006 over the contestation of race and space when a black student named Kenneth Purvis asked Jena High School authorities for permission to sit under the “white tree,” a de facto segregated gathering place exclusively occupied by white students during school breaks. The school principal informed Purvis that he could sit wherever he pleased, and along with two of his buddies, the young man did just that.<sup>4</sup> The following morning, the student body arrived to find three nooses, painted black, dangling from the tree.

Shortly afterwards, white District Attorney J. Walters Reed accompanied several police officers to address a Jena High School assembly. In a throwback to the days of Bull Connor, he threatened the black students for protesting and “making a fuss about this innocent prank,” claiming that he could be their “best friend or worst enemy.”<sup>5</sup> Next he informed the black students, “With the stroke of my pen, I can make your lives disappear.”<sup>6</sup>

Joiner provided the students with a didactic lesson in the history of race and law in America: blacks are more likely to be victimized by state violence than they are to be recipients of equal protection from the rule of law.<sup>7</sup> The school was put on lockdown for the remainder of the week.

Later that fall, on November 30, 2006, a fire burned down the main academic building of Jena High School. The next evening, December 1, 2006, a black student possessing a printed invitation to a white party was beaten up, and on December 2, 2006, Matt Windham, a young white man, pulled out a shotgun in a confrontation with several black youth at a local convenience store. When the black youth defended themselves and seized the gun, they were arrested for theft of a firearm,<sup>8</sup> second-degree robbery,<sup>9</sup> and conspiracy<sup>10</sup> to commit second-degree robbery. No charges were filed against the white man.<sup>11</sup>

Finally, on December 4, 2006, at Jena High School, a white student named Justin Barker—who allegedly was making racial taunts, including calling the African American students “niggers” and supporting the white students who hung the nooses and beat up the black student off-campus—was knocked down, punched, and kicked by six black students.<sup>12</sup> The white provocateur was taken to the hospital, treated, and released with minor bruises. He attended a social function that evening.

All six black teens were charged with attempted second-degree murder, a charge that was later determined to be unsubstantiated according to the Louisiana Criminal Code.<sup>13</sup> Amidst controversy, Prosecutor Reed reduced the charges to aggravated second-degree battery<sup>14</sup> and conspiracy to commit aggravated second-degree battery.<sup>15</sup> Under Louisiana criminal law, the aggravated charge requires the use of a weapon. Prosecutor Walters argued the tennis shoes worn by Mychal Bell, one of the black teens, and used to kick Barker constituted the dangerous weapons, an argument the jury ultimately accepted.<sup>16</sup>

At trial, the system continued to exact its violence. Public defender Blane Williams, himself a black man, not only encouraged Bell to accept a

plea for a crime that was unsubstantiated by the facts of the case, but he failed to perform his duties as a zealous advocate for his client.<sup>17</sup> Williams failed to challenge the all-white jury composition<sup>18</sup> and rested the defense without offering any evidence or calling a single witness.<sup>19</sup> The jury deliberated less than three hours and returned a conviction for Mychal Bell.<sup>20</sup> Edna Thompson, a long-time friend of the Bells, summed up the jury's decision: "The best thing if you're black in this town is to stay out of the system, because once they get you, you're done for. You're not getting out."<sup>21</sup> Public outrage, protests, and rallies helped provoke judicial review, which overturned the conviction on the grounds that Bell should have been tried as a juvenile since he was sixteen at the time of his arrest.<sup>22</sup> On December 3, 2007, Bell pled guilty to a reduced charge of battery and was sentenced to eighteen months in a juvenile facility. The cases of the remaining five youth, four of whom were over seventeen at the time of the incident—legal adults in Louisiana—are still pending.

These six lives remain suspended in what we are characterizing here as the legal proceedings of "raw life." To live in the era of raw life is to occupy the crossroads of life and death. The interlocking of life and death signals the entanglement of past, present, and future.<sup>23</sup> Professor Cornel West, in characterizing the United States in the twenty-first century as a "twilight civilization" replete with "pervasive cultural decay" and the "dangerous rumblings" of the stigmatized, policed, and degraded Others, illuminates the retrograde direction of this society at the very moment of its most powerful ascendancy.<sup>24</sup> For the postcolonial theorist Achille Mbembe, this emergent temporal context—the *time* of black suffering—is marked by a future horizon that is apparently closed, while the past appears to have receded. Ours is thus a "time of entanglement," a space "where life and death are so entangled that it is no longer possible to distinguish them": the age of raw life.<sup>25</sup> The interlocking of past and present can be seen in Jena in the scene of lynching nooses at integrated schools; in the form of racialized punishment in the era of formal legal equality; and, pointedly, in

the ability of a prosecutor to take away a child's life "with the stroke of a pen."

Over the course of the next three parts of this article, we trace the origins and development of raw life. From this vantage point, the form of power operative in our contemporary prison regime is embodied in the desire of whites to literally consume the bodies of racialized Others. The history of colonization is replete with records of Europeans literally carving, cooking, and using the bodies of indigenous Africans and Americans.<sup>26</sup> The history of North American slavery further demonstrates how modern idioms of power are vested in the fungibility of black bodies—their usefulness for the whims and purposes of whites. Our objective here, then, is to closely examine how the state-sanctioned control of the black body from slavery to the contemporary prison regime—an analysis that usually remains at the level of analogy, that the criminal justice system today is like the slavery of yesterday—illuminates just how intimately the past structures contemporary struggles.

Part I, the "Ethics of Parasitic Pleasure," reaches back to slavery, the institution through which white desires were given expression and defined value in terms of bodily sovereignty: whites attract honor, respect, and power—*value*—by virtue of not simply possessing their own bodies, but through their ability to accumulate black bodies as their pleasure-things. We use this socio-legal lens in order to relate the prosecutions in Jena to the formation of the modern Western world and its production of value. Conversely, blacks entered the modern Western world as devalued human beings. So, too, did the six young boys arrested and charged in the Jena case.

Part II uses the slave codes of the antebellum era to establish the fraudulent ethics surrounding the "rule of law" in the Jena case. The law manifests this fraud in a number of ways worth recounting here. The rule of law presupposes that its subjects have given their consent to being governed, which merely mystifies the reality of captivity, torture, mayhem,

and the requirement of total submission for blacks. At the same time, the law decriminalized the white violence that was essential in holding together the nascent bourgeois democracy. This legal regime also buttressed the moral authority claimed by the ruling class; for decades white violence was cloaked in morality. Yet after the point when such violence became a sign of immorality, the violence did not cease; rather, it became the basis for the fraudulent ethics of white civil society today. This “ethics of fraud,” as we refer to it, helps us understand how Jena unfolded through a legal framing of black criminality versus white innocence—how every act by the black teens was a punishable legal offense, while the white teens violated the law and black bodily sovereignty, with impunity.

Part III uses the post–Emancipation era to reiterate the point that no transcendent moment altered the paradigmatic relation of the black body to the idiom of power that blacks lived under prior to 1865.<sup>27</sup> Gratuitous and irrational violence continued to capture the black body during the era of lynching. Our review of this period contributes a crucial dimension to our understanding of Jena. Lynchings teach us that policing blackness provides indispensable social cohesion for white civil society; that decriminalized white violence is the mechanism by which this community is forged; and therefore that impunity by the police and the ability of whites to ignore this antiblack violence are the marks of a deeper white solidarity that goes beyond differences in region, class, creed, or political affiliation. Part IV concludes with a brief but critical discussion of why the Jena case is fundamental to understanding how white supremacy is so deeply engrained in U.S. culture, in that it not only continues to inform the intrinsic political and psychic structures of this society, but its de facto legality presents little room in which to construct an alternate reality.

The Jena Six case emerges from a legal regime with a particular history of perversion regarding the lives of African Americans. Dating back to the slave codes of the South<sup>28</sup> and progressing through the Fugitive Slave Acts of 1793 and 1850 (which often exacted harsher punishment than plantation

justice itself)<sup>29</sup> to several landmark legal decisions such as *Plessy v. Ferguson* (1896)<sup>30</sup> and *Pace v. Alabama* (1883),<sup>31</sup> the law has continuously guaranteed black suffering in terms of black people's status as negated subjects. In the well-known words of Chief Justice Roger B. Taney in the *Dred Scott v. Sanford* decision, the Negro was so far inferior that his reduction to slavery was not only "to his benefit" but also that he had "no rights that the white man was bound to respect."<sup>32</sup>

This article proffers an analysis of the Jena Six grounded in this historical context, going beyond mere acknowledgment of the debts that our present-day criminal justice system owes to the institution of slavery to approach an assessment of the violence blacks regularly face in the law, an encounter almost so mundane it escapes representation. A wide range of scholars have well documented that the U.S. ruling class crafted the contemporary U.S. prison regime as a replacement for the system of chattel slavery.<sup>33</sup> This legacy can be seen in our nation's jails and prisons.<sup>34</sup> As significant scholarship suggests, the Jena Six assumes its place within slavery's modern legacy.

How can we move beyond the limits of analogy? The Jena Six is much more complex than a metaphor can convey: What does it mean to be, in the words of Frantz Fanon, "an object in the midst of other objects,"<sup>35</sup> to live in "the domain of non-existence?"<sup>36</sup> Born and raised in the French Caribbean colony of Martinique and later educated as a psychiatrist in Lyon, Fanon became an authority on how white supremacy renders the humanity of the colonized subject invisible. When he served as the head clinician at a psychiatric hospital in French-occupied Algeria during the mid-1950s, Fanon came to the realization that the Western discourse on man and civilization—whether in philosophy or medicine—literally expunged the black from existence. For Fanon, therefore, what it means to be "an object in the midst of other objects," to not be seen as a human being but instead objectified as if he were a chair or a log, is a question that is unapproachable: it exceeds the limits of representation.<sup>37</sup>

What Fanon means by this formulation, and why his insight matters for our purposes here, is that proper recognition of the problem before us is always and already circumscribed by the language we have available to us with which to identify our injuries. Insofar as the law establishes how we name and remedy injustice, it sets out the language in which we must locate our selves. The problem of race, however, cannot be adequately understood through the language of law. In this way, analyzing the Jena case—and other mundane operations of white supremacy—necessitates deconstructing law itself as a racial project in which black existence has been systematically occluded. A major reason for the difficulty in getting close enough to the problem of racial injustice in the law to offer a just response to it is what we have referred to as the entanglements of raw life. The task before us, therefore, is to lay out the ways in which the age of raw life retains the depths of earlier eras: a contingent existence that reveals itself through the guise of legal life and the stark horror of premature death.<sup>38</sup>

Our discussion is neither about the legal aspects of the Jena Six case, nor about the six young men whose lives have been irreparably damaged.<sup>39</sup> The former has been well vetted in domestic and international legal discussions, and while a rich treatment of the latter has yet to be done, it remains beyond the scope of this article.<sup>40</sup> Instead, we examine the socio-legal context that produces the events in Jena and analyze how those events represent a moment of truth in what we refer to as “racial ordinariness”: defined as another instance in the historically invariant punishment of black people, a banal spectacle that gives us the occasion to put black experience at the center of our analysis of U.S. legal regimes.

Reviewing the history of the black experience before the law clearly demonstrates that the Jena Six case is anything but unprecedented. U.S. history features a consistent storyline regarding blacks and the law, largely undeviated from—one which historian Mary Frances Berry referred to as “black resistance [to] white law.”<sup>41</sup> Berry reminds us that “[w]hether its policy was action or inaction, the national government has used the



Constitution in such a way as to make law the instrument for maintaining a racist status quo.”<sup>42</sup> The Jena Six case joins this long history of constitutional spectacles—moments where the law is revealed not as the protector of minority rights, as liberal historiographers and philosophers would have us believe<sup>43</sup>—as a manifestation of civil society’s commitment to not only maintain white dominance in economic, political, social, and military matters, but to effectuate blackness as the most trod-upon station in society.

While the popular conception of Jena is one of racist excess—of racism corrupting the otherwise fair process of justice—to conceptualize it as such obscures the mundane reality of black punishment. In other words, recounting the history of crimes against constitutionality, as numerous race scholars and historians such as Berry and Derrick Bell have already done, produces the necessary conditions for arguing the banality of the Jena Six case.<sup>44</sup> But it cannot provide the sufficient grounds for gaining traction on what white supremacy means to the U.S. legal regime. Whenever one attempts to speak about the rules of race and power, one is forced back into a discussion of spectacular events—high-profile legal battles such as the Jena Six, for instance.<sup>45</sup> The problem is that the spectacular actually camouflages the routine, the normal operation of the law against blacks in all its everyday terror and contempt, its misbehavior and broken ethicality. In other words, what is at issue is not that Jena has become a high-profile historical event, but rather that the kind of legal and social punishment of blacks that took place in Jena *typifies* the everyday practice of criminal law and its endorsement by white civil society throughout the nation.

When it comes to everyday life, the secret of the law, hidden in plain sight, is that there is no recourse to the disruption of black life by the mundane violence of living in a white supremacist society. The annals of contemporary legalized violence against black bodies are indeed spectacular, and the readily available examples merely hint at the terror defining black existence before the law: from the police beatings of Rodney

King or Oletha Waugh,<sup>46</sup> the torture of Abner Louima,<sup>47</sup> the killing of Amadou Diallo,<sup>48</sup> the violent deaths of Malice Green<sup>49</sup> and Johnny Gammage,<sup>50</sup> to the recent shooting of Sean Bell on his wedding day.<sup>51</sup> From the analytic vantage point of raw life, the racial violence of legal doctrine is also alive and well. The volatility of numerous Reconstruction era cases, briefly mentioned earlier, entangles with contemporary cases such as *Wilson v. State*<sup>52</sup> and *Lewis v. Casey*.<sup>53</sup> The numerous black men exonerated by DNA evidence and freed from prison through the Innocence Project, the prosecutors and District Attorneys who steadfastly maintain these men's guilt despite the irrefutable scientific evidence, and the numerous anonymous men and women condemned prior to the recent era of technological advances in forensic criminology—these are the signs of raw life in the domain of nonexistence.<sup>54</sup>

To focus on any one of these spectacles is to deploy, and thereby reaffirm, the logic of the law itself. Documenting the law's excesses, in an attempt to explain the paradigm of white supremacist violence, merely renders it nonparadigmatic, and reduces it to the fraudulent ethics on which the law bases its ongoing hegemony. What makes the spectacle "spectacular" is precisely that the essential logic of the law remains unshaken. Such discrete examples cannot represent the spectrum in which this paradigm manifests today—what might be called the "paradigm of policing"<sup>55</sup>—from the explicit violence of police homicides to the more subtle violence of the Jena Six case and the faceless millions held captive by the prison industrial complex. This violence against the black body is structural and foundational to U.S. society—not contingent or excessive—and it is this banal but essential quality to racism that the spectacular examples render unrecognizable.

The objective of this article, therefore, is to take the Jena Six case and examine it not in terms of its excessiveness, but in terms of its ordinariness. Full interrogation and complete understanding requires examining how the law itself has evolved through the state's relationship to captive black

bodies. The law is not merely a mechanism for maintaining a racist status quo.<sup>56</sup> On the contrary, the law is itself constituted through state violence against blacks, from slavery to our present-day prison regime. The point to be examined here is historical and socio-legal in the sense that such an inquiry requires situating our particular spectacle—the Jena Six—at the locus of power created through the conjoined forces of the modern state, law, and race. As Fanon called for, however, this kind of analysis necessarily takes us beyond the law, beyond the political economy of inequality, and into the symbolic economy that produces the meaning of racialized bodies in the first place. We suggest that it is at these final levels—the problem of existence, or as W. E. B. DuBois put it, “what it means to be a problem”—that the spectacle of Jena can be grasped finally, not in terms of an instance of excess, but rather as precisely another moment in the invidious ethos of legalized terror that characterizes black suffering in the age of raw life, and constitutes the vernacular for everything in this society.<sup>57</sup>

#### I. JENA AND THE ETHICS OF PARASITIC PLEASURE

*There is a quest for the Negro, the Negro is in demand, one cannot get along without him, he is needed, but only if he is made palatable in a certain way. Unfortunately, the Negro knocks down the system and breaks the treaties.*

—W.E.B. Du Bois

Slavery is the indispensable starting point for our inquiry into the kind of state violence that produced the Jena spectacle because it is at this historical juncture that three central tropes of Western society—freedom, the individual, and private property—come together in the form of the law. These particularly Eurocentric concepts indicate a shift in power from the premodern era, globally speaking, but specifically for the experiences of

black people. Slavery was the occasion for a transition from a system of property in which “a right to things [is] realized through a hold on persons” to one in which “a hold on persons [is] realized through a right to things.”<sup>58</sup> In Western culture, freedom came to mean full ownership of property rights in oneself. This new idiom of power meant that the basic unit of the expansionist societies of Europe in the early modern period was the individual. The concept of rights, including rights to the labor of oneself and others, being vested in the individual, is rightly described as “the peculiar institution,” given its youth with respect to the long history in human civilization of slavery and other bonded relations.<sup>59</sup> The institution of waged labor and the legal regime in which worker and employer related to each other as autonomous agents, then, was just as peculiar to the African and indigenous societies that provided the slave laborers as plantation slavery was to these societies.

The scope that the relationship between citizen and the state permitted for the individual points to the severe contingency of rights. In their very formulation, rights are relative to their social recognition and institution: subjects possess rights only insofar as they are imbued with value by the social and political systems in which they exist. The social construction of a right is beholden to the prevailing ideologies in which the civil system is based. Europe’s emergent Enlightenment philosophers, for example, defined humanity in relationship to reason: to be human meant to possess the capacity for rational thought.<sup>60</sup> Committed as they were to moral notions of equality and autonomy, Enlightenment philosophers avoided inconsistency by justifying racialized and gendered subordination; this involved denying the rational capacity of women, Africans, and other subaltern peoples.<sup>61</sup> With subaltern humanity circumscribed in this way, enslavement, colonization, and discrimination became not only acceptable, but the moral imperative of a civilized people. For instance, John Stuart Mill, one of Europe’s most prominent political philosophers, was a committed proponent of England’s colonization of India during the

nineteenth century on the grounds that it advanced general civilizing and utilitarian benefits of capitalist development for the sake of the colonized.<sup>62</sup>

The important point for our purposes here is the deeply imbricated co-formation of European expansionism and imperialism; liberal notions of humanity, reason, autonomy, freedom, and rights; and the construction of racial definition and discourse.<sup>63</sup> John Locke, who served as a colonial administrator like Mill, established the notion that the right to property is as basic as the rights to life and liberty. The context of the emergent Western social and political system, however, permits taking this right to entail a right to property in another human being.<sup>64</sup> In this way, the liberalism of the modern state, which implied the freedom to enslave others, was crucial to European overseas expansion.<sup>65</sup>

The ideology of individualism and the rights-bearing subject, therefore, needs closer scrutiny as a significant factor in the European will to conquer.<sup>66</sup> The Western legal tradition emerging from this history of conquest conceives of a right as the conjunction of the *freedom* to do whatever one chooses and the *claim* to be protected from interference by others (whether individual, group, or state) in so doing.<sup>67</sup> This individual capacity is translated as a universal power for the subject to act positively to secure his or her needs, and thus to preempt interference, when in fact it is a highly contingent power, resting in part upon the context of conquest.<sup>68</sup> The commitment to the rights-conception of the individual emergent in Western culture reveals an intrinsic conflict that is most clearly played out in racial terms. The right of each individual to unobstructed self-direction and self-rule creates a clash of directions and rules as each individual seeks to assert and impose the inviolability of their rights.<sup>69</sup> This individualist calculus produces a zero-sum game whereby the rights of some will inevitably mean the denial of another's rights. As French postmodern philosopher Michel Foucault explains, a "right should be viewed . . . not in terms of a legitimacy to be established, but in terms of the subjugation that it instigates."<sup>70</sup>

In a society formed indelibly through racial conquest, the rights of those included will be understood as inviolable primarily by misrecognizing the rights of the excluded as irrelevant. Liberalism's emphasis on equality and universality, however, renders the racial specification of this exclusion in other terms: "just" wars, paternalistic colonialism, civilization, "the march of progress," "manifest destiny," and the savage or childlike nature of the enslaved. The champions of individual liberty emerged from Europe to seek their freedom through the enslavement of others. This point is the crux of the matter when the Western ideology of individualism is concerned: any pursuit of emancipation or freedom is curbed at precisely the moment where self-consciousness picks up. When the Western subject begins to *imagine* himself or herself as "free," he or she inevitably does so through an implicit understanding of the control over or *un*-freedom of another.<sup>71</sup>

In other words, Western culture, with liberalism's emphasis on individual rights and autonomy, emerges *through* Western Europe's clash with Africa and the Americas, not prior to, or simply as a result of, this conquest. In this way the very notion of what it means to *be* "free," to *possess* liberty, is dependent upon an understanding of *un*-freedom and knowing which subjects not only are incapable of possessing themselves, but are, moreover, justly acquired and used by others. Throughout the epistemology of Western culture, race is the recurring boundary line between those subjects understood to be human and those humans whose existence was denied.<sup>72</sup> In this way, Western notions of freedom, liberty, individual rights, and property are all profoundly bound up with the enslavement of the racialized Other.

If Western notions of freedom necessarily require the enslavement of others, another critical question emerges: Why was slavery reserved *exclusively* for non-Europeans, and most particularly, for Africans? Why were Europeans not used for slave labor? European history is replete with the practice of labor coercion—the demonstrated willingness by European elites to kill, use, and persecute lower classes and minority groups; and the

disposition to deprive people of liberty and conscripting their labor as punishment for behaviors constructed as criminal. All of this social violence makes it appear arbitrary to draw the line at enslavement.<sup>73</sup> Moreover, European societies have long-standing practices of internal racialism and of deploying differences to organize hierarchies.<sup>74</sup> Despite the fact that it would have been much more profitable to enslave fellow Europeans, there is no evidence that Europeans ever considered instituting full chattel slavery of Europeans in their overseas settlements. The decision to enslave Africans was as unthinking as it was a matter of course to not enslave Europeans.<sup>75</sup> After the eleventh century, at least, a civilization ingrained in racialism ultimately found that its formative internal differences were not different enough to enslave.<sup>76</sup>

The “brave New World,” built through the transmutation of Africa, was begun by approaching a particular body (the black) with direct relations of force (slavery).<sup>77</sup> This conception of the modern era contrasts with that of liberal historiography in which modernity is marked by the rise of the bourgeois nation-state and the struggles of white citizen-subjects for membership and political representation.<sup>78</sup> It also contrasts with Marxist historiography, which understands the dawn of the modern era to be the struggles between a white body and variable capital (waged relations).<sup>79</sup> The slave is the very condition of possibility not only for capitalism and the success of Enlightenment notions of the civilized, rational, and unracialized subject; it is also the foundation on which legal discourse arises. Our purpose here is to relocate rights as the result of a “fatal coupling of power and knowledge.”<sup>80</sup> What rights blacks have, or how best to mobilize them, are juridical debates that participate in a larger deception. The very concept of a right presupposes something that blacks historically have never had since the dawn of Western modernity—sovereignty over their own bodies.

The Atlantic slave trade was a profound historical rupture, fundamentally degrading the personality of black human beings, all the while obsessing over black flesh.<sup>81</sup> In the very processes employed to produce the body of

the African slave for consumption and use in the global libidinous system of racial capitalism, slavery bestows visibility on the structure and enormity of what is usually private and incommunicable, contained within the boundaries of the bodies of those who suffer pain. At its base, slavery achieves the conversion of absolute pain into the fiction of absolute power in an obsessive, self-conscious, fetishistic, and parasitic display of agency.<sup>82</sup> For this reason, the procedures essential to the history of racial slavery and its pernicious afterlife have not been its brutal regime of labor exploitation nor its utility to the advent and maturation of Eurocentric capitalism. Rather, slavery is enabled by, and dependent upon, the most basic of operations: “symbolic and material immobilization, the absolute *divestment of sovereignty* at the site of the black body: its freedom of movement, its conditions of labor, its physical and emotional sustenance, its social and sexual reproduction, its political and cultural representation.”<sup>83</sup> The legacy of slavery that continues to impress itself upon our social, psychic, and legal structures into the twenty-first century, bears this imprint of bodily dispossession and aggrandizement.

To put it another way, we are working from a definition of slavery that is grounded in an analysis of what the practice signals about the symbolic universe and how physical bodies are constructed in relationship to each other. White supremacy’s reliance upon black dehumanization means that enslavement of Africans was never reducible to mere economic logic. White violence against the black body was compelled by a complex mixture of conscious identification, unconscious fears, and subconscious longings.<sup>84</sup> Loss of one’s own body signals capture by direct relations of force. As a captive entity, fixed in an undynamic state, “subject to be mortgaged, according to the rules prescribed by law,”<sup>85</sup> the slave did not enter into a transaction of value. In this way, slavery was a social death; this is what it means to say that slaves did not exist as human beings.<sup>86</sup> The ethos of slavery that we are pointing to is an economy of desire in which value is produced. However, because value works by mystifying its very processes



of determining values, the worth of white and black bodies appears natural, rather than as the result of violent encounters.<sup>87</sup> The symbolic economy of slavery is more fundamental to its existence than is the political economy. In other words, the constituent elements of slavery begin with desire for the symbols of purity, honor, and humanity represented by whiteness and made possible by blackness and for the pleasure, exoticism, and self-loathing epitomized by blackness as constructed in opposition to whiteness. In addition to the surplus value produced from their labor, the accumulation of black bodies generated a symbolic economy in which slaves were valuable simply for the fact that they existed as things for the satisfaction of the whims of the captor.<sup>88</sup> It is for this reason that the work performed by black slaves is historically significant, but it was not the primary reason for the slaves' (non)being. In the constellation of values that white supremacy establishes, bourgeois democracy mystifies the value of black bodies. As Cornel West puts it:

[White supremacy] dictates the limits of the operation of American democracy—with black folk the indispensable sacrificial lamb vital to its sustenance. Hence black subordination constitutes the necessary condition for the flourishing of American democracy, the tragic prerequisite for America itself. This is, in part, what Richard Wright meant when he noted, “The Negro is America’s metaphor.”<sup>89</sup>

To state it more pointedly, black death provides the very conditions of possibility for white life.<sup>90</sup> This point is not hyperbole or melodrama; it is drawn from an analysis of the discursive structure of slavery and the material realities it calls into being. Slave codes in the southern United States demanded that slaves receive clothing, food, and lodging sufficient to their basic needs. Slaves, although dead to rights and responsibilities—civil death—were reduced to nothing but the physical bodies, unprotected against capture, mutilation, and torture.

## II. JENA AND THE ETHICS OF FRAUD

*In the United States, homegrown white supremacists, and the lion's share of their more moderate neighbors, have long considered black people to be weapons of mass destruction.*

—Jared Sexton

In his famed masterpiece *The Souls of Black Folks*, W. E. B. Du Bois expresses contempt for the legal vestiges of slavery. He opined that the slave experience caused “[n]egroes . . . to look upon courts as instruments of injustice and oppression, and upon those convicted in them as martyrs and victims.”<sup>91</sup> We need to think through Jena, too, in terms of the manner in which slave codes during the antebellum period constructed a universe of fraudulent morality, which continues to be perpetuated in two ways. First, in asserting the rule of law, white society shrouds the conditions of violent domination behind the myth of consent. The slave is presumed to give his or her consent to being dominated as a consequence of his or her utter powerlessness, or perfect subjugation. Second, slavery has such an extensive legal history precisely because the slave so frequently violated these terms, resisting the absolute authority of white civil society.

Much of the discursive order of slavery was preoccupied with how to mark the black body as socially dead and therefore as existing beyond the penumbra of legal rights and responsibilities. Simply put, the law decreed that the black body is a fraud. To be a fraudulent person is to impersonate a human being. There is only one such position in the ontology of the modern Western world and it belongs to the black. The lasting ideological and affective matrix of white supremacy admits no legitimate claims of black self-possession, self-determination, or autonomy in the face of white society’s desire to possess, consume, and enjoy the captive body of blacks. This ethos of slavery is far more central to understanding violence against

the black body than simply the immiserated conditions (including “disparate treatment” by the state and civil society) that blacks share with other people of color, workers, and the poor generally under global corporate capitalism.

A number of legal decisions demonstrate the violence of this fraudulent ethic. In *State of Missouri v. Celia, a Slave*,<sup>92</sup> Celia was prosecuted for the murder of her owner, who had been raping her regularly in the four years since he purchased her. Celia was convicted and sentenced to death by hanging. How could a slave be tried for murder? Is not murder a human act, something requiring agency and a reasoning subjectivity, a mind capable of forming intention and a will to carry out that intent?<sup>93</sup> By definition, slavery is the absence of these qualities. The court recognized Celia as human, however, solely in the context of criminal liability: the slave’s will was acknowledged only as it was prohibited or punished.<sup>94</sup> The criminality imputed to Celia disavowed the banal terror of white violence and its instrumentality in state power. The slave woman could neither give nor refuse consent to sex, nor could she offer reasonable resistance to being raped. In the trial record, the history of rape is only obliquely acknowledged as “sexual intercourse.” From the perspective of the law, Celia’s body represents the vested interests of others, rather than the vessel of an intrinsic human agency; black criminality was thus a necessary response by the state to this threatening agency of blackness.<sup>95</sup>

Numerous additional cases prove that *Missouri v. Celia* was typical rather than anomalous. More importantly, extensive archival evidence from slave narratives exemplifies the routine terror of sexual and other forms of physical and psychological violence under slavery.<sup>96</sup> The law, on the other hand, records state terrorism (slavery) in terms that mask the violence necessary for its operation. In *Alfred v. State*, Alfred, a slave, was sentenced to death for murdering the overseer who raped the slave’s wife, Charlotte.<sup>97</sup> When the defense sought to have Charlotte testify on behalf of her husband, the prosecution objected. The court sustained the objection on the grounds that Charlotte’s relation to Alfred (that of a wife and her

husband) had no legal status; the denial of marital relation, in turn, negated the violence that had precipitated Alfred's act of murder.

The law's repression of state violence transmogrifies Charlotte's rape into mere "adultery" and Alfred's act into "outrages of conjugal affections." As in *Missouri v. Celia*, the *Alfred* court endorses the indiscriminate use of the slave body for pleasure, profit, and punishment. As A. Leon Higginbotham comments, the Missouri court "held that the end of slavery is not merely 'the [economic] profit of the master' but also the joy of the master in the sexual conquest of the slave."<sup>98</sup> The normativity of rape that derives from the violence of the law is also produced through the law's refusal to recognize any legitimate social relations among the enslaved. Bodily dispossession and its fungibility for white civil society are enabled by constructing the black body as a "genealogical isolate"—a being disconnected from both ancestors and progeny.<sup>99</sup> Slavery achieves this rupture by outlawing African cultural expression; by proscribing parenthood, principally through the separation of children from their "parents"; and through the master's property interest in the female reproductive body.<sup>100</sup> In this way, the slave is bound only to the human realm through property relations.

The famous North Carolina Supreme Court decision *State v. Mann* demonstrates how the law simultaneously manifests this fraudulent ethic and represents a significant terrain on which the obvious contradictions are managed. Mann was indicted for assault and battery upon Lydia, a slave whom he had hired for a year from another slave owner, Elizabeth Jones. "During the term, the slave had committed some small offence, for which the Defendant undertook to chastise her—that while in the act of so doing, the slave ran off, whereupon the Defendant called upon her to stop, which being refused, he shot and wounded her."<sup>101</sup> The lower court convicted Mann, finding him guilty of "cruel and unwarrantable punishment, and disproportionate to the offense committed by the slave."<sup>102</sup> In overturning

the conviction, however, the North Carolina Supreme Court emphasized that the slave had

no will of his own [and he must surrender] his will in implicit obedience to that of another. Such obedience is the consequence of uncontrolled authority over the body. There is nothing else that can operate to produce the effect. The power of the master must be absolute to render the submission of the slave perfect.<sup>103</sup>

The Court held that this absolute power was not a matter for legal debate and that the purpose of the slave codes was to convince each slave that “there is no remedy” for injury at the hands of the master.<sup>104</sup>

The *Mann* decision is significant in many respects. It is certainly noteworthy for the bald language of power it deploys—the supreme authority it reserves for whites and the total surrender it requires from blacks. We suggest, however, that the importance of the *Mann* decision lies with the cultural codes of white supremacy that the law draws upon and reaffirms. The *Mann* court asserted that although the power of the master had to be absolute in order to render the “submission of the slave perfect,” “[a]s a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things it must be so.”<sup>105</sup> Yet the harshness of this absolute power would be regulated not by legislative fiat or judicial restraint, but rather by “the private interest of the owner, the benevolence toward each other, seated in the hearts of those who have been born and bred together, the . . . deep execrations of the community upon the barbarian, who is guilty of excessive cruelty to his unprotected slave.”<sup>106</sup> In other words, the naked brutality of the law was to be ameliorated by the feelings of benevolence and affection between master and slave. The master was expected, out of the goodness of his heart, to care enough for the enslaved that he would not punish them too harshly.

In cultural terms, this legal discourse is profoundly and fatally contradictory. First, the notion that perfect submission—total and utter surrender of bodily sovereignty—is a fundamental ordering principle of the

society, to be policed by whatever violent means necessary, means that public order and “harmony” (to use the language of the *Mann* court) requires systemic state violence. Second, this violence was understood to be regulated through an appeal to the morality of whites, rather than through legal or political bonds. In this way, white civil society preserved a moral self-image on the one hand and established the prerogative for brutal violence on the other.

In order to fully appreciate the cultural impact of this legal discourse, we should remind ourselves that the unwritten complement of slave law was the decriminalization of white violence that serves as the founding gesture of society. In *Commonwealth v. Turner*, the Virginia court upheld the master’s right to extreme forms of punishment. The only dissenting justice argued that a slave was entitled to protection as a person “except so far as the application of it conflicted with the enjoyment of the slave as a thing.”<sup>107</sup> The coupling of tyranny with affection—absolute dominion with moral sensibility—established a fraudulent ethic in which the pleasures of parasitism were experienced as morality. As we move our analysis towards the afterlife of slavery, the realm in which we now live, it is worth observing that this form of power becomes both increasingly tenuous and progressively more difficult to dislodge. Whites continue to respond in personal and moral terms to challenges to the status quo; moving into the twenty-first century, assertions of racism and racial inequality are almost impossible to make without being consumed by personal affront or dissipated into an isolated case. Power is effectively insulated by the personal subjectivities of those people (still mostly white but now increasingly other races as well) whose investments it represents and deposits in the social structures of this society.<sup>108</sup>

### III. JENA AND THE ETHICS OF WHITE SOLIDARITY

The power that centuries of slavery bequeath us is most clearly understood in terms of antiblackness. The Western world structures itself according to an Aristotelian, binary logic of opposition. This binary system of meaning works contextually by always placing any two terms as far from each other as possible; that which supposedly differentiates them constitutes the organizing principle for the schema.<sup>109</sup> In other words, since the Western system works by placing positivity and establishing its self-identity on the value of the white, it structures its primary opposition—negativity—on the level of the black. To speak of racial opposition, then, is to reference an antiblack world in which two principles of value predominate: (1) it is best to be white, and (2) it is worst to be black. Or, to put it in multiracial terms, it is best to be white, but when that fails, at least avoid being black at all costs.

From the vantage of whiteness, this structure of logic is absolute. It is Manichæan (Gnostic) in the sense that it presents the world as comprised of “objective” material good and evil: there are people who are materially good and others who are evil, not by virtue of their behaviors, but because of who or what they are.<sup>110</sup> This divide does not produce a hierarchy of humanity; instead, it produces a finite schism between the realm of humanity (whites/Europe) and nonhumanity (blacks/Africa). In a Manichæan world, the black can only achieve equality among blacks—a particular and degraded contextuality—while the white finds his or her reference in the universality of humanity.

The Martinican anticolonialist Frantz Fanon wrote about how the modern world was formed first through sadistic aggression towards blacks (slavery and colonialism), a process which we have elaborated on in the sections above. For Fanon, this sadistic aggression is structural because without it “white would not be white.” But the official sanction against this violence in bourgeois democratic culture turns this structural violence into

impermissible knowledge—the knowledge of the necessity of black death for white life. As we reviewed in the section above, slave law is deeply grounded in the fraudulent ethics of violence and denial. This dual terror—violence and denial—also reveals the double movement that is at the heart of legal discourse in the antiblack world. In the post-Emancipation era, this ethic is reworked in a way that sutures the status of blacks as nonpersons to a rapidly changing legal landscape. We suggest that the appearance of an increasingly liberal terrain with regards to racial violence and the law in fact obfuscates the ongoing reality of antiblackness.

Formal emancipation of blacks from the social status of chattel was not a reality that whites could comprehend. Consequently, whites reserved a special place in their imaginations for the formerly enslaved subjects.<sup>111</sup> In this way, the dream of slavery lives on at the level of desire and identification, the cultural dimension in which we have said it was most operative all along. Our analysis of slavery emphasized the symbolic economy precisely because it is this ethos that permits identifying slavery's afterlife in the symbols and signs that organize our society in the twenty-first century. In other words, the culture of white supremacy, deeply embedded in the seminal concepts of Western society, means that whiteness remains dependent upon the accumulation of black bodies in new and more complex ways. Two cultural codes took over from slavery: criminality and indebtedness. Both of these figures mark the zone of nonhumanity, demonstrating how, in the post-Emancipation era, the law retrenched antiblackness by simultaneously acknowledging and nullifying black people's new juridical status as free and equal citizens.

The passage of the Thirteenth Amendment; the adoption of Black Codes; the institutions of convict leasing, sharecropping, and debt peonage; and the widespread practice of lynching together make up the complementary methods of recapturing the black body and suspending it in a state of permanent injury. These methods also represent the material structures of the legal and economic systems that forge the discursive connection



between blackness and criminality and form the basis for understanding the contemporary paradigm of policing. The Thirteenth Amendment simultaneously ended slavery in the generalized, formal sense and reconstituted it as the discrete point of reference for continued control over the freed people.<sup>112</sup>

The Black Codes racialized specific crimes such that they created crimes for which only black people could be “duly convicted.”<sup>113</sup> As a result, Southern prisons were transformed from largely white to almost exclusively black, clearly marking a historical shift in the method of white domination and punishment of blacks from slavery to imprisonment.<sup>114</sup> As W.E.B. Du Bois explains in *Black Reconstruction*, there were no black convicts in the antebellum period since blacks were almost exclusively punished under the discipline of the plantation. After the war, however, the “whole criminal system came to be used as a method of keeping Negroes at work and intimidating them. Consequently there began to be a demand for jails and penitentiaries beyond the natural demand due to the rise of crime.”<sup>115</sup> These penitentiaries quickly swelled with black convicts.<sup>116</sup>

This process contributed to the racialization of crime itself, with criminality imputed to blackness. Frederick Douglass claimed that the tendency to “impute crime to color” meant that guilt was assigned to blacks as a group, regardless of the race of the perpetrator of a crime:

In certain parts of our country, when any white man wishes to commit a heinous offence, he wisely resorts to burnt cork and blackens his face and goes forth under the similitude of a Negro. When the deed is done, a little soap and water destroys his identity, and he goes unwhipt of justice. Some Negro is at once suspected and brought before the victim of wrong for identification, and there is never much trouble here, for as in the eyes of many white people, all Negroes look alike, and as the man arrested and who sits in the dock in irons is black, he is undoubtedly the criminal.<sup>117</sup>

Douglass’s point is a simple one: black criminality, like race itself, is premised upon the existence of a racial etiquette, where race becomes a

“common sense” way of comprehending, explaining, and acting in the world.<sup>118</sup> Over a century after Douglass wrote this analysis of the criminalization of blackness, Katheryn Russell documented case data for sixty-seven racial hoaxes perpetrated between 1987 and 1996, including the notorious cases of Charles Stuart, Susan Smith, and Jesse Anderson.<sup>119</sup> Russell noted that the majority of hoaxes involved whites who fabricated crimes against blacks; moreover, she noted that this data represents but a fraction of all racial hoax cases, since most hoaxes are not classified or reported as such. The *a priori* criminalization of blackness is the necessary precursor to incarceration as a central tool of power over the black body. In Douglass’s era, it made possible the spread of the convict lease system, in which black prisoners were leased as slaves to private industrialists or planters. As numerous analysts have pointed out, the economic incentive to abuse prisoners, to literally use them up, actually made the experience of convict leasing “worse than slavery.”<sup>120</sup> The Black Codes that permitted criminal prosecution of freed people who did not fulfill their job contracts meant that the threat of penal slavery served to enforce the conditions of debt servitude, in which black farmers found themselves trapped during the post-Emancipation period. The prevailing legal and economic systems of the time—leasing, peonage, tenant farming, sharecropping, payment in scrip, racialized criminal law—mutually informed each other, and were determined by the ethos of slavery imbued into the criminal justice system, to produce a totalitarian effort at controlling the black body.<sup>121</sup> In the present time, as in Douglass’s day, the criminalization of blackness and the racialization of crime support a policy of mass imprisonment that complements extant changes in the global political economy that deepen, rather than ameliorate, black subjugation.<sup>122</sup>

Emancipation was thus fatally paradoxical: it brought both a rupture in slavery and a reorganization of the plantation society. The antiblack world reconstructed the former slaves in terms of criminality in part because white society had so ritualistically cleansed its consciousness, via Emancipation,

of the systemic violence on which the society was based. As we discussed in the section above, the fact that, under slavery, the slave's humanity was denied—except for the purpose of criminal liability—points to the role of the law in the construction of antiblackness. As ritualized in one legal moment after another, the privilege to act with impunity is reserved for whites, while blacks are blameworthy for those same actions.<sup>123</sup>

In this way, the law participated in constructing the larger narrative about slavery as a benevolent institution, emphasizing the dependency and will-less-ness of the slave and the paternalism of the master. As Hartman has demonstrated in her work, within this narrative of the benign institution, the emancipated slave enters freedom beholden to benefactors, the former masters.<sup>124</sup> If Africans were enslaved out of the moral responsibility of Europeans to civilize and protect blacks while benefiting from their labor as “beasts of burden,” then the horrors of slavery and its legacy fall on the shoulders of the freedperson. As solely culpable for the violence of slavery and its aftermath, the freedperson is then cast as indebted to whites for freedom itself. In this way, white supremacy absolves itself of its wrongdoings, thereby producing national innocence for the ongoing crimes of slavery. The freedperson is also held liable by white civil society for the very violence that necessitated the bloody remaking of the nation-state. The renewed forms of violent dispossession and premature death that the freedpersons encountered after Emancipation were thus seen as simply the burdens of freedom, the cross that the former slave must bear.<sup>125</sup>

The specters of criminality and indebtedness thus ensnared blacks in the post-Emancipation era. White supremacy holds the former slave personally responsible for her own victimization, all while the legal and economic institutions that replaced slavery dispossess her of sovereignty and self-determination. This paradoxical process produces the criminal through racially specific social and historical processes—and yet casts her as individually liable. The shame and denigration this experience produces reflects the social devaluation of the criminal; in this context, we can see

how the experience of being socially dishonored and violated can manifest itself in violent behavior.

Lynching remains the phenomenon from the Reconstruction era that provides the most paradigmatic illustration of how the phoenix of slavery rose from its legal ashes stronger than ever before. Lynching is the archetype for contemporary techniques of antiblack policing for three primary reasons. First, it provides cohesion for white civil society against the perceived threat of blackness, and enforces allegiance to white supremacy; second, gratuitous violence against black bodies is the language through which this solidarity is achieved; and third, it is the bridge between slavery and the contemporary prison industrial complex in terms of the impunity claimed by the police and white people's prerogative to ignore this antiblack violence.

We reject the notion that lynching was simply the expression of white civil society and not a form of state terror; the fact that it was not officially organized by the state is merely a technical point made persuasive by the hegemony of the law.<sup>126</sup> On the other hand, we have been analyzing the law in terms of actions, not simply what is written in legislative statutes. In this regard, then, the usual description of lynching as "extra-legal," as in "not regulated or sanctioned by law," has no purchase in our analysis. To the contrary, lynching was, in keeping with American-style contradictions, simultaneously illegal and legal. Torture, rape, and murder have always been illegal in this country, as have trial, conviction, and execution without due process.<sup>127</sup> These practices have long been permissible against blacks, of course, but that underscores the point, rather than overrules it: black bodies have always and already been seized, searched, tried, and convicted.

In our analysis, lynching is "legal" in two senses. First, it is conducted by whites with impunity, often by law enforcement itself. Second, lynching reveals the "law" of white supremacy governing U.S. society and mandating the bodily dispossession of all blacks in the face of white authority. That lynching was a socially customary practice that ultimately

became legal is most clearly seen in the impunity with which lynch mobs operated; in how law enforcement would aid and abet the actions of the mobs; in the high rates of membership by local and federal law enforcement personnel in the Ku Klux Klan; and in the manner in which lynching was eventually contained (not eliminated). Furthermore, the containment occurred through political pressure by the racial state on local elites who discouraged the practice amongst the white working class that did the heavy lifting of racial terror—*not* by means of prosecuting perpetrators or prohibiting the practice through legislative fiat.<sup>128</sup>

Indeed, the fact that one of the most prominent manifestations of organized black resistance to racial rule during this era took the form of a campaign by black leaders for federal antilynching legislation supports our argument. It is not that the antilynching campaign, led by Ida B. Wells-Barnett and the NAACP, was not historically significant and did not produce important effects, because it achieved both of these things.<sup>129</sup> Rather, the point is that black opposition sought redress for injuries that were already simultaneously prohibited and permitted by law by petitioning the racial state for more law. This paradoxical quality to white supremacy was, and remains, essential to its operation. Although murder is illegal, the law permits, and indeed facilitates, white violence against blacks. The need for a specific legal prohibition against lynching simply underscores the degree to which the law does not recognize black humanity.<sup>130</sup>

The historical narrative of lynching as “extra-legal,” however, is most significant for what it tells us about lynching’s crucial role in producing white solidarity. White society is rallied today through the amnesiac belief that lynching happened despite the law, not because of it. In this way, the law continues to work to bring white people together at the expense of blacks—in this case, by discursively isolating racism from the domain of law. This move is key to the contemporary culture of white supremacy and is most visible in terms of “color-blindness” ideology, an issue to which we will turn our attention momentarily. Today’s public denial of lynching as

state terrorism recalls the ritualism that drove the practice historically. The lynch mob was an extension of the slave patrols central to the slavocracy prior to Emancipation.<sup>131</sup> In writing about the slave patrols, renowned author and progressive activist Steve Martinot provides us with a critical lens through which to discern the meaning of lynching to white people.

[T]he patrols were more than merely a mode of policing. On the one hand, their potential violence as a control mechanism engendered an ethos of impunity that expressed itself as terror in the face of their operations. On the other, they appeared to the white population as the institution of peace and social tranquility. Terror and impunity toward black people constituted the materialization of white solidarity and tranquility, and white consensus in solidarity constituted the product of terror and impunity.<sup>132</sup>

Lynching, too, produced social cohesion out of terrorism. The violence generated allegiance to white supremacy by conjuring the specter of social disorder; in so doing it indulged the parasitic fantasies of white society. In this way, lynching was instrumental in reproducing the culture of slavery after its official demise. Lynchings were public rituals that literally created white communal spaces: torture and killing of black people provided one of the few occasions when the class divisions of white society were overcome.

Between 1882 and 1946, there were at least five thousand recorded lynchings in the United States, almost one every three days (in February 1893, there was practically one lynching per day).<sup>133</sup> Nonetheless, this figure only just begins to embody the violence directed against black communities. White mobs attacked blacks throughout the country during this period, leading to numerous race riots and thousands of deaths.<sup>134</sup> In all cases, this violence against black people has been gratuitous: although the pretexts for this violence varied—fictional black rapists,<sup>135</sup> revenge for perceived affronts to white superiority,<sup>136</sup> competition over jobs,<sup>137</sup> and suppression of black voting rights,<sup>138</sup> to name a few—it was all in response to nothing but black existence.<sup>139</sup> In the realm of white mob violence, the

law as legal discourse and disciplinary practice subtends the symbolic arena; in this regard, lynching teaches us that policing is profoundly psychological, reinforcing the authority of white power.<sup>140</sup> In lynching, then, we see the constituent elements of modern policing: impunity, solidarity, terror, and public bodies fungible for white civic pleasure. Since a basic indicator of social parasitism is when one group's pain is another group's pleasure, we should recall the words of Richard Wright and Cornel West, cited earlier: black death provides the very conditions of possibility for white life.<sup>141</sup>

#### IV. CONCLUSION: WHITES ON THE LOOSE

With regard to the Jena case, this combined ethic of parasitism, fraud, and white solidarity—fundamental to white supremacy and deeply engrained in U.S. culture—continues to inform the intrinsic political and psychological structures of this society. In Jena, the hanging of the nooses was widely dismissed by whites as a youthful prank, akin to putting toilet paper on a person's front yard or shaving cream on a car.<sup>142</sup> Although the high school principal wanted to expel the three youth, the school's superintendent reduced their charges on the basis that their prank was nothing more than a tasteless joke. Their reward for such parasitic violence was simple: after three days suspension, they were back at school. Barbara Murphy, a white resident of Jena, expressed the viewpoint of much of the white community that saw no connection between the nooses and racial hatred, nor between racism and the criminal charges against the six black students:

We don't have a race problem. It's not black against white. It's crime. The nooses? I don't even know why they were there, what they were supposed to mean. There's pranks all the time, of one type or another, going on. And it just didn't seem to be racist to me.<sup>143</sup>

Racial violence, of course, is rarely recognized as such by the persecuting society. In the contemporary period, the parasitic relation between white

and black, “with black folk the indispensable sacrificial lamb”<sup>144</sup> vital for the sustenance of white civil society, is strictly impermissible knowledge.<sup>145</sup> This denial on the part of whites is not merely psychological or cultural—it is structural. In the post-civil rights era of formal legal equality, the State’s official policy of colorblindness<sup>146</sup> would evaporate as so much hot air were it not for white people, *en masse*, disavowing the continued centrality of racism.

Black people in Jena, of course, read the racist violence inherent in the hanging nooses. Robert Bailey, one of the Jena Six, illuminates the parasitism represented by the nooses:

It was in the early morning. I seen them hanging. I’m thinking the KKK, you know, were hanging nooses. They want to hang somebody. Real nooses, the ones you see on TV are the kind of nooses they were, the ones they play in the movies and they were hanging all the people, you know, and the thing dropped, those were the kind of nooses they were. I know it was somebody white that hung the nooses in the tree. You know, I don’t know another way to put it, but, you know, I was disappointed, because, you know, we do little pranks—you know, toilet paper, that’s a prank, you know what I’m saying? Paper all over the square, all the pranks they used to do, that’s pranks. Nooses hanging there—nooses ain’t no prank.<sup>147</sup>

Caseptla Bailey, Robert’s mother, specifically addressed how the violence of the message is connected to actual violence against black bodies:

It meant hatred, to the other race. It meant that “We’re going to kill you, you’re going to die.” You know, it sent a message: “This is not the place for you to sit. This is not your damn tree. Do not sit here. You know, you ought to remain in your place, know your place and stay in your place. You’re out of your boundaries.” And the first thing now that the sheriff department or that the chief of police want to say that—as well as the superintendent—one had nothing to do with the other. Now, come on now!<sup>148</sup>



As Caseptla Bailey so clearly puts it, black bodily dispossession remains a reality today; raw life is still the mark of the age. This pilfering of black sovereignty is literally a source of white entertainment. The June 1998 lynching of James Byrd in Jasper, Texas, by three white men who dragged Byrd from the back of their pickup truck for miles until his head separated from his body, not only underscores in horrific fashion Bailey's assessment of the violence faced by blacks in Jena, but provided the occasion to see white people having fun. Within a week of Byrd's murder, there were reports of copycat crimes: in Louisiana, three white men taunted a black man with racial epithets while trying to drag him alongside their car; in Illinois, three white boys assaulted a black teenager in almost exactly the same way; in New York City three months later, where police officers and firefighters parodied Byrd's lynching by imitating it in a Labor Day parade float; and in Washington, D.C., while Byrd's killers were under trial, a radio announcer responded to a clip from a song by Lauryn Hill by commenting, "No wonder people drag them behind trucks."<sup>149</sup> Jokes and mimicry surround incidents of racial violence in ways that confound representation.<sup>150</sup> It also shows how the distance of time and space do little to hinder the pedagogy of racial violence from reproducing its lessons.

The Jena Six case itself occasioned its own period of mimicry. In November 2007, the *New York Times* reported that since the huge September twentieth rally in Jena, where tens of thousands protested racism in the criminal justice system, there have been as many as fifty to sixty "noose incidents."<sup>151</sup> That same month, hundreds of people gathered in Charleston, West Virginia, to call for hate-crime charges in the case of Megan Williams, a young black woman who was beaten, tortured, and sexually assaulted for days in a remote trailer by six white people.<sup>152</sup> Paul Vitello, writing in the *New York Times*, questioned whether these hate crimes were "part of some new homegrown vernacular of race hate."<sup>153</sup>

It seems more likely, however, that incidents such as the Jena Six case (or the murder of James Byrd) give permission to others to express in a more

dramatic fashion what is already alive and well at the level of the banal and everyday. We occasion this permitted conduct not to a new form of race hate, as Vitello suggests, but to an extension of a racially ordinary past in legal memory. In other words, what matters is not the new social terrain upon which we confront the racial disposition of the black body today, but instead, the manner in which we have failed to establish a legal system that could remove black punishment from its racial safekeeping. Chester Himes once wrote that “yesterday will make you cry.”<sup>154</sup> We would add that tomorrow will bring tears as well, since yesterday continues to shape the psychological, social, legal, and political structures of our society. This is one of the many lessons available to us through the Jena Six.

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<sup>3</sup> Todd Lewan, *Locals Dispute Growing Story of Jena 6: Black and White Fades to Gray in the Home of the Jena 6*, ABC NEWS (Sept. 14 2007), <http://abcnews.go.com/US/wireStory?id=3641855>.

<sup>4</sup> Tom Mangold, ‘Stealth Racism’ Stalks Deep South, BBC NEWS (May 24, 2007), [http://news.bbc.co.uk/2/hi/programmes/this\\_world/6685441.stm](http://news.bbc.co.uk/2/hi/programmes/this_world/6685441.stm).

<sup>5</sup> See Richard Cohen & John Tye, *The Stroke of a Pen: Double Standard in Jena, S. POVERTY L. CENTER* (Sept. 28, 2007), <http://www.splcenter.org/news/item.jsp?aid=286>.

<sup>6</sup> *Id.*

<sup>7</sup> Historians and legal scholars alike have written extensively on this dialectical relationship. Three excellent texts include DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (BasicBooks 1992); Derrick Bell, *Racial Realism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 302–312 (Kimberle Crenshaw et al. eds., 1995); MARY FRANCES BERRY, *BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* (2d ed. 1994) (1971).

<sup>8</sup> LA. REV. STAT. ANN. § 14:67.15(A) (2000). “Theft of a firearm is the misappropriation or taking of a firearm which belongs to another, either without the consent of the other to the misappropriation or taking or by means of fraudulent conduct, practices, or representations.” An intent to deprive the other permanently of the firearm is essential. The trouble with this charge is that there existed no proof that the defendants had the requisite specific intent to permanently keep the weapon that was being leveled at them. Intent was negated by the fact that the boys took the firearm to the police, who in return arrested them and charged them with the above listed crimes. The white youth, however, was never charged with attempted (LA. REV. STAT. ANN. §. 14:27 (2003)) second-degree murder (LA. REV. STAT. ANN. §. 14:30.1 (2008)) to which he was clearly guilty under Louisiana law.

<sup>9</sup> LA. REV. STAT. ANN. § 14:34 (1980). Second-degree robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another when the offender intentionally inflicts serious bodily injury. Subsection 2 defines “serious bodily injury” as unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death. *Id.*

<sup>10</sup> LA. REV. STAT. ANN. § 14:26(A) (1977). Louisiana defines “criminal conspiracy” as the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

<sup>11</sup> A good narration of the events in Jena can be found in various online news sources including, but not limited to, <http://www.counterpunch.org>, <http://www.wikipedia.com>, <http://www.freethejena6.org>, <http://www.colorofchange.org/jena>.

<sup>12</sup> The six black students were 17-year-old Robert Bailey, Jr., for whom bail was set at \$138,000; 17-year-old Theo Shaw for whom bail was set at \$130,000; 18-year-old Carwin Jones for whom bail was set at \$100,000; 17-year-old Bryant Purvis for whom bail was set at \$70,000; 16-year-old Mychal Bell, a sophomore who was charged as an adult and for whom bail was set at \$90,000; and a juvenile Jesse Rae Beard.

<sup>13</sup> LA. REV. STAT. ANN. § 14:30.1. Second-degree homicide requires that the defendant either have the specific intent to kill, further defined by LA. REV. STAT. ANN. § 14:10(1) (1942) as a “state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act, or when the defendant is engaged in an enumerated felony namely the perpetration or attempted perpetration of aggravated rape (LA. REV. STAT. ANN. § 14:42), forcible rape

(LA. REV. STAT. ANN. § 14:42.1), aggravated arson (LA. REV. STAT. ANN. § 14:51), aggravated burglary (LA. REV. STAT. ANN. § 14:60), aggravated kidnapping (LA. REV. STAT. ANN. § 14:44), second degree kidnapping (LA. REV. STAT. ANN. § 14:44.1), aggravated escape (LA. REV. STAT. ANN. § 14:110), armed robbery (LA. REV. STAT. ANN. § 14:64), first-degree robbery (LA. REV. STAT. ANN. § 14:64.1), or simple robbery (LA. REV. STAT. ANN. § 14:65), even though he has no intent to kill or to inflict great bodily harm.

<sup>14</sup> Mary Foster, *Charges Reduced for Student in LA Fight*, THE GUARDIAN, June 27, 2007, available at <http://web.archive.org/web/20071025141828/http://www.guardian.co.uk/world/latest/story/0,-6738454,00.html>.

<sup>15</sup> LA. REV. STAT. ANN. § 14:34 (1980). Aggravated battery is battery committed with a dangerous weapon. There are three elements that received varying emphasis in the conglomeration of Louisiana's assault and battery statutes: (1) the type of weapon used; (2) the seriousness of the injury inflicted; and (3) the specific intent with which the act was done. An assault or battery with intent to commit a specific crime contains all the elements of and necessarily includes an attempt to commit that crime. The only distinction between an assault or battery with specific intent and an attempt is that an offender may be guilty of an attempt where his overt act falls short of constituting a battery, or is even so remote as not to constitute an assault.

<sup>16</sup> Howard Witt, *Louisiana Teen Guilty in School Beating Case; Witnesses Provide Conflicting Testimony*, CHI. TRIB., June 29, 2007, available at [www.chicagotribune.com/news/nationworld/chijena\\_witt.1jun29,1,1872156.story?coll=chi-newsnationworld-hed](http://www.chicagotribune.com/news/nationworld/chijena_witt.1jun29,1,1872156.story?coll=chi-newsnationworld-hed).

<sup>17</sup> Friends of Justice, *Ineffective Assistance of Counsel: What Blane Williams Should Have Known*, <http://friendsofjustice.wordpress.com/2007/07/02/ineffective-assistance-of-counsel-what-blane-williams-should-have-known/> (July 2, 2007, 12:47 EST).

<sup>18</sup> Witt, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> Susan Roesgen and Elliot C. McLaughlin, *Residents: Nooses Spark School Violence, Divide Town*, CNN NEWS, Sept. 5, 2007, [http://www.cnn.com/2007/US/law/09/04/bell.jena.six/index.html?eref=ib\\_us](http://www.cnn.com/2007/US/law/09/04/bell.jena.six/index.html?eref=ib_us).

<sup>21</sup> The Associated Press, *White Jury Convicts Black Teen in Case of Racially Tinged Louisiana School Fight*, INT'L HERALD PRESS, June 28, 2007, available at <http://www.iht.com/articles/ap/2007/06/28/america/NA-GEN-US-Racial-School-Fight.php>.

<sup>22</sup> The Associated Press, *Court Overturned Conviction in Jena Beating: Judges Rule Teen Should Not Have Been Tried as Adult in Racially Tinged Case*, MSNBC.COM, Sept. 15, 2007, <http://www.msnbc.msn.com/id/20779755>.

<sup>23</sup> ACHILLE MBEMBE, *ON THE POSTCOLONY* 197 (A.M. Berrett, Janet Roitman, Murray Last & Steven Randall trans., Univ. of California Press 2001).

<sup>24</sup> Cornel West, *Black Strivings in a Twilight Civilization*, in *THE FUTURE OF THE RACE* 108–109 (Henry Louis Gates, Jr. & Cornel West eds., Knopf 1996).

<sup>25</sup> MBEMBE, *supra* note 24, at 17, 197.

<sup>26</sup> *See, e.g.*, ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1st ed., Mariner Books 1999); ANNE

MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* (Routledge 1995); see SILVIA FEDERICI, *CALIBAN AND THE WITCH: WOMEN, THE BODY, AND PRIMITIVE ACCUMULATION* (Autonomedia 2004); see also, DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* (Oxford Univ. Press 1993). Federici in particular gives a clear accounting of how the transition to capitalism required concerted—and global—assaults on the body's ability to reproduce itself. In these terms, the subordination of social reproduction to the rationalization of capital means that the formation of the modern world has at its core the negation of self-ownership and a constant battle against rebellious bodies resistant to this order.

<sup>27</sup> Frank Wilderson, *Gramsci's Black Marx: Whither the Slave in Civil Society?*, WE WRITE, Jan. 2005, 5, <http://www.wewrite.org/Articles/Frank.pdf>.

<sup>28</sup> William Goodell in his book entitled *The American Slave Code in Theory and Practice* covers the depth and magnitude of the slave codes. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 225–38 (Johnson Reprint Corp. 1968) (1853), available at <http://www.dinsdoc.com/goodell-1-1-18.htm>.

<sup>29</sup> STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW 1850–1860* (Univ. of N. C. Press 1970); see DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATION TO SLAVERY* 202–251 (Don E. Fehrenbacher and Ward M. McAfee eds., 2001); see also JOHN HOPE FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* (Oxford Univ. Press 2000); see also, Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 YALE L. J. 161–82 (1921).

<sup>30</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding racial segregation constitutional in public accommodations under the doctrine of separate-but-equal); see also HARVEY FIRESIDE, *SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM* (2005); see also CHARLES LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

<sup>31</sup> *Pace v. Alabama*, 106 U.S. 583 (1883) (holding Alabama anti-miscegenation statute is constitutional), *rev'd* 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>32</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856); see also DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* (Oxford Univ. Press 1981).

<sup>33</sup> By “ruling class,” we refer to how control over social resources and crucial institutions in a white supremacist capitalist patriarchy (to use bell hooks's wordy but pointed phrasing) is shaped by the interests of an elite sector of society. This elite is comprised of a select handful of wealthy capitalists and their counterparts in government and the nonprofit knowledge sector. As the Italian Marxist Antonio Gramsci teaches us, these interests win consent from significant sectors of civil society such that people technically not of the elite act as if their interests and those of the elite constitute an identity. See generally *THE AMERICAN RULING CLASS* (Mongrel Media 2006) (providing an interesting and entertaining examination of the ruling class, although limited in reach and in analysis).

<sup>34</sup> A brief sampling of texts that document the link between slavery and the modern prison system: EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH-CENTURY AMERICAN SOUTH* (Oxford Univ. Press 1984); STUART BANNER, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 96–116 (Charles Ogletree & Austin Sarat, eds., 2006); ANGELA Y. DAVIS, *The Black Women's Role in the Community of Slaves in* THE ANGELA Y. DAVIS READER, (Joy James, ed., Wiley Blackwell 1998); BARBARA ESPOSITO & LEE WOOD, *PRISON SLAVERY* (Kathryn Bardsley ed., 1982); HOWARD BRUCE FRANKLIN, *PRISON LITERATURE IN AMERICA: THE VICTIM AS CRIMINAL AND ARTIST* (Oxford Univ. Press 1989); JOY JAMES, *THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS* (State Univ. of N.Y. Press 2005); *see generally* JOHAN THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* (1st ed., Elsevier 1976).

<sup>35</sup> *See* FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Grove Weidenfeld 1967).

<sup>36</sup> *See* Jared Sexton & Huey Copeland, *Raw Life: An Introduction*, *QUI PARLE*, Spring/Summer 2003, at 53.

<sup>37</sup> *See id.* at 53–62.

<sup>38</sup> MBEMBE, *supra* note 24, at 12–15.

<sup>39</sup> For instance, Melissa Bell, mother of Mychal Bell, told CNN news reporters that Bell was not the same kid following this incident. “He’s grown up a lot since he’s been in there. He’s not the same ol’ smiling Mychal he used to be,” she claimed. Roesgen and McLaughlin, *supra* note 20.

<sup>40</sup> Reed Walters, *Justice in Jena*, *N.Y. TIMES*, Sept. 26, 2007, [http://www.nytimes.com/2007/09/26/opinion/26walters.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/09/26/opinion/26walters.html?_r=1&oref=slogin); *Court Overturns Conviction in Jena Beating: Judge Rules Teen Should Not Have Been Tried as Adult in Racially Tinged Case*, *MSNBC*, Sept. 15, 2007, <http://www.msnbc.msn.com/id/20779755/>; *Judge in Jena 6 Cases is Removed*, *THE DETROIT FREE PRESS*, Aug. 2, 2008, <http://www.freep.com/apps/pbcs.dll/article?AID=/20080802/NEWS07/808020343/1009>.

<sup>41</sup> *See* BERRY, *supra* note 7.

<sup>42</sup> *Id.*

<sup>43</sup> *See generally* JOHN RAWLS, *THEORY OF JUSTICE* (Belknap Press of Harvard Univ. Press 2005) (1971).

<sup>44</sup> *See, e.g.*, BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* *supra* note 7; *see also*, Bell, *Racial Realism*, in *CRITICAL RACE THEORY*, *supra* note 7.

<sup>45</sup> *See* Steve Martinot & Jared Sexton, *The Avant-Garde of White Supremacy*, 9 *SOCIAL IDENTITIES* No. 2, 169–181 (2003) (discussing spectacle and banality).

<sup>46</sup> Bruce Cadwallader, *Two Officers Disciplined*, *COLUMBUS DISPATCH*, Apr. 30, 1992, at A1. Waugh, an African American and former varsity wrestler at Ohio State University, was struck in the head twice and sprayed repeatedly with mace simply for walking in the street to avoid a fight that was taking place on the sidewalk. Similar to the King case, the officers in Waugh’s case were found not guilty in their trial for the criminal use of excessive force.

<sup>47</sup> Sewell Chan, *The Abner Louima Case, 10 Years Later*, *N.Y. TIMES*, Aug. 9, 2007, <http://cityroom.blogs.nytimes.com/2007/08/09/the-abner-louima-case-10-years-later>.

<sup>48</sup> See *Suit Filed by Parents of Amadou Diallo Against City of New York*, <http://www.courtvtv.com/archive/national/diallo/complaint.html> (last visited Aug. 14, 2008) (providing a detailed description of the facts in the Diallo case, including all of the court documents).

<sup>49</sup> *White Ex-Officer Guilty in Black Motorist's Death*, CNN.COM, Mar. 19, 1998, [www.cnn.com/US/9803/19/police.beating/index.html](http://www.cnn.com/US/9803/19/police.beating/index.html).

<sup>50</sup> Brian Jenkins, *Three White Police Officers Charged in Death of Black Man*, CNN.COM, Nov. 27, 1995, [www.cnn.com/US/9511/gammage/index.html](http://www.cnn.com/US/9511/gammage/index.html).

<sup>51</sup> Robert D. McFadden, *Police Kill Man After Queens Bachelor Party*, N.Y. TIMES, Nov. 26, 2006, available at <http://www.nytimes.com/2006/11/26/nyregion/26cops.html>; Sean Bell, *Interactive Website*, N.Y. TIMES [http://topics.nytimes.com/top/reference/times-topics/people/b/sean\\_bell/index.html?inline=nyt-per](http://topics.nytimes.com/top/reference/times-topics/people/b/sean_bell/index.html?inline=nyt-per) (last visited Aug. 14, 2008).

<sup>52</sup> *Wilson v. State*, 281 Ga. 447 (2006), available at <http://www.insideradvantagegeorgia.com/PressGW.pdf> (last visited Aug. 9, 2008) (holding that an aggravated child molestation conviction and ten year prison sentence was cruel and unusual ("grossly disproportionate) for a seventeen-year-old teen who had consensual oral sex with a fifteen-year-old girl at New Year's Eve party).

<sup>53</sup> *Lewis v. Casey*, 518 U.S. 383 (1996) (holding that prison inmates do not have an abstract, freestanding right to a law library); see also, Josephy L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries*, 95 LAW LIBR. J. 491-513 (2003).

<sup>54</sup> BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 235-38 (Doubleday 2000).

<sup>55</sup> See Steve Martinot & Jared Sexton, *The Avant-Garde of White Supremacy*, 9 SOCIAL IDENTITIES No. 2, 169-181 (2003) (discussing spectacle and banality).

<sup>56</sup> BERRY, *supra* note 7, at 7.

<sup>57</sup> See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007) (1969); Martinot and Sexton, *supra* note 55, at 173.

<sup>57</sup> FANON, *supra* note 35, at 176.

<sup>58</sup> ORLANDO PATTERSON, *SLAVERY* 28 (1982) (quoting Marshall Sahlins). To put it another way, the majority of the world, for the majority of human history, has developed notions of property that are invested in the collective, or the commons. Western society has been the anomaly in this regard: it alone has conjured the notion of private property. The different conceptions of property ownership are an expression of prevailing individual human relations. We can see this distinction through the differing notions of freedom: western society is unique in claiming the individual "free" when s/he is unfettered by social ties; the rest of the world has regarded this situation as akin to death. Notions of "freedom," therefore, are socially constructed and thus grounded in particular historical and cultural contexts. The law is merely one instantiation of a particular context. See DAVID M. SCHNEIDER, *A CRITIQUE OF THE STUDY OF KINSHIP* (Univ. of Mich. Press 1984) (providing an example of close cultural deconstruction).

<sup>59</sup> See PATTERSON, *supra* note 58, at 28.

<sup>60</sup> The most famous iteration of this proposition is Rene Descartes's "cogito ergo sum": *I think, therefore I am*, or, *I am thinking, therefore I exist*. RENE DESCARTES, *DISCOURSE ON METHOD* 48 (ReadHowYouWant.com, 2006).

<sup>61</sup> DAVID GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 32 (Wiley-Blackwell 1993). By “subaltern,” we refer, in the most literal sense, to groups of subordinate status, whether because of race, gender, class, nation, sexuality, religion, or ethnicity. More expansively, we refer to the leading work of postcolonial scholars that reexamine history from the vantage point of nonelites and the colonized. *See, e.g.*, Gayatri Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271–316 (Cary Nelson and Lawrence Grossberg, eds., Univ. of Ill. Press 1988); *see* *THE LATIN AMERICAN SUBALTERN STUDIES READER* (Ileana Rodriguez, ed., Duke Univ. Press 2001).

<sup>62</sup> GOLDBERG, *supra* note 61, at 34–35.

<sup>63</sup> *See* CHARLES W. MILLS, *THE RACIAL CONTRACT* (Cornell Univ. Press 1999).

<sup>64</sup> *See* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, (Peter Laslett, ed., Cambridge Univ. Press 1988); *see also* JOHN STUART MILL, *UTILITARIANISM* (Willard Small 1887).

<sup>65</sup> DAVID DAVID ELTIS, *THE RISE OF AFRICAN SLAVERY IN THE AMERICAS* 21–23 (Cambridge Univ. Press 2000).

<sup>66</sup> The issue of “rights” has, of course, been extensively treated in legal scholarship in a variety of contexts from property rights to voting rights. *See, e.g.*, William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U. C. DAVIS L. REV. 1311 (2006-2007); Henry L. Chamber, *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002); Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1689 (2007); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium*, 18 HARV. BLACKLETTER L.J. 1 (2002). It has also been a lightning rod in the debate among progressive left scholars. *See, e.g.*, PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (Harvard Univ. Press 1992) (critiquing critical legal studies (CLS) for its totalizing deconstruction of rights as purely mythological and thus for ignoring the historical importance of rights for articulating black needs). We maintain that the debate between CLS and Critical Race Theory scholars is largely a juridical discussion, however, focusing on the place of rights discourse in civil rights legislation and doctrine. Our aim here is to shift the focus to see how the juridical is always and already a product of racial rule.

<sup>67</sup> GOLDBERG, *supra* note 61, at 19.

<sup>68</sup> *See generally* CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* (Cornell Univ. Press 1998).

<sup>69</sup> GOLDBERG, *supra* note 61, at 20.

<sup>70</sup> MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED KNOWLEDGE AND OTHER WRITINGS, 1972-1977*, 95–96, (Colin Gordon et al., trans., Colin Gordon, ed., Pantheon 2000).

<sup>71</sup> DENISE FERREIRA DA SILVA, *TOWARD A GLOBAL IDEA OF RACE* (Univ. of Minn. Press 2007).

<sup>72</sup> *See* ZIAUDDIN SARDAR ET AL., *BARBARIC OTHERS: A MANIFESTO ON WESTERN RACISM* (1993).

<sup>73</sup> *See also* R. I. Moore, *THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE, 950–1250* (2d ed., Blackwell Publishing 2007) (1987).



<sup>74</sup> We distinguish between “racialism” and “racism.” Racialism refers to the exploitation, reification, and reproduction of differences present with society. For instance, these differences can be based in language, religion, geography, or family relations. Racism is a specific form of racialism whereby these differences are fatally coupled with power and located in a visual economy, such as skin color, in such a way that it “creates or reproduces structures of domination based on essentialist categories of race.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 71 (Routledge 1994). So although racialism within Europe of the Middle Ages is not in this sense racism, any full genealogy of Western racism must attend to the racialist thought deep within European culture. See CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (Reed Bus. Info. 2000).

<sup>75</sup> This point is not without debate, including the perspective that white Europeans were subjected to enslavement as much, if not more so, than were Africans. See, e.g., DON JORDAN & MICHAEL WALSH, *WHITE CARGO: THE FORGOTTEN HISTORY OF BRITAIN’S WHITE SLAVES IN AMERICA* (N.Y. Univ. Press 2008) (2007). We find this argument unconvincing. For instance, in Jordan and Walsh’s book, the authors argue that slavery applies to any person bought and sold, whether for a decade or a lifetime, and therefore the historiography on “indentured servitude” minimizes the severity of white bondage. Although perhaps a useful definition for a comparative study of slavery across time and space (*à la* Orlando Patterson), this perspective simplifies transatlantic slavery by vacating the noneconomic, or supra-economic, dimensions of trans-Atlantic slavery. In other words, white supremacy’s reliance upon the enslaved black body was less about the profit requirements of global capitalism and more about how Western society imagines itself in relation to its racialized Other. See, FANON, *supra* note 35; LEWIS GORDON, *HER MAJESTY’S OTHER CHILDREN: SKETCHES OF RACISM FROM A NEOCOLONIAL AGE* 76 (Rowman & Littlefield Publishers 1997) (explaining and defining “white” reliance upon “black.”)

The effort to equate the capture and systemic oppression of the working classes in Europe and North America with transatlantic slavery does not do justice to the suffering of white “slaves”—it merely further obfuscates the central role of white supremacy in the long-standing subordination of these working classes. Other scholars attempt a similar argument about the enslavement of white Europeans and Americans in the context of the Mediterranean. See e.g., *WHITE SLAVES, AFRICAN MASTERS: AN ANTHOLOGY OF AMERICAN CAPTIVITY NARRATIVES* (Paul Baepler ed., Univ. of Chicago Press 1999); see also ROBERT C. DAVIS, *CHRISTIAN SLAVES, MUSLIM MASTERS: WHITE SLAVERY IN THE MEDITERRANEAN, THE BARBARY COAST, AND ITALY, 1500–1800* (2004). Davis asserts that during the period 1500–1650 African enslavement of white Christians exceeded the European enslavement of Africans and that marauding Muslim corsairs (pirates) wrought greater destruction and depopulation along the Spanish and Italian coasts than what European slavers would later inflict on the African interior.

Again, although the practices documented by Davis and others certainly occurred, there is a larger context that renders the comparison to transatlantic slavery unsuccessful and unhelpful. For example, Peter Lamborn Wilson’s study of the Muslim corsairs from the Barbary Coast points out that thousands of Europeans converted to Islam and joined

the pirate “holy war” against the rising bourgeois states of Europe and the persecuting societies of Christendom, creating “insurrectionary communities.” See, e.g., PETER LAMBORN WILSON, *PIRATE UTOPIAS: MOORISH CORSAIRS & EUROPEAN RENEGADOES* (Autonomedia 2003). In general, scholarship that attempts to recenter white people as victims needs rigorous interrogation. See Jamaica Kincaid, *The Little Revenge from the Periphery*, 7 *TRANSITION*, No. 73 68–73 (Ind. Univ. Press 1997) (providing an example of a productive examination of victims of whiteness).

<sup>76</sup> DAVID NORTHRUP, *THE ATLANTIC SLAVE TRADE* (2d. ed., Houghton Mifflin Co. 2002) (1994); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (Howard Univ. Press rev. ed. 1981); RONALD SEGAL, *THE BLACK DIASPORA: FIVE CENTURIES OF THE BLACK EXPERIENCE OUTSIDE AFRICA* (Macmillan 1996); ROBERT J. C. YOUNG, *COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE, AND RACE* (1st ed., Routledge 1995); ELTIS, *supra* note 65, at 66; see also Paul E. Lovejoy, *The Impact of the Atlantic Slave Trade on Africa: A Review of the Literature*, 30 *J. OF AFR. HIST.* 365–394 (1989); see generally ANNE MCCLINTOCK, *supra* note 26.

<sup>77</sup> Wilderson, *supra* note 27, at 1–17.

<sup>78</sup> See, e.g., *THE DEVELOPMENT OF THE MODERN STATE* (Henry Lubasz, ed., Macmillan 1964).

<sup>79</sup> See, e.g., E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (Pantheon 1964).

<sup>80</sup> Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, 54 *THE PROFESSIONAL GEOGRAPHER* 15–24 (2002); Stuart Hall, *Race, Culture, and Communications: Looking Backwards and Forward at Cultural Studies*, 5 *RETHINKING MARXISM* 1, at 10–18 (1992).

<sup>81</sup> See Hortense Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, in *BLACK, WHITE, AND IN COLOR: ESSAYS ON AMERICAN LITERATURE AND CULTURE* 203–209 (2003) (discussing of *flesh* in the Middle Passage and discursive order of slavery).

<sup>82</sup> ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 27 (Oxford Univ. Press 1987).

<sup>83</sup> Jared Sexton, *Race, Nation, and Empire in a Blackened World*, 95 *RADICAL HIST. REVIEW*, 251–252 (Spring 2006).

<sup>84</sup> See Stuart Hall, *Race, Articulation, and Societies Structured in Dominance*, in *BLACK BRITISH CULTURAL STUDIES: A READER* (Houston Baker, et al. eds., 1996) for an excellent exposition of the relationship between race and class that helps illuminate the intertwined but distinct logics of capitalism and white supremacy; see JOHN LEWIS ET. AL, *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* (James Allen, ed., 2000) (providing an illustration of the white supremacy’s need to accumulate, consume, and use the black body); see also FRANK WILDERSON III, *RED, WHITE, AND BLACK: CINEMA AND THE STRUCTURE OF U.S. ANTAGONISMS* (forthcoming 2009) (providing an exposition of the accumulation and fungibility of black bodies, theorized through the tradition of epistemological reflection on social death).

<sup>85</sup> Spillers, *supra* note 81, at 225; EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 70–75 (Vintage 1974).

<sup>86</sup> PATTERSON, *supra* note 58.

<sup>87</sup> LINDON BARRETT, *BLACKNESS AND VALUE: SEEING DOUBLE* (Cambridge Univ. Press 1999). For example: the fact that a blue T-shirt from The Gap costs more than the same blue T-shirt from Wal-Mart is commonly perceived to be a function of higher quality of design and production at The Gap, rather than the relations of force and exploitation in the respective production and consumption processes; the reality that in the year 2000 Gap T-shirts in London cost more than they did in the United States, and that this situation has now reversed itself in 2008, makes it easier to see precisely this problem of the mystification of value.

<sup>88</sup> Wilderson, *supra* note 27, at 6.

<sup>89</sup> West, *supra* note 24, at 72.

<sup>90</sup> Wilderson, *supra* note 27, at 9.

<sup>91</sup> DU BOIS, *supra* note 57, at 201.

<sup>92</sup> SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 226, n.2 (Oxford Univ. Press 1997) (citing *State of Missouri v. Celia, a Slave* (1855)).

<sup>93</sup> According to MODEL PENAL CODE § 210.2, criminal homicide constitutes murder when: (a) it is committed purposely or knowingly . . . . See also ROGER LANE, *MURDER IN AMERICA: A HISTORY* (Ohio State Univ. Press 1997) (providing an excellent discussion on the history of murder).

<sup>94</sup> HARTMAN, *supra* note 92.

<sup>95</sup> *Id.* at 82–83.

<sup>96</sup> See also HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF* (Jean Fagan Yellin, ed., Harvard Univ. Press 1987); MELTON MCLAURIN, *CELIA, A SLAVE* (Univ. of Ga. Press 1991); *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY* (George Rawick, ed., Greenwood Press 1973).

<sup>97</sup> *Alfred v. State*, 37 Miss. 296 (1859).

<sup>98</sup> A. Leon Higginbotham, *Race, Sex, Education, and Missouri Jurisprudence: Shelley v. Kramer in a Historical Perspective*, 67 WASH. U. L.Q. 694 (1989) cited in HARTMAN, *supra* note 92, at 84. The legal record makes it abundantly clear how the constructs usually referred to as “sexuality” and “gender” were primary axes of power for white civil society under slavery. We do not devote the proper space to treating this formative dynamic; for two canonical analyses of this issue see HARTMAN, *supra* note 92; see also, Spillers, *supra* note 81.

<sup>99</sup> PATTERSON, *supra* note 58, at 5.

<sup>100</sup> See Davis, *The Black Woman’s Role in the Community of Slaves*, *supra* note 34.

<sup>101</sup> *State v. Mann*, 2 Dev. 263, 13 N.C. 263 (1829).

<sup>102</sup> *Id.* at 263.

<sup>103</sup> *Id.* at 266; A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* 9 (Oxford Univ. Press 1978).

<sup>104</sup> *Mann*, 2 Dev at 264.

<sup>105</sup> *Id.*

<sup>106</sup> PATTERSON, *supra* note 58.

<sup>107</sup> *Commonwealth v. Turner*, 26 Va. 678, 5 Rand. 678, 685 (1827).

<sup>108</sup> Perhaps the most prominent illustration of this phenomenon is the white reaction against affirmative action. Although affirmative action is a complex issue that warrants

more thorough treatment than we can provide here, we can briefly point to some of the ways that whites articulate their political resistance to the policy in personal terms. For instance, the frequently evoked sentiment that a “less qualified” black candidate received the position over a “more deserving” white candidate is essentially whites internalizing, and simultaneously insulating themselves from, the structural reality of institutional racism. They internalize it in the sense that they take the current arrangement of resources to be the outcome of something inside of them, reflective of their characters and their merits as individuals, rather than the outcome of white privilege. In so doing, they are distancing themselves psychologically from the ongoing reality of historical inequities. As a result, the offense they experience when they perceive that they have been passed over by a “less qualified” black candidate is fundamentally racist in its meaning, but equally impossible for them to see as such.

<sup>109</sup> GORDON, *supra* note at 75.

<sup>110</sup> *Id.* at 29.

<sup>111</sup> SHARON P. HOLLAND, RAISING THE DEAD: READINGS OF DEATH AND (BLACK) SUBJECTIVITY 14 (2000).

<sup>112</sup> U.S. CONST. amend. XIII § 1. “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party has been duly convicted, shall exist within the United States or any place subject to their jurisdiction.”

<sup>113</sup> Angela Y. Davis, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System* in FREDERICK DOUGLAS: A CRITICAL READER 339 (Bill E. Larson & Frank M. Kirkland, eds., Blackwell Publ’g 1999).

<sup>114</sup> See generally WILLIAM B. TAYLOR, BROKERED JUSTICE: RACE, POLITICS, AND MISSISSIPPI PRISONS, 1798–1992 (Ohio State Univ. Press 1994).

<sup>115</sup> W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 506 (Henry Louis Gates, Jr. ed., Oxford Univ. Press 2007).

<sup>116</sup> See generally MILFRED FIERCE, SLAVERY REVISITED: BLACKS AND THE SOUTHERN CONVICT LEASE SYSTEM, 1865–1933 (1st ed., Africana Studies Research Ctr., Brooklyn Coll. 1994).

<sup>117</sup> Frederick Douglass, *quoted in* Davis, *supra* note 113, at 83.

<sup>118</sup> See OMI AND WINANT, Racial Formation in the United States: From the 1960s to the 1980s 62 (2d ed., Routledge 1994) (1986); Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, 21 Socialist Rev. 37 (1991); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusions, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev 1, 27–29 (Winter 1994). Some scholars argue that, similar to its social construction, the legal construction of race, is not accidental, but undertaken to legitimate racial inequality and domination. See also Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393 (1991).

<sup>119</sup> KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 71 (N.Y. Univ. Press 1998). In October 1994, Susan Smith, a white South Carolinian mother, murdered her two young children and claimed that she had been the victim of carjacking by a fictional black assailant. In April 1992, Jesse Anderson, a white man,

attacked and killed his wife in the parking lot of a suburban Milwaukee restaurant and blamed her death on two fictional black men. In November 1989, Charles Stuart killed his pregnant wife on the way home from a Lamaze class in Boston and told police that he and his wife had been shot and robbed by a black man.

<sup>120</sup> See FIERCE, *supra* note 116; MATTHEW MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (Univ. of S.C. Press 1996); DAVID OSHINSKY, “WORSE THAN SLAVERY”: PARCHEMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (Free Press 1996).

<sup>121</sup> Davis, *supra* note 34. Although it is beyond the scope of this article, it should be noted here that the origins of black bodily dispossession in the contemporary period lies with the fundamental alienation from labor and land solidified through the post-Emancipation legal regime. As Jeff Kerr-Ritchie points out, the freedpeople were very clear as to what they wanted their relationship to the land to become after slavery. The sentiments of freedpeople from the Georgia Sea Islands in testimony to Congress in 1865: “Cotton is no good for nigger. Corn good for nigger; ground nuts good for nigger; cotton good for massa; if massa want cotton he may make it himself, cotton do nigger no good; cotton make nigger perish.” Kerr-Ritchie reminds us that former slaves throughout the diaspora exhibited a profound distaste for cash crop production: in independent Haiti and British Jamaica, freedpeople had sought subsistence over cash crop economies, with many former slaves becoming small peasant farmers as a result.

It was this orientation that made the freedpeople a major obstacle to restoring the cotton economy after the Civil War, and directly contributed to them not receiving the promised forty acres and a mule. The loss of the land, in other words, is an extension of the loss of sovereignty over oneself; this dispossession is refracted in the law, which made it possible for whites to become the major beneficiaries of the “forty acres and a mule” supposedly intended for the former slaves. See Jeffrey Kerr-Ritchie, *Forty Acres, or, An Act of Bad Faith*, THE NEW BLACK RENAISSANCE: THE SOULS ANTHOLOGY OF CRITICAL AFRICAN-AMERICAN STUDIES 25–39 (Manning Marable et al., eds., Paradigm Publishers 2005).

<sup>122</sup> The mass imprisonment of African Americans has been extensively documented by scholars and journalists. See, e.g., MUMIA ABU-JAMAL, THE INDUSTRY OF FEAR 133 (Soc. Justice 2000); see MARC MAUER, RACE TO INCARCERATE (1st ed., New Press 1999); see also JOHN IRWIN, VINCENT SCHIRALDI, JASON ZIEDENBERG, AMERICA’S ONE MILLION NONVIOLENT PRISONERS (Justice Policy Inst. March 1999) available at [http://www.justicepolicy.org/images/upload/9903\\_REP\\_OneMillionNonviolentPrisoners\\_AC.pdf](http://www.justicepolicy.org/images/upload/9903_REP_OneMillionNonviolentPrisoners_AC.pdf).

<sup>123</sup> Perhaps the best modern example of the black-white disparity in criminal blameworthiness resides in the ongoing debate centered on the disparity in crack versus powder cocaine sentencing. Although different forms of the same drug, crack and powder cocaine, have the same effects on the brain and nervous system. Federal law, however, sets a one hundred to one sentencing disparity between the two forms. This means that the distribution of just five grams of crack cocaine (a thimble full) yields a five-year mandatory minimum, while it takes five hundred grams of powder cocaine to trigger the same five-year sentence. The sentencing disparity, enacted in 1986 at the height of drug war hysteria, was based largely on the myth that crack cocaine was more

dangerous than powder cocaine and that it was instantly addictive and caused violent behavior, a distinction now disproven by copious amounts of scientific evidence. The impact of this disparity on black-white blameworthiness is devastating. For example, in 2006, 82 percent of those sentenced under federal crack cocaine laws were black, and only 8.8 percent were white—even though more than two-thirds of people who use crack are white. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 16 (2007); see also Bob Paynter, *If You’re Arrested for Drugs, You’re More Likely to Receive a Second Chance if You’re White*, THE CLEVELAND PLAIN DEALER REPORTER, Oct. 19, 2008, [http://blog.cleveland.com/metro/2008/10/race\\_and\\_drug\\_use.html](http://blog.cleveland.com/metro/2008/10/race_and_drug_use.html) (providing an excellent example of the impact of this disparity).

<sup>124</sup> HARTMAN, *supra* note 92, at 132–133.

<sup>125</sup> *Id.*

<sup>126</sup> Wilderson, *supra* note 27; see ANTONIO GRAMSCI, THE PRISON NOTEBOOKS (Joseph A. Buttigieg ed., Columbia Univ. Press 1992) (1972). We should elaborate on our use of the concept “hegemony” in the context of the Jena 6. The Italian Marxist theorist Antonio Gramsci is often referenced by analysts seeking to explain the nature of political struggle in a bourgeois democracy such as the United States. The Left persistently seeks guidance from Gramsci’s study of “hegemony” to explain how state/capital formations are insulated from contestation by the institutions of civil society (e.g., schools, media, churches, social services, entertainment) that appear to spontaneously perform the bidding of the ruling class. According to Gramsci’s notion of hegemony, what appears to be spontaneous is in fact a product of political struggle in which consent is manufactured by intellectuals of the ruling class, backed up by “coercion-in-reserve.” In this vein, the law is a key instrument in the winning of consent: the production of “common sense” about the law—for example, *that it exists as the last barrier against chaos, and as such, represents everyone’s interests*—is a primary means by which civil society participates in its own subordination.

Unfortunately, Gramsci’s insights are limited in their applicability to a social context predicated on slavery. As Frank Wilderson explains, Gramsci’s assumptive logic posits “that all subjects are positioned in such a way as to have their consent solicited and to, furthermore, be able to extend their consent ‘spontaneously,’” Wilderson, *supra* note 27, at 5. In a slave society, and one such as ours based in slavery’s ongoing relations of force, there is no valency of position for blacks and whites. While whites may have their consent solicited in various ways by the institutions of state, capital, and civil society, with coercion only as a contingency, a reverse process has applied to blacks. Direct relations of force, both state violence and the deregulated violence of white civil society, have always preceded the manufacturing of consent when it comes to blacks. In other words, hegemony is not a useful concept for explaining the black experience. So when we observe above that the popular belief that lynching was not a form of state-sanctioned terror is only sustained by the hegemony of the law, we are referring to law’s hegemonic relationship to *white* civil society. We make this argument in the context of our discussion in Section II, where we sought to situate the central tropes of western legal discourse (freedom, the individual, and private property), showing that historical

development of these concepts occurred *through* the capture of black people, and that within the U.S. legal tradition, the rule of law developed through the myth of consent.

<sup>127</sup> No state criminal code would refute this official pronouncement, and the United States Constitution so thoroughly recognizes the legal principles of right to a fair trial and due process of law that it is codified in the Sixth and Fourteenth Amendments.

<sup>128</sup> See HERBERT APTHEKER, *DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* (Herbert Aptheker ed., Citadel Press 1969) (1951); BERRY, *supra* note 7; DU BOIS, *supra* note 115; ROBIN D. G. KELLEY, “*Slangin’ Rocks . . . Palestinian Style*”: *Dispatches from the Occupied Zones of North America*, *POLICE BRUTALITY: AN ANTHOLOGY* 21–59 (Jill Nelson ed., W. W. Norton & Co. 2000); CEDRIC ROBINSON, *BLACK MOVEMENTS IN AMERICA* (1st ed., Routledge 1997); CHRISTOPHER WALDREP, *THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA* (Palgrave Macmillan 2002).

<sup>129</sup> IDA B. WELLS-BARNETT, *ON LYNCHINGS* (Humanity Books 2002) (1991); NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, *THIRTY YEARS OF LYNCHING, 1889–1918* (Negro Univ. Press 1969) (1919).

<sup>130</sup> The fact that other scholars have eloquently made a similar argument regarding the aftermath of Hurricane Katrina in New Orleans conjoins our larger objective of demonstrating the ongoing efficacy of anti-blackness. See, e.g., *THROUGH THE EYE OF KATRINA: SOCIAL JUSTICE IN THE UNITED STATES* (Kristin Bates & Richelle S. Swan, eds., Carolina Academic Press 2007); see also *HURRICANE KATRINA: RESPONSE AND RESPONSIBILITIES* (John Brown Childs, ed., New Pacific Press 2007); see also *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* (David Dante Troutt ed., New Press 2006); see also *SOUTH END PRESS COLLECTIVE, WHAT LIES BENEATH: KATRINA, RACE, AND THE STATE OF THE NATION* (South End 2007).

<sup>131</sup> By “slavocracy,” we refer to the society governed through the institution of slavery: the political economy in which it is embedded, and the social relations it produces. The term was originally used between 1840–1875 to describe the political power (slave power) of the slaveholding class in the South. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 93 (2d ed., Oxford Univ. Press 1995).

<sup>132</sup> STEVEN MARTINOT, *RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE* 78–79 (Temple Univ. Press 2003).

<sup>133</sup> Kelley, *supra* note 128, at 27, 29. Cedric Robinson claims that the KKK slaughtered twenty thousand men, women, and children in a single two-year period following the end of the Civil War. ROBINSON, *supra* note 128, at 87.

<sup>134</sup> MARY FRANCES BERRY AND JOHN BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* (Oxford Univ. Press 1982); ROBERT V. HAYNES, *A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917* (La. State Univ. Press 1976); ANN J. LANE, *THE BROWNSVILLE AFFAIR: NATIONAL CRISIS AND BLACK REACTION* (Kenikat Press 1971); HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* (Univ. of Mass. Press 1988); Charles Rowe, *Racial Violence and Social Reform: Origins of the Atlanta Riot of 1906*, 53 *J. OF NEGRO HIST.* 234, 256 (1968).

<sup>135</sup> An excellent example of this racial backlash available to whites of the fictitious black rapist appears in the legal-historical record of the Rosewood (FL) Massacre. For an inclusive account, see ROSEWOOD VICTIMS V. STATE OF FLORIDA: SPECIAL MASTER'S FINAL REPORT, Mar. 24, 1994, <http://afgen.com/roswood2.html>. Additionally, a popular culture version of the Rosewood Massacre was directed by John Singleton in his 1997 adaptation. See ROSEWOOD (Warner Brothers Movies 1997).

<sup>136</sup> The best-known example of the usage of lynching as revenge for perceived affronts of authority resides in the case of Emmitt Till. Till, a Chicago born native, was lynched based on an accusation that he wolf-whistled at a twenty-one-year-old white woman named Carolyn Bryant. His lynching was noted as one of the leading events that motivated the nascent civil rights movement. Two excellent sources on the events in the Emmitt Till case include M. SUSAN ORR-KLOPHER, *THE EMMETT TILL BOOK* (Lulu.com 2005) and FED. BUREAU OF INVESTIGATION, *THE PROSECUTIVE REPORT OF INVESTIGATION CONCERNING EMMETT TILL*, available at <http://foia.fbi.gov/till/till.pdf> (last visited Sept. 21, 2008).

<sup>137</sup> ELLIOT RUDWICK, *RACE RIOT AT EAST ST. LOUIS* (Univ. of Ill. Press 1982); BEN JOHNSON ET AL., *Report on the Special Committee Authorized by Congress to Investigate the East St. Louis Riots*, in *THE POLITICS OF RIOT COMMISSIONS, 1917–70* (Anthony Platt ed., 1971) [hereinafter, *POLITICS*].

<sup>138</sup> ROBERT M. GOLDMAN, *RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK* (2001); see also Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469 (2001), n.1–2. The Florida election scandal from 2000 highlights the fact that black people are again being rapidly disenfranchised in the present period. The purging of voter rolls in Florida was but the most visible instance of suspected voter fraud, however, as California, Colorado, Texas, Virginia, and Ohio all reported significant irregularities. See JARED SEXTON, *Racial Profiling and the Societies of Control*, *WARFARE IN THE AMERICAN HOMELAND: POLICING AND PRISON IN A PENAL DEMOCRACY 197*, 202–26 (Joy James, ed., 2007).

Sexton's analysis of the 2000 election reminds us again that the Florida spectacle was in fact utterly banal in terms of black suffering. Sexton points out that the key moment during the six-week deliberations over the election outcome, all the way to the Supreme Court's negation of the popular and electoral process, came when the congressional black caucus made its impassioned petition of objection to the inclusion of Florida's disputed electoral votes. The collective response of the then-all-white U.S. Senate—on *both sides of the aisle*, Republican and Democrat—to their black colleagues was open ridicule, disregard, and mockery. See Associated Press report of Gore presiding over the Bush certification, ASSOCIATED PRESS, [http://quest.cjonline.com/stories/010701/gor\\_0107017643.shtml](http://quest.cjonline.com/stories/010701/gor_0107017643.shtml) (last visited Sept. 21, 2008).

As Sexton puts it, “the true political lesson of the year 2000” was that a Gore victory required an official defense of black citizenship, a stance which no U.S. senator at the time was willing to make. *POLITICS*, *surpa* note 140, at 205. Indeed, the leading legal mechanism of undermining black participation in the body politic has been the expansion of voter felony-exclusion laws, legislation that has enjoyed virtual consensus from both major political parties over the years. See DAVID GARLAND, *MASS IMPRISONMENT: ITS*



CAUSES AND CONSEQUENCES (Sage Publications, Ltd. 2001), INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer and Meda Chesney-Lind, eds., 2002). Despite this critical display of white solidarity, the idea that the suppressed black vote in Florida and elsewhere represents a viable challenge-in-reserve to the operations of the white supremacist state and civil society is misguided. Steve Martinot, *Deconstructing Electoral Politics for 2004*, 33 SYNTHESIS/REGENERATION (Winter 2004), available at <http://www.greens.org/s-r/33/33-17.html> (last visited Sept. 21, 2008) (explaining how electoral power at the state and national levels has been effectively eviscerated, even for whites).

<sup>139</sup> Steve Martinot, *The Dual-State Character of U.S. Coloniality: Notes Toward Decolonization*, 5 HUM. ARCHITECTURE: J. OF THE SOC. OF SELF-KNOWLEDGE 378 (Summer 2007).

<sup>140</sup> ROBYN WIEGMAN, AMERICAN ANATOMIES: THEORIZING RACE AND GENDER 81–82 (Duke Univ. Press 1995).

<sup>141</sup> Wilderson, *supra* note 27, at 9.

<sup>142</sup> Jacquie Soohen, *The Case of the Jena Six: Black High School Students Charged with Attempted Murder for Schoolyard Fight After Nooses Are Hung from Tree*, DEMOCRACY NOW, July 10, 2007, [www.democracynow.org/2007/7/10/the\\_case\\_of\\_the\\_jena\\_six](http://www.democracynow.org/2007/7/10/the_case_of_the_jena_six).

<sup>143</sup> *Id.*

<sup>144</sup> West, *supra* note 24, at 72.

<sup>145</sup> See FANON, *supra* note 35.

<sup>146</sup> The idea of color-blind constitutionalism emanates from the racially charged Supreme Court opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896), where Chief Justice Taney states that “our Constitution is color-blind.” *Id.* at 559. Since *Plessy*, which one scholar has described as “an ignominious marker in U.S. law,” critical race scholars have long stood in opposition to the principle that law can be decided without the consideration of race. See Thomas J. Davis, *More than Segregation, Racial Identity: The Neglected Question in Plessy v. Ferguson*, 10 WASH. & LEE RACE & ETHNIC ANCESTRY L. J. 1 (2004). The argument has been a simple one, that “the United States Supreme Court’s use of color-blind constitutionalism—a collection of legal themes functioning as legal ideology—fosters white racial domination.” See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991) (attesting to the Court’s consistent misapprehension of race fosters white racial domination).

Some critical race scholars take this argument further to suggest that the Supreme Court’s construction of race is not accident, but design undertaken to legitimate racial inequality and domination. See Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393 (1991). Patricia Williams criticizes color-blind formalism in legal decision-making. See Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) (describing how the law operates to omit women and people of color at all levels); see also Gary Pellar, *Race Consciousness*, 1990 DUKE L. J. 758 (1990) (providing a good example of how integrationist approaches to race reform efforts became the hegemonic mode for conceiving of racial justice); see also Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV.

L. REV. 1331 (1988) (describing how racial subordination continues despite ostensible civil rights reforms).

<sup>147</sup> Soohen, *supra* note 142.

<sup>148</sup> *Id.*

<sup>149</sup> Ashraf H. A. Rushdy, *Exquisite Corpse*, 9.3 TRANSITION 70, 76 (2000).

<sup>150</sup> For instance, Byrd's primary killer, John William King, kept in his apartment an *Esquire* magazine article on the Emmett Till lynching, suggesting that his actions were premeditated. *Id.* Emmett Till was a fourteen-year-old black boy from Chicago who was brutally murdered while visiting relatives in Mississippi in 1955. His mother, Mamie Till Bradley, insisted on an open-casket funeral so that the entire world would see the brutality of white supremacy. This moment is often credited with galvanizing the modern civil rights movement. Rushdy points out that no photographs of Byrd's murdered body have ever been made public; he argues that hiding the violent handiwork of white supremacy enables the majority of white Americans to continue believing that racism was a phenomenon that ended sometime in the 1960s.

<sup>151</sup> Mark Potok, et. al, *The Geography of Hate*, N.Y. TIMES, Nov. 25, 2007, available at [www.nytimes.com/2007/11/25/opinion/25potok.html](http://www.nytimes.com/2007/11/25/opinion/25potok.html).

<sup>152</sup> Associated Press, *Rally in Torture Case Seeks Hate Charges*, N.Y. TIMES, Nov. 4, 2007, <http://www.nytimes.com/2007/11/04/us/04hate.html>; Final Call, *West Virginia Torture Victim Speaks Out in Exclusive Final Call Interview*, SAN FRANCISCO BAY VIEW, vol. 32, no. 42, Oct. 24, 2007.

<sup>153</sup> Paul Vitello, *Few Answers About Nooses, but Much Talk of Jim Crow*, N.Y. TIMES Oct. 21, 2007, available at [www.nytimes.com/2007/10/21/nyregion/21noose.html](http://www.nytimes.com/2007/10/21/nyregion/21noose.html).

<sup>154</sup> CHESTER HIMES, *YESTERDAY WILL MAKE YOU CRY* (Marc Gerald & Samuel Blumenfeld eds., Old School Books 1998) (1953).